Legislative Analysis

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UNIFORM VIDEO SERVICES
LOCAL FRANCHISE ACT

House Bill 6456 as enrolled
Public Act 480 of 2006
Sponsor: Rep. Mike Nofs
House Committee: Energy and Technology
1st Senate Committee: Technology and Energy
2nd Senate Committee: Government Operations

Second Analysis (8-2-07)

BRIEF SUMMARY: Public Act 480 of 2006 (House Bill 6456 as enrolled), entitled the "Uniform Video Services Local Franchise Act," creates a new franchising system for providers of video services (cable television-type services). Although providers must still receive a franchise from the local units of government in which they operate, they may obtain a franchise by presenting a standardized form to the local unit of government, which must approve it within 30 days, if complete.

FISCAL IMPACT: This act may increase State of Michigan expenditures for the Public Service Commission (PSC) by an indeterminate amount. The PSC is directed to develop a standard form for local governments to use in authorizing video providers within their jurisdiction. This form is to be issued as an order by PSC. While the cost of developing the form is not expected to be significant, PSC will also incur additional costs to develop and administer new dispute resolution procedures to handle customer complaints and disputes between video services providers or between providers and local governmental units. Under Section 13(6) of the Act, the PSC may assess providers a pro rata share of a total assessment of up to one million dollars through the end of 2009.

Local government expenditures will increase by an indeterminate amount for localities which have been provided an institutional network, also known as I-Net, at no cost by the incumbent cable provider. These I-Nets connect all the buildings within a local government, and provide the basis for all internal and external communication, including 911 emergencies, telephone, e-mail, as well as video communication. This communication network will need to be replaced immediately when the contract is abrogated under this act. Local governments will then have to either pay the incumbent provider to use the existing network, or lease T-1 communication lines to create a new network. At this writing, the number of local governments with no-cost I-Nets and the cost of replacement have not yet been compiled. In addition, the Act will require local governments to travel to the telecommunications provider's record-keeping site in order to audit cable fees. Currently, such records are provided at the local government's location.

Local government revenue may decline by an indeterminate amount, even where multiple cable television providers compete. New customer revenue is unlikely because the market for cable television in most jurisdictions has matured to the point that those not receiving this service are either not interested, or use a satellite television provider.

THE APPARENT PROBLEM:

Currently, cable television providers must obtain a franchise from each local unit of government in which they operate. These franchise agreements govern many aspects of cable television service, including access to public rights-of-way, a schedule for a company to build its network throughout the entire service area ("build-out" requirements), customer service provisions, insurance or bonding requirements, franchise fees, and the carriage and financial support of public, educational, and governmental (PEG) channels. In addition, some franchise agreements also require the building or maintenance of institutional networks (I-Nets) or broadband networks connecting municipal buildings and facilities. Some people believe that requiring a cable provider to negotiate franchise agreements in each community in which it wishes to operate is a cumbersome process that discourages new companies from providing services, with the result that most incumbent providers have a de facto monopoly. Some also believe that certain permissible aspects of local franchising, particularly build-out requirements and in-kind services such as I-Nets, should be reduced or eliminated entirely.

Most, but not all, areas of Michigan and the United States have only one cable provider, despite the fact that exclusive franchises are generally unlawful and telecommunications providers are free under federal and state law to enter the cable television market. Currently, the primary source of competition (other than over-the-air broadcast television) for cable television is from satellite companies. However, in a trend sometimes referred to as “convergence,” the distinctions between cable companies, telephone companies, wireless companies, and Internet service providers are blurring. Cable companies also offer Internet and voice services, and telephone companies offer Internet and have begun offering subscription television services in some areas. Large cable companies and telephone companies have also acquired or reacquired cell phone operations and have partnerships with or have acquired satellite dish companies.

Large telecommunications companies such as AT&T and Verizon, and some smaller ones, have announced plans to build fiber networks to offer video services in competition with incumbent cable television providers. AT&T has already begun expanding its fiber optic network in some parts of Michigan and is offering subscription video services in a few other parts of the U.S. Supporters of the legislation contend it will simplify and streamline the cable television franchising process, thus encouraging new providers to enter the market. More competition, they say, may provide customers with wider choices of services, including video entertainment options, help to constrain monthly fees that have risen at a pace greater than inflation in recent years, and may lead to better customer service.

During debate on the new act, some people asserted that the effort to streamline franchising should be coupled with a mandate requiring providers to maintain net neutrality. The act, however, contains no net neutrality requirement.

On the federal level, there were two significant developments shortly after passage of the act. On December 20, 2006 (after passage of the House Bill 6456, but before it was signed) the Federal Communications Commission (FCC) adopted new cable franchising rules applicable nationwide also designed to streamline cable franchising, which among other things adopted a 90-day "shot clock" for issuance of cable franchises and limited local build-out requirements. [See Background Information for more information.] On the heels of the FCC's cable franchising decision, AT&T made additional commitments to the FCC relating to several issues, including net neutrality, broadband build-out, and the provision of video services, to secure FCC approval of a pending merger of AT&T and Bell South. More information about the FCC's new ruling on cable franchising and AT&T/Bell South's merger commitments can be found in Background Information.

Since the law became effective, the PSC has taken the following steps required by the act:

- Issued an order containing the standardized video franchise form:
  http://www.cis.state.mi.us/mpsc/orders/comm/2007/u-15169_01-30-2007.pdf

- Issued a proposed Dispute Resolution Process:
  www.michigan.gov/documents/mpsc/dispute_resolution_198239_7.pdf

THE CONTENT OF THE ACT

The following is a brief summary of the content of the Uniform Video Services Local Franchise Act (referred to as "the Act"), followed by a more detailed, section-by-section summary.

- Streamlined franchise approval. Video service providers continue to need a franchise agreement with the local governmental unit to offer video services within its boundaries, but will now use a uniform local franchise agreement developed by the PSC. Once a provider submits a uniform video franchise agreement to a local unit of government, the local unit has no more than 15 days to determine if it is complete. If complete, the proposed agreement must be approved within 30 days. If these deadlines are not met, the proposed franchise agreement is considered automatically approved.

- Effect on existing franchises. At the provider's option, an existing franchise agreement may either be replaced by a uniform agreement or modified to include only those provisions required under a uniform agreement. Existing franchise agreements may not be renewed or extended after they expire. As of January 1, 2007, any provisions in existing franchise agreements that are inconsistent with or go above and beyond the uniform franchise agreement are considered "unreasonable and unenforceable."

- Voluntary local deviation permitted under limited circumstances. Local units and video providers may enter into *voluntary* franchise agreements different from the uniform agreements, under specified circumstances, but the local unit of government may not *require* any fee or franchise requirement other than those included in the standardized form.

- Annual video service provider fee. Providers must pay an annual video service provider fee to the local unit expressed as a percentage of gross revenues. The amount will vary depending on the amount of the franchise fee, if any, in the existing franchise agreement in that community. Specifically, if there is an existing franchise agreement, the amount of the fee is initially the percentage of gross revenues paid to the local unit of government by the incumbent video provider with the largest number of subscribers. Once that franchise expires, or if there is no existing franchise agreement, the local unit of government may establish a percentage fee applicable to all providers of not more than **five percent**.

- METRO Act credit. Providers are entitled to a credit applied toward their 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 (METRO) Act, minus any property tax credit allowed under Section 8 of the METRO Act.

- PEG fees. In addition to the video service fee described above, a provider must pay a quarterly fee for support for public, education, and government (PEG) programming. The amount of the PEG fee for a local unit of government will remain at whatever level is set in the existing franchise of the provider with the largest number of subscribers unless that amount exceeds two percent in which case it will be reduced to **two percent** at the expiration of the existing franchise. If there is no existing franchise agreement, a fee of no more than **two percent** may be established after an assessment of community needs.

- Redlining ban. A provider is free to choose the service footprint in which it wishes to operate, and local units of government are prohibited from imposing any build-out requirements or deployment provisions beyond those of the Act. A provider may not, however, deny service access to any group of potential residential subscribers because of the race or income of the residents, a practice sometimes referred to as "redlining." If a provider provides access to its services to a certain percentage of low-income households within specified time period after beginning services, it has a statutory defense against allegations of redlining.

- Build-out requirement for large providers. Providers with more than one million access lines (i.e., AT&T Michigan) must provide access to video service to a number of households equal to "at least 25 percent of the households in the provider's telecommunication service area in the state within three years of the date it began providing video service under this act and to a number not less than 50 percent of these households within six years." However, a "video service provider is not required to meet the 50 percent requirement in this subsection until two years after at least 30 percent of the households with access to the provider's video service subscribe to the service for six months."

- Consumer protection. Among other requirements, video services providers are prohibited from making false, misleading, or deceptive statements or representations, including omissions of material information, regarding, rates, terms, or conditions of providing video service. Nor can they charge customers for services for which the customer did not make an affirmative order, continue to charge customers for cancelled services, or engage in other confusing, deceptive, misleading or coercive practices.

- Reports. Providers must file an annual report with the local unit and PSC on access and build-out. The PSC would file an annual report with the Governor and Legislature on video service competition, with recommendations for legislation.

- Dispute resolution. A provider must establish a dispute resolution process for customers and maintain a local or toll-free telephone number. The PSC must establish a process for reviewing (1) unresolved disputes between providers and customers, (2) disputes between a provider and a franchising entity, and (3) disputes between providers.

The following is a more detailed section-by-section summary of the Act.

Definitions. [Section 1]

"**Cable operator**" means that term as defined in 47 USC 522(5): "[A]any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system."

"**Cable service**" means that term as defined in 47 USC 522(6): "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."

"**Cable system**" means that term as defined in 47 USC 522(7): "[A] a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title;

or (E) any facilities of any electric utility used solely for operating its electric utility system."

"**Commission**" means the Michigan Public Service Commission.

"**Franchising entity**" means the local unit of government in which a provider offers video service through a franchise.

"**Household**" means a house, an apartment, a mobile home, or any other structure or part of a structure intended for residential occupancy as separate living quarters.

"**Incumbent video provider**" means a cable operator serving cable subscribers or a telecommunication provider providing video services through the providers existing telephone exchange boundaries in a particular franchise area within a local unit of government on January 1, 2007.

"**IPTV**" means internet protocol television.

"**Local unit of government**" means a city, village, or township.

"**Low-income household**" means a household with an average annual household income of less than $35,000 as determined by the most recent decennial census.

"**Open video system**" or "**OVS**" means that term as defined in 47 USC 573.

"**Person**" means an individual, corporation, association, partnership, governmental entity, or any other legal entity.

"**Public rights-of-way**" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easements dedicated for compatible uses.

"**Uniform video service local franchise agreement**" or "**franchise agreement**" means the franchise agreement required under this Act to be the operating agreement between each franchising entity and video provider in Michigan.

"**Video programming**" means that term as defined in 47 USC 522(20): "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."

"**Video service provider**" or "**provider**" means a person authorized under this act to provide video service.

"**Video service provider fee**" means the amount paid by a video service provider or incumbent video provider under Section 6 of the Act.

<u>Uniform local video franchising form.</u> [Section 2(1) – 2(2)] The PSC must issue an order establishing the standardized form for the uniform video service local franchise agreement to be used by each franchising entity—local unit of government—in Michigan. [This form is now available on the PSC website: www.michigan.gov/documents/mpsc.] A person must obtain a uniform video service local franchise before providing video services in any local unit of government.

Required provisions. [Section 2(3)] The uniform local video franchising form must include the following provisions:

- The provider's name, and the address and telephone number of its principal place of business.
- The name of the provider's principal executive officers and authorized representatives.
- The date on which the provider expects to provide video services in the identified video service area, if the provider is not an incumbent provider.
- An exact description of the video service area footprint to be served "as identified by a geographic information system [GIS] digital boundary meeting or exceeding national map accuracy standards." A large telecommunications provider with one million or more access lines in Michigan must identify its video service area in terms of wire centers or exchanges. Incumbent video providers (i.e., cable or telephone companies providing video services on the effective date of the Act) do not have to provide an exact video service footprint; instead, they need only make right-of-way-related information available to a local unit of government, upon request, comparable to the information required by a permit under the METRO Act.
- A requirement that the provider pay the video service provider fees required under Section 6 of the Act.
- A requirement that the provider timely file all necessary forms with the FCC before offering video service in Michigan.
- A requirement that the provider agrees to comply with all valid and enforceable federal and state statutes and regulations.
- A requirement that the provider agrees to comply with all valid and enforceable local regulations regarding use and occupation of public rights of-way, including the police powers of the franchising entity.
- A requirement that the provider comply with all FCC requirements involving the distribution and notification of federal, state, and local emergency messages over the emergency alert system applicable to cable operators.
- A requirement that the provider comply with the public, education, and government (PEG) programming requirements of Section 4 of the Act.
- A requirement that the provider comply with FCC customer service rules applicable to cable operators, under 47 CFR 76.309(c), and applicable provisions of the Michigan Consumer Protection Act, Public Act 331 of 1976, MCL 445.901 *et seq*.
- A requirement that the provider comply with the consumer privacy requirements of 47 USC 551 applicable to cable operators.

- A requirement that the provider comply with FCC in-home wiring and consumer premises wiring rules applicable to cable operators.

- A requirement that an incumbent video provider comply with the terms which provide insurance for right-of-way related activities contained in its most recent cable franchise or consent agreement.

- A grant of authority by the local unit of government to provide video service in the video service area footprint.

- A grant of authority by the local unit of government to use and occupy the public rights-of-way in the delivery of the video service, subject to the laws of Michigan and the police powers of the franchising entity [local unit of government].

- Agreement that the parties are subject to the provisions of the Act.

- The penalties provided for under Section 14 of the Act.

Franchise agreement needed before offering services. [Section 3(1)] A video provider must enter into or possess a franchise agreement with the local unit of government before offering video services within the boundaries of a local unit of government.

Franchise agreement approval. [Section 3(2)] A franchising entity must notify a provider as to whether a submitted franchise agreement is complete within 15 business days after the franchise agreement is filed. If it is not, the local unit of government must state in its notice the reason the agreement is incomplete. If the agreement is complete, the local unit of government must approve it within 30 days from the date of submission. If the local unit does not notify the provider regarding completeness or approve the franchise agreement within the applicable time period, the franchise agreement will be considered complete and approved.

Transfer, modification, renewal, and duration. [Sections 3(3) – 3(7)] Video franchise agreements are fully transferable to any successors in interest to the provider. Notices of transfer must be filed with the appropriate local unit of government within 15 days of the completion of the transfer. A provider may terminate its video franchise agreement or modify its service footprint by submitting notice to the local unit of government, unless doing so would produce income or racial redlining.

If any of the information contained in the franchise agreement changes, the provider must notify the local unit of government.

Video franchise agreements last for a period of 10 years and are renewable for additional 10-year periods.

Additional requirements prohibited. [Section 3(8)] A local unit of government may not *require* a video service provider to obtain any other franchise, or assess any fee or charge, or impose a franchise requirement other than those specified in the Act. For this purpose, "franchise requirement" includes rate regulation, build-out requirements, or facility or services deployment requirements. [Note: Section 13, described below, allows *voluntary* agreements containing different terms.]

PEG Channels. [Sections 4(1) - 4(3)] A video service provider must designate a sufficient amount of capacity on its network to provide for the same number of public, educational, and government (PEG) channels that are in actual use on the incumbent video provider system on the effective date of the Act or as provided under subsection 14. A provider may withdraw any PEG channel that a local unit of government has used for less than eight hours per day for three consecutive months. If the local unit of government later certifies a schedule for at least eight hours of daily programming for a period of three consecutive months, the provider would have to restore the channel.

The local unit of government must ensure that all transmissions, content, or programming to be retransmitted by a video service provider are provided in a manner or form capable of being accepted and retransmitted by a provider (in a form compatible with the technology or protocol used by the provider without any requirement for additional alteration or change in the content by the provider) over the particular network of the provider.

Video service provider interconnection for PEG purposes. [Section 4(4)] A video service provider may request that an incumbent video provider interconnect with its video system for the sole purpose of providing access to PEG programming for a local unit of government served by both providers. Where technically feasible, interconnection is allowed under an agreement of the parties. The requesting provider and the incumbent provider must negotiate in good faith and may not withhold interconnection unreasonably. The providers may use any reasonable agreed-upon method to accomplish interconnection. The requesting provider must pay the construction, operation, maintenance, and other costs arising out of the interconnection, including the reasonable costs incurred by the incumbent provider.

Responsibility for content on PEG channels. [Sections 4(5) and 4(6)] The person producing broadcasts is solely responsible for all content provided over PEG channels. A video service provider may not exercise any editorial control on any PEG channel. Video service providers are exempt from any civil or criminal liability for any programming carried on PEG channels.

Carriage of local broadcast channels. [Sections 4(7) – 4(11)] In general, a video service provider must carry 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 other than a qualified low power station as defined under 47 U.S.C. § 534(h)(2).) A provider must carry *digital* broadcast signals only 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. A local broadcast station may either be granted mandatory carriage or request retransmission consent with the provider.

A provider must transmit, without degradation, the signals a local broadcast station delivers to the provider, and the provider is not required to provide valuable consideration in exchange for carriage.

A provider *must not* do either of the following:

- 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, in no event, required to be superior to the quality as received from the broadcast television station.

- 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.

PEG channels restricted to noncommercial use. [Section 4(12)] PEG channels may only be used for noncommercial purposes.

Provisions on carriage of broadcast channels only apply if provider regulated is *not* regulated as a cable operator under federal law. [Section 4(13)] Provisions concerning the carriage of local broadcast television channels only apply to video service providers *not* regulated as a cable operator under federal law.

Governmental requests for PEG channels. [Section 4(14)] If a local unit of government seeks to use PEG channel capacity designated under Section 4(1) or in a voluntary agreement under Section 13 of the Act (the provision allowing for voluntary agreements between providers and franchise entities with certain terms different than the standardized form), the local unit of government must make a written request to the provider specifying the number of channels in actual use on the incumbent video provider's system or specified in a voluntary agreement entered into under Section 13. The provider has 90 days to begin providing access as requested by the local unit of government.

Effect of Act on existing franchise agreements. [Section 5] As of January 1, 2007, no existing franchise agreement can be renewed or extended once it expires.

In addition, as of January 1, 2007, an incumbent video provider may elect to do one of the following, at its option, to continue to provide video services:

- Terminate its existing franchise agreement *before its expiration date* and enter into a new uniform local franchise agreement.

- Continue under its existing franchise agreement *amended to include only those provisions required under a uniform local franchise agreement.*

- Continue to operate under the terms of an expired franchise until a uniform local franchise agreement takes effect. An incumbent video provider would have 120 days after January 1, 2007 to file for a uniform local franchise agreement.

As of January 1, 2007, any provisions of an existing franchise agreement that are inconsistent with or in addition to the provisions of a uniform local franchise are deemed "unreasonable and unenforceable."

"Most favored nation" or "Me too" requirement. [Section 5(4)] If a local unit of government authorizes two or more video service providers, it may not enforce any term of a franchise agreement that is more burdensome than a term contained in another franchise agreement.

Annual video service provider fee. [Section 6(1) – 6(3)] A video service provider must pay an annual video service fee to the local unit of government calculated in one of the following ways:

- If there is an existing franchise agreement, an amount equal to the percentage of gross revenues paid to the franchising entity by the incumbent video provider with the largest number of subscribers.

- At the expiration of an existing franchise agreement, or if there is no existing franchise agreement, an amount equal to the percentage of gross revenues established by the local unit not to exceed five percent. The amount set by the local unit is applicable to all providers.

The video service provider fee must be paid on a quarterly basis within 45 days after the close of the quarter. Each payment must include a statement explaining the basis for the calculation of the fee. The local unit of government may not demand any additional fees or charges from a provider and may not demand the use of any calculation method other than that described in the Act.

Definition of gross revenues for purpose of calculating applicable fees. [Section 6(4) - 6(7)] "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 franchising entity [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 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 paid to an affiliated third party for video service advertising.

Gross revenues specifically <u>exclude</u>:

- Any revenue not actually received, even if billed, such as bad debts (net of any recoveries).
- Refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already offset, and to the extent 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, information services, and other services, capabilities, and applications that may be packaged, 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 service at no charge, including the provision of service 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 any forgone revenue exchanged for trades, barters, 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, capabilities, or applications, the revenue for all of the services is <u>included</u> 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 is <u>included</u> "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."

<u>PEG facilities and services fee</u>. [Section 6(8)] In addition to the video service fee described above, a video service provider must pay a fee, on a quarterly basis, to the local unit of government as support for public, education, and government facilities and services. The fee would be equal to one of the following:

- If there is an existing franchise on January 1, 2007, the PEG fee paid by the provider with the largest number of cable service subscribers as determined by the existing franchise agreement.

- At the expiration of the existing franchise agreement, the PEG support fee would be the amount required under the existing franchise agreement unless it exceeds two percent of gross revenues in which case it would be limited to two percent.

- If there is no existing franchise agreement, a percentage of gross revenues as established by the local unit of government not to exceed two percent as determined by a community need assessment.

- An amount agreed to by the local unit of government and the video service provider.

The PEG fee applies to all providers and is due on a quarterly basis and paid within 45 days after the end of a quarter. Each payment would have to include a statement explaining how the amount submitted was calculated.

<u>Credits toward annual video service provider fees (not PEG fees)</u>. [Section 6(11)] A video service provider 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 (METRO) Act, *minus any property tax allowed under Section 8 of the METRO Act*, Public Act 48 of 2002, MCL 484.3108. The credits are to be applied on a monthly pro rata basis and are to be calculated by multiplying the linear feet occupied by the provider in the public rights-of-way of the franchising entity by the lesser of five cents or the amount assessed under the METRO Act. To be eligible for this credit, a video service provider must have taken all property tax credits allowed under the METRO Act. The credit for METRO Act maintenance fees (less property tax credits) applies only toward annual service provider fees, not PEG fees.

<u>Generally accepted accounting principles</u>. [Section 6(12)] All determinations and computations made with regard to the required fees and credits must be made using generally accepted accounting principles.

<u>PSC assessment through December 31, 2009</u>. [Section 6(13)] Within 30 days of an appropriation to it, the PSC must calculate the portion of the appropriation attributable to its costs of exercising its duties under this Act not to exceed one million dollars. The PSC will assess providers a portion of the total assessment in the same proportion that the number of its video subscribers bears to the total number of video service subscribers in Michigan in the previous calendar year. The first assessment under this Act will be based on a PSC estimate of the number of subscribers for each provider. This provision has a sunset date of December 31, 2009.

<u>Audits</u>. [Section 7(1) – (2)] 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. The local unit of government and the video service provider are each responsible for their respective costs of the audit. Any additional amount due verified by the local unit must be paid by the provider within 30 days of the local unit's submission of an invoice. If the underpayment exceeds five percent of the total fees that should have been paid for the 24-month period, the provider must pay the local unit's reasonable audit costs.

<u>Limitations period</u>. [Section 7(3)] 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 a provider, must be made within three years from the date the compensation is remitted.

<u>Identification of fees on subscribers' bills</u>. [Section 7(4)] A provider may identify and collect the amount of the video service provider fee and the PEG support fee as separate line items on the regular bill of each subscriber.

<u>Use of public rights-of-way</u>. [Section 8] A local unit of government must allow a video service provider to install, construct, and maintain a communications network within a public right-of-way and must 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 owned by a governmental entity.
- A municipal utility pole attachment.

A local unit of government may impose a permit fee on a video service provider only 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 must 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 rights-of-way. Permit fees must not be levied for general revenue purposes.

<u>Redlining ban and defenses</u>. [Section 9(1) and (2)] A video service provider must not deny access to service to any group of potential residential subscribers because of the race or income of the residents in the local area in which the group resides. Such discrimination is sometimes referred to as redlining.

Either of the following is a defense to an alleged redlining violation:

- Within three years of the date it began providing video service under the Act, at least 25 percent of the households with access to the provider's video service are low-income households (average annual household income of less than $35,000).

- Within five years of the date it began providing video service, and from that point forward, at least 30 percent of the households with access to the provider's video service are low-income households.

Build-out requirements for large providers. [Section 9(3)] Telecommunications companies with more than one million access lines in Michigan providing video services must provide access to its video service to a number of households equal to "at least 25 percent of the households in the provider's telecommunication service area in the state within three years of the date it began providing video service under this Act and to a number not less than 50 percent of these households within six years." However, a "video service provider is not required to meet the 50 percent requirement in this subsection until two years after at least 30 percent of the households with access to the provider's video service subscribe to the service for six months."

Annual provider report to PSC and the local unit of government. [Section 9(4)] Providers must file an annual report with the local unit of government and the Public Service Commission regarding compliance with the requirements pertaining to non-discriminatory access and the build-out requirements for large telecommunications companies.

Use of alternative technology other than satellite service. [Section 9(5)] A video service provider may satisfy the non-discrimination and large company build-out requirements using alternative technology, *other than satellite service*, offering "service, functionality, and content" similar to that provided through the provider's video service system. Providers may use alternative technology, *other than satellite service*, that does not require the use of any public right-of-way. The alternative technology used must include PEG channels and emergency alert system messages.

Extensions of time/waivers. [Section 9(6)] A video service provider may apply to the local unit of government (large telecommunications companies subject to the build-out requirements may apply to the PSC) for a waiver of or extension of time to meet the non-discrimination or build-out requirements if one or more of the following apply:

- The provider was unable to obtain access to public and private rights-of-way under reasonable conditions.

- Developments or buildings were not subject to competition because of existing exclusive service arrangements.

- Developments or buildings were inaccessible using reasonable technical solutions under commercially reasonable terms and conditions.

- Natural disasters.
- Factors beyond control of the provider.

The local unit of government or the PSC may grant the waiver or extension only if the provider has made "substantial and continuous" effort to meet the requirements of the Act. If an extension is granted, the local unit of government or the PSC must establish a new compliance deadline. If a waiver is granted, the local unit of government or the PSC must specify the requirements waived.

No additional build-out requirements permitted and no build-out outside existing telephone exchange boundaries. [Section 9(8) - 9(9)] 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 is not required to comply with, and a local unit of government is not be permitted to impose or enforce, any mandatory build-out or deployment requirements or schedules except as required by Section 9 of the Act.

Additional consumer protections. [Section 10(1)] Section 10(1) prohibits certain actions on the part of providers. The PSC may enforce compliance with these consumer protection prohibitions to the extent that the activities are not covered by Section 2(3)(*l*) of the Act. (Section 2(3)(*l)* obligates all providers to comply with all FCC customer service rules applicable to cable operators and applicable provisions of the Michigan Consumer Protection Act.) Under Section 10(1), a provider must not do any of the following:

- Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing video service that is false, misleading, or deceptive. "Material information" includes fees, taxes, and charges.
- Charge a customer for a subscribed service for which the customer did not make an initial affirmative order. Failure to refuse an offered or proposed subscribed service is *not* an affirmative order for the service.
- Charge a customer for service provided after the effective date a service was canceled.
- Cause a probability of confusion or a misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction by making a false, deceptive, or misleading statement or by failing to inform the customer of a material fact, the omission of which is deceptive or misleading.
- Represent or imply that the subject of a transaction will be provided promptly, or at a specified time, or within a reasonable time, if the provider knows or has reason to know that it will not be so provided.
- Cause coercion and duress as a result of the time and nature of a sales presentation.

Dispute resolution. [Section 10(2)] Each video service provider must establish a dispute resolution process for its customers and maintain a local or toll-free telephone number for customer service contact. In addition, by June 1, 2007, the PSC must submit to the legislature a proposed process to be added to this Act that would allow the PSC to review (1) disputes that are not resolved by the video service provider's consumer dispute resolution process, (2) disputes between a provider and a local unit of government, and (3) disputes between providers.

Freedom of Information Act exemptions. [Section 11] Except under the terms of a mandatory protective order, trade secrets and commercial and financial information submitted to a local unit of government or the PSC are exempt from the Freedom of Information Act. If disclosed under a mandatory protective order, a local unit of government or the PSC may use the information for the purpose for which it is required, but the information would remain confidential. There is a rebuttable presumption that cost studies, customer usage data, marketing studies/plans, and contracts are exempt from FOIA disclosure. The party seeking disclosure of the information has the burden of removing the presumption.

Limitation on PSC authority. [Section 12(1)] The authority of the PSC is limited to the powers and duties explicitly provided for in the Act. The PSC does *not* have the authority to regulate video service providers as public utilities.

Annual report by the PSC. [Section 12(2)] The PSC must file an annual report with the Governor and Legislature by February on the status of video service competition in Michigan and recommendations for legislation, if any. Providers have a duty to submit information requested by the PSC necessary for preparation of its annual report, so long as it is information generated or gathered in the normal course of business.

Voluntary franchise agreements with different terms. [Section 13] Local units of government and video service providers may enter into a voluntary franchise agreement that includes terms and conditions different from the uniform agreement provided for in the Act, including, but not limited to, "a reduction in the franchise fee in return for the video service provider making available to the franchising entity services, equipment, capabilities, or other valuable consideration." This section does not apply unless for each provider servicing the local unit of government "it is technically feasible and commercially practicable to comply with similar terms and conditions in the franchise agreement and it is offered to the other provider."

Remedies for violations; appeals. [Section 14] If, after notice and hearing, the PSC finds that a person has violated the law, it may order remedies and penalties designed to protect and make whole persons who have suffered damages, including, but not limited to:

- First offense: a fine not less than $1,000 or more than $20,000 (except for certain small providers, see below).

- Second or subsequent offense: a fine not less than $20,000 or more than $40,000 (except for certain small providers, see below.)

- If a video service provider has fewer than 250,000 telecommunication access lines in Michigan:
  - First offense: a fine not less than $200 or more than $500.
  - Second or subsequent offense: a fine not less than $500 or more than $1,000.
- Revocation of the video service franchise.
- Cease and desist orders.

Exceptions. No fines may be imposed on providers who have otherwise fully complied with the law and who show that the violation was due to an "unintentional and bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error." Examples of bona fide errors include 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.

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

Appeals. Any party of interest has the same rights to appeal and review an order or finding of the PSC as under the Michigan Telecommunications Act, Public Act 179 of 1991, MCL 484.2101 to 484.2604.

BACKGROUND INFORMATION:

Federal legislative activity. The 109th Congress considered legislation that would have established a national video services franchising system. On June 8, 2006, the House of Representatives passed H.R. 5252, the "Communications Opportunity, Promotion, and Enhancement Act (COPE) of 2006." The Senate Committee on Commerce, Science and Transportation reported out its own version of the legislation on September 29, 2006, Neither version was enacted.

FCC proposed rulemaking regarding cable franchising. In November 2005, the Federal Communications Commission opened a proceeding to investigate whether the current local franchising process inhibits competition in the retail market for the distribution of video programming. (See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking, 20 FCC Rcd 18581 (2005)(Franchising NPRM)).

On December 20, 2006 (after passage of House Bill 6456, but before it was signed by the Governor), a divided FCC voted along partisan lines to adopt new rules governing cable franchising, including, among other things, a 90-day "shot clock" for franchise

negotiations, and limitations on build-out requirements. The FCC order can be found online at:
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-180A1.pdf.

The order contains a discussion of whether and to what degree the FCC's order preempts state and local laws.

Local government organizations representing municipal and county officials filed suit against the FCC in April 2007 seeking to reverse the FCC's franchising order. See http://www.nlc.org/pressroom/pressreleaseitems/FCCTelecomBrief.aspx

AT&T/Bell South Merger. At the end of December, 2006, AT&T offered a set of concessions to the FCC to persuade it to approve the pending merger between AT&T and Bell South. (See http://www.fcc.gov/ATT_FINALMergerCommitments12-28.pdf.) The merger commitments, which led to approval of the merger, include a broadband build-out commitment, a "Statement of Video Rollout Intentions," and a limited net neutrality pledge.

- Broadband build-out. AT&T committed to offering broadband Internet access service to 100 percent of the residential living units in AT&T/BellSouth in-region territory, i.e. the areas in which an AT&T or BellSouth operating company is the incumbent local exchange carrier, by the end of 2007. AT&T will use wireline technologies for at least 85 percent of the residences to which it offers broadband and will reach the rest using alternating technologies and operating arrangements, including satellite and Wi-Max fixed wireless technologies. At least 30 percent of the new deployment to achieve the build-out commitment will be to rural or low income residences. AT&T also committed to provide a free DSL modem to residential subscribers who upgrade their AT&T dial-up Internet service to DSL service and elect a 12 month or longer plan. Further, within six months of the merger closing, and continuing for 30 months, AT&T will offer new AT&T DSL customers DSL service for $10 per month.

- Video Roll-Out Intentions. The merger commitments included "A Statement of Video Roll-Out Intentions" in which AT&T said that it is "committed to providing, and has expended substantial resources to provide, a broad array of advanced video programming services in the AT&T in-region territory. These advanced video services include U-Verse, on an integrated IP platform, and HomeZone, which integrates advanced broadband and satellite services." AT&T promised to do the same in the BellSouth in-region territory.

- Net Neutrality. AT&T agreed to certain time-limited net neutrality provisions:

  - From the date of the merger closing and for 30 months thereafter, A&T/Bell South will comply with the principles set forth in the FCC's Policy Statement on Net Neutrality, issued September 23, 2005 (FCC 05-151).

- With many exclusions, including IPTV, AT&T committed that it would maintain a neutral network and neutral routing in its wireline broadband Internet access service; i.e., it will not provide or sell any Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that "privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination." This commitment will sunset on the earlier of (1) two years or (2) the effective date of any congressional network neutrality legislation, defined as "any legislation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic."

State laws. Article I, Section 10 of the Michigan Constitution states: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted."

Article VII, Section 29 of the Michigan Constitution states: "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 facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."

Section 309a of the Michigan Telecommunications Act, (MCL 484.2309a) permits a provider of a telecommunication service to provide cable service if it has received a franchise agreement from a local unit of government.

The Metropolitan Extension Telecommunications Rights-of-Way (METRO) Act, MCL 484.3101 et seq., was enacted in 2002 as part of a package of bills designed to promote broadband technology deployment throughout the state. The METRO Act established the METRO Act Authority, currently housed within the Department of Labor and Economic Growth, with the right to assess fees on telecommunications providers for access to public rights-of-way. Under the METRO Act, telecommunications providers must obtain permits to use a municipality's rights-of-way (most obtain a unilateral permit form good for up to five years rather than the longer bilateral permits). Annual maintenance fees (and related tax credits) are established according to formulas set forth in the METRO Act. Fees are based on linear feet and access lines as reported by the providers. The telecommunications provider with the largest number of access lines pays five cents per linear foot in fees and the rest of the incumbent local exchange carriers (ILECs) pay the lesser of five cents per linear foot or the access line rate.

At first glance, the METRO Act appears to require cable providers to pay a lower one-cent-per- linear-foot fee but the Act exempts cable providers from paying the one-cent fee so long as they have made an aggregate investment in Michigan since January 1, 1996, in facilities capable of providing broadband Internet transport service that exceeds the amount of the METRO Act fee. No traditional cable provider paid METRO Act fees in 2005 or is expected to in the near future because of significant aggregate broadband investments in the past.

For 2006, METRO Act fees charged to all telecommunications providers totaled $21,420,633, of which $15,106,658 was billed to AT&T and $3,902,767 was billed to Verizon. METRO Act fees collected by the METRO Authority are allocated to local units of government based on the formula set forth in Section 11 of the METRO Act. Seventy-five percent of the funds collected are disbursed to cities and villages based on the formula found in Section 13 of Public Act 51 of 1951. The remaining 25 percent is distributed to townships based on the number of linear feet in a particular township as a percentage of the total linear feet reported for all townships. If a local governmental unit has not opted into the METRO Act (as is the case with 40 communities), the money they would have received had they opted in is redistributed to other communities according to the Act.

The METRO Act allows for a tax credit as the sole means by which telecommunications providers can recover the fees paid under the METRO Act; they are not allowed to pass along the METRO Act fees to customers. These tax credits must be applied for and approved by the Public Service Commission. The act allows telecommunication providers to claim a credit against their utility property tax (which is paid to the state General Fund).

Cable franchise reforms in other states. According to the FCC, California, Indiana, Kansas, New Jersey, North Carolina, South Carolina, Texas, and Virginia have recently passed cable franchising Acts.

- In 2005, Texas enacted a law enabling new video programming entrants to provide service under state-issued certificates of franchising authority. Upon the submission of a completed affidavit by an applicant, Texas regulators now are required to issue this franchising certificate within 17 business days.

- In 2006, California, Indiana, Kansas, New Jersey, North Carolina, and South Carolina adopted statewide video franchising procedures that require prompt approval of completed applications. In California, the grant must occur within 44 days; Indiana, 15 days; Kansas, 30 days; New Jersey, 45 days; North Carolina, upon the filing of a completed notice of franchise; and South Carolina, 80 days.

- In March 2006, Virginia passed legislation that maintains local involvement in franchising but streamlines the process and establishes time limits for approval.

On the other hand, Louisiana's governor vetoed a bill that would have created a statewide franchising structure for cable and video service providers in July, 2006. Other states that have recently considered cable franchising legislation but where the efforts have stalled or been withdrawn include Florida, Georgia, Iowa, Minnesota, Missouri, New York, Pennsylvania, and Tennessee.

Cable television industry background. According to the FCC, about 67 percent of American households purchase cable service; and about 17 percent of American homes purchase satellite television service. The remaining households receive over-the-air broadcast television or have no television service. Newer choices include viewing television programs over the Internet or over a cell phone.

FCC data indicate that the average monthly rate cable subscribers are charged for the combined basic and cable programming service tiers rose approximately 84 percent between 1995 and 2004, and that the cost of cable programming service tiers rose more than five percent or almost five times the rate of inflation between 2003 and 2004 alone. Competition for cable television services exists in very few parts of Michigan and the United States with the major exception of satellite television services.

However, the lines between different types of communication companies and services are blurring. Some industry analysts call this trend "convergence." "Convergence" sometimes refers to the coming together of previously separate communications and entertainment services: fixed and mobile telephone services (traditional landline telephones and cell phones), broadband Internet, and television. As a result, companies that were once in separate industries—telephone companies, wireless telephone companies, cable television companies, satellite television companies, and Internet-service providers—are now essentially competitors in the same general business—providing some or all voice, Internet, and television services. Cable and telephone companies are currently offering or are moving to offer similar bundles of services. A bundle of Internet, television, and telephone services is sometimes referred to as the "triple play"; if wireless (cell) phone service is also included, the bundle is sometimes called a "quadruple play" or "home run." One of the attractions of bundles for the providers is that there may be lower customer turnover or "churn" among customers who have signed up for bundles, rather than individual services. Customers may benefit from discounts or having one bill instead of three or four. Disadvantages for customers may include being locked into a long-term contract or being required to purchase services they do not truly want or need in order to obtain discounts.

According to an article in the Economist magazine (Oct. 14, 2006), traditional telecommunications firms view bundled services "as a way of protecting their core business of fixed-line voice calls, which still accounts for the bulk of their revenues." A current challenge for telephone companies is that they are losing fixed-line subscribers to cell phone companies, cable companies, and voice over Internet protocol (VoIP) firms such as Skype. Large internet companies including Google, Yahoo! and Microsoft MSN are also launching new services offering free calls over the internet. In contrast, the cable industry sees bundles as a way to protect its core business of television, as cable companies have been losing television customers to satellite television providers and are now facing competition from telephone companies and Internet service providers.

In order for traditional telephone companies to offer high-quality television services over broadband Internet connections, a technology generally referred to as Internet-protocol TV (IPTV), they are upgrading their telecommunications networks. With its FiOS project, reportedly costing $23 billion dollars, Verizon has taken the most costly approach, known as fiber to the premises (FTTP)—running fiber right up to the customer's home. Verizon's new network already includes parts of Texas, Virginia, and Florida. AT&T's fiber project is called "Project Lightspeed." Project Lightspeed uses a combination of fiber to the node (FTTN) in most areas, and fiber to the premises (FTTP) in greenfield areas. AT&T's Internet protocol television (IPTV) service, currently in operation in San Antonio, Texas, and a few neighborhoods in other cities including Houston, Texas; Indianapolis, Indiana; San Jose, California; and Hartford, Connecticut, goes by the name "U-Verse." The cost of AT&T's project has been reported as $4.6 billion. Fiber to the node or FTTN has been described as running fiber to local exchanges and neighborhood junction boxes, and then, for the final link into the home, using existing or upgraded copper phone lines.

In some areas, AT&T has begun placing new metal junction boxes in rights-of-way easements about one for every 300-500 customers. These boxes come in a variety of sizes but are reportedly often about five feet high, and sometimes described as about the size of a small refrigerator. In Ohio, for instance, AT&T is reportedly in the process of placing about 50,000 of these boxes. The size, appearance, and placement of these boxes have upset some residents in some communities where they have appeared. Some Chicago-area communities have placed temporary bans on the placement of these large boxes, and have been sued by AT&T.

Direct broadcast satellite companies, such as DIRECTV and EchoStar (Dish Network), and to a lesser degree, large home satellite dish companies, are currently the most significant competitors to the incumbent cable companies. A 2005 GAO report found that direct broadcast satellite company subscription rates have been and remain highest in rural areas, but that since 2001, growth has occurred most rapidly in urban and suburban areas. Currently, satellite companies do not pay video franchise fees to local units of government and they remain exempt from doing so under House Bill 6456. Satellite television services are sometimes bundled with high-speed Internet services. For example, in July 2006, AT&T began offering a service called "Homezone" in Ohio in which it partners with Dish Network to offer bundles of telephone, broadband, and satellite services. This will allow it to offer television service in areas where it has not upgraded its network to support U-Verse. In some parts of the country, states have moved to impose fees on subscription television services whether provided by satellite or cable.

Other new technologies currently deployed in Michigan include broadband over power line (BPL) service, in Grand Ledge and St. Johns, Michigan, and various types of wireless broadband services. It does not appear that these companies are currently offering television services, only high speed Internet services. However, with the advent of VoIP telephone services and new Internet television services, it is becoming increasingly possible to obtain Internet, voice, and some degree of television services using virtually any broadband connection. Another technology on the horizon is the convergence of fixed and mobile telephones in which a single handset works as a cell phone when outside the customer's home or business but connects to a regular home network for calls inside the customer's home. Convergence of services, technologies, and providers will continue to pose many difficult questions about how to regulate the telecommunications industry.

ARGUMENTS:

For:

Supporters of the Act made the following arguments.

<u>The Act will streamline and speed up the franchising process, encouraging new providers to enter the market</u>. Requiring a video service provider to obtain a separate franchise agreement from each community in which it wishes to operate is a cumbersome process that discourages competition. Making cable franchise agreements uniform and easy to obtain within a short period of time should make it significantly easier for new companies to offer video services in Michigan. Under the Act, a company submitting a complete franchise agreement can receive a franchise in as little as 30 to 45 days. Although in most parts of Michigan, people have a choice between cable and satellite television, few Michigan residents currently have a choice between two cable providers.

<u>Increased competition may help constrain prices, promote a wider range of services, and improve customer service</u>. Consumers should be the direct beneficiaries of more head-to-head competition in the market for video programming. Several studies have shown that competition constrains rate increases, including one GAO study finding that monthly cable rates in markets where there is one more than one cable provider are approximately 15 percent below similar markets with no competition. (Competition from satellite television alone does not appear to drive down prices to the same degree.) Some evidence suggests that where Verizon's FiOS TV is competing with incumbent cable providers in Texas, Florida and Virginia, some customers are seeing lower bills. (In some cases, the advertised price may not drop, but customers threatening to switch to a different provider may be offered better deals.)

Increased competition may also spur companies to offer more services or improve customer service as a way of attracting or retaining customers.

<u>The high capacity networks that may be built by telecommunication companies to provide video services provide a basis for short-term and long-term economic growth</u>. To the extent the Act encourages telecommunications companies to build expensive new fiber networks or make other infrastructure upgrades, the Act will boost Michigan's economy. New infrastructure investments should create not only short-term jobs, but upgraded fiber networks or other infrastructure improvements will support Michigan's long-term economic growth. During the debate on the Act, AT&T promised to invest up to $620 million and hire 2,000 workers over the next three years to upgrade its fiber-optic network and provide video products to Michigan consumers. (Verizon has apparently not announced any plans to provide video services in Michigan.)

Some people have suggested that Michigan should position itself to attract telecommunications companies to build new fiber networks here earlier rather than later. The fiber projects are very expensive and Michigan should try to be near the front of the line in case the telecommunications firms run out of money before the whole country is wired. Others have noted that large telecommunications firms tend to have unionized workforces and to provide good benefits and training for their workers. They suggest that the jobs created if telecommunications companies choose to build new fiber networks here will be good jobs for Michigan workers.

<u>The Act prohibits redlining and requires build-out by large telecommunications companies</u>. Some have expressed concern that the Act would allow telecommunications companies to bypass low-income or minority neighborhoods. The Act specifically bans providers from denying access to service to any group of potential residential subscribers because of the race or income of the residents in the local area in which the group resides.

Moreover, the Act requires a provider with one million or more access lines in Michigan (i.e., AT&T Michigan) to designate its service footprint in terms of entire wire centers or exchanges. This requirement limits AT&T's ability to pick and choose its service footprint on a house by house basis. If it wants to include any home or business covered by a wire center or exchange, it would presumably have to include the entire wire center or exchange in the service footprint. Moreover, the Act requires AT&T to provide access to at least 25 percent of the households in the provider's chosen service area in the state within three years of beginning video service, and to at least 50 percent within six years (but no earlier than two years after it achieves subscription rates of at least 30 percent for six consecutive months.)

No further build-out requirements are necessary because they would discourage new entrants. The Act strikes a reasonable compromise between having no build-out requirements at all, as advocated by some, and having build-out requirements so stringent that they would serve as an obstacle for new companies to enter the market. If new services are popular with consumers, providers will have market incentives to build-out their networks widely.

<u>The Act requires the carriage of local broadcast signals, including digital where required by federal law, PEG channels, and emergency alerts</u>. Although some people would have preferred an even more streamlined or deregulated franchising process, others argued that some requirements needed to be imposed to create a more level playing field for industry competitors or to serve the public interest. The Act's requirement that local broadcast signals be transmitted, without degradation, is an important requirement in the age of high definition digital television. The Act also requires video service providers to carry local PEG channels, an important source of local information, particularly about local governments and schools. The Act also requires that all video providers carry the emergency alerts that cable providers are required to carry under federal law.

<u>The Act contains important consumer and public safety protections</u>. The Act incorporates many federal and state consumer protection requirements to benefit

consumers: concerning wiring, privacy, restrictions on deceptive marketing, and others. Consumers will benefit from the additional competition that the Act will spur and these provisions will help make sure that the competition is fair.

The Act is designed to preserve as much local control as possible while still streamlining the system to encourage more competition and broadband investment. Under the new Act, providers obtain local franchises (rather than statewide franchises), fees are paid to local units directly (rather than disbursed from the state), right-of-way authority under the current METRO Act is preserved, carriage of PEG channels is continued, and PEG funding is continued at the preexisting level until francise expiration, and up to two percent thereafter. Although some would have liked to abandon the concept of PEG channels and funding altogether, a balance was struck in the Act.

Institutional networks are a cost of running local government and should be paid for accordingly. House Act 6456 does not protect a local unit of government's ability to require an I-Net, or other types of in-kind services, in return for a cable franchise. Although I-Nets may be essential to local units of government, and they may be "free" to the local unit of government under the terms of existing franchise agreements, the provider likely passes the cost of the I-Net onto cable subscribers. Therefore, cable subscribers are paying for the I-Nets. It is not fair to require cable subscribers to pay for the costs of a broadband network for municipal governments.

Net neutrality provisions should be taken up, if at all, at the federal level or in subsequent state legislation. Supporters of the Act rejected arguments that cable reform legislation was an appropriate vehicle to address the thorny issue of net neutrality. Some proponents of the Act contended that the issue was more appropriately addressed at the federal level, if at all, or in subsequent stand-alone state legislation.

Against:

Opponents of the Act made the following arguments.

The Act is unnecessary as existing franchises are not exclusive, and local units of government would welcome new entrants to the market. Since 1992, it has been generally unlawful under federal cable law for local units of government to grant exclusive franchise agreements or to unreasonably refuse to award a competitive franchise. Local units of government say they would welcome new providers of cable or video service to their communities. Many have offered expedited and streamlined franchising negotiations to telecommunications companies.

The current process is not as difficult as critics make it seem. In the late 1990's, Ameritech, a predecessor of AT&T, sought and obtained cable franchises and competed for a few years with incumbent cable operators in approximately 40 communities in suburban Detroit. (Ameritech's cable operations were subsequently obtained by a provider called Wide Open West or WOW! which continues to offer Internet and cable services in many communities outside of Detroit, an example of a part of Michigan where cable competition already exists with very little downward effect on rates, according to some). In many rural areas of the state, all a provider needs to do to obtain a franchise is to present it to the local unit of government for signing. Rural areas are often so pleased to have a cable television provider that they do not charge any franchise fees or ask for any public access channels or facilities.

In other parts of the U.S., Verizon, unlike AT&T, has sought local franchises where it is offering video services (more than 160 have already been obtained) and recently told its investors that local franchising laws were not holding back its deployment of video services. In short, current franchising laws are not a serious obstacle to telecommunications companies offering video services, and companies are able to obtain franchises as fast or faster than they can deploy their new services. In addition, telecommunications companies are rolling out television services in some states that have *not* passed cable franchise reform.

<u>The Act is unnecessary because there is a strong possibility of federal action in the near future</u>. Congress is considering legislation that would establish a national video service franchising system. On June 8, 2006, the House of Representatives passed H.R. 5252, the "Communications Opportunity, Promotion, and Enhancement Act (COPE) of 2006, available athttp://thomas.loc.gov. On September 29, 2006, the Senate Committee on Commerce, Science and Transportation favorably reported out its own version of the legislation. Federal legislation may preempt state cable franchising laws. [Note: no cable franchising legislation was enacted by the 109th Congress.]

In addition, the Federal Communications Commission (FCC) has proceedings underway that could impact video franchising. A decision in this preceding could preempt state action or render it unnecessary. [Note: After House Bill 6456 was passed, but before it was signed, the FCC did, in fact, issue its decision in its Franchising Notice of Proposed Rulemaking, which sets forth new national cable franchising rules. See <u>Background Information</u>.]

<u>The Act is unnecessary given the slow rollout of IPTV by telecommunications companies</u>. Given that AT&T has been rolling out its U-Verse services very slowly, and in very few markets, there was no need to rush to pass this legislation. AT&T has plenty of time to negotiate franchise agreements with local units of governments in the places they are planning to offer services, which is surely not the entire state. Verizon recently told its investors that local franchising is not slowing its deployment of video services in the states in which it is offering those services.

<u>The Act should include a net neutrality requirement</u>. Some companies and individuals, notably Google, contended that any comprehensive reform of cable franchising should include a net neutrality provision. Some fear that without a net neutrality requirement, large cable or telephone companies could prioritize Internet traffic in undesirable ways or block or charge for access to websites run by competitors.

<u>There is no guarantee that the Act will lower cable bills</u>. Approximately 40 communities in suburban Detroit (i.e., the communities served by WOW!) already have at least two

wireline cable competitors but have not seen significantly lower monthly bills. Moreover, if, as one cable executive testified, a significant reason why cable bills have increased so rapidly in recent years is that cable companies have recently invested a large amounts of money in upgrading their networks to fiber optics, telephone companies spending billions nationwide on new fiber optic networks to offer competing video services will be unlikely to offer substantially lower subscription fees than current cable companies.

It is also possible that cable bills will be reduced or constrained in areas of the state that have more competition, while raised in others with little competition (and nothing in the bill would prevent this). Discounts may also only be available temporarily or when consumers buy bundled services with long-term contracts, which might actually lessen consumers' ability to pick and choose from various providers the most appropriate and lowest-cost services for their needs. Although lobbying and advertising efforts may have created expectations to the contrary, consumers should not expect much, if any, price relief from this legislation.

<u>The redlining prohibition and build-out provisions are weak and riddled with loopholes</u>. Although the Act prohibits providers from denying access to service on the basis of income or race, it allows providers to freely choose where they do and do not wish to offer services. It would be very difficult to prove that the intent of a provider's business plan was to discriminate on the basis of race or income, and the Act provides an easy defense to any allegation of redlining on income or racial grounds.

Moreover, it not just income or racial redlining that is of concern. A variety of different reasons could cause one neighborhood to be perceived as a more attractive place for a video service provider to build than another—population density, infrastructure issues, geographical features, or demographics, to name a few. Nothing in the Act to requires a company to offer services to all residents of a municipality in which it is operating, to operate in all parts of the state, or to encourage build-out in rural areas. AT&T has told its investors it primarily intends to serve "high-value" customers—those who spend more on monthly services. Providers would be free to avoid lower density areas of the state, such as rural areas, and any area expected to be less profitable or more difficult to wire for any reason. All citizens, of any race or income level, whether living in urban, suburban, or rural areas, would be better protected by strong build-out language requiring build-out throughout the service area (or at least the entire service area of sufficient density). But the Act expressly prohibits local units of government from requiring any build-out or deployment provisions more stringent than those contained in the Act.

Current cable franchise agreements require cable companies to build out their network to allow the entire service area access to cable within a set and relatively short period of time. In essence, in return for use of the public rights-of-way in a given local unit of government, cable companies have been required to make cable service available to everyone in the community (or in some cases, to at least to all areas that have a minimum of 20-25 homes per linear road mile or some other formula). Michigan and its citizens have benefited tremendously from build-out requirements because they have made not only cable television but also broadband Internet service via cable modem widely available.

The Act only imposes a weak affirmative build-out requirement on video service providers with more than one million telecommunication access lines in the state and there are waivers and exemptions of the timeframes allowed. Further, the fines for not meeting the limited build-out requirements are so small (up to $20,000 for first offense and up to $40,000 for second or subsequent offenses for the largest companies) as to be insignificant to the larger telecommunications companies. Stronger build-out requirements would create more jobs and would provide a more solid foundation for Michigan's economy.

<u>The Act may be unconstitutional</u>. The Act would allow incumbent cable companies to terminate their existing franchise agreements before their expiration date. Cable contracts were negotiated in good faith between local units of government and cable companies, and should be honored until they expire. The Michigan Constitution prohibits laws that impair contracts. Moreover, the Michigan Constitution places franchising and control of the rights-of-way in the hands of local units of government. To the extent the Act erodes local franchising and right-of-way authority, as it does in a variety of ways—requiring the issuance of franchises, dictating the terms of the franchise agreements, and preventing local governments from protecting its communities with build-out or other requirements—the law may be unconstitutional.

<u>The Act threatens PEG programming in Michigan</u>. The Act does not adequately support PEG channels and funding. As to the number of channels, the Act would allow a community that already has PEG channels to retain the existing number of active channels under a new provider. It does not require that providers ever agree to expand the number of channels (as may be necessary in a growing area), or that a provider ever agree to provide even one channel in an area without any currently. Under Section 4(14), a community that needs new channels could *ask* a provider to carry them under voluntary nonstandard arrangement allowed under Section 13 of the Act, but the provider would be under no obligation to agree. In effect, the Act may freeze the development of PEG channels in Michigan at the current number without any regard for the present or future expansion needs of communities.

As to funding, it would appear the most that a community can receive for PEG funding *after the expiration of any existing franchise agreement* is two percent of the provider's gross revenues, even if the community has previously benefited from higher levels of support. Some communities whose current PEG funding exceeds two percent will be faced with a significant funding decrease if their fees are reduced to two percent after their current franchises expire. In other communities, two percent of gross revenue is about what they currently receive and their funding will remain about the same. If a community has an existing franchise with a PEG fee of less than two percent (some have no PEG fees), it is arguably restricted to PEG funding of less than two percent (or even no PEG fee at all) indefinitely, with no opportunity to negotiate an increase if the provider is unwilling. A community with no current franchises (but not necessarily one with current franchises that provide for PEG fees of less than two percent) may be able to establish a maximum of two percent based on a community needs assessment. The Act should be amended to "do no harm" to PEG funding; that is, to at least retain PEG funding at existing levels and to provide for opportunities for all communities to receive adequate PEG funding.

The Act imposes significant new interconnection costs on PEG operators. Section 4(3) of the Act unfairly imposes significant new interconnection technology and cost burdens on local units of government, requiring the local government to ensure that all PEG programming is provided in a format acceptable to the provider compatible with the technology or protocol utilized by the provider. The Act places more of a burden in this regard on non-profit PEG access facilities than it does on for-profit broadcast channels which presumably have more funds to spare.

The Act eliminates critical local emergency alerts. Under Section 2(3)(j) of the Act, providers would have to comply with all FCC requirements involving the distribution and notification of emergency alert system messages—federal, state, and local—over the emergency alert system applicable to cable operators. Local officials say that this provision would not preserve local emergency alert systems provided for in some local franchise agreements that allow alerts to be initiated by local officials and sent only to a limited local area, because cable operators are not required to carry these local EAS messages. An example given was that the city of Alma's issuing of local "boil water" alerts in the past. The perceived need to streamline franchise reform is no reason to eliminate public safety and health protections.

The Act threatens I-NETs on which local units of government rely. Federal franchising law has historically been designed to accommodate both the needs of local communities, including PEG channels and I-Nets, as well as the needs of the providers. This Act gives short shrift to community needs yet still gives providers the right to use the public rights-of-way of those communities for profit. Under the Act, existing cable franchise agreements may be terminated early or modified to include only uniform provisions. Non-uniform provisions such as specific in-kind services negotiated by a particular community would no longer be enforceable. Local governments may lose in-kind services such as I-NETs immediately even if no new provider enters the area or does not do so for a matter of months or years. There is no justification for abrogating current contract provisions before a new provider has appeared on the scene.

Reportedly, in many areas the cable company "owns" the I-Net under the terms of the local franchise agreement, although in some areas—Southfield, for example—the I-Net may be jointly owned by the municipality and the incumbent cable company. Once the Act is in effect, a cable company could, in effect, turn off the I-Net, at least where it “owns” the I-Net. If a local unit of government needs to preserve its I-Net, it would have to purchase the existing I-Net from its cable owner or install a new network, plus pay for ongoing operations of the I-Net. A preliminary estimate in October 2006 by local government representatives concluded that in-kind service losses from just eight communities examined totaled 25 million to 35 million dollars.

I-Nets are critical to the functioning of many modern municipalities. A municipality's facilities, including schools, courts, administrative offices, libraries, senior centers and others, may be interconnected for voice, video, and data by a fiber network. Functions handled through I-Nets vary by community but may include 911 services, video arraignments (saving money and increasing public safety), Internet phone services (reducing municipalities' telephone bills), and others. At less cost to the cable provider than it would cost a municipality to replace similar services, governments have been able to negotiate arrangements that help meet the needs of their communities under current local franchising rules.

<u>The Act jeopardizes fees relied on by local units of government</u>. The Act potentially jeopardizes franchise fees relied on by local units of government in a variety of ways.

The Act would allow a telephone provider to deduct the METRO Act fees it paid attributable to a local area, minus a utility property tax credit that may be granted by the PSC under the METRO Act, against the video service provider fees it owes that local area. If the PSC did not grant this full METRO Act credit (there have been years in which certain providers did not get credits in accordance with certain settlement agreements with the PSC), the telecommunications provider could simply deduct the amount of its METRO Act payments attributable to a given area from the franchise fees it owes that community. Under this scenario, the local unit of government would suffer a loss in fees.

Another more subtle issue concerns definitions under both the METRO Act and the new Franchise Act. In some contexts, telecommunications companies providing video services have attempted to argue that they are not cable companies and do not need franchises. On the other hand, to the extent they receive franchises to provide video services, would they then be able to argue that they are no longer subject to the up to five cents per linear foot METRO Act fees paid by telecommunications providers, but only the one cent per linear foot fee to which cable companies are theoretically subject (but do not pay because of offsetting credit provisions in the METRO Act)? This position has already been taken by a small telecommunications company in Michigan providing bundled services in a matter before the METRO Authority.

Forty communities that never opted in to the METRO System—and are therefore ineligible to receive METRO Act payments—might also lose out on franchising fees under this section if it is interpreted as permitting the METRO Act fees attributable to that municipality or township from being deducted from franchise fees, even if the local unit did not receive any METRO Act payments.

Finally, local officials argued that the auditing provision may make it difficult or costly for a local government to make sure that it is receiving the proper amount of fees. For example, the Act would require local auditors to travel to where the records were ordinarily kept to have access to necessary records and auditors would be limited to looking at the previous 24 months only.

Transferring responsibility for consumer dispute resolution to the PSC is a bad idea, and the Act fails to ensure that the new PSC dispute resolution process will be in place in a timely fashion. Representatives of local governments currently field customer complaints about cable service interruptions or construction causing damage to their property. (The Act also requires the PSC to handle provider-provider disputes and provider-local government disputes.) Under the Act, responsibility for these calls would be transferred to the Public Service Commission. This could require the PSC to hire additional staff to field the calls. It could also lead to less satisfactory resolution of customer complaints. Local elected officials are in the best position to handle consumer complaints about service, construction, or rights.

Under the Act, the PSC has until June 1, 2007 to propose a process "to be added to the Act" to handle these complaints. (Although not entirely clear, this language would appear to contemplate the need for legislative action after the PSC proposes procedures.) Local officials express concern about the possibility of an extended period of time during which there is no satisfactory dispute resolution mechanism in place.

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