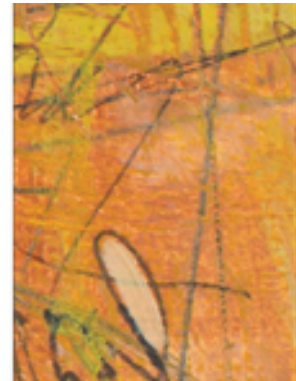


Cable Franchising Update: Detroit v Comcast

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Introduction

- Update, summary and implications of the July 2012 Federal Court decision in City of Detroit v State of Michigan and Comcast of Detroit, 879 F. Supp. 2d 680 (E.D. Mich. 2012)
- Judge has basically found in favor of Detroit, the issue now is damages
- Case centers around constitutionality, Federal preemption of 2006 State Video Act/Uniform Franchises under State Act
- Rulings in case affect franchising by townships and cities

Detroit v Comcast, Background

■ Facts

- 1985 Detroit cable franchise provides substantial cash, in-kind benefits and protections for City, its residents and institutions
- Franchise expired by its terms on February 28, 2007
- On February 28 Comcast applied for Uniform Franchise under 2006 State Video Act with a 5% franchise fee, no other benefits
- City timely acted on application in early March, sent franchise back with changes (added 2% PEG fee) which Comcast rejected

Detroit v Comcast, Background (cont'd)

▪ Lawsuit Summary

- June 2010 - - City files Federal court suit vs Comcast
- Michigan Attorney General intervenes to defend State Act against preemption claim
- Comcast Motion to Dismiss for lack of Federal Court jurisdiction denied in March 2011
- Summary Judgment motions on liability filed, argued in last half of 2011
 - Amicus briefs filed by AT&T; state cable association; and Michigan Municipal League, Michigan Township Association et al.
 - Decision issued July 10, 2012

Detroit v Comcast, Background (cont'd)

■ Lawsuit Summary (cont'd)

- July 10 decision rules that Comcast has been a trespasser since February 2007
 - City had argued Comcast was a “holdover tenant” still bound by terms of original 1985 franchise
 - Comcast had argued it had gotten a new, Uniform Franchise in early 2007
- Comcast’s Motion for Reconsideration denied

Detroit v Comcast, Background (cont'd)

■ Lawsuit Summary (cont'd)

■ Remedies/Damages

- July order required parties to brief what the damages should be for Comcast's trespass
- City: Relief includes damages for failure to provide benefits City would have received under 1985 franchise, disgorgement of profits and municipal civil infraction fines
- Comcast: At most nominal damages, no actual damages, should be awarded
- Judge: Will rule on amounts, types of damages after trial

Detroit v Comcast, Background (cont'd)

- **Lawsuit Summary (cont'd)**
 - Trial on damages likely late 2013
 - Comcast filed a request to for the judge to certify his July ruling on liability for immediate appeal, and the judge has done so.
 - We expect Comcast to file its appeal with the 6th Cir. Court of Appeals.

Detroit v Comcast, Background (cont'd)

- **Main Claims of Parties**

- **City of Detroit**

- 2006 Michigan Uniform Video Services Franchise Act
 - Preempted by Federal Cable Act, and
 - Invalid under Mich Const Art VII Section 29
- Thus renewal by Comcast under State Act ineffective
- Comcast a holdover tenant under original (1985) franchise
- Comcast's attempts to modify unilaterally were ineffective

- **AG/State of Michigan**

- State & Federal Acts can be reconciled, no preemption
- Cities & Twps can reject Uniform Franchise applications

Detroit v Comcast, Background (cont'd)

- **Main claims of parties (cont'd)**
- **Comcast**
 - State Act is valid and not preempted
 - Cities as subordinate bodies of state are subject to state control on franchising
 - Federal Cable Act allows states to control, specify local franchising decisions
 - State is/can be the “franchising authority”
 - Comcast’s franchise renewal under State Act in Feb 2007 is valid and effective as applied for (without changes added by City)
 - Comcast is a “new franchisee” under State Act, not a renewing incumbent

July 10 Decision - - Generally

- **Effect of decision**
 - Persuasive with other Michigan Federal judges
 - Especially in combination with Dearborn case upholding local PEG requirements
 - May bind, affect Comcast, State, State courts, MPSC and AG
- Particularly helpful for municipalities that 1) preserved rights in the event of court decisions invalidating part or all of the State Act, 2) have an active pre-2007 franchise still in place, or 3) who never approved a Uniform Franchise (*i.e.*, took effect by operation of law)
- Be aware that if providers began violating franchise requirements in 2007, based on change in state law, there may be a statute of limitations issue that could be arising shortly

July 10 Decision – State Franchising

- Rejects City’s argument that State Act is generally preempted by the locally oriented renewal provisions of Federal Cable Act
 - *"[T]he existence of state-wide franchising procedures does not subvert the Cable Act’s goal of creating national standards, municipalities retain a role in the franchising process under the Michigan Act, and many other states have state-wide franchising procedures and standards."* Slip Opinion, p. 37
- But bases this conclusion in large part on the State Act’s
 - Allowing cities and cable operators to enter into franchises differing from state Uniform Franchise,
 - Requiring cable companies comply with all valid local ordinances, and
 - Municipalities’ ability to deny/reject a Uniform Franchise (see below)

July 10 Decision – State Franchising (cont'd)

▪ Implications

- Municipalities with Uniform Franchises should adopt a Video Service Provider Right of Way Ordinance, with substance similar to Metro Act permit
 - Carefully drafted to impose on cable companies the same, favorable right of way management provisions that apply to telecom companies under Metro Act permits, which have been approved by the legislature and MPSC
 - Assures good, local control of right of way
 - Assures that provider (not Road Commission or municipality) pays the large cost to relocate its lines when there is street work
 - Avoids discrimination claims, challenges

July 10 Decision – State Franchising (cont'd)

▪ Implications (cont'd)

- Municipalities approving future Uniform Franchises should preserve their rights as to court decisions overturning part/all of State Act or Uniform Franchises
 - Potentially reject Uniform Franchise applications (see next slides)
- On existing Uniform Franchises, municipalities can make claims (especially municipalities who preserved rights or where Uniform Franchise took effect by operation of law) that they are ineffective
 - Or must be modified by a “voluntary franchise” (see below) on mutually acceptable terms
 - See PEG, local office, other typical items of concern, discussed below

July 10 Decision - - Renewal

- Accepts AG's argument that municipalities **can reject** a Uniform Franchise application, and that State Act is not preempted by renewal provisions of Federal Cable Act
 - Based on strong preference for upholding constitutionality of statutes (otherwise State Act violates Michigan Constitution)
 - Result: Municipalities now have at least 15/30 days to accept **or reject** Uniform Franchise applications under State Act
 - AG says rejection leads to parties entering into a mutually agreed-to “voluntary franchise” under State Act, or renewal proceeding under Federal Cable Act process

July 10 Decision - - Renewal (cont'd)

▪ Implications

- Uniform Franchise: 1) allows franchise fee up to 5%; 2) caps PEG fee at prior PEG fee (not to exceed 2%); 3) caps PEG channels at existing number; 4) contains no obligation to provide service (universal service or homes-per-mile standard); 5) has no in-kind services; 6) requires no local office; 7) has few protections for municipalities or residents
- Municipalities wanting different terms than a Uniform Franchise can deny it and negotiate mutually acceptable voluntary franchise or comply with Federal Cable Act's formal renewal process
- Cable companies since 2006 often have invoked Cable Act's formal renewal process, and municipalities in some cases may consider invoking it themselves

July 10 Decision - - Modifications

- Rejects on Federal preemption grounds the State Act's automatic modification of all franchises in existence as of date of the Act (by making “unenforceable” all franchise provisions in conflict with or in addition to those in State Uniform Franchise)
 - Based on language (“shall”) in 47 U.S.C. § 545, setting forth the Federal franchise modification process as well as restrictions on such modifications, ruled that § 545 is mandatory and exclusive
 - *“The provisions of the Michigan Act invalidating provisions in existing franchises is expressly preempted by the Cable Act”*. Slip Opinion at 28.
 - Therefore, cable company claims that all existing franchises were immediately altered in 2007 by State Act to be identical to Uniform Franchise are wrong and preempted

July 10 Decision - - Modifications (cont'd)

■ Implications

- Pre-2007 franchises thus continue in effect, unmodified
- Cable companies were wrong in taking away many of the benefits required by pre-2007 franchises. Examples:
 - Elimination of free service to municipal buildings
 - Closing or ceasing operation of PEG studios
 - Changing how franchise fees are computed and paid
 - Not complying with “universal service” or “homes per mile” standards for where they must provide service
 - Closing local customer service centers and taking away consumer protections

July 10 Decision - - Modifications (cont'd)

■ Implications (cont'd)

- Municipalities should examine pre-2007 franchises for items such as the preceding that are not being provided or complied with
 - List such items
 - Determine which ones you wish to pursue
 - Send notice of violation and opportunity to cure letter (needed to use violations against company in Federal Cable Act formal renewal process)
 - Make claim against cable company

July 10 Decision - - PEG Channels

- State “may” have some latitude to decide what is “adequate” support for PEG channels going forward
 - May relate to PEG support fee, 2% cap
- No ruling on State Act’s limits on number of PEG channels, or apparent limits (companies contend) on in-kind services such as free service to PEG center, free drop to studio and other locations to receive PEG channel signal

July 10 Decision - - PEG Channels (cont'd)

■ Implications

- Where desired, press for number of PEG channels, in kind services and other PEG support or provisions that are needed, especially if they were contained in or provided under prior franchise
- State Act allows voluntary franchises with cable operator with terms different from Uniform Franchise
- AG expressly supported such voluntary franchises

July 10 Decision - - Anti-Redlining

- Anti-redlining: Cable Act says franchising authority “shall” prevent redlining based on income of “residents in local area”
 - State Act says there is no redlining violation (safe harbor) if 30% of company’s customers statewide are low income.
- Decision rejects state safe harbor
 - *“As the plaintiff points out, ‘Comcast could actually discriminate against every low income resident in the City, as long as 30% of households anywhere in Michigan with access to its service are “low-income.” Mich. Comp. Laws 484.3309(2)(b). This application of a state-wide standard, in place of a franchise-area one, clearly conflicts with the Federal Act’s prohibition on income-based discrimination “of the residents of the local area in which such group resides.” 47 U.S.C. § 541(a)(3).’” Slip Opinion, p. 34*

July 10 Decision - - Anti-Redlining (cont'd)

▪ Implications

- Municipalities can (must?) implement franchise or ordinance provisions preventing redlining, e.g.
 - Monitoring, reporting provisions, as well as
 - Substantive provisions
- Some municipalities may elect to have state anti-redlining provisions continue to apply, but without statewide-based safe harbor provision

July 10 Decision - - Customer Service

- *"[T]he Michigan Act's restrictions against municipalities from enforcing customer service likely conflict with 47 U.S.C. § 552(a)(1) ("A franchising authority may establish and enforce . . . customer service requirements of the cable operator"). Slip Opinion p. 32.*
 - Clearly applies to customer service provisions of pre-2007 franchises
 - And likely to later ones as well

July 10 Decision - - Customer Service (cont'd)

- **Implications**
 - Municipalities can continue to enforce customer service provisions of pre-2007 franchises
 - And ones in later franchises as well

July 10 Decision - - Universal Service

- Rejects City's argument that Cable Act requires or permits a universal service requirement (cable company must provide service to everyone in a municipality), at least to enforce anti-redlining provision of Cable Act
 - Says there may be valid non-income based reasons for cable company failure to serve certain areas
 - Notes that FCC has reached a similar conclusion

July 10 Decision - - Universal Service (cont'd)

- **Implications**

- Universal service and homes per mile requirements in pre-2007 franchises likely enforceable (under portions of decision striking automatic modification provisions of State Act)
- New requirements may be possible

Conclusion

- Cable franchising - - Be aware of the several aspects of July 10 Federal Court decision in Detroit v Comcast
 - Has significant rulings, especially on issues of:
 - Companies' failure to comply with pre-2007 franchises
 - Municipalities' ability to reject Uniform Franchise applications
 - Impact of local ordinances
 - Anti-redlining protections
 - Local customer service provisions
 - Take actions where appropriate to preserve, protect municipalities' rights under the decision or future decisions, & watch the Statute of Limitations

Questions & Discussion

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