

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
Implementation of Section 621(a)(1) of )  
the Cable Communications Policy Act of ) MB Docket No. 05-311  
1984 as Amended by the Cable )  
Television Consumer Protection and )  
Competition Act of 1992 )  
)

**REPLY COMMENTS OF THE  
MICHIGAN PUBLIC SERVICE COMMISSION**

**I. Introduction**

The Michigan Public Service Commission (MPSC) respectfully submits these reply comments in response to the Federal Communications Commission’s (FCC or Commission) September 25, 2018 *Second Further Notice of Proposed Rulemaking (Second FNPRM)* in MB Docket No. 05-311. Specifically, the FCC is seeking comment on its tentative determinations that cable-related “in-kind” contributions required by a franchising entity should be treated as “franchise fees” subject to the statutory five percent cap and that local franchise authorities (LFAs) should be prohibited from using their video franchising authority to regulate the provision of most non-cable services, such as broadband Internet access service, offered over a cable system by an incumbent cable operator.<sup>1</sup> Finally, the FCC requested

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<sup>1</sup> MB Docket No. 05-311, Second Further Notice of Proposed Rulemaking, September 25, 2018, available at <https://ecfsapi.fcc.gov/file/0925046713889/FCC-18-131A1.pdf>.

comment on whether its instant conclusions and previous orders should apply to state-level franchising actions in addition to local franchising actions.

## **II. Michigan law promotes competition and investment in infrastructure.**

The MPSC shares the FCC's goals of promoting competition and encouraging investment in infrastructure. Michigan's Uniform Video Services Local Franchising Act, MCL 484.3301 *et seq.*, provides a comprehensive regulatory framework that already successfully achieves these goals. Unlike some other state laws, the Michigan law limits the authority of franchising entities to what is permitted by the statute. This approach avoids the problems caused by open-ended language discussed in the *Second FNPRM*.

The Uniform Video Services Local Franchising Act (Michigan Act) took effect on January 1, 2007. The purpose of the Michigan Act was to create a uniform franchise agreement system, to promote competition in providing video services in Michigan, to ensure local control of rights-of-way, to provide for fees payable to local units of government, and to prescribe the powers and duties of certain state and local agencies and officials. Michigan Public Act 480 of 2006, Preamble, codified at MCL 484.3301 *et seq.* The Michigan Act limits the regulatory role of local franchising entities and the MPSC to video and cable service; it does not apply to other services such as broadband or telecommunications services. MCL 484.3301(2); MCL 484.3306(5)(c).

The Michigan Act promotes fair competition by prohibiting favoritism and disparate treatment of service providers. Specifically, where a franchising entity grants a franchise to more than one service provider, “the franchising entity shall not enforce any term, condition, or requirement of any franchise agreement that is more burdensome than the terms, conditions, or requirements contained in another franchise agreement.” MCL 484.3305(4). Thus, a franchising entity cannot hinder competition by offering one service provider favorable terms while offering all other service providers prohibitively expensive terms. Further, the Act prohibits a franchising entity from selectively withholding franchises. Prior to the Act, a franchising entity could enter into an exclusive franchise agreement with one provider, denying other providers from serving its franchise area. Now, a franchising entity can delay or deny a franchise agreement only if the franchise agreement is incomplete. MCL 484.3303(2). The franchising entity must provide notice to the provider that the agreement is incomplete within 15 business days of filing. *Id.* If a franchising entity fails to act on the agreement within 30 days of the date of filing, that agreement is deemed complete and approved. MCL 484.3303(3). Thus, service providers are assured that they will not be unfairly barred from serving any franchise area in Michigan.

The Michigan Act also avoids the issue of whether cable-related, in-kind contributions should be included in the statutorily-capped franchise fee. The Act prohibits a franchising entity from requiring anything from a service provider other than what is specifically permitted by the Act. The statute is explicit in this regard.

As a condition to obtaining or holding a franchise, a franchising entity shall not require a video service provider to obtain any other franchise, assess any other fee or charge, or impose any other franchise requirements than is allowed under this act. For purposes of this subsection, a franchise requirement includes, but is not limited to, a provision regulating rates charged by video service providers, requiring the video service providers to satisfy any build-out requirements, or a requirement for the deployment of any facilities or equipment. [MCL 484.3303(8).]

Like franchise agreements, build-out provisions are limited to what is permitted by the Act. MCL 484.3309(9).

In addition to franchise fees, the Michigan Act also mandates public, education, and government (PEG) fees. These fees support PEG access facilities and services and cannot exceed 2% of the service provider's gross revenue. MCL 484.3306(8). The Michigan Act defines gross revenue in detail, listing numerous items that are included in gross revenue as well as several exclusions. MCL 484.3306(4)-(5).

Finally, the Michigan Act limits the MPSC's authority to "the powers and duties explicitly provided for under this Act." MCL 484.3312(1). The MPSC is also charged with resolving disputes involving providers, customers, and franchising entities via the procedure described in that section.

As described above, the Michigan Act fosters competition, encourages investment in infrastructure, and provides for resolution of disputes. The MPSC respectfully offers it as an example of state legislation that successfully achieves these goals.

**III. If enacted, the FCC's proposed actions could require an amendment to Michigan law and revision of over 1,700 Uniform Agreements currently in place.**

The MPSC opposes the FCC's proposal to apply FCC decisions to state-level franchising actions. Michigan has avoided the issues highlighted in the *Second FNPRM* by enacting legislation. The Michigan Act gave the MPSC authority to adopt the standardized form for Uniform Video Services Local Franchise Agreements (Uniform Agreement) that is used by each franchising entity in Michigan.<sup>2</sup> This statewide system streamlined the franchise agreement process, limiting both local and state level franchising entities, and creates consistency and a level playing field for providers and franchising entities alike. As of 2017, there were more than 1,700 active Uniform Agreements in Michigan.

The Michigan Act has been in effect for almost 12 years in Michigan. In that time, the MPSC is aware of only one legal challenge to the law, which was brought by a franchising entity and ultimately dismissed. The MPSC is also not aware of any concerns from service providers.

The MPSC opposed the FCC's proposed action for three main reasons. First, there is no evidence that the issues the FCC has raised with LFAs are occurring in Michigan. Specifically, the MPSC has not received any complaints

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<sup>2</sup> A copy of the Uniform Video Services Local Franchise Agreement can be found at <https://www.michigan.gov/mpsc/0,4639,7-159-49641---,00.html>.

like the state-level concerns that the NCTA – The Internet & Television Association (NCTA) raised in its Comments.<sup>3</sup>

Secondly, the goals that the FCC is attempting to achieve appear to have already been achieved by Michigan legislation. The Michigan Act prohibits cable-related, in-kind contributions other than those allowed by statute (and which are included in the five percent franchise fee cap). The Michigan Act also prohibits mixed-use regulation.

Lastly, applying the FCC’s proposed action at the state level could create a burden on video providers and franchising entities, particularly in Michigan and other states with video franchise laws. As the NCTA noted, “23 states now empower a state-level entity, such as a state public utilities commission, to grant cable franchise authorizations, rendering them franchising authorities under Title VI.”<sup>4</sup> This means that the FCC’s action on this issue could impact state laws for almost half of the states in the country.

If the FCC adopts its tentative conclusions, it could invalidate what is already in place in Michigan, specifically with gross revenue and franchise and PEG fees, potentially affecting the more than 1,700 Uniform Agreements in Michigan. This would create a significant administrative burden on franchising entities and video service providers. Revising these agreements could also create legal

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<sup>3</sup> NCTA Comments at pages 62-64, available at <https://ecfsapi.fcc.gov/file/1115214612110/Comments%20of%20NCTA%20-%20MB%20Docket%20No.%2005-311%20--%2011.14.2018.pdf>.

<sup>4</sup> *Id.* at 61.

challenges between the franchise entities and providers as they attempt to implement the changes.

Finally, the FCC's proposed action regarding gross revenue and franchise and PEG fees could conflict with the Michigan Act. As a result, the FCC actions may require Michigan and other state legislatures to amend this statute to be consistent with the FCC.

Michigan has legislation in place that effectively addresses the FCC's concerns regarding fostering competition, encouraging investment, and maintaining consistency between local and state-level franchising entities.

#### **IV. Conclusion**

The MPSC appreciates the opportunity to provide reply comments on the FNPRM. While the NCTA pointed out a few examples of states where there may be potential franchise agreement issues, these issues are not present in Michigan nor perhaps the rest of the states with video franchise laws. As the MPSC has shown, Michigan's Uniform Video Services Local Franchise Act already addresses the concerns raised by both the FCC and the NCTA. The MPSC does not believe it is the intent of the FCC to create administrative or legal burdens on video service providers, franchising entities, or state legislatures. Some states, including Michigan, have already addressed the FCC and NCTA's concerns by establishing a uniform franchise agreement. As the adage goes, "if it ain't broke, don't fix it." The

MPSC urges the FCC to consider alternatives that would not require changes to a statutory and regulatory scheme that has been successful for over a decade.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION**

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