



Still Broken: Michigan's Video Franchising Law 18 Months Later

Editor's Note: In the 18 months since the Uniform Video Services Local Franchise Act, Public Act 480 of 2006 (MCL 484.3301, et seq.) became law, most townships have seen little—if any—improvements in the cable service provided to their areas. To examine what has occurred, MTA asked attorney Jon Kreucher, widely regarded as one of the nation's foremost cable franchising experts, to look at the origins of the act—and the outcomes, both intended and unintended. A former "cable insider"—he previously worked as a division vice president of regulatory and government affairs for a large cable company—Kreucher provides his insights and opinions on where the law came from and where he thinks it's headed.

How have things been going with your township's cable operator lately? Has service improved, and are prices coming down for your residents?

If you've recently experienced a few bumps in the road with Comcast, Charter or another cable company, you're not alone. Eighteen months have now passed since Michigan's "Uniform Video Services Local Franchise Act" was voted through a lame-duck session of the Michigan Legislature. With the benefit of hindsight, we can begin to reflect on Michigan's new cable law and pose some fundamental questions, including whether

Michigan's franchising law will ultimately prove to be more of a public necessity—or a nuisance. While the jury may still be out on that question, a troubling picture is beginning to emerge.

THE PROVEN APPROACH AND THE NEW EXPERIMENT

For the four decades prior to passage of Public Act 480 of 2006, the cable monopoly¹ had been regulated by local governments. Cable's rates, customer service, construction practices and notices had all been monitored by local officials so cable's market dominance wouldn't have too many adverse consequences for residents. This approach made sense. After all, cable digs up local rights-of-ways, makes extensive use of local roads, and has more contact with local residents than perhaps any other business. To a large extent, cable was a local enterprise—and as with most other types of local businesses, it was regulated by local officials.

Local regulation worked well for nearly half a century. But in 2006, a new theory was floated in Michigan and in many other states: If local regulation were eliminated, the idea went, more video service providers would be motivated to enter the market. More providers, in turn, would mean that cable competition would flourish, prices would decline, and customer service would

improve. Put differently, proponents argued that a new state-wide law could replace the “regulatory underbrush” imposed by local governments with new, market-based competition.

It seemed like a worthwhile experiment—but it was also a radical departure from a proven method of keeping cable issues under control.

WHOSE IDEA WAS THIS, ANYWAY?

Many local officials are asking, “Why did state lawmakers make this change when the old way worked pretty well?” Let’s deal with that question before going any further, because it helps to explain some of the consequences emerging under this new law.

In today’s political environment, influence can be sought either directly or indirectly. The most obvious attempt to create influence is through campaign contributions. That route was heavily traveled by the telephone/cable company (telco/cableco) consortium in 2006, when PA 480 was being considered. In just that one election cycle, political action committees (PACs) representing cable and telephone companies spent more than a half-million dollars on political contributions.²

That’s a lot of political capital. To place the amount in context, the telco/cableco consortium spent 50 percent more in the 2006 cycle than the GM, Ford and Chrysler PACs combined.³ Policymakers often assert that contributions have no impact on decisions that are later made—but with spending like this, the telco/cableco consortium seemed to feel differently.

Influence can also be sought in less overt ways. For example, it’s sometimes difficult to determine whether a real “grassroots” organization is sponsoring a new idea or whether the effort is backed by an industry-run “astroturf” group. These “astroturf” organizations are made to look like grassroots groups, but they typically arrive on the scene quickly and evaporate once their mission is over.

With respect to PA 480, groups like “Consumers for Cable Choice” appeared nearly overnight in 2006—but the organization really hasn’t been heard from in Michigan since.⁴ Other telco efforts to buy “independent” support have been extensively chronicled in newspaper reports⁵ and in other sources.⁶ So while it may have appeared as if cable customers throughout the state were clamoring for a change in the way cable companies were regulated, it now appears that much of that activity was cover for changes that the industry itself sought. One now needs to look no further than PA 480 for evidence.

WAS THIS THE CABLE INDUSTRY’S DOING?

The telco/cableco consortium may have played a Herculean role in ensuring that PA 480 would pass. But it would be wrong to suggest that the telecom industry alone was capable of such a feat. Policymakers at all levels are capable of peering past the curtain to see who really controls the Great Oz—so a plausible argument must also exist.

Here, such advocacy came in the claim that PA 480 would “break up cable’s monopoly.” Once cable faced real competi-

tion, the theory went, lower prices and better service would soon follow. As with many bills, promises were also made by the industry that jobs and hundreds of millions of dollars in investment would be created by the new law. This pitch appealed to those who favored market forces over regulation and those who were anxious to bolster Michigan’s struggling economy. When these arguments were combined with the claim of consumer benefits, there was little to stop the train from rolling down the tracks.

Did legislators vote for PA 480 with the best of intentions? Undoubtedly. But with this sort of lineage, problems could be expected. Unfortunately, those unintended consequences are now beginning to emerge.

Even though the statute’s primary objective was to “promote competition in providing video services in this state,” the law made no mention as to how much competition was to be expected, whether that goal was realistic, and the deadline when the competition was to be achieved.

Emerging Problem #1: There is No Objective Way to Measure the Success or Failure of PA 480.

When it comes to meeting our own objectives, we’re held accountable. Consultants make it easy for our bosses, who are taught to use the “SMART” standard for goal-setting: Every objective should be Specific, Measurable, Achievable, Reviewable, and Time-specific. In our own lives, SMART objectives keep us honest and focused; when such criteria are in place, there can be no real dispute as to whether a goal has been met or a deadline missed.

When PA 480 was passed, however, I noted that the law was “heavy on hype but weak on when.”⁷ Even though the statute’s primary objective was to “promote competition in providing video services in this state,” the law made no mention as to how much competition was to be expected, whether that goal was realistic, and the deadline when the competition was to be achieved. *Although the ability to measure actual performance would seem to be important, PA 480 doesn’t contain a provision that requires video service providers to report the number of video franchises they hold.* No one—not even the Michigan Public Service Commission (MPSC)—really knows. Nor is there any requirement for video providers to report the areas in each community where service is actually being offered. Add it all up, and there are plenty of promises—but none that is specific, measurable or time-based.

As a consequence, state-level officials are beginning to get questions from constituents about *when* cable competition will surface, *when* lower prices will be seen, and *when* customer service will actually improve. In response, a fair amount of rationalization has developed. State lawmakers are telling ▶

The Cable World Since PA 480 Passed

According to attorney Jon Kreucher, since PA 480 was passed, some cable operators have*:

- Canceled construction and performance bonds, which leaves local governments relying upon governmental immunity and municipal coverage for liability arising from cable operators' activities in rights-of-way
- Charged commercial rates for cable services previously provided to first responders and government locations at no charge
- Closed local business offices, in order to save rent and associated staff expense
- Announced plans to close nine public, educational and government (PEG) channel studios around the state
- Reduced staff formerly responsible for interacting with local governments and resolving local issues
- Continued to impose "dispute resolution" procedures on cable customers that have been found unconscionable in other states
- Aggressively reduced other "franchise-related costs" while avoiding any associated reduction in rates for customers
- Allowed customer service to hit all-time lows, according to the American Customer Satisfaction Index
- Asserted that the Michigan Public Service Commission has no jurisdiction to resolve disputes between the video providers and local governments
- Announced plans to migrate PEG channels to a digital tier, which could leave approximately 500,000 customers in Michigan without any PEG programming
- Announced that they would no longer support local emergency alert systems previously required by franchise agreements

constituents, "give it time—new providers can't build these systems overnight."

While that has always been true, state lawmakers weren't told that patience would be required when PA 480 was passed. Instead, state policymakers heard that the "regulatory underbrush" imposed by local governments was the only obstacle to widespread cable competition. It's since become clear that if video competitors needed time to build their systems, they also had time to negotiate local video franchises—just as cable companies had done for decades prior.

Emerging Problem #2: Competition is Developing Much Slower Than Legislators Anticipated.

While the act provides for no objective measurement, some anecdotal evidence exists as to the pace at which cable competition is developing. Unfortunately, that evidence isn't encouraging.

Here are a few snapshots. When considering this information, keep in mind that there are nearly 2,000 townships, cities and villages in Michigan.

- Before PA 480 was enacted, 36 different companies held franchises to offer cable service in the state. One year after PA 480 was passed, 39 companies held such franchises—but only 37 actually offered any service,⁸—a net service-provider increase of one company (AT&T).
- Before PA 480 was passed, about 42 Michigan communities—and perhaps a few more—enjoyed wireline cable competition. Most of that competition was located in southeast Michigan, and was (and is) delivered through a video company named WOW! One year later, *portions* of about 100 Michigan communities had wireline cable competition.
- While impossible to pinpoint, my firm, Howard & Howard Attorneys, P.C., endeavored to extrapolate the number of Michigan households that actually had cable competition one year after the new law was passed. The number amounted to only about one of every 20 Michigan households.⁹
- Even now, AT&T is asserting that it serves *portions* of approximately 140 Michigan communities—that still leaves about 1,800 Michigan townships, cities and villages without any wireline cable competition.

It remains unclear whether PA 480 can be credited for the modicum of competition that has developed in Michigan. North Carolina, for example, has a law similar Michigan's, but AT&T has been slow to apply for *any* cable franchises in that state. On the other hand, Mississippi has no statewide cable franchising law, but AT&T is negotiating with individual communities in that state to obtain traditional cable franchises.¹⁰ As a consequence, it is becoming clear that market forces, *not* regulatory treatment, drive the development of cable competition.

So, while the promise of wireline video competition has reached a small fraction of Michigan residents, it's now becoming painfully evident that it will be *years* before *any* competition reaches most Michigan communities—and in many places in our state, such competition may never arrive.

The slow pace in the development of competition has resulted in a large and likely unintended consequence (at least unintended from the perspective of state lawmakers): While competition is developing in a *handful* of Michigan communities, the new state statute has *already deregulated* cable's monopoly in *every* Michigan community.

The point bears repeating: Despite the fact that competition does not exist in the vast majority of Michigan communities, no one—whether local officials *or* the MPSC—is permitted to regulate cable's monopoly under state law.¹¹ Cable's now-unregulated market power is starting to bear down on Michigan's residents. At the first of this year, for example, Comcast increased the price on its lowest tier of service by 25 percent in many Michigan communities, and most other services saw price increases in the 10 percent range, even though the cost of the entertainment/recreation index increased by less than 1 percent over the same period.¹² Comcast and Charter—the two dominant cable operators in our state—also reflect abysmal customer satisfaction scores. In fact, those two cable operators were the *lowest-scoring companies* in the *lowest-scoring industry* as measured in 2007 by the American Customer Satisfaction Index. In 2008, the airline industry slipped past cable and displayed poorer customer satisfaction scores—but Comcast's own customer satisfaction still dropped to the lowest point in the company's history.¹³

While good intentions may have driven the desire to replace local regulation with competition, local regulation had proven effective over the course of 40 years. Cable competition, on the other hand, still hasn't even begun to take root. Consequently, it appears that PA 480 deregulated cable much too soon.

Emerging Problem #3: Cable is Taking Advantage of the Uncertainty That Michigan's New Statute Creates.

Cable prices in Michigan continue to rise exponentially when compared to the cost of living. PA 480 actually promoted this outcome when it prohibited local governments from regulating cable rates¹⁴—this, even though federal law has vested local officials with that authority since 1992. Similarly, cable's customer satisfaction scores are among the worst in any industry, and the number of cable complaints in Michigan increased in 2007.¹⁵

Again, PA 480 unwittingly fostered this outcome, because the statute allows cable companies to close customer service offices throughout the state—an opportunity regularly seized by cable operators throughout 2007. PA 480 also purports to limit other customer service standards that communities can impose under federal law, like the right to restrict the amount of time that a customer is left on hold when calling a cable operator. With no one left in a position to regulate cable, the industry has exerted its market power—and its customer satisfaction scores reflect this.

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Under traditional regulation, local governments could also bargain for in-kind services, local production studios, financial protections for the residents like performance and construction bonds, and public safety measures such as local emergency alert systems. As with rate regulation and customer service oversight, however, PA 480 purports to strip this bargaining position away from local governments. Again, the cable industry has been quick to take advantage of the situation.

The sidebar article on page 20 depicts how we'll never really have a way to calculate the adverse economic impact that PA 480 has had on Michigan's economy, because the law makes no effort to measure such things. But hundreds of jobs have probably been lost as public studios, and customer service personnel have been reduced in number. Storefronts have been vacated, and personal property tax revenue will show declines.

Paradoxically, while the cable operators' expenses were allowed to be *cut by tens of millions of dollars annually* through PA 480, the law nevertheless allows cable operators to concurrently *raise their prices* without any regulatory oversight. This, again, is not an outcome that any legitimate consumer group would have fashioned—but it was a debate in which few legitimate ►



Feeling in the Dark? Here's How You Can Make a Difference

While many of PA 480's developments to date have been disappointing, township officials might consider doing the following:

- **Write your state legislators.** Ask your elected representatives when your community can expect to see any wire-line competition. Press for a date, rather than just a new promise. If cable prices continue to rise and customer service continues to slip in your community, share this information with your legislators.
- **Consider passing an ordinance.** The ordinance should rely on the rights that local governments have under federal law. Consult with a qualified attorney to first determine the scope of federal rights that state law purports to limit.
- **Audit franchise fees—and SOON!** If your community didn't notice a material bump in the amount of franchise fees paid between 2006 and 2007, check into whether the cable operator is using the definition required by state law. PA 480 limits audits to one in every 24 months—so townships are already just six months from the first deadline, Dec. 31, 2008. If your township hasn't planned a review of franchise fees, consider getting one started right away.
- **Collect franchise fees.** If your township isn't already collecting franchise fees, consider whether you want to collect such fees in the future. A community that chooses not to charge a fee still sees cable prices go up every year—if the fees aren't going into township coffers, there's a good chance that they will be going into the cable company's pockets instead.

consumer groups were fully engaged, as PA 480 made its final move through the Legislature during a holiday period.

Emerging Problem #4: Disputes are Not Being Resolved.

When state legislators enacted PA 480, a piece of the picture was left incomplete—this time, intentionally. No provision was made for how disputes would be resolved.

Because franchises were previously negotiated and issued by local governments, local officials used to have a significant amount of influence when it came time to resolve the problems which inevitably arose. PA 480, however, rearranged regulatory responsibility. Rather than resolving a dispute directly with the cable provider, PA 480 requires local governments to bring their disputes with a cable operator before the Michigan Public Service Commission.

Unfortunately, PA 480 left development of the dispute resolution procedure for another day. According to Section 10(3) of the act, the MPSC was to “submit to the Legislature no later than June 1, 2007, a proposed process to be added to this act that would allow the commission to review disputes ... between a provider and a franchising entity.” The MPSC met the act's deadline—but the state Legislature has yet to pass any law that would address the MPSC's role in resolving local government/cable operator issues.

As a consequence, several disputes have been filed with the MPSC, but they remain unresolved because the cable operator has essentially dismissed the MPSC's authority to resolve the dispute.¹⁶ Many more issues have likely gone unfiled because there is no assurance that claims will ever be heard and settled.

Emerging Problem #5: Bills to Correct These Unintended Consequences are Not Moving.

Many bills to correct these problems have been introduced in the state Legislature, but at the time this article was written, all show little legislative progress. Two of the bills—House Bill 5048 and Senate Bill 637—relate to the still-unresolved dispute resolution process. Others—HBs 5693 and 5667, and SB 1235—are intended to restrict the cable operators' ability to move public, educational and government access programming off the cable operators' basic service tiers. Still others—HB 5047 and SB 636—attempt to ensure that communities receive compensation for the in-kind services that were lost when existing franchise agreements with cable operators were invalidated under the new law.

THE BEST OF INTENTIONS

PA 480 was passed with the best of intentions. Cable competition was supposed to get jump-started by the new statute. In turn, cable prices were to decline and customer service was to improve. Unfortunately, just the opposite picture is taking shape. PA 480 essentially deregulated the cable industry in Michigan before cable competition ever developed. As a consequence, cable companies have increased their prices at an exponential pace when compared to the consumer price index, customer service has slipped and complaints continue to mount.

While this picture isn't pleasant, this cause has not been lost, either. A bright spot in PA 480 was the definition the law used for "gross revenues," which is the base against which franchise fees are to be paid. Township officials should take a close look at their township's recent franchise fee collections to ensure that the cable operator is using the statute's definition for this calculation. This franchise fee review should be conducted soon, however, as PA 480 limits the number of franchise fee audits that can be conducted to one every 24 months. Therefore, township officials have only until Dec. 31 of this year to audit the full schedule of payments since PA 480 was enacted.¹⁷

Communities should also consider drafting a letter to their state officials, reminding them of the promises that were made when PA 480 was passed. When, exactly, should residents start to see more cable competition, lower prices and better customer service? Now that 18 months have passed, these are fair questions that all townships should begin to ask. ■

Footnotes appear on page 24.

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FOOTNOTES

¹ Cable operators will steadfastly argue that their business is not a “monopoly.” Competition, they assert, is found in the form of direct broadcast satellite services like Dish Network and DirecTV, and even from video rental stores like Blockbuster. Cable still controls nearly 70 percent of the multi-channel video market, however, and remains the only provider that can deliver video, telephone service and high-speed Internet access over the same wire in most of the markets it serves. *See, e.g.*, FCC News Release, *FCC Adopts 13th Annual Report to Congress on Video Competition* (Nov. 27, 2007). Available at www.fcc.gov. Additionally, certain benefits of competition—like materially lower prices—are only achieved when cable faces competition from a *wireline* competitor; “competition” from satellite companies does not have the same impact on prices. *See, e.g., id.*, and U.S. General Accounting Office, *Telecommunications: Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T at 6 (Rel. March 25, 2004).

² Michigan Campaign Finance Network, *Top 150 Michigan PACs*. Available at www.mcfn.org.

³ *Id.*

⁴ Sourcewatch tracks organizations and their sponsors. According to its Web site, “Consumers for Cable Choice describe themselves as ‘an alliance of consumer organizations across the nation committed to the development of a competitive, vibrant cable communications market’ but it is in actual fact an astroturf organization. Consumers for Cable Choice president Bob Johnson ... acknowledged having received \$75,000 in startup funds from Verizon this summer and ‘a commensurate amount’ from SBC.” Available at www.sourcewatch.org.

⁵ *See, e.g.*, David Lazarus, Cable “Coalitions” Sketchy, *San Francisco Chronicle*, Nov. 2, 2005. Available at www.sfgate.com.

⁶ Kreucher, *Forced Franchising: Why Telephone Industry Calls for “Shall Issue” Video Franchising Shouldn’t be Answered*, National Whitepaper of the International City/County Management Association at 28–32 (November 2006). Available at www.cablecounsel.com.

⁷ www.bloggingbroadband.com/?p=80

⁸ MPSC Annual Report on Video Competition, at 14 (Feb. 1, 2008).

⁹ Cable Competition Index Rates Michigan’s Situation “Very Poor.” Available at www.freepress.net/news/30015.

¹⁰ On Dec. 7, 2007, for example, it was reported that Horn Lake, Miss. had struck a cable franchise deal with AT&T. The article is available at www.commercialappeal.com/news/2007/dec/09/att-offers-cable-tv-in-area.

¹¹ Certainly, at least, this is the cable/teleco position—and one that finds some support in PA 480. Large questions remain, however. Among them: Whether state law can circumscribe authority that otherwise exists to regulate cable under federal law, and whether PA 480 complies with the Michigan Constitution.

¹² CPI-Recreation can be viewed at www.bls.gov/news.release/cpi.nr0.htm.

¹³ The ACSI analysis can be viewed at www.theacsi.org. Click on “ACSI Scores and Commentary,” then “Scores by Industry” and “Cable and Satellite TV.”

¹⁴ *See, e.g.*, Act Section 3(8).

¹⁵ Michigan’s attorney general released a list of the top 10 categories of complaints it receives from consumers. The category encompassing cable complaints rose from #3 in 2006, to #2 in 2007. The list is available at www.michigan.gov/ag/0,1607,7-164--185866--,00.html

¹⁶ *See, e.g.*, Nov. 28, 2007, letter filed in MPSC Docket No. U-15439.

¹⁷ According to Act Section 7(1): “No more than every 24 months, a franchising entity may perform reasonable audits of the video service provider’s calculation of the fees paid under section 6 to the franchising entity during the preceding 24-month period only ... Any additional amount due verified by the franchising entity shall be paid by the provider within 30 days of the franchising entity’s submission of an invoice for the sum. If the sum exceeds 5 percent of the total fees which the audit determines should have been paid for the 24-month period, the provider shall pay the franchising entity’s reasonable costs of the audit.”