

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**CITY OF DETROIT,**

**PLAINTIFF,**

**v.**

**COMCAST OF DETROIT, INC.,**

**DEFENDANT.**

Case Number: 2:10-cv-12427  
Hon. Bernard A. Friedman

**DEFENDANT'S MOTION TO DISMISS**

1. Defendant Comcast of Detroit, a Michigan general partnership ("Comcast")<sup>1</sup>, through its undersigned attorneys, respectfully submits this Motion to Dismiss Plaintiff City of Detroit's ("City") Complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6).<sup>2</sup>

2. None of the provisions of Title VI of the federal Communications Act, 47 U.S.C. §§ 521-573 ("Cable Act") relied upon by the City in its Complaint include a right of action for a city to sue a cable operator in federal court, nor any federal remedy for cities to obtain preemption of State law.

3. The Cable Act carefully preserved the sovereign powers of States as the source of State cable regulatory authority. 47 U.S.C. § 556(b). The legislative history of the Cable Act makes clear that Congress preserved the power of a State to "plac[e] conditions on a local government's grant of a cable franchise." H.R. Rep. No. 98-934, at 94 (1984). Indeed, Congress understood that some states regulate through "statutes specifying the terms on which a

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<sup>1</sup> The Complaint incorrectly names Comcast as "Comcast of Detroit, Inc.".

<sup>2</sup> Pursuant to Local Rule 7.1, the undersigned counsel contacted Mr. Phelps, attorney for the City of Detroit, and a conference was conducted in which Comcast explained the nature of this motion, its legal basis, and requested but did not obtain concurrence in the relief sought.

municipality may grant and enforce a franchise." *Id.* at 23. Thus, as a political subdivision of the State, the City derives whatever authority it has over cable television from the State, and it must exercise that authority upon the conditions prescribed by State law. *City of Niles v. Michigan Gas & Elec. Co.*, 262 N.W. 900, 903 (Mich. 1935).

4. None of the Cable Act sections invoked by the City provide any express right of action for local governments to obtain federal preemption of State law.

a. Section 521 merely sets forth the "purposes" of the Cable Act. It grants no entity any right, and establishes no federal remedy. 47 U.S.C. § 521(1) & (5).

b. With respect to the franchising provisions of the Cable Act on which the City relies, 47 U.S.C. §§ 541, 545 and 546, Congress expressly provided *cable operators* a right of action and remedies when a State or local government violates those provisions. 47 U.S.C. § 555(a). Congress did not provide express rights or remedies for franchising authorities. Congress' explicit determination of federal rights and remedies, and its failure to extend those rights and remedies to local governments, "is determinative." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

c. Additionally, 47 U.S.C. §§ 531(c) and 552, also invoked by the City in its Complaint, are merely savings clauses that allow certain franchising regulation of cable television that would otherwise be prohibited and preempted by other terms of the Cable Act. *See, e.g.*, 47 U.S.C. § 531(a) (allowing a franchising authority to "establish requirements . . . only to the extent specified in this section"); 47 U.S.C. § 544(a) "[a]ny franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title"); 47 U.S.C. § 556(c) ("any provision of law of any State, political subdivision . . . or franchising authority . . . which is inconsistent with this Act shall be deemed

to be preempted and superseded." ). To the extent the provisions of the Cable Act relied upon by the City specify that a franchising authority "may enforce" certain regulations, they merely preserve authority that may exist under State law that would otherwise be preempted by the Cable Act. These provisions, however, do not include express federal rights of action or federal remedies for the City.

5. Nor should this Court find that the City has an implied federal right of action under the multi-factor inquiry for such causes of action. *Thomas M. Cooley Law School v. American Bar Assoc.*, 459 F.3d 705, 711 (6th Cir. 2006).

a. The legislative history of the Cable Act conclusively shows that Congress considered and rejected the fundamental premise of the City's claims, which defeats any argument that Congress intended to establish the federal rights of action and remedies set forth in the City's Complaint. H.R. Rep. No. 98-934 at 46, 94.

b. Congress' provision of express federal causes of action and remedies to certain protected classes of beneficiaries, none of which include local governments, makes clear that Congress did not consider the Cable Act to be of "especial benefit" to cities. *See, e.g.*, 47 U.S.C. §§ 555(a), 551(f), 532(d)-(e).

c. Implied rights of action for the City's claims would be inconsistent with the express purposes of the Cable Act and its overall structure for local franchising.

d. The City's claims of federal preemption are properly characterized as claims for breach of contract under state law, with no basis to imply a federal remedy. The legal status of a cable franchise is that of a contract, enforceable by municipalities through state law claims for breach of contract. *City of Niles*, 262 N.W. at 902. There is nothing in the Cable Act

to suggest that Congress intended to convert municipal claims for breach of contract into questions of federal preemption of State control of local government.

6. If the Court dismisses the City's federal claims, the Court should exercise its discretion under 28 U.S.C. § 1367(c)(3) to dismiss the remaining state law claim in Count IV, because it goes to the "structure of [State] government . . . through which the State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. at 460. Moreover, "judicial economy, convenience, fairness, and comity" all weigh in favor of dismissal because the Court has yet to expend any significant amount of resources. *Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992).

**WHEREFORE**, for all of the foregoing reasons, Comcast respectfully requests that the Court dismiss the City's Complaint.

Respectfully submitted,

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**MEMORANDUM OF LAW IN SUPPORT  
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### CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether the City of Detroit's federal preemption claims should be dismissed on grounds that Title VI of the federal Communications Act, 47 U.S.C. §§ 521-573 ("Cable Act") does not authorize a city to sue in federal court to invalidate State law that limits a city's regulatory power over cable television?
2. Whether the Court should decline to exercise supplemental jurisdiction over a controlling and dominant issue of State law that goes to the fundamental sovereign power of the State to define the limits of local government authority to franchise cable television systems?

### CONTROLLING AUTHORITY

1. For motions to dismiss: Federal Rule of Civil Procedure ("FRCP") 12(b)(6); *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008).
2. For Plaintiff not having a private right of action under the federal Communications Act: 47 U.S.C. §§ 521, 531, 541, 545, 546, 552, and 556; *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).
3. For refusal to exercise supplemental jurisdiction over State law claims: 28 U.S.C. § 1367.

### INTRODUCTION

Defendant Comcast of Detroit, a Michigan general partnership, ("Comcast")<sup>1</sup> submits this Memorandum of Law in Support of its motion to dismiss the City of Detroit's ("City") Complaint pursuant to FRCP 12(b)(6).

Counts I, II and III of the City's Complaint rest entirely on the argument that provisions of the Cable Act preempt all or part of Michigan's recent Uniform Video Services Local Franchise Act of 2006, M.C.L. §§ 484.3301 *et seq.* ("Uniform Act"), which imposes reasonable

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<sup>1</sup> The Complaint incorrectly names Comcast as "Comcast of Detroit, Inc."

limitations on the power of local governments to regulate and otherwise control cable television operators through their franchises for use of public rights of way.<sup>2</sup> This Court should dismiss those claims because Congress did not provide cities with any rights of action in the Cable Act sections invoked in the Complaint, and there is no basis for federal jurisdiction. Instead, the text of the Cable Act provisions on which the City relies, as well as the text of related provisions and the legislative history, demonstrates Congress' unequivocal intent to allow States to "exercise authority over the whole range of cable activities," including the power to "plac[e] conditions on a local government's grant of a cable franchise." H.R. Rep. No. 98-934 at 94 (1984). Further, because the City has no right to bring the federal claims contained in Counts I-III of its Complaint, pursuant to 28 U.S.C. § 1367, the Court should dismiss Count IV, which presents a supplemental State constitutional challenge to an Act of the Michigan Legislature.

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<sup>2</sup> If the case proceeds, Comcast expects to demonstrate the absence of merit in the City's allegations in this case. For example, although the City seeks here to enforce a 1985 cable franchise (Compl. ¶ 45), it earlier sought a declaration from the Michigan Public Service Commission that the same 1985 franchise had *expired*, and that Comcast's Uniform Franchise with the City was *effective*. See *In re Verified Complaint of the City of Detroit*, Complaint, Case No. U-15329 (Mich. Pub. Serv. Comm'n June 19, 2007), available at <http://efile.mpsc.state.mi.us/efile/docs/15329/0001.pdf>. Indeed, the City did not challenge the Uniform Act for more than three years after its passage, filing this case instead on the same day it filed comments with the Federal Communications Commission ("FCC") challenging Comcast's pending merger with NBC Universal. See *Comments of the City of Detroit*, MB Docket 10-56 (FCC June 21, 2010), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020510241>.

## STANDARD OF REVIEW

A motion to dismiss pursuant to FRCP 12(b)(6) permits a district court to dismiss a complaint "for failure to state a claim upon which relief can be granted." *Association of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007). In considering a motion to dismiss, the Court must determine whether the plaintiff is entitled to legal relief if all of the allegations in the complaint are accepted as true and the complaint is construed in a light most favorable to the plaintiff. *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). However, the Court need not "accept as true legal conclusions or unwarranted factual inferences." *Gregory v. Shelby County*, 220 F.3d 443, 446 (6th Cir. 2000).

## ARGUMENT

### **I. The City Has No Cause of Action Under the Cable Act**

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. at 286. Where a plaintiff invokes a federal right of action, the court must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy," and "this latter point is determinative." *Id.* As detailed below, the Cable Act provisions on which the City relies do not include a right for a city to sue a cable operator in federal court, much less a federal remedy for cities to obtain preemption of State law. The Court should dismiss the federal claims for this reason.

**A. Congress Expressly Preserved the Power of Each State to Exercise Jurisdiction Over Cable Television Matters and Did Not Override the Traditional Relationship of Cities as Subdivisions of a State**

The federal counts of the City's Complaint rest on a sweeping notion of federal preemption that runs headlong into fundamental principles of State sovereignty that are carefully guarded by the courts and preserved by Congress in the Cable Act.

**1. States Have Sovereign Power Over Cities**

Given the premise of the City's Cable Act preemption claims, the relationship between federal law and State sovereignty is central to Comcast's motion to dismiss. "Through the structure of its government . . . a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Cities "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004). "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. at 460-61 (internal quotation marks omitted). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. Thus, "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 140.

Michigan law is entirely consistent with these principles of federalism. As a municipality, a city is a "political subdivision" of the State and a "creature[] of legislation." *Mayor of Detroit v. Arms Technology, Inc.*, 258 Mich. App. 48, 60, 669 N.W.2d 845 (2003).

Although the Michigan Constitution art. 7 § 29 grants cities control over the use of their public rights of way, "a municipality's exercise of 'reasonable control' over its streets cannot impinge on matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law." *City of Taylor v. Detroit Edison Co.*, 475 Mich. 109, 112, 715 N.W.2d 28 (2006). The authority granted to cities pursuant to art 7 § 29 is subject to art. 7 § 22 of the Michigan Constitution and "the Legislature has the authority to limit the manner and circumstances under which a city may grant or deny consent under § 29." *City of Lansing v. Michigan*, 275 Mich. App. 423, 433, 737 N.W.2d 818 (2007).<sup>3</sup> Prior to the passage of the Uniform Act, the Michigan Supreme Court recognized that the Legislature "has set up procedures for municipalities to follow in . . . granting public service franchises" and that "the grant[] of cable television franchises" by a city was subject to "statutory limits on its authority." *White v. City of Ann Arbor*, 406 Mich. 554, 570, 281 N.W.2d 283 (1979).<sup>4</sup> Against these principles of State supremacy over political subdivisions, the City cannot point to any federal right to maintain its Complaint, or a federal remedy to upend an act of the State legislature.

## **2. The Federal Communications Act Preserves State Power Over Cities**

The City invokes 47 U.S.C. § 556 as the source of express federal preemption of State law (Compl. ¶¶ 12, 40), but this section of the Cable Act, titled "Coordination of Federal, State

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<sup>3</sup> See also *TCG v. City of Dearborn*, 261 Mich. App. 69, 95, 680 N.W.2d 24 (2004) (rejecting city claim of power to charge telecommunications franchise fees under Article 7, Sections 29 and 30 of Michigan's Constitution of 1963 because where "the Constitution does not expressly grant that right to the cities, it remains with the state, and is subject to the state's control if exercised").

<sup>4</sup> The City derives whatever authority it has over cable television from the Legislature: "[t]he grant of a franchise is an exercise of the sovereign power of the State, vested in the legislature. The power may be delegated to municipalities but, when so delegated, the municipality exercises it as agent of the State and upon the conditions prescribed by law." *City of Niles v. Michigan Gas & Elec. Co.*, 273 Mich. 255, 265, 262 N.W. 900 (1935). A municipality cannot expand the powers delegated to it by the Legislature through a franchise contract. *Id.*

and Local Authority," makes an important distinction between the power of States and the power of their political subdivisions. Subsection (c) indeed expressly preempts "any provision of law of any State, political subdivision . . . or franchising authority . . . which is inconsistent with this Act." But as between local governments and the States, in subsection (b) Congress carefully preserved the traditional role of States, not their subdivisions, as the ultimate source of State cable regulatory authority, declaring "[n]othing in this title shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title."<sup>5</sup>

The legislative history of this provision leaves no doubt that Congress fully respected and preserved the sovereign power of States to control local government cable franchising:

*The Committee does not intend Title VI to upset the traditional relationship between state and local governments, under which a local government is a political subdivision of the state and derives its authority from the state. A state may, for instance, exercise authority over the whole range of cable activities, such as negotiations with cable operators; consumer protection; construction requirements; . . . and other franchise-related issues – as long as the exercise of that authority is consistent with Title VI. If, under [this Act] or any state law, a requirement imposed upon a cable operator must be reflected in a franchise, **the state may exercise its authority over cable either by establishing a state franchising authority or by placing conditions on a local government's grant of a cable franchise.***

H.R. Rep. No. 98-934 at 94 (emphasis added). Congress thus fully preserved the power of a State to "exercise authority over the whole range of cable activities," including the power to "plac[e] conditions on a local government's grant of a cable franchise." *Id.* It did not intend to give cities new federal rights to preempt state law.

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<sup>5</sup> Congress provided a different definition of "State" for this provision than the definition of "State" applicable to the rest of Title VI, further underscoring each State's sovereign control over units of local government. 47 U.S.C. § 556(d) ("For purposes of this section, the term "State" has the meaning given such term in [47 U.S.C. § 103(40)]."). *Compare* 47 U.S.C. § 103(40) ("State" includes Washington D.C. and the territories and possessions of the United States but not local governments) *with* 47 U.S.C. § 521(18) (definition of "State" generally applicable in the Cable Act means any State "or political subdivision, or agency thereof").

Moreover, Congress did not presume to define which unit of government constitutes the "franchising authority" under State law. The Cable Act defines "franchising authority" as "**any governmental entity** empowered by Federal, State or local law to grant a franchise." 47 U.S.C. § 521(10) (emphasis added). The legislative history recognizes that "[i]n several states, such as New York, the franchising process includes approval of a franchise by a state agency as well as by a local government. . . . in such cases the term 'franchising authority' shall include these state agencies, in addition to any local government body with authority to grant a franchise." H.R. Rep. No. 98-934 at 45. With the Uniform Act, Michigan joined the ranks of those States that impose state-level franchise requirements.

In discussing "franchising authority" in general, the history of the Cable Act reveals that Congress understood the extent to which some States limited the power of their subdivisions to regulate cable television prior to enactment of the Cable Act:

Some states have also acted to regulate the cable franchise process, either directly by requiring state level review and/or approval of municipal franchise actions or indirectly **through state statutes specifying the terms on which a municipality may grant and enforce a franchise**. For example, California and Massachusetts have statutes which prohibit municipalities from regulating rates if certain conditions are met. New York State has a detailed statute to guide the municipal franchise process and a state agency approves each franchise. New Jersey requires state-level approval for each cable franchise, and details certain terms that must be included in a franchise.

*Id.* at 23. Thus, when Congress declared in 47 U.S.C. § 556(b) that "[n]othing in this title shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title," it fully preserved the power of any State, including Michigan, to limit the cable regulatory authority of cities and other units of local government.

As explained below, this overriding principle of State sovereignty, specifically considered by Congress and included in the Cable Act in Section 552(b), compels the dismissal of the City's Complaint.

**B. Congress Did Not Provide Any Express Private Rights of Action for Those Cable Act Sections the City Advances As the Basis for Its Federal Claims**

**1. Cable Act Sections 521, 541, 545, and 546 Have No Federal Rights or Remedies for Cities**

The City suggests that Congress somehow expressed an intent to give the City a federal right to obtain federal preemption of Michigan law through 47 U.S.C. §§ 521(1) & (5), the "purposes" section of the Cable Act. (Compl. ¶¶ 19, 37.) This provision, however, grants no entity any right, and establishes no federal remedy. *See also Centel Cable Television Co. v. Admiral's Cove Assocs.*, 835 F.2d 1359, 1363 (11th Cir. 1988) ("The Cable Act, however, does not expressly contain a cause of action in favor of local governments.").

The City also asserts that three franchising provisions of the Cable Act preempt Michigan's Uniform Act: Section 541, which governs cable franchising generally; Section 545, which defines standards and procedures by which a cable operator is entitled to modify a franchise; and Section 546, which governs the renewal of a franchise upon its expiration.<sup>6</sup> (Compl. ¶¶ 19, 21, 25, 37, 49-50, 56, 58, 60-61.) For each of these provisions, Congress provided a single express right of action for "[a]ny cable operator adversely affected by any final determination made by a franchising authority." 47 U.S.C. § 555(a). The statute also *provides cable operators* with express *remedies* when any State or local government violates these provisions of the Cable Act. 47 U.S.C. § 555(a) (injunctive and declaratory relief). Although

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<sup>6</sup> The Government Printing Office codified Title VI of the Communications Act with confusingly different numbering than that used in the Communications Act. For example, 47 U.S.C. §§ 541, 545, 546, and 556 are the codified versions of Sections 621, 625, 626, and 636 of the Cable Act. For simplicity, we use the numbering as codified in the U.S. Code.

Congress provided express rights and remedies for *cable operators*, it did *not* provide any franchising authority with any such express rights or remedies. To the extent the City's Complaint rests on these key franchising provisions of the Cable Act, Congress' explicit determination of federal rights and remedies, and its failure to extend those rights and remedies to local governments, "is determinative." *Alexander v. Sandoval*, 532 U.S. at 286.

## **2. Cable Act Sections 531 and 552 Include Savings Clauses, Not Federal Rights of Action**

The City's Complaint erroneously assumes Congress created federal rights of action by preserving certain local authority in Section 531 to enforce cable television franchise provisions relating to public, educational, or governmental ("PEG") programming, and in Section 552 to enforce consumer protection and customer service standards. (*See, e.g.*, Compl. ¶¶ 42, 56, 54.) Neither of these statutes includes any express right of action for any entity, nor any federal remedy for any claimed violation thereof. Instead, insofar as these provisions declare Congress' intention that franchising authorities are "authorized to enforce" franchise provisions or regulations, they are merely savings clauses that allow municipal regulation that would otherwise be prohibited and preempted by other terms of the Cable Act.

A central principle of the Cable Act is that certain significant areas of local and State cable franchise regulation are disallowed unless otherwise expressly permitted by the Cable Act. For example, Section 544 states that "[a]ny franchising authority *may not regulate the services, facilities, and equipment provided by a cable operator* except to the extent consistent with this title." 47 U.S.C. § 544(a) (emphasis added). Moreover, Congress explicitly provided that "any provision of law of any State, political subdivision . . . or franchising authority . . . which is inconsistent with this Act shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c). Thus, where the Cable Act declares that a franchising authority "may enforce" franchise

provisions (as in Section 531) or "may establish and enforce" other cable-related requirements (as in Section 552), Congress was merely defining those regulations and enforcement rights that are not prohibited or preempted by the Cable Act. But there is no word or phrase in either Section 531 or 552 that suggests Congress intended to override the application of State law and create new federal rights of action and federal remedies for local governments.

The Complaint cites to the order denying a motion to dismiss a city's claim that Section 531 preempted parts of the Uniform Act in *City of Dearborn v. Comcast of Michigan III, Inc.*, Case No. 08-10156, slip op. at 9 (E.D. Mich. Nov. 25, 2008).<sup>7</sup> That order simply did not purport to consider, and does not discuss, whether a city has an express private right of action under Section 531. In any event, the decision of another district court judge is not binding, and is "entitled to no more weight than [its] intrinsic persuasiveness merits." *Bhutta v. Bush*, No. 05-CV-70433-DT, 2006 WL 568343, at \*4 n.28 (E.D. Mich. Feb. 3, 2006) (citing *TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990)); *Liebisch v. Secretary of Health & Human Servs.*, 21 F.3d 428 (Table), 1994 WL 108957, at \*2 (6th Cir. 1994) ("District Court opinions have persuasive value only and are not binding as a matter of law."). Moreover, the decision in *City of Dearborn* was demonstrably wrong to the extent it overlooked (and did not discuss) the ample evidence in the text and legislative history of Section 531 and the Cable Act (discussed below) that Congress did not intend this provision to implicitly "give the franchising authority the power to override the application of state law." H.R. Rep. No. 98-934 at 46.<sup>8</sup>

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<sup>7</sup> The Complaint cites the Court's Order dated October 3, 2008. (Compl. ¶ 42.) That Order, however, was amended by Document No. 67, an Amended Order dated November 25, 2008. *City of Dearborn v. Comcast of Michigan III, Inc.*, No. 08-10156, 2008 WL 4534167 (E.D. Mich. Oct. 3, 2008), as amended (Nov. 25, 2008).

<sup>8</sup> Indeed, where Florida cities relied in part on the *City of Dearborn* case to argue that the Cable Act preempted the PEG channel provisions of Florida's new cable franchise law, the court found that "the Cities have not made any convincing argument that these provisions of the [Florida

No explicit right of action is to be found in any section of the Cable Act on which the City's Complaint rests. Further, as explained below, under the well-known multi-factor inquiry for analyzing whether a court should imply a private right of action where Congress has not expressly provided one, the inescapable conclusion is that Congress did not intend to authorize political subdivisions of the States to sue in federal court to preempt State laws.

**C. There Can Be No Implied Right of Action for the City's Claims Under the Cable Act**

Because there is no provision in the Cable Act expressly creating a private right of action for the City's claims, it is the City's burden to demonstrate that Congress intended to create a private cause of action under a federal statute. *See Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992). In the absence of an express right of action, courts are not to "infer the existence of private rights of action haphazardly." *Thomas M. Cooley Law School v. American Bar Ass'n*, 459 F.3d 705, 711 (6th Cir. 2006) (quoting *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000)); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979). The Sixth Circuit in *Cooley* listed four factors that a court must consider in evaluating whether a private right of action is implied:

*First*, we consider whether the plaintiff is one of the class for whose especial benefit the statute was enacted. *Second*, we examine legislative history to see if we can discern any intent either to create or deny a right of action under the statute. *Third*, we weigh whether implying a right of action would be consistent with the purposes of the legislative scheme. *Finally*, we determine whether the

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statute] are preempted by federal law or are unconstitutional." *City of St. Petersburg v. Bright House Networks, LLC*, Nos. 8:07-cv-02105-T-24 and 8:07-cv-02106-T-23, 2008 WL 5231861, at \*5 (M.D. Fla. Dec. 12, 2008). In addition, although the *Dearborn* court cited *Goldberg v. Cablevision Sys. Corp.*, 261 F.3d 318, 320-21 (2d Cir. 2001), that opinion addressed a claim under Section 531(e) – not Section 531(b) – and did not discuss private rights of action. In fact, a later case among the exact same parties held that "[the plaintiff] has **failed to set forth any authority establishing that Congress intended to create a private right of action under Section 531(b).**" *Goldberg v. Cablevision Sys. Corp.*, 281 F. Supp. 2d 595, 604 (E.D.N.Y. 2003) (emphasis added).

cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law.

*Cooley Law School*, 459 F.3d at 711 (emphasis added). *Accord Vidosh v. Holsapple*, No. 84CV2447DT, 1987 WL 273164, at \*8 (E.D. Mich. Feb. 2, 1987) ("Where neither statutory language nor legislative history reveals congressional intent to imply a private cause of action, the inquiry ends with a denial of the private right."). None of these factors supports the City's claims.

### **1. The Cable Act's Legislative History is Dispositive**

The second *Cooley* factor is dispositive. The legislative history of the Cable Act conclusively rejects any argument that Congress intended to establish the federal rights of action and remedies advanced by the City's Complaint, effectively ending any further inquiry. Congress declared in categorical terms that it did not intend the Cable Act (in its entirety) "to upset the traditional relationship between state and local governments, under which a local government is a political subdivision of the state and derives its authority from the state. . . . [T]he state may exercise its authority over cable either by establishing a state franchising authority or by placing conditions on a local government's grant of a cable franchise." H.R. Rep. No. 98-934 at 94. Because Congress clearly considered and rejected the fundamental premise of the City's claims, Congress certainly did not authorize federal rights and remedies for local government to preempt State law.

Likewise, the legislative history of the PEG channel provision, Section 531, emphasizes that the statutory ability for a franchising authority to impose PEG requirements through the franchise process "*does not give the franchising authority the power to override the application of state law.*" H.R. Rep. No. 98-934 at 46 (emphasis added). The same passage further confirms that the statutory language allowing a franchising authority to enforce PEG requirements

contained in a franchise was to assure that "offers for the provision of PEG services, facilities and equipment by a cable operator *in excess of minimum requirements* that might be established in an RFP, which are then reduced to the franchise, are fully enforceable by the franchising authority." H.R. Rep. No. 98-934 at 46 (emphasis added). Section 531(c) thus clarifies that a city may enforce a cable operator's voluntary offers for PEG channels and other benefits that are reduced to a franchise agreement, even if they exceed the requirements of the city's RFP or renewal proposal allowed under Section 531(b). But Congress categorically did not "give franchising authorities the power to override the application of state law."<sup>9</sup> There is simply nothing in the legislative history that allows for the premise of the City's Complaint.

## **2. Congress Considered and Provided Express Federal Rights for Intended Beneficiaries of the Cable Act**

Under the first *Cooley* factor, the Cable Act contains numerous explicit provisions which grant or define express federal causes of action and remedies to different classes of beneficiaries, none of which include local governments. *See, e.g.*, 47 U.S.C. § 555 ("[a]ny cable operator adversely affected by any final determination made by a franchising authority . . . may commence an action" in federal or state court, and "the court may award any appropriate relief . . ."); 47 U.S.C. § 551(f) ("[a]ny person aggrieved by any act of a cable operator in violation of [the Cable Act's privacy provision] may bring an action in a United States district court," which "may award -- actual damages . . . punitive damages; and reasonable attorneys' fees and other litigation costs"); 47 U.S.C. § 532(d)-(e) (establishing right of persons aggrieved by a cable

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<sup>9</sup> The Court in *City of Dearborn v. Comcast of Michigan* failed to mention either the explicit history of Section 531, or the broader statement in the legislative history that Congress did not intend the Cable Act to disturb State control of local government. Similarly, the court in *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 972 (D.C. Cir. 1996) in *dicta* suggested that this provision would preempt state law that might otherwise prohibit local PEG requirements, but did not consider the question of a private right of action, much less the relevant statutory text and legislative history that reveals the true purpose of this provision as a savings clause.

operator's failure to comply with obligations to lease channel capacity to sue in federal court or to bring a complaint at the FCC, and defining available remedies). These examples show that Congress considered and provided private rights and remedies to certain protected classes of beneficiaries throughout the Cable Act, but did not provide the rights or remedies claimed by the City. *Accord Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-15 (1981) (noting the enforcement provisions that *were* included in the act at issue and concluding that "Congress provided precisely the remedies it considered appropriate"). Congress did not consider the Cable Act to be of "especial benefit" to cities.

### **3. Implied Rights of Action for the City Would Be Inconsistent With the Purposes of the Cable Act and the Provisions At Issue**

One of the express purposes of Congress in the Cable Act was to "[e]stablish guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3). That goal is embedded throughout the Cable Act in provisions that delineate Congress' "especial beneficiaries" of the various provisions, including express federal rights of action and federal remedies. To the extent the City would urge this Court to disregard that Congress specified numerous rights and remedies, but none for local governments, it also ignores one of the express purposes of the Cable Act.

Section 541 (governing general franchising requirements) was not intended to protect local government from State regulation of cable franchises. Indeed, the FCC itself has preempted certain local processes and standards and established federal requirements for competitive local video franchises. *In re Implementation of Section 621(A)(1) of the Cable Commc'ns Policy Act of 1984*, Report and Order, MB Docket 05-311, 22 FCC Rcd. 5101, 2007

WL 654264 (Mar. 5, 2007).<sup>10</sup> In doing so, the Commission *preserved* franchise decisions made by States (or made in compliance with statewide statutes), and applauded states like Michigan that had reformed their franchise process. *Id.* ¶¶ 16, 20 (noting that "state level reforms appear to offer promise" and recognizing Michigan among states in which "recent state level reforms have the potential to streamline the process to a noteworthy degree").<sup>11</sup> The FCC's approach is consistent with the absence of any Cable Act right for a local government to proceed against a State law governing cable franchising.

The purpose of both Sections 531 and 552, as discussed in Section I.B.2. above, was to allow certain local franchise requirements concerning PEG channels and customer service. But they operate only as savings clauses, creating exceptions to the overriding limits on State and local regulation that would otherwise prevent them. There is no evidence that Congress intended these savings clauses to create new federal rights and remedies for local governments as against the States.

Finally, the dominant purpose of both Sections 545 and 546 is to protect cable operators from unreasonable or unfair franchise requirements. Section 545 allows a cable operator to obtain modification of a franchise because Congress "was sufficiently concerned with the plight of some cable operators . . . to create a federally protected right to modification of commercially impractical agreements." *Tribune-United Cable v. Montgomery County*, 784 F.2d 1227, 1231 (4th Cir. 1986). Section 546 effectuates Congress' express purpose to "establish an orderly

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<sup>10</sup> "[W]e do not preempt state law or state level franchising decisions in this *Order*. Instead, we preempt only local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this *Order*; and (2) such provisions are not specifically authorized by state law." *Id.* ¶ 126.

<sup>11</sup> The Sixth Circuit upheld the FCC order and the rules it promulgated in their entirety. *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

process for franchise renewal *which protects cable operators* against unfair denials of renewals." 47 U.S.C. § 521(5) (emphasis added). Nothing in either of these sections of the Cable Act suggests a Congressional purpose to allow local governments to seize power over cable franchising in contravention of statewide law.

#### **4. The City's Causes of Action Are Traditional State Law Claims for Breach of Contract**

Under the fourth *Cooley* factor, the City has stated only traditional claims for breach of contract, a fact most plainly demonstrated by the City's requests for the substantive remedy of specific performance of a 1985 franchise contract. (Compl. at 10, 12.) The legal status of a cable franchise is that of a contract, enforceable by the municipality through state law claims for breach of contract. *See, e.g., City of Niles v. Michigan Gas & Elec. Co.*, 273 Mich. 255, 262, 262 N.W. 900 (1935) ("[a] franchise is a contract"); *City of Detroit v. Michigan Bell Tel. Co.*, 374 Mich. 543, 552, 132 N.W.2d 660 (1965) (a franchise to use streets creates vested contract rights for the utility); *TCG*, 261 Mich. App. at 94 (city power to franchise use of streets "is exercised by entering into contracts with providers").<sup>12</sup> There is nothing in the Cable Act to suggest Congress intended to convert municipal claims of breach of contract into questions of federal preemption of State control of local government.

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<sup>12</sup> *See also Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1314-15 (8th Cir. 1991) (cable franchise is a bargained-for contractual agreement); *Jones Intercable, Inc. v. City of Stevens Point*, 729 F. Supp. 642 (W.D. Wis. 1990) (analyzing breach of cable franchise under principles of contract law); *Cox Cable San Diego, Inc. v. City of San Diego*, 188 Cal. App. 3d 952, 966 (1987) ("The granting by City of a cable franchise is a legislative act, and establishes a contractual relationship between City and [the cable operator].") (internal citations omitted); *B-C Cable Co. v. City of Juneau*, 613 P.2d 616, 619 (Alaska 1980) (cable television franchise is a binding contract); *City of Owensboro v. Top Vision Cable Co.*, 487 S.W.2d 283, 287 (Ky. 1972) ("We are also of the opinion that a franchise is an agreement between the granting authority and the holder and partakes of the usual incidents of a contract.").

The status of a franchise as a contract under state law also reinforces the conclusion, discussed above, that Congress' reservation of local franchising authority to enforce franchise provisions such as those for PEG channel and customer service requirements, 47 U.S.C. §§ 531, 552, are merely savings clauses. Nowhere in either of these provisions is there even a suggestion that Congress intended to give local governments the federal remedy of preemption of State law *in addition to* whatever remedies for violation of a franchise contract exist under State law.<sup>13</sup> Without "an intent to create not just a private right but also a private remedy . . . a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. at 286-87 (emphasis added) (collecting cases)

## **II. The Court Should Not Exercise Supplemental Jurisdiction Over the City's Claim Under the Michigan Constitution**

When a court grants a motion to dismiss for failure to state a federal claim pursuant to Rule 12(b)(6), it has discretion to dismiss the remaining state law claims. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-15 (2006). The court's decision to exercise supplemental jurisdiction depends on "judicial economy, convenience, fairness, and comity." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1254-55 (6th Cir. 1996) (internal quotation marks omitted). A court may decline to exercise supplemental jurisdiction if the state claim raises a novel or complex issue of state law, substantially predominates over the federal claims, or remains after the court has dismissed the federal claims. 28 U.S.C. § 1367(c).

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<sup>13</sup> As discussed above, any suggestion to the contrary is defeated by 47 U.S.C. § 556(b), which declares that "[n]othing in this title shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title." Congress did not intend any part of the Cable Act to grant cities federal rights and remedies that trump the power of the State.

If the Court dismisses the City's federal claims, all that would remain is the dominant question of Count IV, which goes to the "structure of [State] government [through which the] State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. at 460. That question should be dismissed. 28 U.S.C. § 1367(c)(3). *Prosser v. Francoeur*, 85 F. Supp. 2d 736 (E.D. Mich. 2000) (once federal claims have been dismissed prior to trial, it is generally proper for district court to dismiss supplemental state law claims without prejudice so they may be pursued in appropriate state forum). Furthermore, "judicial economy, convenience, fairness, and comity" would all weigh in favor of dismissal because the Court has yet to expend any significant amount of resources. *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) ("when 'all federal claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction . . .'" (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988))). See also *Pinney Dock & Trans. Co. v. Penn Cent. Corp.*, 196 F.3d 617, 621 (6th Cir. 1999) ("Where . . . dismissal occurs under Rule 12(b)(6) for failure to state a claim, a 'strong presumption' arises in favor of dismissing a remaining supplemental state law claim because Rule 12(b)(6) dismissals typically occur 'early in the proceedings, when the court has not yet invested a great deal of time into resolution of the state claim.'" (citing *Musson*, 89 F.3d at 1255)).

**CONCLUSION**

**WHEREFORE**, for all of the foregoing reasons, Comcast respectfully requests that the Court dismiss the City's Complaint.

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Date: July 15, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2010, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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