Moss & Barnett
A Professional Association

International Municipal Lawyers Association

74th Annual Conference

Miami, FL

Cable Television Franchising - What's Left to Regulate and What Power Remains

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Introduction

In 2004 there were over 10,000 franchising authorities in the United States. Since that time the number has been reduced by more than half due to state franchising. Of the remaining local franchising authorities (LFA), each has granted one or more cable television operators the authority to provide cable/video service within its jurisdiction. This authority may take the form of a resolution, ordinance, license, permit, or agreement - all of which are generally referred to as a franchise.

Historically, franchises across the United States were granted for 15 year terms. The vast majority of franchises were granted in the late '70s and early '80s and were renewed in the mid to late ‘90s for an additional 10-15 year terms. Consequently, thousands of local franchises that remain under LFA control will soon come up for renewal. Prior to franchise expiration, cable operators and LFAs are expected to consider renewal using the procedures specified in the Cable Communications Policy Act of 1984, as amended by the Cable Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996 (collectively the "Cable Act").

Section 626 of the Cable Act (47 U.S.C. 546) identifies specific procedures to be followed in order to renew cable television franchises. The Cable Act contemplates both a "formal" and "informal" procedure to accomplish renewal. Typically, the process begins approximately three (3) years prior to franchise expiration, with the cable operator sending a letter to the LFA requesting renewal. The formal renewal protections afforded cable operators under the Cable Act all but guarantee that the franchise will be renewed, but the terms of the renewed franchise can vary dramatically.

While most franchises are ultimately renewed via informal renewal negotiations (47 U.S.C. 546 (h)), increasingly LFAs have found the need to resort to the formal process (47 U.S.C. 546 (a-g)) in order to reach agreement with cable operators on the key needs and interests of the community. A common problem encountered by many LFAs is locking into informal negotiations to the point of no return. For example, staff may spend months negotiating key deal points with an operator only to find the operator unwilling to commit to the final franchise or attempting to undercut key deal points by lobbying elected officials. Having spent the time, money and effort to reach a near final agreement, the LFA often feels painted into a corner as they do not want to restart the renewal process using the formal procedures but find the modified informal deal unacceptable. In these times of tight fiscal budgets, the operator uses this leverage to obtain a more favorable franchise renewal leaving the LFA with unmet needs.

The solution to this problem is for the LFA to prepare the necessary record, or needs assessment, in advance of renewal negotiations. This will allow the LFA the option of negotiating informally or moving quickly to the formal renewal procedure should the operator fail to meet the LFA’s identified needs.

The creation of a needs assessment will also provide elected officials with a foundation upon which to judge a renewed franchise. This paper will outline 10 steps to successfully process an operator's request for franchise renewal and will review several key franchise renewal provisions.

Ten Steps for successful franchise renewal

Step # 1
Initial response to operator's renewal request

The LFA's goal:

Conduct renewal process "informally" while reserving the right to reenter the formal process if the LFA and operator cannot agree upon a mutually acceptable franchise.

Why is this goal important?

- Allows LFA to attempt informal negotiations without "formal" timing requirements.
- Affords greater flexibility to negotiate franchise provisions.
- Places LFA in control of the process and the documents to be considered.
- Satisfies statutory requirement.

What the LFA must do to accomplish this goal:

The operator's written request for renewal will be sent between 36 and 30 months prior to the expiration of its franchise. The request will trigger the formal renewal process but will likely encourage informal negotiations. 47 U.S.C. 546 (a)(1) requires that the LFA "commence a needs assessment proceeding" not later than six (6) months after the date such notice is submitted. Upon receipt of this letter, the LFA should respond by agreeing to proceed informally and requesting that the operator agree in writing to place the formal renewal process "on hold" until the parties determine whether renewal can be achieved through informal negotiations. This written agreement is often referred to as a "standstill agreement." The standstill agreement should clarify that the LFA's obligation to "commence" a needs assessment proceeding is also on hold or is satisfied by virtue of the agreement.

What to expect from the cable operator:

Most cable operators prefer the informal renewal process and will execute a standstill agreement so long as each party has the right to reenter the formal process at any time without any waiver of rights. Typically, the operator will request information on the timing and details of the informal process to be undertaken by the LFA. It is not uncommon for the operator to attempt to delay or slow down a renewal process until the expiration date approaches. If the LFA is left with little time to accomplish renewal prior to expiration, the operator may attempt to use the time pressure to its advantage. The LFA should endeavor to

keep the operator informed of the informal renewal procedure as it moves toward negotiations. However, recognize that in the informal process neither party has any statutory requirements to respond in a prescribed time period or to negotiate at all. Therefore, if both sides are not willing to commit to an informal process it may result in wasted time and money.

Key legal considerations:

Triad CATV, Inc. v. LFA of Hastings, No. L89-30090, slip op. (W.D. Mich. December 21, 1989), aff'd without published opinion, 916 F.2d 713 (6th Cir. 1990). A cable operator is not entitled to "formal" renewal protections unless the LFA receives written notice between 36 and 30 months prior to franchise expiration. Triad sent notice 12 days late and, thus, waived "formal" protections.

Step #2
Development of renewal process

The LFA's goal:

Place the LFA in control of informal/formal renewal proceedings and all document preparation.

Why is this goal important?

- Ensures renewal process reflects LFA's timetable.
  - LFA staff can anticipate council meetings for consideration of key issues.
  - Process can be arranged to avoid difficult times of the year, i.e., budget season, holidays, summer vacation season, etc.
- The party which drafts the key documents negotiates from a position of strength.
  - It is always preferable to negotiate from your own documents.
- Ensures sufficient time to consider responses from operator.

What the LFA must do to accomplish this goal:

Shortly after a standstill agreement is signed, the LFA should draft an outline of the steps to be undertaken in its renewal process. The first task is to determine the type of information gathering/needs assessment work the LFA desires to pursue. The Cable Act does not prescribe any checklist of what must be included in an assessment of local needs and interests. It could include surveys, technical review, franchise fee audit/review, public hearings, focus groups, PEG (local Programming) review, LFA department review and related tasks. the goal is to determine the LFAs' future cable related needs and interests and to document the needs should the LFA be forced to enter the formal process. Once the needs assessment is complete, the LFA can use these findings to draft a model franchise on which informal negotiations can be based.

What to expect from the cable operator:

Most cable operators prefer to handle franchise renewal at the local level with a goal of reducing the costs associated with the franchise and minimizing local

regulation. Some operators will suggest that the old franchise documents should simply be extended for a few years but will generally suggest a few edits, particularly to issues such as financial support for PEG or customer service obligations. The operators goal is usually to avoid more burdensome franchise obligations that could result from renewal. In addition, the operator may be hopeful a short extension could allow time for state or federal law changes that could simplify renewal for the operator. Other operators may suggest a face-to-face meeting between the company's general manager and the mayor or LFA manager. The operator may appear to be surprised to find the LFA has developed a detailed informal renewal process. It is important to educate elected officials by reminding them that cable operators work on franchise renewals 365 days a year. LFAs deal with renewal once ever 10 or more years. Therefore LFAs should be cautious when entering into informal negotiations without cable operators without adequate preparation.

Key legal considerations:

An LFA can establish deadlines for submission of a formal proposal by the operator - 47 U.S.C. 546 (b) (3). See also Eastern Telecom Corp. v. Borough of East Conemaugh, 872 F.2d 30 (3rd Cir. 1989), cert denied, 493 U.S. 811 (1989).

Step #3
Creation of needs assessment

The LFA's goal:

Develop a list of cable-related needs and interests of the LFA's residents, educational institutions, local programmers, key community groups and governmental agencies.

Why is this goal important?

- Provides foundation for franchise and negotiations.
- Can be used to rebut operator's argument that no demand exists for services/regulations.
- Ensures that significant issues will not arise during the "eleventh hour" of the process because an opportunity did not exist for public participation.
- Should the formal process become necessary, the LFA can quickly and effectively move into the formal process.

What the LFA must do to accomplish this goal:

The LFA may use a variety of methods to gather information. Often, LFAs will conduct a subscriber/non-subscriber survey asking for responses on key issues, such as signal quality, customer service, public access channels, equipment and facilities, PEG financial support and related matters. LFAs may also employ the services of a technical consultant to review the quality of the existing cable system and make recommendations for code compliance. A technical expert may also be used to review existing institutional networks and PEG origination facilities as well as franchise compliance. The LFA may also conduct public hearings to solicit information from members of the general public and may use

focus groups comprised of key community leaders, department heads, local programming producers or educational leaders to identify needs in specific areas. Finally, the LFA may solicit information from the cable operator regarding existing policies and procedures and the technical capabilities of the cable system. This information request will often include a franchise fee review to verify the accuracy of past franchise fee and PEG support payments made to the LFA.

Be careful not to spend time and effort on issues over which the LFA has limited control such as rates and programming preferences. Also, pay close attention to the distinction between "cable services" over which the LFA has control and "telecommunications" or "information (broadband)" services over which the LFA has limited authority.

What to expect from the cable operator:

Some cable operators may wish to participate in various information gathering steps. However, most choose to simply observe public hearings and request copies of reports on any surveys conducted. Operators are generally cooperative, completing information requests so long as sufficient time is provided. Recently operators have begun to mandate "nondisclosure agreements" for information regarding franchise fee payments, subscriber statistics or even system maps. The operators argue that competition in the cable industry as well as homeland security require that the City guarantee confidentiality. Careful review of state sunshine laws must be undertaken before such a nondisclosure agreement can be accepted.

Key legal considerations:

Time Warner Entertainment Company, L.P. v. Briggs, et al., C.A. No. 92-401 17-6N (D.C. Mass., January 14, 1993). Franchising authority cannot require operator to accept franchise which incorporates provisions which conflict with the Cable Act.

47 U.S.C. § 541(b)(D) "… a franchising authority may not require a cable operator to provide any telecommunications service or facilities other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise."

Step #4
Identify deficiencies in operator's past performance

The LFA's goal:

Document operator's performance deficiencies: (a) for use if informal process is unsuccessful; and (b) to cure deficiencies in existing franchise documents.

Why is this goal important?

- Protects the LFA's right to identify operator's past deficiencies as a basis for non-renewal should informal negotiations break down and the parties choose to proceed under the formal renewal process.
- Deficiencies in a cable operator's performance often result from franchise provisions which lack specificity or are otherwise ambiguous.
  - New franchise documents should correct these mistakes.
- May result in financial benefit for LFA prior to franchise renewal, i.e., discovery of underpaid franchise fees or PEG support.

What the LFA must do to accomplish this goal:

The LFA should carefully review the existing franchise documents and outline all requirements with which the operator must comply. The LFA should verify whether the operator has complied with these requirements, using technical and/or financial expertise as required. One area typically scrutinized is the operator's payment of franchise fees. Many LFAs conduct franchise fee audits to ensure the payments have been correctly made and often discover underpayments going back several years. In many states the statute of limitations allows an LFA to go back 6 or more years and collect unpaid or incorrectly calculated fees.. These issues, if properly documented, can also be used to strengthen the LFA's negotiation position during franchise renewal.

What to expect from the cable operator:

In order to effectively deal with an operator's deficient past performance, the LFA must issue a written notice of franchise violations and provide the operator an opportunity to cure the deficiency. Operators will argue that if written notice was not provided, the LFA waived its right to raise objections. LFAs should follow the enforcement provisions in the existing franchise to pursue compliance.

Key legal considerations:

Rolla Cable Systems, lnc. v. LFA of Rolla, 745 F. Supp. 574 (E.D. Mo. 1990); Rolla Cable Systems, Inc, v. LFA of Rolla, 761 F. Supp. 1398 (E.D. Mo. 1991). Cable operator may be denied renewal if past performance is inadequate even if operator has capability to provide quality service.

Step #5
Preparation of needs assessment report

The LFA's goal:

Preparation of a concise document which clearly outlines the cable-related needs and interests of the community as well as any deficiencies in operator's past performance.

Why is this goal important?

- The process of preparing the report helps the LFA to focus on key issues to be addressed in the draft franchise or any code revisions that may be required.
- Provides a roadmap for the LFA's negotiation team on key issues.

- Provides solid foundation on which to base negotiations and rebut claims made by cable operator.

What the LFA must do to accomplish this goal:

The LFA should assimilate all information obtained during the information gathering/needs assessment stage. This includes all survey information, public hearing and focus group information, responses from key LFA leaders, local programming producers, educational leaders, and any responses received from the cable operator. If outside technical or financial consultants are involved, their recommendations should be incorporated into the report. The report should be concise in order to be of maximum benefit for document preparation and negotiations, but should be supported by ample documentation and exhibits.

What to expect from the cable operator:

The cable operator will likely challenge many of the conclusions made in the needs assessment report. In some cases, the operator will conduct separate surveys or evaluations of the system to rebut the LFA's conclusions despite the fact that under the Cable Act the LFA bears the burden of assessing its local needs. If properly prepared, the LFA's needs assessment report will serve as a valuable tool to ensure the legitimate needs and interests of the LFA are addressed in the renewed franchise.

Key legal considerations:

Section 626 of the Cable Act (47 U.S.C. 546 (d)) provides that an operator's request for renewal can be denied during formal renewal process based only on the following criteria:

- Whether operator has substantially complied with the material terms of the existing franchise and with applicable law.*
- The quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix of quality of cable services or other service provided over the system, has been reasonable in light of community needs.
- The operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

* Must provide operator written notice of noncompliance and opportunity to cure.

Step #6
Draft model franchise documents

The LFA's goal:

Draft a model franchise as well as any required code revisions to address the identified needs and interests.

Why is this goal important?

- It is important to negotiate renewal based on a model franchise crated by the LFA.
- An operator's model document will generally be a "one size fits all" document and will typically not address the LFAs' local needs and interests.
- An LFA may have provisions in the local code which require amendment because the regulations contained therein may be obsolete or conflict with the draft franchise.
- When preparing the draft franchise and code revisions other amendments to the LFA's right-of-way code provisions should also be assessed.

What the LFA must do to accomplish this goal:

When reviewing the need for possible code amendments, the LFA should incorporate all rights and regulatory authority allowed under the Cable Act and applicable FCC regulations which is generally applicable to any cable/video service provider. Thus the local code may include provisions regarding customer service, technical standards, public educational and governmental access channels, franchise fee requirements, transfer, renewal, indemnification and insurance and related provisions. The franchise agreement should include provisions authorizing operations within the LFA, line extension criteria, public access equipment and facilities, institutional network provisions, performance bond and/or security fund provisions, franchise term, and other issues unique to the relationship between the operator and the LFA. If the LFA has no code provisions governing cable services, all of these provisions should then be covered in the draft franchise.

What to expect from the cable operator:

It is not uncommon for a cable operator to provide the LFA with its own draft franchise document for the LFA's review and consideration. The cable operator will prefer to negotiate from their own document since it is far easier for the operator to work from language which generally favors its position and which may maintain consistency with franchises in a given region or state. The LFA should avoid working from the cable operator's franchise document. The LFA will incur far greater expense attempting to negotiate additions/deletions to the operator's proposed franchise than would be expended in drafting its own model document.

Key legal considerations:

Birmingham Cable Communications, Inc. v. LFA of Birmingham, CV-87-L-0755-S (N.D. Ala., May 5, 1989). Franchising authority cannot adopt an ordinance prior to completion of the ascertainment proceedings because it is in direct conflict with Cable Act formal renewal requirements.

Step #7
Analysis of operator's informal response to draft franchise

The LFA's goal:

Develop a list of open issues to be negotiated with the cable operator and identify strengths and weaknesses of LFA's position.

Why is this goal important?

- Some of the changes proposed by the operator will be acceptable to the LFA because they deal with routine, practical issues not affecting the substance of the documents.
- The LFA's negotiation team will need a list of topics to focus on as opposed to negotiating the franchise line by line.
- Preparation for negotiations is essential to ensure the LFA's negotiation team is coordinated and knowledgeable of the pros and cons of each issue.

What the LFA must do to accomplish this goal:

When presenting the draft franchise to the cable operator, the LFA should specifically request that the operator informal response be returned in writing using the legislative format. That is, the operator should strike over language it wishes to delete and underscore all new language proposed to be added to the documents. The LFA should also require that the operator provide written rationale for each change made to the documents to assist the LFA in understanding the operator's response. Upon review of the operator's response, the LFA can then identify those changes which are acceptable and those which will require negotiation between the parties. A short list of key issues should emerge to help focus the negotiations. If the LFA determines that the list of open issues is substantial and informal negotiations are not likely to succeed, the LFA should proceed cautiously and consider when it may be appropriate to move to the formal process so time and money is not wasted in unproductive informal negotiations

What to expect from the cable operator:

The operator's response will likely reflect changes which the operator may desire but may not require to reach agreement. In other words, the operator will attempt to position itself to have some bargaining power as negotiations proceed. The key for the LFA is to identify any "false demands" contained in the operator's response so as not to unknowingly negotiate away valuable franchise provisions. Be particularly careful not to spend too much time and money in informal negotiations unless progress is being made. Long, costly informal renewal negotiations generally work to the operators advantage as the LFA becomes worn down and may agree to questionable provisions simply to bring the process to a close.

Key legal considerations:

TCI of South Carolina v. LFA of Bennettsville, No. 89-0334-2 (D.S.C. July 17, 1990). LFA can't deny renewal without conducting formal renewal proceedings.

LFA's actions may be reviewed by court at any time during formal renewal process even when negotiating informally.

Step #8
Develop negotiation strategy

The LFA's goal:

Ensure that the LFA's negotiation team clearly understands the key elements which must be included in a renewed franchise in order to meet the identified needs and obtain LFA approval.

Why is this goal important?

- LFAs typically have several layers of administration which must approve franchise.
- Advisory committees and LFA staff must understand the desires of elected officials.
- LFA will be negotiating against individuals who negotiate franchises year-round.
  - Many operators have regional staff which work exclusively on government relations and franchise documents.
  - The cable operator will be well coordinated and prepared on each and every issue to be discussed.

What the LFA must do to accomplish this goal:

The LFA should establish a negotiation team which consists of individuals with expertise on each particular provision to be negotiated. In other words, if technical or financial issues are to be addressed, the LFA's negotiation team should consist of individuals knowledgeable in these areas. It is often helpful to have an elected official (LFA council member) serve on an advisory committee or even the negotiation team to ensure the documents ultimately negotiated will meet the expectations and desires of the LFA. The negotiation strategy itself should identify all open issues, the strengths and weaknesses of each provision and how the LFA plans to rebut the cable operator's arguments.

What to expect from the cable operator:

The cable operator's negotiation team will consist of experienced industry professionals who deal in cable television 365 days a year. They will know the cable television industry better than most LFA representatives and will reference federal laws, regulations or trends to bolster their position. It is important for the LFA to place on its negotiation team individuals with sufficient expertise in cable television laws and regulations and the likely industry trends so that the operator's arguments can be effectively rebutted.

Be particularly careful of an operators attempts to circumvent staff and negotiate directly with elected officials. If staff is holding the line on certain key deal points operators may seek out elected officials to bypass the LFAs' negotiation team. The arguments before elected officials typically hinge on the financial

impact on subscribers of certain obligations. To avoid having the LFAs' negotiation positions undermined, staff should attempt to educate elected officials early in the process and warn them to seek out staff for clarification if the operator argues certain issues before them.

Step #9
Negotiate franchise language with operator

The LFA's goal:

Reach agreement with operator on strong franchise which retains sufficient flexibility to adapt to changes in the law and the industry.

Why is this goal important?

- Even if the LFA has a positive relationship with the operator, it is possible the system may be sold or transferred during the franchise term to a less desirable operator.
  - The franchise should be as strong as possible to ensure a reasonable level of service will be provided.
  - The stronger the franchise, the less likely the LFA will be forced to spend time and money arguing over enforcement issues.
- Even if existing LFA officials are disinclined to be aggressive regulators, subsequent elected officials may find the need to become more aggressive in franchise enforcement should customer service lapse or a new operator/management provide poor service..

What the LFA must do to accomplish this goal:

LFA should take charge of negotiations by establishing the timetable for meetings and topics to be discussed. Whenever possible, the LFA should draft all rewrites of various franchise provisions and should retain control over authorship of the franchise documents. The LFA should avoid allowing time pressures to impact negotiations and should base negotiations on conclusions made within the needs assessment report. If informal negotiations prove unsuccessful, the LFA should use the needs assessment already created t solicit from the operator a formal renewal proposal. The operator will then be forced to put its best offer forward as the stake of the process are raised and the LFA will have authority to accept or deny the operator's formal proposal.

What to expect from the cable operator:

The cable operator will likely begin negotiations with the local general manager. If
negotiations become protracted, a state or regional manager may become involved. Typically, local GMs lack authority to bind the company on any franchise provisions. Operators will also continually remind the LFA of the costs associated with each and every requirement within the franchise and may even threaten political pressure on existing elected officials. Finally, If the operator is unable to work effectively with the LFA's negotiation team, operators may attempt to circumvent the negotiation team, going directly to elected officials

even to the point of attempting to discredit the LFA's negotiation team. The trap to avoid is investing too much time, money and effort in the informal process so that the LFA has no choice but to accept undesirable provisions from the operator. Always consider the need to move to the formal procedure if informal negotiations are not progressing according to plan.

Key legal considerations:

Continental Cablevision of Massachusetts. Inc. v. Rodney H. Irvin, No. 91-1 1256-N (U.S.D.C. Mass. June 4, 1991). Operator can challenge procedures during formal renewal administrative hearings at any time.

Step # 10
Adopt franchise and any code amendments

The LFA's goal:

Ensure all federal, state and local procedural steps are satisfied when adopting franchise documents.

Why is this goal important?

- Typically there are numerous procedural steps to be followed when adopting an ordinance and entering into a contract with a private entity.
  - Procedure must be coordinated to ensure that necessary steps at LFA council level are fulfilled.
  - If the local code is being amended be certain to follow all state and local hearing requirements prior to adoption.

What the LFA must do to accomplish this goal:

The LFA should outline all federal, state and local procedural requirements to be followed in adopting franchise documents. If the LFA is within the informal renewal process and a public hearing has already been held, no federal procedural requirements will exist. Typically, under state and local law, adoption of an ordinance requires published notice given approximately two weeks before the scheduled meeting in a newspaper of general circulation. There may be multiple reading requirements, depending upon local law, and typically the ordinance, or a summary of it, must be published within two weeks following adoption. The franchise should identify various acceptance documents to be provided by the cable operator which may include security funds, performance bonds, insurance documents and acceptance agreements.

What to expect from the cable operator:

The cable operator will likely attempt to delay acceptance of the franchise documents for as long as possible. Many operators are now requesting between 60 and 90 days to accept a franchise once approved by a LFA council. Assuming the process proceeds informally, there is no reason an operator should need more than 30 days to obtain necessary signatures for acceptance of franchise documents.

Key Franchise Renewal Provisions

Below is a review of the key franchise renewal issues being negotiated today and the likely position the cable operator make take during renewal negotiations. The goal in drafting franchise language on each of these issues is to retain maximum regulatory authority for the LFA while at the same time creating sufficient flexibility so that the LFA can adapt to changes which will inevitably occur in both the cable industry and the laws and regulations governing cable operators.

1. Grant of Authority

What is the purpose?

This provision will dictate the types of service your operator can provide over its cable system. The provision will usually allow the operator access to all of your LFA's public rights-of-way(ROW) and easements for the purpose of constructing, operating and maintaining its cable system. The issue is what "services" can the operator provide over that cable system and will the franchise supersede local code provisions governing the ROW.

Cable franchises typically include regulations relevant only to the distribution of video programming. Since operators often desire to provide many other "non-cable services" over their systems such as telecommunications and information (e.g. broadband) service, the language in this section must be carefully drafted to ensure the LFA's rights with respect to its ROW are protected.

What issues should the LFA Consider?

It is prudent to include language in this section specifying exactly what services the operator can and cannot provide over the cable system. You may consider a requirement that the operator must seek additional approval from your LFA to provide non-cable services to the extent not inconsistent with state and federal law. If you authorize the operator to provide any and all services it desires over the cable system, you may wish to add provisions to your franchise to ensure that reasonable regulations regarding the provision of such other services will be available to protect the rights and interests of your citizens. Pay particular attention to maintaining all police power authority over the ROW and be careful not to allow any language from the operator that could serve as a waiver of rights that may limit the LFA from enforcing ROW code provisions.

What is the cable operator's perspective?

Operator's typically desire franchise language which will allow them to provide any possible services over their cable systems. These services may include data or other electronic intelligence transmissions such as online services, facsimile reproductions, gaming, IP delivered services and telephone services. Of course

LFAs want the operator to provide these services but the LFA must also be careful to reserve all legal authority to regulate these services consistent with applicable state and federal law. Some state will allow for the imposition of an additional franchise for the provision of telecommunications service. Other states may allow for LFAs to charge fees for the occupation of the ROW. The important issue to focus on is to limit the scope of the "cable" franchise to cable/video and reserve all rights to regulate other services in the future to the maximum extent permitted by applicable law.

Key legal considerations

Section 541(a)(2) of the Cable Act provides that a franchise shall be construed to authorize the construction of a **cable system**. Section 522(7) defines **cable system** as "a facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide **cable service** which includes video programming and which is provided to multiple subscribers within a community … " Section 522(6) defines **cable service**, in part, as "the one way transmission to subscribers of video programming, or other programming service and subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service." Finally, Section 522(13) defines **other programming service** as "information that a operator makes available to ***all*** subscribers generally."

Cable operators will seek specific language in a cable franchise authorizing the use of the system to provide a host of non-cable services. The FCC has recently reiterated its position that a cable franchise can not be used to regulate telecommunications and information (broadband) services, and it is also worth noting that the legislative history of the Cable Act supports a narrow scope of authority to be included in a cable franchise regarding the definition of "cable service":

> *Making available a cable system for voice communication between cable subscribers would not be a cable service because the information transmitted between the parties would not be generally available to all. Similarly, offering cable system capacity for the transmission of private data such as bank records or payrolls (for instance to and from data processing centers or between the separate locations of a single business in a local area) would not be a cable service because only specific subscribers would have access to this information. . . All services offered by a cable system that go beyond providing generally-available video programming or other programming are not cable services. For instance, a cable service may not include "active" information services such as at-home shopping and banking that allow transactions between subscribers and operators or third parties. In general, services providing subscribers with the capacity to engage in transactions*

> *or to store, transform, forward, manipulate, or otherwise process information or data would not be cable services.*

This legislative history provides strong support for the position that an operator is ***not*** entitled to use its cable system for any purpose it desires unless authorization has been specifically provided. While an LFA may desire that the operator provide ancillary services on the cable system, it is important to retain the necessary regulatory authority to address legitimate health, safety and welfare concerns regarding the operator's use of the ROW. These regulations may include assessment of a reasonable fee for such use.

2. Franchise Term

What is the purpose?

The goal of the LFA is to enter into a franchise that will address its needs over the entire length of the contract while maintaining flexibility to keep pace with a rapidly changing industry and ever evolving regulatory requirements.

What issues should the LFA Consider?

Traditionally, operators have desired a lengthy franchise term of 15 or more years to ensure a sufficiently stable financial future and to allow enough time to earn a return on their investment. LFAs typically desire a far shorter franchise term to ensure that the cable system serving their community does not become antiquated and lose pace with the ever changing industry. Over the past five years that trend has reversed with operators hoping that states may modify local franchising authority and therefore seeking very short 1-5 year franchise terms. LFAs now find themselves seeking longer term (10-15) franchises hoping to preserve regulatory authority over the operator and locking in long term commitments for PEG and other local obligations. Determining the appropriate length of the franchise term often hinges on the commitments made by the operator regarding customer service, PEG channels and support and related local obligations.

What is the cable operator's perspective?

Operators today generally seek a far shorter franchise term than previously agreed upon in past renewals. Operators are concerned with state law changes, the rapidly evolving IPTV business over broadband and other factors which motivates the operator to execute short term deals to maximize flexibility. Another reason for this change from long term franchises to shorter deals is the belief that as competition continually emerges, franchise obligations will be reduced or eliminated. Therefore, operators believe they may be better served by allowing more burdensome franchise documents to expire.

Key legal considerations

There are no express provisions under federal law governing the appropriate length of time for a franchise. The only reference to franchise term is contained in the House Report to the Cable Act on the franchise renewal provision (47 U.S.C Section 546). In the House Report a statement is made that "franchises are granted for a determined length of time - generally 10 to 15 years."

Prior to adoption of the Cable Act, FCC regulations recommended a 15 year term. 47 C.F.R. Section 76.31 (note) (1982) (deleted 1985). During the initial franchising phase in the early 1980's, many LFAs used the 15-year term as an industry standard. Several states across the country have also adopted limitations on the length of franchise terms. In the State of Minnesota, the franchise term cannot exceed 15 years while in Nebraska a 25-year term is the maximum.

One case on the length of a franchise term is Preferred Communications. Inc. v. LFA of Los Angeles, No. CV 83-5846 C.D. Cal. (Jan. 5, 1990), which held that a five-year franchise term exerted a "potentially chilling effect" on operators and therefore was unconstitutional. It is important to note, however, that in the Preferred case the facts dealt with an "initial" franchise where the operator was forced to expend considerable capital to build out the entire system. In the case of franchise renewals, the franchise term will often be dictated based upon the capital investment needed for a system upgrade/rebuild, if required and other long term financial commitments.

3. Competitive Equity

What is the purpose?

Many cable operators today refuse to enter into a renewal franchise without a provision that guarantees the operator will not be placed at a competitive disadvantage if the LFA grants a competitive franchise to another provider. The goal of the operator is to maintain a level playing field between all providers in a given jurisdiction. These provisions offer little benefit to the LFA but the LFA should attempt to minimize the potential harm of this type of provision and preserve flexibility should a competitor seek different franchise terms and provisions.

What issues should the LFA Consider?

Operators typically seek franchise language that allows the operator to unilaterally modify its franchise if the operator believes the LFA has granted a more favorable franchise to a competitor. The LFA should reject any attempt by the operator to insert language that would permit automatic or unilateral franchise modifications. In the alternative the LFA may wish to offer the operator the right to petition for changes. Generally LFAs have no desire to create a regulatory approach that favors one competitor over the other. Thus if the LFA grants a competitor a less

burdensome franchise, the LFA should be open to consider a petition for an amendment from the incumbent operator.

What is the cable operator's perspective?

The operator may seek to expand the scope of this type of provision to address changes in state or federal law. Some operators seek the right to unilaterally terminate the local franchise if state or federal law is modified to offer the operator a more attractive franchise option. LFAs should carefully review such proposals as it could result in the operator avoiding key franchise obligations even if the state law may have anticipated a different transition from LFA franchising to state franchising.

Key legal considerations

The FCC has held that "most favored nations" clauses in an incumbent franchise are no longer enforceable. These clauses were used by operators to limit the authority of the LFA from granting a competitor alternative franchise provisions. As a result of the FCC order, operators now avoid MFN clauses and instead pursue the competitive equity provisions described above.

4. Franchise Fees

What is the purpose?

The payment of a franchise fee is considered compensation for the use of public ROW and other public property and for the ongoing enforcement and administration of the cable television franchise. The key reason for issuing a franchise is that the operator uses the public ROW to string cable and provide service thereby generating a profit. Aside from the LFA's responsibility to ensure that the public health, safety and welfare are protected with respect to the operator's use, the LFA has a legitimate right to obtain fair compensation for allowing a public resource to be used for the benefit of a private company. Failure of a LFA to collect a franchise fee may mean the residents of the LFA are in essence subsidizing cable subscribers.

What issues should the LFA Consider?

While most operators will pay a 5% franchise fee, there is often heated debate regarding the base on which the franchise fee should be paid. Therefore, it is important to pay particular attention to the definition of "gross revenues" and to define this term as broadly as possible. Properly defining "gross revenues" will ensure that the operator is required to provide compensation on any and all revenue derived from the operation of the cable system.

What is the cable operator's perspective?

Operators also have the right under Section 542 of the Cable Act to identify the franchise fee as a line item on subscriber bills. Therefore, for LFAs which are not currently assessing a full 5% franchise fee as permitted under the Cable Act, it is quite likely the operator will begin including this fee as a separate line item and may blame any rate increase on the LFA for imposing an additional tax on cable service.

Operators also may argue that imposing a 5% franchise fee places them at a competitive disadvantage with other service providers such as direct broadcast satellite, IP video providers such as HULU or wireless television operators. Operators therefore may attempt to include language which will relieve them of franchise fee payment obligations based upon certain trigger provisions they request in the franchise.

Key legal considerations

Section 542(b) of the Cable Act permits LFAs to charge up to a 5% franchise fee based on the operator's "gross revenues" derived from the provision of cable services from the operation of the cable system. The House Report indicates that the language "from the operation of the cable system" is not intended to prescribe any particular accounting method but limits the application of the franchise fee to revenues derived from the cable system to which the franchise applies.

5. Customer Service

What is the purpose?

Both the Cable Act and FCC regulations provide LFAs with the ability to establish and enforce customer service standards at the time of renewing a franchise. In general, the FCC's customer service standards address the specific performance of the operator in the areas of telephone response, repair service, installation, billing practices and system reliability. The FCC's standards, however, contain no enforcement guidelines and, thus, it is up to LFAs to create remedies if the standards are not met. LFAs are free to enact and enforce consumer protection laws over and above those found in federal law. When drafting such provisions LFAs should strive for specific, quantifiable and verifiable standards by which to measure the operator's performance.

What issues should the LFA Consider?

If you choose to simply incorporate by reference the FCC's customer service standards at 47 C.F.R. § 76.309, recognize that if these FCC standards are amended or deleted your community may lose its right to enforce any objective customer service standards on the operator. It is best to specifically outline the standards within the franchise and require compliance with the standards and with

all other federal laws and regulations regarding customer service standards which may go beyond those outlined in the franchise.

What is the cable operator's perspective?

Operators have been attempting to overcome the historic perception that the cable industry provides poor customer service. In fact wireless competitors have used this argument over the years to convince customers to switch to a satellite provider. Interestingly, however, operators have become quite resistant to include specific, quantifiable and verifiable customer service standards within renewed franchises. Operators argue that their competitors are not obligated to comply with such standards and that, while operators may currently exceed all industry standards, they do not wish to be tied to these standards throughout the term of the franchise. In return, operators often suggest very minimal customer service standards in an attempt to reduce any administrative burdens which may result from these requirements.

Key legal considerations

Section 522 of the Cable Act outlines the consumer protection laws and customer service agreements permitted under federal law. Often your state's laws will also include customer service requirements for operators.

47 C.F.R. § 76.309 outlines the FCC's customer service standards which may be implemented by a LFA at any time upon 90 days advance written notice to the operator. These standards include aggressive requirements for:

1. Office hours and telephone availability;
2. Installations, outages and service calls;
3. Communications between operators and subscribers; and
4. Billing, refunds and credits.

6. Rate Regulation

What is the purpose?

Although rate regulation is limited to basic cable service and associated equipment and is not enforceable where competition exists, it can still be an important issue during renewal. An LFA should retain all of its rights to regulate all of the rates and charges assessed by the operator to the extent not prohibited by federal law. There have been cases where operators have charged well in excess of the maximum permitted basic service fee and or equipment fee and LFAs have been successful obtaining large rebate and fee reductions for subscribers.

What issues should the LFA Consider?

Since existing federal law requires specific procedures to be followed to regulate an operator's rates, it is probably not prudent to spend significant time developing franchise language on this issue but rather simply reference 47 U.S.C 543. Note that if a wire-line competitor is present the issue is moot as effective competition is deemed to exist and the LFA will have no authority to regulate rates.

What is the cable operator's perspective?

Operators obviously desire to limit a LFA's ability to regulate any of its rates which may be charged for cable services. The operator will seek the narrowest possible language in this area and may even propose language which would result in the LFA waiving some of its federal rate regulation rights. Operators argue that since competition is present from direct broadcast satellite and other service providers which are not regulated, the operator's services likewise should be accorded similar treatment.

Key legal considerations

Section 543 of the Cable Act governs the regulation of rates charged by an operator. Congress essentially delegated much of the responsibility for rate regulation to the FCC which promulgated rules at Part 76, Subpart N, Sections 76.900 - 76.987. Numerous changes have occurred in the FCC's rate regulations since they were promulgated in 1993.

7. PEG Access Requirements

What is the purpose?

If the LFA desires local programming channel(s), numerous issues must be considered. First, you must determine the appropriate number of channels to accommodate the public, educational and governmental (PEG) programming needs within your community. Second, the LFA must determine who will be in control of programming these channels -- the LFA, non-profit group, school district, local university? Third, the LFA must identify the needed capital support to purchase equipment and/or facilities to produce the programming to be aired on the PEG channels. Fourth, the LFA must identify funding sources for operational costs including personnel to facilitate the production.

What issues should the LFA Consider?

In addition to the issues listed above, the LFA should carefully consider the details of operating PEG access channels and possibly owning equipment and controlling PEG access facilities. Invariably, certain details are forgotten and heated debates often occur attempting to interpret subtle issues regarding PEG access operations. These issues may include whether the operator can assess a charge for the use of channel time on the PEG channels or a fee for distribution of

the PEG signals from the origination point back to the head-end. LFAs should also consider who will be responsible for master control facilities and who will make the editorial decisions regarding programming to be carried on each PEG channel. There are also a number of issues related to channel placement, quality of the PEG signal, conversion from analog to digital, distribution of the PEG signal between locations and host of related issues.

What is the cable operator's perspective?

Generally, operators view PEG access channels and support payments as an unnecessary and burdensome obligation. The operator will argue that often PEG access channels contain character generated information or remain blank during substantially portions of the day representing a poor use of channels capacity. In larger communities where more sophisticated access centers have been developed, significant funding is required to provide quality access programming and operators argue that they alone should not be required to finance these endeavors. A very small minority of operators have recently begun to publicly acknowledge the value of local programming to their system and have slowly started to embrace PEG access programming as one element which makes cable television service unique from satellite competitors. Still other point to "You Tube" and argue that there is longer a need for local public access channels because the Internet allows for the expression of diverse ideas which is why these channels were created in the first place.

Key legal considerations

Prior to the 1984 Cable Act, LFA could require not only PEG channel capacity and equipment but, also, operating support from the operator to finance access operations. This "operating support" was used to pay salaries and various other associated expenses. Section 542 of the 1984 Cable Act prohibits LFAs from requiring that operators provide operational support for PEG access; however, LFA are still allowed to require capital support for PEG access equipment and facilities. Therefore, LFAs which enjoy large capital contributions from operators may find the operator reluctant to continue providing operating support under a renewed franchise unless the LFA demonstrates specific needs for the capital in its needs assessment.

To make matters more difficult for LFAs, the 1992 Cable Act amended Section 542 to allow operators to include a separate line item on each monthly subscriber bill identifying the amount of the bill assessed to satisfy any requirements imposed on the operator by the franchise to support PEG channels or the use of the channels. Therefore, even capital requirements dedicated solely for PEG access equipment and facilities typically appear as a separate line item on subscriber bills creating political pressure whenever an increase in that line item occurs.

End of paper

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