DTC LAWYERS, PLLC WEBINAR

CABLE TV FRANCHISING FOR MUNICIPAL OFFICIALS
NH Municipal Association

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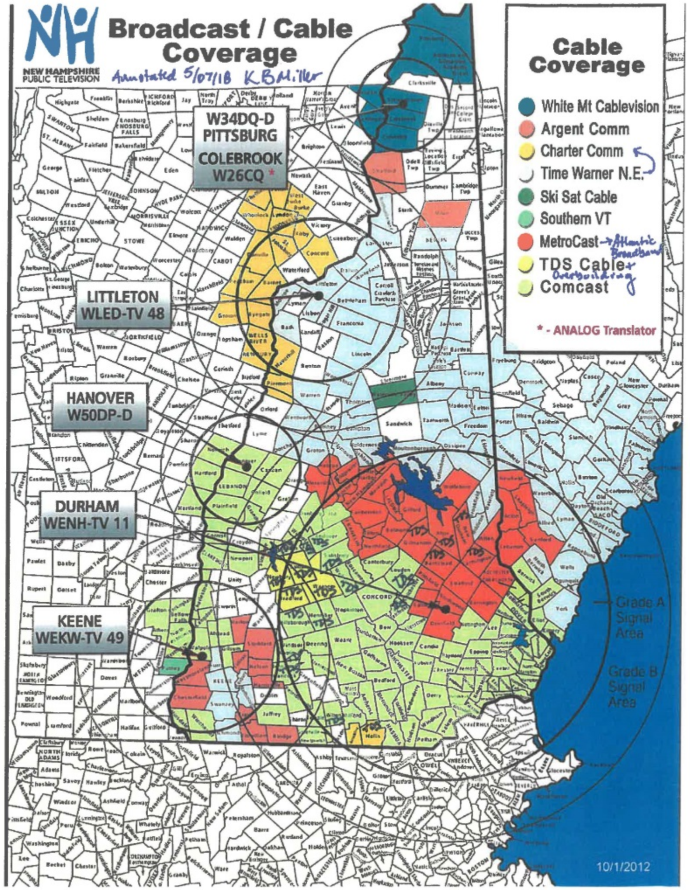
Basics of Cable TV Franchising

- Most towns in NH have a cable TV provider.
- Cable TV systems also provide internet service – broadband – and often "voice" – telephone service.
- Municipalities only have jurisdiction over the cable TV portion of the company's business.
- Federal Communications Commission (FCC) recently reiterated that in August 2, 2019 Order ("FCC 8/2/19 Order").
- All services come over the same system.

NH Cable TV Franchises by Company



Basics of Cable TV Franchising

- Cable TV franchising is governed by federal law (47 U.S.C. § 521, et seq., and the rules of the FCC at 47 C.F.R. Part 76) and state law (RSA Ch. 53-C).
- The governing body is the "franchising authority," to grant a new cable TV franchise and to negotiate a renewal franchise agreement with the existing cable TV provider, because the company will occupy public land: the public rights-of-way. Municipalities are entitled to charge the company "franchise fees" for that right to occupy public land, just like any other "tenant" of municipal property.
- NH Cities and Towns cannot grant an exclusive franchise to one cable TV company. Reality is, most communities have only received proposals from one company, ever.

Basics of Cable TV Franchising

Requirements of NH Law:

RSA 53-C:3-a Franchise Applicant Considerations. –
No municipality shall grant a franchise for cable service to a cable system within its jurisdiction without first, at a duly noticed public hearing, having considered:
I. The financial ability of the franchise applicant to perform.
II. The ability of the applicant to provide adequate and technically sound facilities, equipment and signal quality.
III. Adequate channel capacity and appropriate facilities for public, educational, or governmental use, taking into account available technology, subscriber interest, and cost.
IV. The prohibition of discrimination among customers of basic service.
V. Reasonable service quality in terms of available technology, subscriber interest, and cost.
VI. Construction and installation which conforms to all applicable state and federal laws and regulations and the National Electric Safety Code.
VII. A competent staff able to provide prompt, adequate service and to respond comprehensively to customer complaints or problems.
VIII. Reasonable rules and policies for line extensions and disconnects, customer deposits, and billing practices. **Source.** 1989, 338:3, eff. Aug. 1, 1989.

Renewing Cable TV Franchises

- Cable TV providers may only be denied renewal of their franchises in a community once initially granted if they are in default of their current franchise agreements or their proposals are not "reasonable."
- "Reasonable" is judged on economic as well as other grounds, in other words, would the company get a reasonable return on its investment?
- If the company offers the same, standard proposal for a new or renewed franchise region- or nation-wide, it is deemed "reasonable."
- What does the renewal process look like?

The Cable Franchise Renewal Process
(Informal)

The Town receives a letter from the current Franchisee advising they wish to commence the renewal process. This letter is forwarded to DTC, who then prepares an engagement letter to the Town, engaging us to act as your attorneys in this matter. The Town may form a Cable Committee to work with DTC.

DTC prepares two sets of audit questions regarding the current franchise agreement: one for the Town and one for the Franchisee. The answers to these questions help determine if the Franchisee has met all the conditions of the current franchise agreement.

Within six months of the date of the renewal letter, the Town holds an ascertainment hearing with concerned residents and municipal departments to determine if the terms of the current franchise agreement have been met and to discuss future needs—items the Town would like included in the new agreement. Minutes of the hearings (or a transcript) should be kept, as the more complete the ascertainment record, the more negotiating power the Town will have. The Town may hold as many ascertainment hearings as necessary, provided the initial hearing takes place within 6 months of the renewal letter.

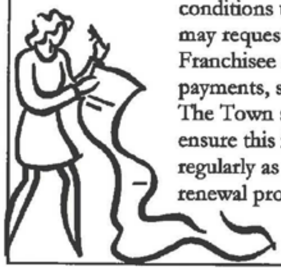
DTC analyzes the responses to the audit questions posed to the Town and to the Franchisee. This analysis is forwarded to the Town. If necessary, follow-up questions are sent to the Franchisee. A matrix of the current agreement and suggestions arising from the ascertainment hearing(s) is prepared.

The Governing Body or Cable Committee and DTC meet and discuss the upcoming negotiations.

Based on the input from the Town and the results of the ascertainment hearing(s), with the assistance of DTC, the Town presents a renewal proposal to the Franchisee. DTC updates the matrix to include a comparison of the renewal franchise proposal.

The Franchisee provides a counterproposal to the Town's initial renewal proposal. DTC confers with the Town about negotiating the new agreement with the Franchisee. During this back-and-forth process, the results of the ascertainment hearing(s) bear fruit.

The negotiation team recommends a franchise renewal to the Governing Body, who holds a public hearing on the proposed agreement. The final result is the best agreement that can be negotiated for the Town.



The final agreement may include conditions under which the Town may request annual reports from the Franchisee regarding subjects such as payments, services and upgrades. The Town should take steps to ensure this information is obtained regularly as it will make the next renewal process go smoothly!

Renewing Cable TV Franchises

Audit of the cable company’s performance under the current franchise agreement:

- Part of governing body’s due diligence in renewing cable TV franchise.
- Can request maps of cable system in community to determine areas not served.
- Omissions or problems can be addressed, and you are more likely to have the company’s attention during this renewal period (3 years).
- Can provide negotiating leverage to you.

Renewing Cable TV Franchises

Public Process to Ascertain Future Cable-Related Needs and Interests of Community:

- Bring in stakeholders (schools, emergency management, PEG Channel staff, subscribers).
- Educate stakeholders and public in general on opportunities and limitations.
- Determine support or lack of support for expenditures and initiatives.
- If conducted within 6 months of date of renewal letter from cable company, protects rights under federal law.

Renewing Cable TV Franchises

Cable Committee vs. Governing Body:

- In some communities, great interest in participation by citizens (e.g. Exeter passed a warrant article at Town Meeting re: having an opportunity for the community to submit videos for cablecasting, not just governmental and school programming on local access channels (the “P” in PEG: Public, Educational and Governmental). Generally takes more time.
- In others, governing body prefers to maintain control. Generally faster that way.

Renewing Cable TV Franchises

Drafting the Document:

- What about using the cable company's standard document?
- This is a contract negotiation, so the cable company will put in what is best for it, not necessarily what is best for your community.
- Some cable companies leave out sections required by NH law (e.g. taxation for use of public rights-of-way, RSA 72:23).

Renewing Cable TV Franchises

Drafting the Document -- DTC approach:

- Treat this like any other contract negotiation, to ensure community retains control of its public rights-of-ways, receives the financial support that is appropriate and has the protections in the franchise agreement that the community deserves.
- Use the protections granted to communities by the federal and state cable laws.
- Customize the terms to meet needs of the community (sometimes need to be creative).

Renewing Cable TV Franchises

Creative approaches:

- “Public-Private Partnerships” can be fertile ground for extending the cable TV systems to parts of the community not currently served.
- Win-Win-Win: Cable company can get more subscribers; residents can get access to cable TV and broadband (and voice); the community can become more attractive for potential residents and businesses, increasing property values and boosting the tax base.
- Still hard to get companies to agree sometimes.
- Important to look for ways to compromise.

Renewing Cable TV Franchises

Company Pays for Extensions of the Cable System:

- Cable companies have formulas on the “density” of homes required to extend the cable TV system.
- Towns can solicit interest among residents in an unserved area, and, if there are enough willing to commit to a one- or more year cable TV service agreement, the company will extend.

Renewing Cable TV Franchises

Getting Creative on Paying for Extensions of the Cable System:

- If not enough residents, Towns can (1) collect franchise fees from cable company and use part or all of them to fund the extension, or (2) pay with appropriated dollars.
- Bonding for construction of municipal broadband infrastructure is not available for extension of the cable TV system, as the facilities will be owned by the cable TV company, not the Town.
- How can the Town start collecting (or increase) cable TV franchise fees?

Renewing Cable TV Franchises

Cable TV Franchise Fees Paid to Community:

- During the renewal of the cable TV franchise, the Town may required that the cable operator pay the Town franchise fees up to 5% of the gross revenue annually from the operation of the cable TV system (not voice or broadband services) in the Town.
- Franchise fees paid to the Town are like “rent” for the cable TV company’s use of the public rights-of-way to reach their customers.

Renewing Cable TV Franchises

Cable TV Franchise Fees & Appropriated Funds:

- All are general revenues (unless earmarked by legislative body for a purpose such as the PEG Access Channels) and can only be spent for municipal purposes.
- Cable TV franchise fees are like more narrowly assessed “taxes,” because only cable TV subscribers pay them to the company, who pays them to the Town.
- Very unlikely to get “free” money from the cable TV company.

Renewing Cable TV Franchises

Cable TV Franchise Fees Paid to Community:

- For expenditure of public funds, it is important to establish a robust record of the anticipated benefit to the Town through the extension of the cable TV system, in terms of economic development, maintaining property values, providing resources to residents for education and business, as well as leisure, recreation, tourism.

Renewing Cable TV Franchises

Cable TV Franchise Fees Paid to Community:

- Focus on step 3 in the graphic in slide 7, the ascertainment of future cable related needs and interests of the community.
- In establishing the record, emphasis must be on the ***cable TV services*** provided by the company, not telephone or broadband, as ***cable TV is the only thing over which the governing body has control***.

Negotiating "Competitive" Cable TV Franchises

- Some cable companies are proposing "competitive" cable TV franchises in communities that already have one cable TV provider: e.g. TDS in Alton, Hopkinton, Loudon and other communities; Comcast in Rochester, Laconia and Gilford, and maybe more.
- Most (all?) communities would ***love*** to have a choice of cable TV provider for their residents.

Negotiating “Competitive” Cable TV Franchises

Differences Between Negotiating Competitive Cable TV Franchises and Renewals of Existing Cable TV Franchises (Federal Law):

Timelines:

Renewing an ***Existing*** Franchise:

- to preserve rights under federal law, commence process to ascertain cable related needs and interests of the community within **6 months** of receiving the letter from the cable company seeking to renew the franchise.
- The renewal “window” is 36 months before the expiration of the franchise agreement.
- No outside deadline for concluding negotiations, although if governing body ceases negotiating, or is not being “reasonable,” cable company can resort to the “formal” process for renewal and impose a proposal it offers within **120 days** (rare if the governing body is engaged in negotiations).
- Parties can extend a franchise if negotiations not concluded. If the franchise agreement expires, the company may continue providing cable TV services pursuant to the expired franchise.

Negotiating “Competitive” Cable TV Franchises

Differences Between Negotiating Competitive Cable TV Franchises vs. Renewals of Existing Cable TV Franchises (Federal Law):

<u>Timelines:</u>

Negotiating a ***Competitive*** Franchise:

- If the new company already has access to the public rights-of-way (e.g., it is a telephone company like TDS, already attached to the poles): governing body has **90 days** from the date it received the proposal from the competitive cable TV operator to grant or deny the application. If the governing body does not act within that time, competitive company can begin providing cable TV services pursuant to the proposed franchise.
- If the company is not already authorized to be in the public rights-of-way, then the governing body has **120 days** from the date it received the proposal from the competitive cable TV operator. If it does not act, the competitive cable company can begin providing cable TV services pursuant to the proposed franchise.

Negotiating “Competitive” Cable TV Franchises

Differences Between Negotiating Competitive Cable TV Franchises vs. Renewals of Existing Cable TV Franchises (NH Law):

RSA 53-C:3-b Franchises; Administration by Municipality. –
I. All franchises shall be nonexclusive. ***No municipality shall grant any additional franchises to cable service within its jurisdiction on terms or conditions more favorable or less burdensome than those in any existing franchise within such municipality.***
II. Nothing in this section shall be construed to prevent any municipality considering the approval of an additional cable service franchise in all or any part of the area of such municipality from imposing additional terms and conditions upon the granting of such franchises as such municipality shall in its sole discretion deem necessary or appropriate.
III. All cable service franchises in existence as of May 1, 1989, shall remain in full force and effect according to their existing terms.
Source. 1989, 338:3, eff. Aug. 1, 1989.

Recent Changes: FCC's 8/2/19 Order on Franchise Fees

- Under the federal Cable Act, municipalities have long been able to require cable companies to pay the municipality up to 5% from the gross revenue generated annually from the operation of the ***cable system*** in that community.
- In the FCC's 8/2/19 Order, it ruled that, going forward, in all existing and new franchise agreements, the ***retail value*** of services and non-capital facilities provided up to now for free to the community will now be ***deducted*** from the franchise fees paid to the community.

Recent Changes: FCC's 8/2/19 Order on Franchise Fees

- <u>Costs covered by Order</u>: free cable TV to municipal and school facilities, "I-Nets" (institutional networks), non-capital aspects of local access channels, and possibly other services.
- <u>Costs not covered by Order</u>: PEG channel support payments / capital expenditures, extensions of cable TV systems required, customer service requirements.
- <u>Unclear whether/how covered by Order</u>: PEG channel capacity, possibly other services.

Recent Changes: FCC's 8/2/19 Order on Franchise Fees

- Cable companies are still trying to figure this out.
- It appears they will address free cable TV services first, possibly the costs of Institutional Networks.
- So far, we have heard no plans for companies to being charging the non-capital costs for PEG Access Networks, but expect it will come.
- How to respond?

Recent Changes: FCC's 8/2/19 Order on Franchise Fees

- Some companies have decided to sign no new or amended franchise agreements or extensions to franchise agreements without addressing at least some of these services. It's time to get prepared:
- Recommendations:
  - Determine what formerly free cable TV service accounts exist, whether the community still needs them or whether some or all could be discontinued;
  - If the community relies on an I-Net, research other options that may be less expensive;
  - Use the internet to provide video programming to the public, to supplement or potentially replace the PEG Access Channels;
  - If the community wishes to keep any of the services now charged for, consider raising the franchise fee to the maximum (5% of gross revenue) to make up the difference and/or use appropriated funds to pay for them, and
  - If the community has and wants to keep a PEG Channel, consider requesting annual capital grants to replace some of the franchise fees lost (reminder: expenditures must be for capital purchases, not operations) and/ or looking for sponsorships, similar to NH Public TV.

Thank you for your attention! Questions?

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