



MAKING THE MOST OF THE CABLE TELEVISION FRANCHISE RENEWAL PROCESS



By Anita Gallucci

It is about three years before your local cable operator's franchise is to expire and your community, as the franchising authority, receives a letter from the cable operator notifying you that the company wishes to renew its cable television franchise. How your municipality responds to that notice can have a significant impact on the community. A cable television franchise renewal presents both challenges and opportunities. Meeting those challenges and realizing those opportunities depends in large measure on how well the franchising authority understands the renewal process as established under the federal Cable Act.¹

FRANCHISE RENEWAL PROCESS UNDER THE CABLE ACT

The procedures for renewing a cable franchise are set out in Section 626 of the Cable Act.² Under the Cable Act, a franchising authority, such as a city or village, may follow either of two processes avail-

able for franchise renewal: a formal and an informal renewal process. Many recommend that both processes be followed simultaneously. Generally, a cable operator will ask the franchising authority to begin formal proceedings at the same time it asks the franchising authority to begin to negotiate informally.³ If informal negotiations are unsuccessful, the franchising authority and cable operator can then proceed through the formal renewal process.

The procedural requirements under the Cable Act for denial of a franchise renewal request differ greatly depending on whether the formal or the informal process is followed. While a franchising authority may deny a renewal proposal⁴ submitted during informal renewal negotiations for any legitimate reason, a renewal proposal submitted during formal renewal proceedings can be denied only on one of four statutory grounds established in the Cable Act.⁵ The franchise must be renewed if the cable operator's past performance and proposal for future performance meet the standards established by the Cable Act. Where those standards are not met, renewal may be denied provided that the franchising authority follows the statutory procedures and develops an adequate administrative record.⁶

THE FORMAL RENEWAL PROCESS

Under the formal renewal procedures of the Cable Act,⁷ either the franchising authority ("on its own initiative") or the cable operator (by submitting a written renewal notice to the franchising authority requesting the commencement of a formal proceeding) can activate the process during the six-month period beginning three years before the franchise is to expire. If the cable operator does not submit a request to the franchising authority during this six-month window, the franchising authority is not required to follow the formal Cable Act procedures, unless the franchising authority has commenced a formal proceeding on its own initiative. In almost all cases, the cable operator asks the franchising authority to begin informal renewal negotiations at the same time as it initiates the formal proceedings. This dual track renewal process is expressly allowed by the Cable Act. A franchising authority faced with such a request should establish procedures which allow it to move forward on both tracks in accordance with federal law.

The procedures for formal or informal renewal proceedings should be geared to the renewal criteria of the Cable Act. This involves reviewing the cable operator's past performance, evaluating the

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1. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, codified at 47 U.S.C. §521et seq. (referred to in this article as "Cable Act" or "Act"). The Act was subsequently amended by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and by the Telecommunications Act of 1996 ("1996 Telco Act").
2. 47 U.S.C. §546.
3. Following the guidelines set out in the Cable Act, cable operators routinely send a "renewal letter" to the franchising authority two and a half to three years before the franchise is due to expire. Through the renewal letter, the cable operator invokes the Act's formal renewal procedures and may, at the same time, express a desire to commence informal renewal negotiations.
4. A renewal proposal often comes in the form of a proposed franchise ordinance and franchise agreement.
5. See Section 626(d) of the Cable Act, 47 U.S.C. §546(d).
6. *Id.*
7. Section 626(a)-(g) of the Cable Act, 47 U.S.C. §546(a)-(g)

state of the current cable system, identifying the community's future cable-related needs and interests, and developing strategies for meeting those needs and interests. A franchising authority faced with a formal renewal request must take the following steps (even if the franchising authority is simultaneously negotiating with the cable operator informally):

Step 1: The franchising authority must begin a formal renewal proceeding no later than six months after a cable operator's renewal notice is submitted.⁸ The proceeding must "afford the public in the franchise area appropriate notice and participation" to review the past performance of the cable operator under the existing franchise and to identify future cable-related community needs and interests.⁹ The statute does not specify what constitutes the start of formal proceedings; however, many communities initiate formal proceedings with the opening of a public hearing to begin gathering information relevant to the renewal.

Step 2: At any point following the completion of the public proceeding, the cable operator may submit a renewal proposal on its own initiative or in response to a request for a renewal proposal by the franchising authority.¹⁰ The cable operator's renewal proposal "shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system."¹¹ Upon receiving the operator's renewal proposal, the franchising authority must provide "prompt

public notice" that it has received the proposal.¹²

Step 3: Within four months of receiving the cable operator's renewal proposal, the franchising authority must either "renew the franchise or, issue a preliminary assessment that the franchise should not be renewed."¹³ In this four-month period, the franchising authority and the cable operator usually attempt to resolve their differences to avoid an administrative hearing (which is the next required step).

Step 4: If the franchising authority makes a preliminary decision to deny the franchise, the franchising authority is required to begin an administrative proceeding either "at the request of the operator or on [the franchising authority's] own initiative."¹⁴ The purpose of the proceeding is to consider whether: (1) "the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;" (2) "the quality of the operator's service . . . has been reasonable in light of community needs;" (3) "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 (4) "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."¹⁵

At the conclusion of the administrative proceeding, a franchising authority can deny a request for renewal if it makes

a finding adverse to the cable operator with respect to any one of the four factors listed above. However, a decision not to renew cannot be based on a failure to perform under the current franchise if (a) the cable operator was not given notice and an opportunity to cure the failure, or (b) if the franchising authority has waived its right to object or has acquiesced in past failures to perform by not objecting after receiving written notice from the cable operator of a "failure or inability to cure."¹⁶

At the close of the administrative proceeding, the franchising authority must issue a written decision granting or denying renewal based on the record developed in the administrative proceeding.¹⁷ This written decision may consider only those four statutory factors that can form a basis for denial of the renewal request.¹⁸

INFORMAL RENEWAL PROCESS

The vast majority of cable franchises are renewed pursuant to the informal procedures of the Cable Act.¹⁹ A cable operator may submit an informal renewal proposal to the franchising authority at any time. A franchising authority will be better able to make the most of informal negotiations if it prepares itself by reviewing the cable operator's past performance and conducting a future needs assessment. The franchising authority may grant or deny a renewal request for any legitimate reason

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8. Section 626(a)(1) of the Cable Act, 47 U.S.C. §546(a)(1).
9. *Id.*
10. Section 626(b)(1) of the Cable Act, 47 U.S.C. §546(b)(1).
11. Section 626(b)(2) of the Cable Act, 47 U.S.C. §546(b)(2).
12. Section 626(c)(1) of the Cable Act, 47 U.S.C. §546(c)(1).
13. *Id.*
14. *Id.* The Cable Act provides little guidance on the administrative proceeding. The Act does specify that the cable operator must be allowed to "fully participate" in the proceeding, including having the right to introduce evidence, to require the production of evidence, and to examine witnesses. A transcript of the proceeding must be made. Section 626(c)(2) of the Cable Act, 47 U.S.C. §546(c)(2).
15. Section 626(c)(1)(A)-(D) of the Cable Act, 47 U.S.C. §547(c)(1)(A)-(D).
16. Section 626(d) of the Cable Act, 47 U.S.C. §547(d). While some franchise violations are not addressed until renewal, it is better to deal with such violations as they arise. In this way, the violation will either be corrected or, if not, there will be a written record of the cable operator's failure to perform.
17. Section 626(c)(3) of the Cable Act, 47 U.S.C. §546(c)(3).
18. Section 626(d) of the Cable Act, 47 U.S.C. §547(d).
19. *See* Section 626(h) of the Cable Act, 47 U.S.C. §546(h).

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"after affording the public adequate notice and opportunity for comment."²⁰ Thus, a cable operator and a franchising authority can attempt to address franchise issues through informal negotiations without following all the requirements of the formal process. However, if the cable operator has timely invoked the formal renewal procedures, then those procedures must be followed before renewal may be denied.

IMPORTANT CONSIDERATIONS DURING FRANCHISE RENEWAL

As directed by the Cable Act, the franchise renewal process focuses on two central areas: the cable operator's past performance and the future cable-related needs and interests of the community. The renewal process presents the franchising authority with an opportunity to evaluate and seek improvements in the cable services provided to the community.

ASSESSING THE CABLE OPERATOR'S PAST PERFORMANCE

Compliance Audit. A compliance audit examines the cable operator's past performance. The audit's primary focus is on whether the cable operator has complied with the terms of the current franchise. This involves reviewing the terms of the current franchise documents and ascertaining whether the cable operator has fulfilled its franchise obligations. The audit should document failures to cure past breaches of the franchise and complaint history. Current customers may also be surveyed to obtain their views on the quality of services provided by the cable operator. Many franchising authorities conduct compliance audits as a precursor not only to redrafting the franchise ordinance, but also to renewal negotiations.

The audit can provide useful information regarding how effective the existing franchise arrangements have been and how those arrangements should be modified to be more effective. In preparing for franchise renewal negotiations, it is also useful to know whether the cable operator is in compliance with existing franchise requirements.

Franchise Fee Audit. A compliance audit can also include an audit of the cable operator's franchise fee payment history to determine whether the cable operator has been making all the required franchise fee payments under the current franchise. An audit report should attempt to establish any franchise fee underpayments and calculate any amounts due and owing to the franchising authority.

ASSESSING CABLE-RELATED NEEDS AND INTERESTS

Future Needs Assessment. Federal law requires that a cable operator's renewal proposal must be "reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests."²¹ A future needs assessments is conducted to identify and substantiate cable-related needs and interests of the community by ascertaining whether and how those needs and interests are currently being met; evaluating how capital and infrastructure improvements in the cable system could better meet the community's needs and interests; determining which improvements will best serve the community and its institutions; detailing the particular improvements desired; and prioritizing those cable system improvements for the purposes of a renewal negotiation.

The needs assessment can be accomplished, in part, through focus groups made up of primary cable user groups and institutional users of cable-related ser-

vices and individual interviews of governmental department heads, representatives from non-profit organizations providing community services, and representatives of local educational institutions. Some communities also conduct telephone or "paper" surveys of subscribers and non-subscribers to determine what cable services are being used and what, if any, additional services are desired.

The future needs assessment is an important tool to aid the franchising authority in making decisions during either the formal or informal renewal process on the following key franchise issues:

Franchise Fee. Under the Cable Act, a franchising authority may charge a franchise fee of up to 5% of a cable operator's gross revenues derived from the operation of the cable system in the community to provide cable services.²² During renewal, the franchising authority should evaluate whether the level of franchise fees it is currently receiving is adequate to meet the community's needs and interests. Although many communities use a part or all of the franchise fee to support cable-related activities (e.g., community access channel), there are no limitations on the use of such funds. All or a portion of the franchise fee may be taken into the general fund. In making the decision on the level of franchise fee to impose, the franchising authority should be aware that the cable operator may pass the entire amount of the franchise fee on to its subscribers and may also designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill.²³

Franchise Fee on Internet Revenues. While the status of Internet access over a cable system (also called "cable modem

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20. *Id.*

21. Section 626(c)(1)(D) of the Cable Act, 47 U.S.C. §546(c)(1)(D).

22. Section 622(b) of the Cable Act, 47 U.S.C. §542(b).

23. Section 622(c)(1) of the Cable Act, 47 U.S.C. §542(c)(1).

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service") has yet to be decided,²⁴ many franchising authorities in Wisconsin require that the cable operator also pay a franchise fee based on the company's Internet revenues. This source of revenue may be lost, however, if it is determined that cable modem service is not a cable service.

System Upgrade. A common requirement in a renewed cable franchise is that the cable operator upgrade its cable system within the first one to three years of the renewed franchise. While many systems in Wisconsin have already been upgraded, there are still some older systems that lack the capacity to provide the level of services desired by the community. A franchising authority cannot require a cable operator to employ specific transmission technologies in upgrading its cable system.²⁵ However, the franchising authority can designate the types of services the community desires and allow the cable operator to determine what type of technology to use to meet the designated requirements. Accordingly, as part of the renewal process, a franchising authority should undertake an evaluation of the cable operator's system to determine whether it is reasonably capable of meeting the needs and interests of the community. If not, then the cable operator should be required to upgrade its system.

PEG Access. Under the Cable Act, a franchising authority may require the cable operator to provide for public, educational, and governmental (PEG) access. PEG access channels offer residents, schools, and governmental agencies the opportunity to broadcast programs over the cable systems. Such programming often in-

cludes local high school sporting events, local governmental meetings, important school or community events, and public safety messages. Some communities even produce their own original programming, such as talk or new shows.

In those communities that desire PEG access services, renewal negotiations center on the number of channels to be set aside for PEG access purposes, as well as funding for an access studio and equipment. PEG access funding is primarily provided by two sources: the franchising authority—through use of all or part of the franchise fee—and the cable operator. The cable operator can be required to provide facilities and equipment or, more usually, capital grants, which are to be used to acquire facilities and equipment.

During the ascertainment process, the franchising authority should take steps to substantiate the community's need for channel capacity, facilities and equipment to support its request for PEG channel capacity and a capital grant to pay for such facilities and equipment. The franchising authority should also decide what management structure should be used for the PEG access operation. Many communities have opted to establish a nonprofit corporation to manage the provision of PEG access in the community.

There is no requirement that a community offer PEG access services to its residents and businesses. In determining whether to pursue the PEG access option or to expand current operations, the franchising authority should take into account the possible passthrough of all or a portion of the capital grant for PEG access to subscribers. Like the franchise fee, any capital grant requirement may be passed through to subscribers and shown as a separate line item on the subscriber's bill.²⁶

Institutional Networks. As the demand for high-speed data services has increased, so has the importance of Institutional Networks (I-Nets). Under the Cable Act, a franchising authority may require that channel capacity on an I-Net be designated for educational or governmental use.²⁷ An I-Net is a communication network which is either constructed or operated by the cable operator. Such a network is not available to residential subscribers, but is provided for internal use by governmental, educational and other government-supported institutions. Communities throughout the country are using I-Nets in a myriad of ways, including for example, training for firefighters and police; distance learning; high-speed data transmission among municipal buildings; and monitoring and control of automobile traffic volume and flow. Communities with municipal utilities have used I-Nets for load management, meter reading and demand-side-management services.

A needs assessment should evaluate the need and potential uses for an I-Net within the community. There are many issues to consider associated with an I-Net, such as what sort of technology will be used, who will build, operate, and maintain the network, who will have access to the network, and how the network will be funded. These issues are all subject to negotiation.

Franchise Term. Probably one of the most hotly contested issues during franchise renewal negotiations is the length of the franchise term. The Cable Act does not establish any term requirements, thus term length is determined through negotiation. While older franchises had terms of twenty years or more, today franchise terms are generally in the range of ten to fifteen years. Given that the renewal process generally begins three years be-

24. The FCC has yet to decide, and there is no agreement among federal courts, whether cable modem service is a cable service, information service, or telecommunications service. If cable modem service is not a cable service, then a franchising authority would not be entitled to collect a franchise fee on revenues derived from that service, nor would a franchising authority be able to require that the service be provided in the community.

25. Section 624(e) of the Cable Act, 47 U.S.C. §544(e).

26. Section 622(c)(2) of the Cable Act, 47 U.S.C. §542(c)(2).

27. Section 611(b) of the Cable Act, 47 U.S.C. §531(b).

fore the franchise is to expire, the franchise term should not be so short (e.g., five years or less) that the community is constantly engaged in the renewal process.

The franchise term should be geared to the needs assessment. That is, in determining what the community's future cable-related needs and interests are, the franchising authority should use a reasonable planning horizon (typically eight to ten years). Anticipating the community's needs beyond a ten-year planning horizon can be difficult because it is hard to predict, for example, what type of PEG access equipment may be available in ten years. Cable operators generally push hard for a fifteen-year term. To mitigate the drawbacks of a longer franchise term, the franchising authority should insist on provisions in the franchise agreement which allow for periodic review of the cable operator's performance (with requirements to improve inadequate performance) and which provide a mechanism for increasing service requirements.

As the length of the franchise is often the franchising authority's most powerful bargaining chip, it is wise to deal with this item near the end of the negotiation process, when the franchising authority will have a better perspective on what the cable operator is willing to provide.

Customer Services Standards. The 1984 Cable Act allowed franchising authorities to adopt customer service standards.²⁸ This provision was substantially modified by the 1992 Cable Act. The modifications allow a franchising authority to enforce the customer service standards adopted by the FCC.²⁹ A franchising authority may enforce these standards provided that it gives ninety-days' written notice to the cable operator that it intends to enforce the new standards.

The FCC has adopted standards relating to cable system office hours and telephone availability; installation, outages and service calls; and communications between the cable operator and the subscriber (including standards governing billing and refunds). Franchising authorities are permitted to adopt more stringent customer service standards by ordinance or by agreement with the cable operator. Whether additional standards should be imposed will usually depend on the cable operator's past performance under the current franchise. The cost of complying with standards that exceed the FCC standards may be passed through to subscribers.³⁰

The customer service standards adopted by the FCC do not provide enforcement guidelines. Thus, the franchising authority must determine what enforcement mechanisms should be used. Enforcement mechanisms could include credits or rebates of the cost of cable service to individual subscribers, liquidated or other damages, revocation, acceleration of the franchise terms and/or denial of renewal, and actions for specific performance.

Programming and Other Services. The Cable Act specifically precludes a franchising authority from establishing "requirements for video programming or other information services" in the request for renewal proposal.³¹ Accordingly, a franchising authority may not condition a franchise renewal on the cable operator's agreement to provide certain programming or services. That is, the franchising authority cannot require that the cable operator carry certain channels (e.g., ESPN, History Channel) on its system. A franchising authority may only enforce agreed-upon or voluntarily contracted for broad categories of video programming.³²

and may not impose such requirements on the cable operator.

The franchising authority may, however, condition the renewal of a franchise on the provision of free cable service to schools, libraries or other public buildings.

Regulation of Cable Rates. Many communities are unaware that they may regulate cable television rates. While this is true, local rate regulation under the Cable Act is somewhat limited. Under the 1992 Cable Act, the franchising authority was granted authority to regulate the rates for basic service and equipment. The FCC was responsible for regulating rates for the expanded basic tier or "cable programming services" (CPS). Under the 1996 Telco Act, the FCC no longer regulates the CPS tier, but local franchising authorities may still opt to regulate basic service and equipment rates as long as the incumbent cable operator is not subject to "effective competition."³³ The local franchising authority cannot regulate rates for the CPS tier or for premium and pay-per-view programming. Nonetheless, the franchising authority should take the opportunity during the franchise renewal process to consider whether it is worthwhile to regulate rates for the basic service tier.

CONCLUSION

Many opportunities present themselves to a community during the franchise renewal process. Making the most of those opportunities requires thoughtful and diligent preparation and a good understanding of the renewal process. This article is intended to provide an overview of that process and the key issues that arise during franchise renewal.

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28 See Section 632 of the Cable Act, 47 U.S.C. §552.

29 These standards are set out in 47 C.F.R. §76.309.

30 47 C.F.R. §76.925(a)(3).

31 Section 624(b)(1) of the Cable Act, 47 U.S.C. §544(b)(1).

32 Broad categories of programming would include, for example: news programming, public affairs programming, ethnic programming, etc.

33 Section 623(a) of the Cable Act, 47 U.S.C. §543(a).

