

Municipal Communications Law Update

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To: Moss & Barnett Clients and Interested Parties
From: Brian T. Grogan, Esq.

Wisconsin Video Services Legislation Assembly Bill 207

Of all of the states that have adopted legislation to supposedly promote competition in the delivery of video services, Wisconsin's AB 207 represents the one of the most drastic limitations on local government authority. AB 207 was referred to the Senate by the Assembly and slightly amended in the Senate. It will be considered by the Assembly on or about December 11, 2007 and then must be signed by the Governor. Below is a brief summary of the key provisions of AB 207 as presently drafted.

1. How do new competitors obtain a state issued franchise?

The Department of Financial Institutions (Department) is charged with reviewing applications for a "Video Service Franchise" (VSF) in Wisconsin. The applicant is required to answer and/or provide information on eight (8) questions and submit \$2,000 to complete its application. The Department has 15 days to determine that the application is complete. The applicant must serve a copy of the application on each municipality in its chosen video franchise area. If the Department determines the application is complete, within fifteen (15) business days from the date of filing the application the Department must grant a perpetual VSF. Existing cable operators and AT&T are pre-approved as qualified operators. The VSF authorizes the video service provider to occupy the public rights of way and to construct, operate, maintain and repair a video service network to provide video service in its chosen video franchise area as long as the provider so chooses. The provider alone has the right to terminate the VSF upon 30 days notice.

The municipality must notify the applicant in writing within ten (10) business days of receipt of a copy of the video service application of the following: 1) the number of PEG channels which the incumbent operator is currently providing, 2) the monetary support currently provided by the incumbent operator for PEG channels and 3) the percentage of revenues (e.g. franchise fee percentage) the incumbent operator is required to pay. A municipality has no further ability to comment on the application, the video franchise area, the applicant's qualifications or to provide any input whatsoever on the grant of the VSF. Failure to provide the required municipal notice could delay payment obligations and channel capacity requirements

2. How can an incumbent cable operator obtain a state franchise?

An incumbent cable operator can immediately apply for a VSF. This will have the effect of immediately terminating the existing local franchise with a municipality. The incumbent

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operator could also choose to continue to provide service under the existing local franchise until its expiration, if the “operator” so chooses. Once a local franchise expires it may not be renewed or extended and the only available method to provide cable/video service in Wisconsin will be via a VSF. Given the lack of any meaningful oversight or regulation under a state issued VSF, there is little motivation for an incumbent operator to honor an existing local franchise. Virtually all incumbent operators will opt into a VSF and terminate all existing local franchises.

3. Once an operator obtains a state issued VSF can it be transferred?

An operator may transfer a VSF by simply providing the Department and the municipality a notice of transfer. While the proposed transferee must submit responses to the same eight 8 questions required for the initial grant of a VSF, such application is to be submitted after the transfer closes. In other words, the transferee will already be in possession of the system and providing cable/video service before the Department will even receive an application for transfer. Thereafter the Department will have 15 business days to grant approval or approval will automatically become effective. It is entirely possible that an individual or company with absolutely no experience or expertise regarding the provision of cable and video services can purchase a system and begin providing service in a municipality. Such a person will have access to every right-of-way in a municipality and the municipality will be powerless to prevent it.

4. Will cities still receive a five percent (5%) franchise fee?

Cities may obtain up to a five percent (5%) franchise fee if an incumbent cable operator was remitting five percent (5%) at the time AB 207 becomes effective. In cases where more than one cable operator is providing service to a municipality prior to the effective date of AB 207, operators are then permitted to remit the lowest percentage included in any franchise granted by the municipality. Inexplicably, if a municipality never charged a franchise fee previously, it has authority to impose up to a 5% fee, however, if a city was charging a 3% fee as of the effective date of AB 207 it appears that city will be forever locked into the lower fee percentage with no ability to increase the fee. There also does not appear to be any mechanism to reduce a franchise fee if a future city council should desire to do so. The franchise fee that is in place now for municipalities is forever locked at that level.

5. Can a municipality verify the accuracy of a five percent (5%) payment?

AB 207 permits a municipality to verify the accuracy of franchise fee payments once every three (3) years with a 4 year statute of limitations. If an operator simply chose not to remit a required fee and a municipality conducted an audit to verify the underpayment, the municipality would have to go to court to seek enforcement. The municipality is prohibited from receiving any reimbursement for the costs associated with the audit regardless of the audit findings. Moreover, there is no provision for interest on past due amounts. There does not appear to be any incentive for operators to comply with timely and accurate fee payments to municipalities.

6. Will operators still be required to remit franchise fees on all “gross revenues”?

AB 207 provides a definition for “gross receipts” which excludes “fee on fee” and late payment revenue. Many municipalities will see an immediate decrease in annual franchise fee revenue due to this change. By way of example, if a city was collecting \$100,000 in 2006 it may lose as much as \$2500 per year under this new definition.

7. Can a municipality impose any other fees on operators for their occupation of the right- of-way?

AB 207 expressly prohibits a municipality from mandating any other compensation from a video service provider. This means that a municipality may not impose any permit fees, encroachment fees, degradation fees, or any other fee for the occupation of or work within public rights-of-way. It is not at all clear how broadly the scope of this prohibition will be interpreted. Virtually every municipality in the State has code provisions for restoration of damage which occurs in the right-of-way when an operator installs its facilities. If an operator were to tear up a newly paved street to install its facilities and thereafter repair the street in a substandard manner, it is not clear whether the municipality could mandate any additional compensation against the operator.

8. What about bonds, letters of credit or security funds which a city may impose to ensure proper restoration of the right-of-way?

AB 207 prohibits a municipality from imposing any security requirements on a VSF holder. All existing security within current local franchises would immediately be terminated

9. Can a municipality impose customer service standards on providers?

A municipality may require a video service provider to comply with a portion of the FCC’s customer service standards (47 CFR 76.309(c)) but it may not impose any additional or different customer service standards despite the fact the Federal Cable Act provides such authority. While the bill states that municipalities may enforce these standards, it does not grant municipalities the right to exact penalties, hold a letter of credit, or wield any other power to force compliance.

FCC customer service standards may not be enforced if the operator is subject to “effective competition” from satellite providers or if a competitor provides service in the municipality. All video providers are subject to state enforcement of state consumer protections. The Department of Agriculture, Trade, and Consumer Protection (DATCP) continues to enforce section 100.209, which now also is to include satellite dish services. However, this statute only covers rebates for outages, repair time, and some required notices to customers. Under this provision customers

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could wait on hold for an hour for customer service assistance and neither the municipality nor DATCP would have any authority to assist the subscriber nor enforce compliance by the provider.

10. Will a municipality be able to obtain PEG channel capacity?

Municipalities can mandate that a video service provider provide the same number of channels for PEG programming as provided by the incumbent cable operator immediately prior to the effective date of the AB 207. Thus even if the existing local franchise allows for a municipality to obtain an additional channel several years from now, that option would be preempted under AB 207. AB 207 does not provide any technical definition of a channel and AT&T's interpretation is fluid from its actions in other states. A channel from AT&T could be a signal streamed over the internet with far less resolution and technical quality than other channels offered on the system. Since there is no basic tier, these channels are to be placed on any tier with 50% or more of the total subscribers.

11. What if my municipality doesn't currently have PEG channels but may want them in the future?

If the municipality has a population of 50,000 or more it can obtain up to three (3) PEG channels. If the municipality has a population of 50,000 or less it can obtain no more than two (2) PEG channels. However, AB 207 allows operators to aggregate the channels among several municipalities. In other words, channel capacity is measured from an operator's headend or video hub office not on a city by city basis. Thus if an operator were to utilize a master headend facility that served 25 municipalities in a given region, those 25 municipalities would apparently have to share the three (3) PEG channels. If technology improves and operators can provide service to one hundred municipalities off a single headend, AB 207 would still require that those 100 municipalities share the three (3) channels. AB 207 does not clarify how the channels should be shared, who would get preference, who is in charge of the programming line-up or how any of those determinations would be made.

12. Is it a problem if the city or school district programs the channel Monday through Friday but not on Saturday or Sunday, or perhaps not during the summer months?

AB 207 requires that all PEG channels be "substantially utilized" by the municipality. Therefore whether the PEG channel is used for public, governmental or educational programming each PEG channel must be utilized 40 hours or more each week. Of those 40 hours at least 60% of the programming must be "locally produced." This math equates to 24 hours per week of local programming. If the channel goes unused during the summer and this criteria is not met the

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provider could reclaim the channel. While a municipality can get the channel back, the provider is then free to place the channel on any service tier of its choosing.

13. Will a municipality have to purchase any equipment so that the PEG channels can be carried by the operator?

In many cases municipalities will likely be forced to purchase equipment as AB 207 requires that the municipality must deliver its content or transmission signal in a format that is “compatible with the technology or protocol” (including Internet Protocol) utilized by the operator. AT&T will require different technology and/or protocol than companies such as Time Warner and Charter. Municipalities will be required to pay for such equipment including new equipment which may be required when operators transition to an all digital lineup over the next two years.

14. What about existing connections from high schools or city halls to transmit PEG programming back to the incumbent cable operators headend?

AB 207 requires that providers connect to the municipalities PEG access channel origination points in existence as of the effective date of AB 207. Thereafter the provider is only responsible for the first 200 feet of a transmission line necessary to connect their system with an origination point. AB 207 also expressly prohibits any institutional network or equivalent capacity mandated by a municipality. Providers are permitted to pass through a “PEG Transport Fee” to subscribers to offset the costs associated with providing transmission capacity for PEG.

15. What about existing PEG fees in support of local community programming?

Many franchises in Wisconsin have provisions requiring the operator to remit financial support for the purchase of equipment and facilities to provide local community (PEG) programming. In many cases, these fees are assessed on a per subscriber basis and are in excess of the five percent (5%) franchise fees remitted by the operator. These provisions are generally consistent with the Federal statutes, which allow municipalities to impose such fees for capital purchases.

AB 207 permits the continuation of this support for 36 months from the effective date of the new law. (If the Senate amendments pass the Assembly on December 11th). Once the PEG support ceases, AB 207 prohibits municipalities from requiring providers to provide any funds, services, programming facilities, or equipment related to PEG programming. The operator’s only responsibility will then be to transmit the programming on the PEG channels. Cities relying on cable company-managed access centers could lose these stations entirely unless the operator volunteers to keep them open. This provision will wipe out millions of dollars of financial support that municipalities are currently receiving under existing local franchises with incumbent operators.

16. Do providers holding a state issued VSF have any build out requirements?

AB 207 has virtually no mandatory build out requirements. Municipal boundaries are meaningless under this portion of AB 207. An operator is free to select all or a portion of any municipality within which it wishes to provide service. Providers are prohibited from denying access to video service on the basis of the race or income of the residents although the bill contains a host of defenses and exceptions which will make enforcement extraordinarily difficult. The DATCP not municipalities, has standing to enforce build-out obligations. AT&T may well have an immediate defense to any build-out obligations in that it can utilize satellite dish technology combined with its DSL service to provide AT&T's "U-Verse" service. The U-Verse product would appear to be one of the permitted "alternative technologies" that satisfy one of the automatic defenses of the build-out portion of AB 207.

17. Are there any other state franchising bills in the country which parallel the requirements of AB 207?

Virtually all of the other states which have adopted legislation in the past two years have included greater municipal authority than that contained AB 207. Illinois, in particular, provided additional financial support for local PEG channels and/or the ability to continue to grant local franchises to meet the needs and interests of the community. Whether one reviews California, Texas, Illinois, Virginia, or many other newly enacted state laws, AB 207 stands alone as having the most dramatic, immediate and negative impact on municipal authority and PEG channels.

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