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THE COMPETITIVE CABLE AND VIDEO SERVICES ACT: Increasing Competition and Diminishing Local Authority

by Melissa A. Ashburn, Legal Consultant

August 2008

THE UNIVERSITY of TENNESSEE

MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League

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The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works, law, ordinance codification, and water and wastewater management. MTAS houses a comprehensive library and publishes scores of documents annually.

MTAS provides one copy of our publications free of charge to each Tennessee municipality, county and department of state and federal government. There is a $10 charge for additional copies of "The Competitive Cable and Video Services Act: Increasing Competition and Diminishing Local Authority."

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The Competitive Cable and Video Services Act: Increasing Competition and Diminising Local Authority

One of the most expensive lobbying efforts in Tennessee history resulted in passage of the Competitive Cable and Video Services Act, which took effect on July 1, 2008. Following is a brief summary of the salient points of the legislation with which city officials and employees should be familiar.

Current franchise holders — The current holder of a city franchise may apply for a state franchise, whether or not the local franchise agreement has expired.

Current franchise agreements — The terms of a current local franchise agreement may be adopted by any other cable company that wants to provide services in the city.

Notice — The applicant for a state franchise is required to provide notice of filing an application to the mayor of each city in the proposed service area.

City action required to preserve PEG channels — After receiving notice that an application has been filed, a city must notify the state of any public, educational, and government access channels provided by the incumbent cable company.

City action required to preserve free cable service — If an incumbent cable provider offers free cable service to schools or government offices, the city must provide a list of locations at which free service is provided to the incumbent cable company. If the cable company applies for a state franchise, any cable service provided free must continue until the termination date of the local agreement.

This legislation is part of the national trend to diminish or eliminate the franchising authority of cities by granting cable companies the right to provide services without negotiating agreements with local governments. In recent years, several cable companies operating in Tennessee permitted local franchise agreements to expire and refused to negotiate contracts with cities in anticipation that legislation would be adopted that would give cable companies great advantages in negotiating new agreements. This tactic has paid off, as this law essentially grants a statewide franchise to these companies. Current franchise holders may now terminate their local agreements and seek a state franchise. A city that has previously negotiated a franchise agreement with one cable provider may be forced to permit other cable companies to serve its area under the same terms and conditions of the existing agreement.

The Tennessee law is actually more favorable to cities than competitive cable laws passed in other states, thanks in large part to the efforts of the Tennessee Municipal League. Tennessee cities may receive public access channels through the state franchise, and may receive financial support for public access channels. Unlike similar legislation in other states, the Tennessee law requires that franchise fees be paid directly to cities rather than routing such funds through a state department. The 5 percent franchise fee cities will receive is much higher than fees set by legislation in other states, and it is higher than the fees most cities received under negotiated franchise agreements. Considering the numerous laws passed as a result of the nationwide effort by the telecommunication industry to eliminate local control over cable

services, Tennessee cities actually fared better than their counterparts in other states.

The remainder of this publication explains the process established by the law for obtaining a state franchise, the terms and conditions of the state-issued certificate of franchise authority, and the new authority provided for cities to offer broadband services.

STATE FRANCHISE AUTHORITY

Application Process. The Competitive Cable and Video Services Act permits cable companies and video service providers to apply for a state-issued certificate of franchise authority, issued by the Tennessee Regulatory Authority (TRA). Large companies need file only one application to obtain authority to operate in any area of the state. The application consists of an affidavit signed by an officer or partner of the company which, among other requirements, describes the area to be served and affirms that services will be provided within 24 months of the issuance of the state certificate. If the company fails to provide the services within 24 months of receiving a certificate, the certificate becomes null and void, although the company is permitted to provide an explanation of the reason for the delay.

In addition, the application/affidavit must describe the applicant's customer service complaint process and contact information for customers, but the TRA will not review or evaluate the complaint process. Notice is required of the filing of the application for all local governments included in the proposed service area. The application must also include a minority-owned business participation plan.

After an application is filed, the TRA will determine if the applicant has the management, financial, and technical qualifications to provide the cable or video services to the areas proposed. The TRA may require the applicant to file a plan for compliance, explaining how the company will meet the 24-month deadline for providing services. These service plans or plans for compliance are confidential and may not be obtained by the local governments included in the proposed service area.

Large telecommunications companies have a distinct advantage in the application process. Applications filed by large telecommunication providers, defined as companies with more than 1 million telecommunication access lines in the state, are not reviewed by the TRA to determine whether they can provide services to the proposed areas. Rather, these companies are presumed to have the required capabilities. Large companies also have a shorter review period after an application is filed. The TRA must act on an application filed by a large telecommunication provider within 45 days of filing, or the certificate will be granted automatically. For smaller companies, the time for the TRA to act on their applications is 180 days after receipt. The certificate issued when the time expires without action is temporary, pending final approval or rejection by the TRA.

STATE FRANCHISE AUTHORITY

Rights Granted. The state-issued certificate of franchise authority provides authority to construct, maintain, and operate facilities within the public rights of way, subject to the police powers of local governments. No city can require a cable or video services provider to obtain a local franchise agreement, and no additional taxes or franchise fees may be levied by cities on the operations of these providers. The state-issued certificate is valid for 10 years, after which the provider must reapply.

Local ordinances governing utility pole attachment and construction activities in public rights of way remain effective, but not to the extent that permission to attach to utility poles or to use the rights of way may be denied to a company holding a state franchise. The holder of a state franchise

must still provide required notice to a city before installing lines in its rights of way or attaching to poles and, further, must repair any pavement or property disturbed during installation. Permit fees also may still be collected by cities.

STATE FRANCHISE AUTHORITY

Franchise Fees. The law requires the statewide certificate holder to pay a franchise fee equal to 5 percent of the holder's gross revenues derived from subscribers located within cities and counties, advertising services, and commissions for cable and video home shopping services. (This requirement may differ for incumbent providers. See discussion of incumbent providers below.) Revenues received from nonsubscriber services, such as advertising and home shopping commissions, are computed by multiplying the ratio of subscribers located within a municipality to the total number of the company's subscribers.

Franchise fees must be paid to the municipality within 45 days of the end of the quarter to which the payment applies . A city may audit the business records of the holder of the state certificate, but only for time periods within the previous three years. These audits may occur only once annually. All records reviewed by agents or employees of a municipality during the audit are confidential and not open to the public under the open records law. Each party must bear its own costs incurred in connection with these audits, although some relief is provided to local governments that must send agents or employees out of state to review records when the out-of-state audit results in a final determination that the holder underpaid the franchise fee by more than 10 percent. In these cases, the holder of the certificate must reimburse the city for travel costs incurred by the auditors or reviewers.

The law provides that complaints relating to the payment of franchise fees may be filed with the TRA by local governments or by certificate holders seeking refunds. The holder of a state-issued certificate may request a refund of fees paid to a city within five years of the end of the latest quarter. Either party may file an action in court to determine the correct amount of franchise fees due to a city within six months after a final determination by the TRA or within one year after the complaint is filed with the TRA.

A city may contract with the comptroller of the treasury or a third party to audit or review records. The law forbids compensating either the comptroller or third party on a contingency fee basis.

Incumbent or Current Franchise Holders. Companies currently providing cable or video services under a local franchise agreement that has expired may either negotiate a new franchise agreement with the city or apply for a state-issued certificate of franchise authority. By applying for a state-issued certificate, the provider receives interim authority to continue to provide services in the area.

An incumbent cable service provider operating under a franchise agreement on July 1, 2008, may terminate the local franchise agreement by filing an application for a state-issued certificate for that service area. The local agreement will be terminated on the date the certificate is issued to the applicant. Large companies operating under franchise agreements in numerous jurisdictions may operate under a state-issued certificate in some markets while continuing to operate under local franchise agreements in other areas. The law permits cable or video services providers to terminate specific franchise agreements without canceling all local agreements.

In an effort to "level the playing field," the law provides that cable or video services providers seeking permission to provide services to an area

in which an incumbent provider operates may simply adopt the terms of a negotiated franchise agreement between the incumbent and local government. The city is required to enter into agreements having the same terms and conditions with any service provider making such a request. These agreements entered into after July 1, 2008, remain effective through the expiration date without the option to terminate that the law provides to incumbent service providers.

Customer Service Complaints. Customer complaints against holders of state-issued certificates of franchise authority may be filed with the TRA. The law states that the customer should first follow the procedures in the service agreement before bringing a complaint to the state. The TRA will apply the service agreement standards to determine if the provider has violated the agreement. There is no authority for the TRA to award judgments or levy penalties for violations of customer service agreements, but the TRA may order the provider to cure the violation or to provide a service credit for the time the customer's service was affected. The maximum service credit that may be ordered is three months. The TRA may address only individual customer complaints and may not launch investigations into a provider's service standards or regulate how the provider generally complies with customer service standards.

The statute contains anti-discrimination sections prohibiting the holders of state-issued certificates of franchise authority from discriminating against residential subscribers because of race, income, gender, or ethnicity. Twenty-five percent of households with access to services by a state franchise holder must be low income households within 42 months of the provider receiving the state franchise. Satisfying this requirement will provide the holder of a state-issued certificate with an affirmative defense against allegations of discrimination. The statute establishes a process for claims of discrimination against holders of state-issued certificates of franchise authority. Complaints may be received and investigated by the TRA. If a determination is made that the holder violated the anti-discrimination portion of the statute, the TRA has the power to levy fines against the state-issued certificate holder.

PEG Channels. When a cable service provider applies for a state-issued certificate to serve a city, the city must notify the state of the number of any public, educational, and government access channels (PEG channels) that are in use or have yet to be activated under any existing franchise agreement. In addition, the city's notice must include the terms under which such PEG channels are provided under the existing agreement. This information is required to be filed with the TRA by the city, even if the application is not filed by the incumbent provider. Within 90 days of providing cable services, the holder of a state-issued certificate must provide the same number of PEG channels, under the same terms, as the number the city has activated with the incumbent provider.

The number of PEG channels a city is entitled to receive is the number provided under the existing franchise agreement on January 1, 2008, even if the agreement expires or is terminated for a state-issued certificate. Cities receiving no PEG channels under an existing franchise agreement may make a written request that PEG channel access be provided by the cable company serving the area, and the company must provide access based on population of the area served. Up to three PEG channels must be provided to a city with 50,000 or more households; up to two PEG channels for a city having fewer than 50,000 but more than 25,000 households; and, one PEG channel for a city with fewer than 25,000 households. The cities and counties served in the area shall determine how the PEG channels will be shared by the local governments.

The operation and content of programming for PEG channels is the responsibility of the local governments. Holders of state-issued certificates of franchise authority must transmit PEG channels by either interconnection or transmission of the signal from each PEG channel programmer's origination point.

State-authorized PEG access support fees are available to cities in amounts not to exceed 1 percent of gross revenues. Incumbent agreements requiring PEG support fees will remain in effect. Local governments not receiving PEG access support fees under existing franchise agreements may adopt an ordinance or resolution requiring the holder of a state-issued certificate to make PEG support payments to the county or city. However, the PEG access support fees, combined with the franchise fees, may not exceed 5 percent of gross revenues.

Incumbent cable service providers that provide free cable service to schools or government offices in a city or county must continue to provide free service to those areas until the termination date of the existing agreement. The city or county must provide a listing to the cable company of locations at which free service is provided. Any other cable or video service provider or holder of a state-issued certificate that serves the same area must provide free service to the same locations.

Underground Utilities — Notice. In construction or redevelopment projects in which utility lines are to be placed underground, local governments must require developers or property owners, as a condition of receiving permits, to give at least 60 days notice to the cable or video services provider of dates on which the service providers may install their conduits or other equipment in the open trenches. Failure to serve this notice will result in the developer or property owner bearing the cost of new trenching for the installation of the cable or video services providers' equipment.

Broadband joint venture authority. The law creates the "Tennessee broadband deployment fund" to be used to promote the deployment of broadband service to rural areas. Guidelines will be developed to govern use of the funds, and grants will be available to local governments, cable companies, and telecommunications companies.

Cities now have the authority to enter into joint ventures with one or more third parties to provide broadband services. Joint ventures will be authorized only in areas that are historically unserved. City electric companies and electric cooperatives that participate in these joint ventures must still comply with other applicable statutes, and no revenues from utility operations may be used to subsidize the joint venture.

Cities and utilities are required to provide access to poles and conduit located in public rights-of-way to any entity seeking to provide broadband service in historically unserved areas. Cities having ordinances levying pole attachment fees must modify those charges for broadband deployment in those areas. Cities cannot charge utility pole attachment rates that are higher than 50 percent of the rates charged as of January 1, 2008, to a cable or video service provider or to telecommunications joint ventures seeking to provide broadband services to historically unserved areas. This requirement for discounted pole attachment rates will be in effect until at least July 1, 2018, unless the date is extended by the legislature.

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