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Rate regulation and the Cable Television Consumer Protection and Competition Act of 1992

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In October, 1992, Congress responded to consumer complaints about their cable rates and services by passing the Cable Television Consumer Protection and Competition Act of 1992. The numerous provisions of the new act were the subject of two, day-long workshops held in Portland and Orono last fall that were targeted to municipal officials. The workshops were jointly sponsored by the Margaret Chase Smith Center for Public Policy, the Maine Municipal Association and the Community Television Network of Portland. The following articles were excerpted from those presentations in an effort to both communicate and explain the important changes wrought by the new cable act. In the first article, Lisa Gelb and Frederick Ellrod offer an overview of the recent changes effecting cable rate regulation. Portland attorney Barbara Krause follows with a discussion of the new consumer protection and consumer services provisions of the 1992 Cable Act. Finally, Portland attorney George Burns describes two of his experiences with local cable franchise renewals.

Two case studies in local cable renewal

by George F. Burns, Amerling & Burns

The new Cable Act of 1992 is like any other legal issue related to cable television. It is quite easy to miss the big picture as it might affect a municipality. One can easily get bogged down in what the new act requires, what the 1984 used to require, and when the Federal Communications Commission (FCC) will speak on this or that aspect of the 1992 Cable Act. In fact, the last word from the FCC on subscriber complaint procedures is probably not on the top of the typical municipal official's agenda. Such things do become important, of course, when specific cases arise. But for most franchising authorities, the focus on exact laws and regulations will be necessary at renewal time or when the franchising authority is entering a negotiation to set up a franchise from the very start.

This article addresses the renewal process, but may have some applicability to a new franchise negotiation as well. My most recent experiences with cable television franchise agreements involved a renewal process with one town and a non-renewal situation that resulted in an operator takeover.

A successful renewal

In the renewal situation, we began negotiations, which seemed to last forever, before the 1992 Cable Act became law. In fact, none of us really expected that the 1992 Cable Act to become law. We expected that Congress would talk about this, but that it would never take action. Thus, negotiations proceeded in the context of the 1984 Cable Act, which did not permit rate regulation. Without rate regulation, municipalities generally believed that they really did not have much leverage. The 1984 Cable Act provided what is called a "presumption of renewability," which is the concept that unless the franchisee really does a terrible job, then

renewal occurs. When the town approached our firm to engage in the renewal process, there was a sense that the cable company would be renewed without doing much more than throwing a few bones to the town.

As that negotiation process went on, that sense changed. It is not pre-determined that a franchisee cable company will be renewed, and it is certainly not pre-determined that the franchise will be renewed on any terms it wants. There are points of leverage that the municipality can bring to the negotiation process under the 1984 Cable Act, and those points of leverage still exist under the 1992 Cable Act. Congress did not change the Cable Act significantly on the procedures for renewal. The concerns of the town were the usual concerns of a Maine town, such as parts of the community that have not been wired. Maine is a sparsely populated state and it is a rare (non-city) municipality that does not have at least some sector that has not been wired yet. Another point of contention was who would pay for the town's legal counsel during the negotiation process. The cable company took the position that this cost had to be covered by the franchise fee. The town took that position that the cost could be added on top of the franchise fee. The town was also concerned about the type and amount of equipment that the cable company would donate and the standards and evaluation criteria to which it would agree. The negotiations took a long time, and were based on raw economics. The town wanted more; the cable operators wanted to give less. There was no art to it; it was that simple. Ultimately, the town ended up with a pretty good donation from the cable company.

How did the town get it? Even though there is a presumption of renewability, the Cable Acts of 1984 and 1992 still require that the franchisee make a renewal proposal that is "reasonable." Reasonable is measured by comparing the costs of the proposal against the benefits to the community. Who decides the balance between the cost and the benefits? Ultimately, it is a jury. In fact, in this situation, it might have gone to a jury. The town initially did make a preliminary finding of non-renewal, which then would have necessitated a formal administrative hearing by the town council or, if the cable company insisted, by an independent body. Failing resolution after that process, the case would go to the United States Federal District Court. Happily, we resolved this issue without that expense. The town and the franchisee ended up somewhere in the middle, as negotiations often do. But the real message here is to put aside all the technical detail about the rates and the statutes. Just remember that when renewal is before a municipality, the town or city does have some bargaining points.

A franchise transfer

A different point arises from the experience of a small town in western Maine, which has really nothing to do with the state or federal laws. The issue was just plain old, sound commercial contract negotiation and administration. The best franchise agreement in the world, which takes advantage of every last ounce of leverage under federal and state law and all the applicable regulations, will not make any difference if the franchise operator is penniless and incompetent.

Municipalities, which usually are busy and have a lot on their agendas beside cable regulation, feel triumphant if they have some working knowledge of the law. In the midst of busy agendas and distractions, it is very easy to forget to ask for financial statements from the cable companies. Often, a franchising authority will negotiate for months with a parent company, and

then be asked to sign a document with a subsidiary. Municipal officials, because of the rhythm and pattern of negotiations, may not think to raise this question. When a franchising authority does ask, more often than not the entity with which it negotiated is not the same entity with which it signs a contract.

Franchising authorities are making a financial decision when they grant a franchise, and they must ensure that the credit decision is based on valid information. This second example illustrates the issue. Cable Company M ended up in a Chapter 11 bankruptcy proceedings. Chapter 11 permits the debtor to reorganize its affairs, but in ninety percent of the cases the company ends up either selling off its assets or being taken over by someone. The latter happened in this case. Another company came along and offered to take over the assets, assume the recent debts, and deliver services. The company requested that the municipality transfer the franchise. But, in fact, the parent was not going to be the operator; it almost never is. The parent wants the flexibility in its operations to move profits to the parent and costs to the subsidiary. They can also insulate the parent from some risks that are assumed by a the subsidiary.

Municipalities should scrutinize proposals to identify shifts to subsidiaries. In this case, the town simply asked the parent company to guarantee the obligations of the subsidiary. It is usually easy to win this point, because very often the company has represented itself as a large entity. It is very difficult for the parent not to guarantee the subsidiary when they have touted themselves as having financial integrity.

Franchising authorities deal with cable companies in a highly regulated and a highly legislated area. They enter into contractual relationships with a term of anywhere from 10 to 15 to 20 years, in some cases longer. No one, municipality or otherwise, should negotiate such long-term contracts without having at least rudimentary contract negotiation and contract administration systems in place. Negotiated contracts need clear basic achievement milestones, including renewal evaluation dates explicitly stated in the contract. A well-defined system that is realistic and that includes well-defined milestones provides the leverage points that are necessary during the life of this marriage.

George F. Burns is a founding principal of the law firm of Amerling & Burns, P.A. of Portland. He specializes in commercial litigation and has been involved with the negotiation of cable television franchise agreements for more than 15 years.