Federal Law & Cable Franchise Renewals

Communities can obtain valuable benefits through the cable franchise renewal process, including:

- Cable system upgrades to support advanced cable services
- Cable system buildout requirements
- Customer service and consumer protection requirements
- Public, educational and governmental (PEG) access channel capacity, facilities and capital funding
- A franchise fee of up to 5% of gross revenues derived from the operation of the cable system to provide cable service

A successful cable franchise renewal is never a matter of chance. For many communities, the key is to carefully develop and implement a process that reviews the cable operator's past performance and identifies the community's future cable-related needs and interests. It's also important to have a solid understanding of state laws, federal laws and FCC orders affecting both parties' rights and obligations.

Several states have enacted state video franchising laws that limit local authority to negotiate cable franchise terms. Communities in these states must analyze their state law carefully and should consider the possibility that portions of their state video franchising law – particularly those related to cable franchise renewal – may be preempted by the federal Cable Act.

The Cable Act's Renewal Process

The federal Cable Act allows communities and cable operators to renew a cable franchise through either a formal process or through negotiations with the cable operator.

The formal process and negotiations can, and typically do, go forward at the same time. Very few communities go through the whole formal process; usually the community and operator negotiate and ultimately reach agreement on the terms of renewal. But cities that have gone through the formal process have successfully denied renewal. See *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434 (6th Cir. 1997)).

The Formal Process

The community or cable operator must activate the formal process during the 6-month period between 30 and 36 months before the scheduled franchise expiration date. If the process is not activated, the operator loses the formal Cable Act protections. Communities will rarely want to start the process on their own in states where state law does not dictate franchise terms. Cable operators, on the other hand, will almost invariably request the community to commence the formal process.

Once the formal process starts, the community reviews the operator's past performance and identifies future cable-related needs and interests. The community can then require the operator to submit a proposal that is responsive to the community's identified needs and interests, including curing any past non-compliance with the existing franchise. Should the community not be satisfied with the operator's proposal, it can issue a preliminary assessment that it intends to deny renewal, and must then conduct a trial-like administrative proceeding to make a final decision to deny or grant renewal. The operator can appeal the locality's decision to court, but the court decides the appeal based on the record before the local government. And the burden is on the operator to show that the local government's decision was wrong.

The Informal Process

While the formal process is moving forward, the community and the operator simultaneously can, and often do, pursue what's known as the "informal" renewal process – that is, they engage in negotiations to reach agreement on the terms of a renewal franchise. If the operator and community reach an agreement on renewal terms, the formal process ends, and the agreed-upon franchise can be approved after a public hearing on its terms. But the formal and informal processes work together: The information obtained through the formal process often bolsters the community's negotiating position in the informal process by helping it support its renewal demands and identify past operator errors for which compensation may be owed.

Limits on Franchise Terms

Provisions of the Cable Act place limits on the requirements a community can impose on an operator in a cable franchise agreement. For example, except for PEG channels and programming, a community cannot require that an operator carry specific channels or programming, and it generally has no authority to regulate a cable operator's rates.

The FCC has issued rules that interpret the Cable Act. The rules are not well-written and often misrepresented by operators, but they must be reviewed and taken into account by a community in the renewal process. These rules are discussed in various FCC orders:

- Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007)
- Second Report and Order, 22 FCC Rcd. 19,633 (2007)
- Third Report and Order, 34 FCC Rcd 6844 (2019)

BBK attorneys represented a coalition of local governments that successfully challenged portions of the Second Report and Order and the Third Report and Order in the Sixth Circuit, preserving critical local franchising power and overturning some of the FCC's limitations on franchise fees. See *Montgomery County v. FCC*, 863 F.3d 485 (6th Cir. 2017), and *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021).

State law, including state franchising laws, may significantly affect the renewal process or limit what can be included in a franchise agreement. The expiring franchise agreement or local law may also establish some renewal requirements.

What to Watch Out For

To be successful in the renewal process, communities must ask:

- Does my community have a plan? The operator will often try to benefit from delay — typically by being willing to engage in endless negotiations but not willing to agree to anything of importance to the community. The community should adopt a schedule and a franchising strategy, and stick to it.
- Have I reached out to key groups within the community whose support will be important in the renewal process? Consider briefing elected officials to set expectations.
- Have I accurately identified the community's cable-related needs and interests, and evaluated those needs in light of my legal rights? Don't rely on the operator for information about what the law requires, or what your community needs. Consider conducting surveys, focus groups, engineering analyses and financial audits.
- Has the operator complied with its obligations under the current franchise and applicable law? A community will often be more successful at the negotiating table if it can hold the operator responsible for past non-compliance.
- Does the franchise agreement protect the community? A cable franchise is worth thousands of dollars per subscriber to the operator, and is often one of the most valuable long-term deals a community negotiates. The franchise agreement's phrasing may determine whether or not a community can continue to receive franchise fees when technology changes

If franchising authority has moved to the state, ask:

- Has the operator complied with state video franchising law requirements? If not, the community may have valuable claims against an operator.

- Is the state law consistent with the federal Cable Act's renewal requirements? Note that under the federal law, even informal renewals must provide an opportunity for public participation.

About Us

Best Best & Krieger's telecommunications attorneys are leaders in protecting local interests in broadband, cable, and wireless facilities and services. Our team represents local governments on broadband, telecommunications, cable television, wireless, and rights-of-way issues before state and federal legislators and regulators, and in the courts. In the area of cable franchising, we provide services including advice and assistance with drafting regulatory ordinances and franchise agreements, evaluating franchise noncompliance and enforcing compliance, transfers, operator bankruptcy, "informal" renewal negotiation, "formal" renewal proceedings, hearings and court reviews.

To learn more about and connect with our team, visit https://bbklaw.com/practices/telecommunications.

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