

Management of the Public Rights-of-Way and Utility Franchising

Though local governments likely have the inherent power to manage the public rights-of-way (“ROW”) as part of their protection of the public health, safety and welfare, the legislature has seen fit to specifically grant local governments that power, La. R.S. §48:381.3(A)(2) provides:

With respect to roads, streets, and bridges not part of the state highway system, the public utility facilities located in public right-of-way comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways, and to the extent they exist, with applicable ordinances of the parish or municipality that specify the location for public utility facilities in public right-of-way.

The national trend is the deregulation of the ROW – limiting local governments’ franchising authority for telecommunications, cable television and, even electrical and gas utilities. The statutes that limit local franchising authority often continue to permit “technical” regulation of the ROW, but also tend to limit the amount of revenue that local governments can obtain for use of the ROW. While most elected officials look at the utility franchise fees and taxes as “free money” for the general fund, the fact of the matter is that the placement of utility facilities in the ROW causes significant ongoing costs to the local governments. The costs for street widening, drainage, water and sewer projects increases significantly because AT&T and Comcast have buried cables within the ROW. The engineers must plan the projects around these facilities to not cause disruption and local governmental projects often encounter delays and change orders because these facilities are not exactly where everyone thought they were.

In Louisiana, only cities have the authority to require that telecommunications companies obtain a franchise. La. R.S. §45:781 provides:

A. Corporations, domestic or foreign, formed for the purpose of transmitting intelligence by telegraph or telephone or other system of transmitting intelligence, may construct and maintain telegraph, telephone or other lines necessary to transmit intelligence along all public roads or public works, and along and parallel to any of the railroads in the state, and along and over the waters of the state, if the ordinary use of the roads, works, railroads, and waters are not obstructed, and along the streets of any city, **with the consent of the city council or trustees.** Such companies shall be entitled to the right of way over all lands belonging to the state and over the lands, privileges and servitudes of other persons, and to the right to erect poles, piers, abutments, and other works necessary for constructing and maintaining lines and works, upon making just compensation therefore. If the company fails to secure such right by consent, contract or agreement upon just and reasonable terms, then the company has the right to proceed to expropriate as provided by law for railroads and other works of public utility, but shall not impede the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised. No company, operating under the provisions of this Section, shall contract with the owners of land or with any other corporation for the right to erect and maintain any telephone, telegraph or other line for the transmission of intelligence over its lands, privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this Section.

B. Nothing provided in Section A herein shall affect the right granted to parish governing authorities to grant franchises for the regulation of cable television outside municipalities.

(Emphasis added.) The highlighted language shows that though parish's can franchise cable television operators, only cities can franchise telecommunications companies.

Further, cable or other video provides can now provide services without obtaining a local franchise. The Consumer Choice for Television Act (R.S. 45:1361-1378), which took effect in 2008, allows cable and video service providers to bypass the local governments and obtain a Statewide franchise. In addition to removing the methodology by which most local governments regulate the construction and maintenance of cable facilities in the ROW, the statute, (at section

1368) specifically prohibits parishes and cities from requiring that all of the city or parish be served with all video services offered:

No franchising authority, state agency, or political subdivision of the state shall impose any build-out requirements for construction of a cable system or wireline facilities used to distribute video programming services or for cable service or video service deployment on a holder of a certificate . . .

This means that a cable company operating under a state franchise may decide to upgrade only the densely populated or wealthy parts of a parish or city and leave the higher cost areas to serve with fewer service offerings. Also, as companies like AT&T enter markets to provide their video service, they may choose to only compete with the existing cable company in the densely populated or wealthy areas where the costs to enter the market are less, and likely returns are greater, leaving the rural or poor areas without the benefits of competition.

So without franchises, how do parishes and municipalities actually regulate their ROW to protect the public health, safety and welfare?

I encourage all local governmental entities to enact ROW regulations that are applicable to all utilities that enter the ROW. Regulations should include where in the ROW poles and lines can be installed as well as the proper methods of construction and restoration of the ROW after construction. Further, they should provide for insurance provisions, bonding to insure restoration, permitting (and permit fees) and post-construction “as-built” plans that can be placed into the local government’s GIS system to assist it with planning future public improvements.

Cable Companies seem to favor renewal of their franchises over the Consumer Choice for Television Act. What is the process for franchise renewal?

Many things have changed since your community entered into its original cable television franchise agreement or last renewal agreement – rebuilds and digital technology have increased

channel capacities, new services are offered, and the calculation of franchise fees and grants for public and governmental programming have changed. Though most communities in larger metropolitan areas have already renewed their original cable television franchises, some communities in and around smaller cities are only now being faced with the expiration of their original 15 or 20 year franchise. You should expect the franchise renewal process to begin 2-1/2 to 3 years prior to expiration of the existing franchise. The federal Cable Act (47 U.S.C. §521, et seq.) grants significant rights and protections to cable television companies seeking franchise renewal who submit a written renewal notice 30-36 months prior to the franchise expiration. Unless your cable company is negligent, you will receive a written renewal notice during that time period.

Submission of the written notice sets in motion a formal process that can impose significant time constraints on your community (the “Franchising Authority”). (See 47 U.S.C. §546(a) - (h).) However, Section 546(h), entitled “Alternative Renewal Procedures,” provides for an informal renewal process requiring a public hearing, but removing all of the time limitations and other requirements of the formal procedure. The alternative renewal procedures may be used at any time, even after the formal procedures have begun. We encourage all communities to hold discussions with their cable operator to work out any problems under the current franchise agreement and possibly to even work out a franchise renewal prior to the beginning of the formal process in order to avoid the time limitations which can put undue pressure on the franchising authorities.

Below is an outline of the “formal” franchise renewal process found in 47 U.S.C. §546 (A) - (G).

I. Proceedings

S Commenced by the Franchising Authority or
S By the Cable Operator 30-36 months prior to franchise expiration with a submission of a written renewal notice requesting commencement of proceedings.

S Proceeding must be commenced within 6 months after submission of written request by Cable Operator.

A. Purpose of Proceedings

S “Identifying the future cable-related community needs and interest, and
S Reviewing the performance of the cable operator under the franchise during the then current franchise term.”

B. Review of Performance

S Thorough review of Franchise Agreement for current compliance
S Franchise fee audit
S Technical audit
S Customer satisfaction survey
S Public Hearing re: performance
S Determining future needs
S Competition - before cable and non-cable
S Technology needs and future changes
S Interconnection
S Institutional Network (I-net)
S Equipment and compatibility

S Access: Public, Educational, and Governmental (PEG)

S Future needs survey

S Public Hearing re: Future needs

II Submission of Renewal Proposal

A. By Cable Operator after public hearing.

B. Franchising Authority may require certain materials be contained in proposal (including proposed upgrades and service offerings) and may set a time limit for submission of the proposal.

C. Franchising Authority must provide “prompt public notice” of the proposal when it is submitted.

D. Franchising Authority has 4 months from the date the proposal is submitted to either renew the franchise or “Issue A Preliminary Assessment That the Franchise Should Not Be Renewed”.

E. If a “Preliminary Assessment of Non Renewal” is issued, the Franchising Authority may, on its own, or at the request of the Cable Operator, hold a public hearing to determine:

1. Whether the Cable Operator has “substantially complied” with the “material” terms of the existing franchise.
2. The quality of the service, (i.e. signal quality, response to complaints, billing, etc., **BUT NOT** considering the mix or quality of cable programming.)
3. Whether the Operator has the financial, legal and technical ability to provide the services in its renewal proposal.
4. Whether the proposal will meet the community’s future cable needs and interests, taking into account the cost of meeting those needs and interest.

III. After this public hearing, the Franchising Authority must issue a written decision including the reasons why the renewal was approved or denied. Reasons for denial must be based upon “one or more adverse findings” regarding the four factors above. However, the denial may not be based upon No. 2-(A) or (B) above unless the Franchising Authority has provided the Cable Operator with notice and an opportunity to cure the Franchising Authority has failed to object to a written notice that the Cable Operator is unable to cure the violation.

IV. If renewal is denied, the Cable Operator can appeal to the Federal Courts.

Based upon our analysis of the franchise renewal process, we recommend the following:

- A. Immediately begin the review your franchise agreement to determine if the cable operator has complied with all of its requirements. Seek to gain compliance where it is lacking.
- B. Begin to determine your future cable-related needs and desires, and the cost of those needs and desires. It should be decided whether a consultant will be needed to assist in the process.
- C. Begin an informal renewal process by holding a public hearing or public forum to listen to the public’s cable-related needs and desires.
- D. Seek an “informal” renewal proposal from your cable operator. Once the proposal is received, notify the public and make copies available.
- E. Negotiate the renewal agreement with your cable operator keeping in mind the community’s future needs and desires as well as the costs of implementation.
- F. Hold another public hearing on the renewal agreement pursuant to 47 U.S.C. §546 (h), prior to approval by the Corporate Authorities.

The franchise renewal process is heavily weighted in favor of renewal of the franchise. If the informal process fails, proceed through the formal process and be sure to investigate and back up your findings.

We believe the most important issues with which communities should concern themselves are the continuation or addition of requirements for the upgrading of technology, programming levels and services, as well as the ability to further regulate various matters, including rates, programming requirements and franchise fees, if the Federal statutes and FCC regulations are again amended to allow further control by Franchising Authorities. Franchising Authorities also need to reconsider whether the safeguards in their current agreement are adequate to deal with later system deficiencies.