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Franchising in the Commonwealth In the Era of CST and the Third FCC Section 621 Order

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Gerard Lavery Lederer's unique background as a nationally recognized telecommunications, cable and small cell lawyer combined with his experiences as a registered federal lobbyist provides clients unparalleled service in seeking both legislative and transactional solutions. Prior to joining Best Best & Krieger LLP as a partner in the Municipal Law practice group in Washington, D.C., Gerry was an attorney with Miller & Van Eaton, a highly regarded local government rights of way law firm.



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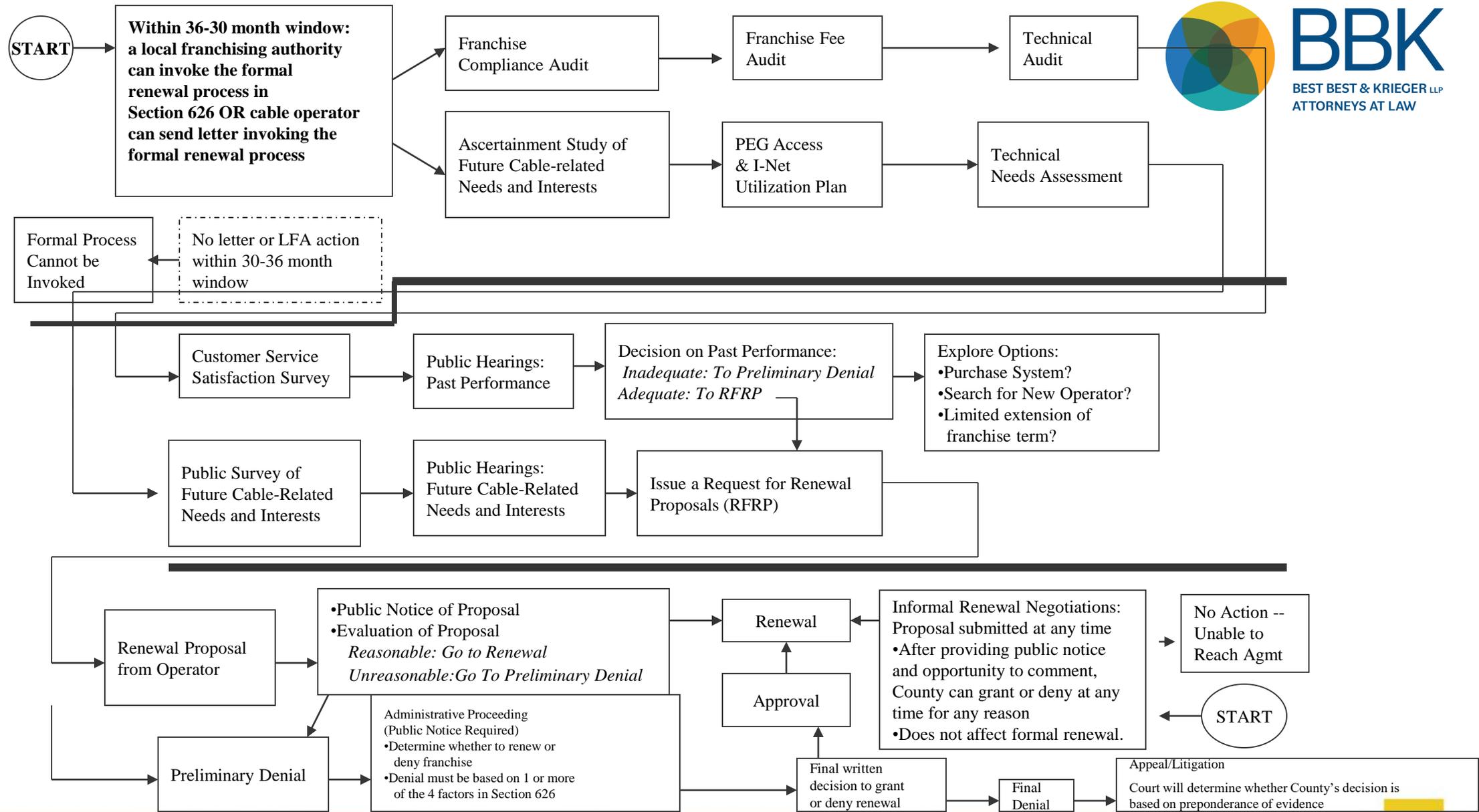
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Cable Television Franchise Renewal Flowchart



Overview:



- Short Overview of Recent Development impacting Renewal
- Deeper Dive Into Renewals and Cable Laws
- Developments (Potential Developments) Impacting Renewals

Cable Franchising Order:



- Redefines “franchise fee” to include the “**marginal cost**” of non-monetary franchise requirements. Amount may be deducted from the franchise fee (or paid for directly).
 - Residential build out, customer service not counted against the fee; new I-Nets are counted
 - Narrowed what may be collected above the fee as a PEG capital cost.
 - Characterization of PEG channels (capital or operating) was not addressed by FCC.
- Preempted state and local authority over cable operators’ non-cable services and facilities
 - Preempted Eugene, OR broadband franchise fee; limited authority over I-Nets
- Applied all rules to state franchise regimes.

Cable Franchising Order:



- 2023 VATOA Action Items (not all that different from 2021 list):
 - Monitor litigation and FCC action.
 - Remember that the FCC must act on 6th Circuit's Remand.
 - Consider carefully any requests or franchise agreements made under current FCC ruling...avoid locking in Order as rule may change.
 - Be aware of the threat of H.R. 3557 and seek political support to oppose.

Cable Basics:



- Local Cable Franchise Agreement is a real estate contract. Community provides authority to use public assets to provide cable service over a cable system and operator pays compensation.
 - Art is usually in defining compensation and basis for same.
 - In Virginia --Communications Sales & Use Tax (“CST”).
 - PEG and I-Net.
 - Non-monetary obligations including consumer protections.
 - Local governments must abide by Federal, state and local laws when conducting franchise renewal process. Examples
 - Franchise is non-exclusive – Federal
 - Access to building tenants – Commonwealth (Va. Code Ann. § 55-248.13:2)
 - Procurement rules – City Code & cable operator

Cable Basics:



- Public input is a critical part of franchise renewal process
 - Needs Report has identified real needs from public and government users.
- Renewal process is central to determining what future services citizens will receive in the future.
 - Required
 - Requested
 - It's OK to obtain requested compensation in side letters, but ensure consideration is present. Needs Assessment paper provides that consideration.
- Electeds (Executive and Council) must act as a team for the residents.
 - Good vs. Bad Cop is OK if coordinated.

The Basic Laws:



- Federal Law
 - 47 U.S.C. Sec. 521 et seq. (the “Cable Act”), esp. Sec. 546
- State Law
 - [§ 15.2-2108.1:1;15.2-2108.21](#)
- City or County Laws
 - Charter, Franchise, Ordinances

Laws Governing Renewal:



47 USC Sec. 546 outline Renewal Process

- Two processes – “informal” and “formal”
- State Level -- [15.2-2108.1:1](#) and Ordinance franchises
- Informal process =
 - Agree at any time
 - Must hold hearing where public can comment
 - Otherwise, the process is done

Cable Act – Formal Process



- How it starts: City or cable operator can start it; operator can start it by submitting a request for renewal 30-36 months before franchise is scheduled to expire
- What happens when it starts: you then have six months to commence a proceeding in which the public has an opportunity to participate....
- Ordinance Franchise under Virginia Law – see [15.2-2108.21/](#)

Cable Act – Formal Process



- What's the proceeding?
 - You are to determine the future, cable-related needs and interests of the community
AND
 - Review the operator's past performance
- How formal do I have to be in starting the process
 - Not very – BUT....
- When do I need to end it?
 - No deadline for ending

The Cable Act – Formal Process



How do formal and informal fit together?

- You can assess community needs/past performance until you have a negotiating position with which you are comfortable.
- You can then negotiate informally.
- If negotiations fail, you can then complete the “assessment” process, and move forward formally.

The Cable Act – Formal Process



- What Happens When the Assessment is Completed?
 - Community can issue a request for proposals OR operator can submit a formal proposal without waiting for a Request for Renewal Proposal or “RFRP.”
 - Once operator proposal is received, community has four months to decide to say “yes” or to say “we preliminarily deny the renewal request”
 - If you say no, operator may require community to promptly commence an administrative proceeding (almost like a trial)

The Cable Act – Formal Process



- What Goes On at the Administrative Proceeding? You consider:
 - Whether the operator has complied with its obligations under the franchise and applicable law (notice/cure)
 - Whether the operator has provided adequate service in the past (notice/cure)
 - Whether the operator has the financial, technical and legal ability to perform as promised
 - Whether the operator's proposal is reasonable to meet the future cable-related needs and interests of the community in light of the costs thereof

The Cable Act – Formal Process



- Denial permitted if you find against the operator on any one of those four grounds
- Operator can appeal to court

Overview of Status



- Common Franchise Renewal Issues
 - Franchise Fees/CST
 - Cable System Issues
 - Customer Service
 - Institutional Networks
 - Competition and Level Playing Field
 - PEG-Related Issues

Franchise Fees



- Franchise fees* cannot exceed 5% of operator’s “Gross Revenues” (47 U.S.C. § 542)
- How do you define “Gross Revenues”?
 - Triple play
 - Over the top services
 - Advertising
 - Programming launch fees
 - Application of GAAP

*no new or renewed cable franchise entered into on or after January 1, 2007, shall include a franchise fee as long as cable services are subject to the Virginia Communications Sales and Use Tax, but it can be used for PEG support.

System Issues



- System Build-out
 - Density requirements
 - Commercial areas
- System Upgrades:
 - an LFA (Local Franchising Authority) may not use its franchising authority to attempt to regulate non-cable services
 - But many of the services using system capacity are not “cable services”

Institutional Networks



- Connect public buildings. Transport PEG programming
- Who owns what?
- Dark fiber vs. managed services
- New entrants vs. incumbents

Competition/Level Playing Field



- Federal law does not require such provisions
- Virginia repealed former state law level playing field provision in 2006 law and essentially replaced it with Ordinance franchise's opt-in options (subsections 26, 30 of § 15.2-2108.1) and the 'no more onerous' provisions in subsections 20.B and 22.
- Caveats: Beware of Provisions:
 - Defining competitor as OTT or MVPD
 - Opt-out provisions to avoid franchise obligations
 - Allowing operator to unilaterally modify franchise if different than competing franchise

Other Issues



- Term / rights on termination
- Precedence of franchise vs. ordinance
- Reporting requirements
- Liquidated damages
- Security for performance
- Audit rights
- Section 621 Offsets

PEG Support



- The term “Franchise Fee” does not include:
 - Capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities. (47 U.S.C. § 542)
- Ways to Capture PEG support/fee*
 - Upfront, pay as you go, periodic payments
 - Payments tied to subscriber numbers
 - % of “Gross Revenues”
- Operating support
 - Must be voluntarily given or subject to offset – “as LFA sees fit.”

*Please keep in mind long hold-over franchises.

PEG Channels



- How do you define channel in a digital world?
- How many?
- What format? HD? Simulcast? What about future advances?
- Channel placement
- Information about channels on Electronic Program Guides

Summary



- Renewals only happen every 10-15 years
- Franchise renewals deal with a diverse range of issues negotiated over months or years
- Both sides bring issues to the table
- Relative importance of PEG-related issues:
 - What other issues are under negotiation?
 - What have other renewals done lately?
 - How strong is community support for your issues and how do you demonstrate that?
- Support the negotiating team
 - Support can take many forms – just be coordinated on city side
- Timing
-

Understanding and Integrating the Sixth Circuit's Cable Order

6th Circuit Decision



- On May 26, 2021, the 6th Circuit:
 - Largely upheld FCC’s “in-kind” decision, but found that the operator was limited to offsetting (or being paid) for the marginal cost of providing the benefit – NOT fair market value;
 - Rejected the FCC’s codified mixed-use rule as written, but in applying the Act appeared to adopt the FCC’s conclusion that a state or local government “cannot do indirectly what it is prohibited from doing directly.”
 - Specifically concluded that the City of Eugene’s broadband franchise fee was not a Cable Act “franchise fee,” but nonetheless found that other provisions of the Cable Act prevent LFAs from charging a cable operator any fee for use of the ROW use to provide non-cable broadband service.

What Is “In-Kind?”

- Regulation appears at 47 CFR § 76.42, “In-kind contributions”
- **Any non-monetary contributions** related to the provision of cable service by a cable operator as a condition or requirement of a local franchise, **including but not limited to:**
 - ...Costs attributable to the provision of **free or discounted cable service** to public buildings, including buildings leased by or under control of the franchising authority;
 - ...**Non-capital costs in support of public, educational, or governmental access facilities;** and
 - ...Costs attributable to the **construction of institutional networks.**
- **But** “In-kind, cable-related contributions do not include the **costs of complying with build-out and customer service requirements.**”

In-Kind Issues/Examples



- Cost of maintaining lines used to transport PEG signals from studios to cable operator count against franchise fees; cost of providing lines are capital costs and do not count against fees.
- FCC determined that cost of providing PEG capacity would count against fee unless that capacity was treated as a capital cost...but agency deferred any decision on whether provision of capacity was a capital cost.
- Free service to public buildings counts against fee, but what about senior discounts, and discounts for persons with disabilities?
- Cost of construction of an I-Net counts against fee, but what about costs of I-Net capacity maintenance? Not consistent with build-out decision.
- What falls within the ambit of customer service requirements?
 - PEG listings on program guide?
- Where do ROW requirements/requirements for ROW restoration, relocation and maintenance fit in?

Mixed-Use Rule & Impact



- An LFA may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on I-Nets. (New 47 CFR §76.43) (Sixth Circuit eliminated the rule but the impact remains.)
 - As adopted, rule:
 - Preempts regulation of any facilities and equipment used in the provision of any services other than cable services;
 - Adopts cable operators' argument that a cable franchise authorizes installation of any equipment in ROW, even if it is not used for cable service, including Wi-Fi and small cell facilities;
 - Impedes local authority to ensure consistent regulations apply to providers of similar services using similar facilities.
- FCC also ruled that Eugene's generally applicable telecom fee is a "franchise fee" and preempted by the Cable Act – and that cable operator could only be charged cable franchise fee for use of ROW to provide non-cable services. (Sixth Circuit disagreed on the legal point, but the practical impact is not much changed.)

How Should You Respond to “Mixed Use” Now?



- Rules do not prevent settlements of past performance/franchise non-compliance issues that provide benefits, which are not a “franchise fee.”
- Rules do not address what happens where a capital obligation is imposed, but operator is given voluntary option of satisfying obligation through provision of a service: e.g., rather than build a line to carry PEG programming, operator provides funds or services that allow for more cost-effective transport. Alternative performance requirements may not trigger offsets.
- Because operators are including WiFi and true wireless radios on strand, it is important to ensure your franchise does not exempt any portion of the system from ROW/zoning rules as applicable – and to make sure your wireless rules take into account the position taken by the operator with respect to
 - Whether additional franchises/fees may be required;
 - Whether additional regulatory approvals may be required before installation.

What Happens Next? – The FCC



- FCC must change its rules to address 6th Circuit's Opinion:
 - At a minimum –
 - Market value as part of formulae;
 - Clarification of Mix Use Rule; and
 - Issues that we can tee up.
- Delay has been to our advantage.
 - Law was clear. (No risk to local governments)
 - Ability to further improve not possible until 5 Member Commission.

Possible FCC Steps in 621 Remand



Goals could include:

- Making clear “customer service obligations” reach issues like compliance with customer service standards, privacy, EEO, or any rule affecting customer-cable operator relationship which would remove them from the franchise fee;
- Clarifying treatment of PEG capacity to treat it as capital cost;
- Clarifying no cost associated with construction, operation or maintenance of the cable system counts against franchise fee;
- Re-construing the Act to clarify that if a fee is not a “franchise fee”, it is not preempted by the Cable Act.

H.R. 3557: American Broadband Act of 2023



- Industry friendly bill introduced with no full text + presented for markup on May 24, 2023 without testimony from local government witnesses
- Wireless/Telecom: Usurps State & Local Government Police Powers & Property Rights
 - All local gov't wireless siting decisions “deemed granted” in as little as 60 days
 - Providers can install facilities regardless of local zoning
 - Eliminates FCC safe harbor pricing for application fees and rent and substitutes FCC for district courts as reviewing body for challenges to local government decisions
- Cable: Removes Ability of State and Local Franchise Authorities to Enforce Franchises
 - Eliminates cable franchise renewals
 - Grants cable operators right to provide non-cable services while prohibiting local government fees on non-cable services
 - Grants cable operators right to terminate franchise without obligation to remove system from ROW



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Questions?

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