Maine Statewide Franchise Stakeholder Group
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Comcast

Issues to consider and resolve prior to moving from a local to state franchise

The Energy, Utilities and Technology Committee tasked the Office of the Public Advocate and certain stakeholders with exploring issues surrounding the state of Maine taking franchising authority from municipalities and placing it within a state agency or other body. Approximately half of states issue franchises locally most having transitioned away from local control at the behest of ILECs in the 2005-2008-time frame. Regionally, there is a mix of models including NH and MA issuing locally while VT and RI issue at the state level. Representatives from the Telephone Association of Maine and the Community Television Association of Maine each presented their own versions of a state issued franchise. There are innumerable variations of franchises each designed to balance the needs of the local provider and the local community or state, all funded by the provider's local customers through line item charges on customer Bills. To contribute to a fuller understanding of the elements commonly negotiated between a municipality and a provider and some of the considerations associated with a shift from local control to state control Comcast offers the following information.

Evolving video marketplace creates disparities with only some providers required to secure a franchise. The last 10 years have seen a proliferation of video content providers including new linear TV providers who argue that they do not need to secure a franchise. Linear TV is a method of delivering video content programming for a schedule of shows to be selected by the broadcaster and then viewed at a set time by the customer, it is also commonly known as Live TV.

By not securing a franchise these providers benefit from not having to pay a franchise fee, franchise related costs, adhere to build out requirements nor dedicate valuable bandwidth to deliver PEG channels or support institutional networks. Currently, cable providers such as Comcast and certain telephone companies such as Consolidated Communications offer live, linear TV to their customers through their networks utilizing the public right of way. Consolidated has not sought a franchise to deliver this programming while Comcast has secured franchises. Other providers such as YouTube TV and Hulu+Live TV offer linear TV without a franchise or associated costs and obligations.

These competitive disparities must be considered when the terms of franchise obligations are considered. A state issued franchise statute must address which providers currently using the public right of way to deliver their services are required to secure a franchise and accept the obligations associated with receiving a franchise.

Franchise Fee: How much? Municipalities granting a franchise for the use of the public right of way may collect a fee of up to 5% of the gross annual revenue derived from the provider's video service. Negotiation between the provider and municipality includes the amount of the fee and the definition of gross receipts. The fee is applied to customer's bills, typically monthly, with the provider collecting and remitting to the Municipality. Remittance is made by the provider to the municipality on a quarterly bi-annual or annual basis.

The policy basis for the franchise fee is the provider's ongoing use of the right of way and compensation to the municipality to offset any costs related to the use of the right of way or the municipality's cost of regulating the provider's use of the right of way. Some, typically rural, communities consider the cost of the use of the right of way to be de minimis or don't wish to apply what they consider to be an additional tax on to their citizens and choose to collect no franchise fee.

Most but not all Maine municipalities negotiate a franchise fee between 1% and 5% with the majority choosing a percentage other than 5%. Historically, most state issued franchises set the franchise fee at the maximum which will result in a fee increase for most Maine consumers.

Franchise Fee: 621 Order The recent 621 Order issued by the FCC found that the 5% cap on franchise fees applies not only to monetary demands but also to in-kind demands like free and discounted cable service to public buildings, Institutional Networks (I-Nets), and PEG operating costs (with the exception of PEG capital costs, which are exempted by statute). The FCC found that in-kind contributions should be valued at their fair market value, and that cable operators may count such contributions against the 5% cap on a prospective basis only.

Since virtually all franchises have some in-kind demands described in the 621 Order the implementation of the Order will necessarily mean that communities with the maximum franchise fee will see a reduction in monetary receipts or an end to in-kind services.

While under appeal in the Sixth Circuit, petitioners filed a motion to stay the Order pending appeal but the court denied the request, finding that "in essence the franchising authorities have asked [the court] to enjoin what appears to be a correct interpretation of a federal statute." The FCC rules therefore remain in effect.

Franchise Fee: Who collects? Currently local municipalities collect the franchise fee and typically place the proceeds into their general fund. In a state issued franchise policy makers will have to designate an agency to handle the collection of franchise fee remittances.

Franchise Fee: Revenue sharing with local municipalities. Currently Maine Municipalities receive more than $10,000,000 a year in franchise fee remittances. If the state decides to share that revenue with municipalities how will it be shared and what will the share be? Will the Franchise Fee revenue be shared annually, quarterly or monthly? Will the amount of revenue sharing be determined through the state budget process or will it be set in statute and will the extant of revenue sharing be determined by each legislature? What formula will determine the pro rata share, will it be based on a share of the state's population or a share of the state's cable TV customer base?

Franchise related costs: Certain costs in addition to the franchise fee are also collected from customers and remitted. These include, among other items, capital costs for PEG including the cost of infrastructure to connect PEG assets to the network and certain costs of operating the channel(s). Currently these priorities are determined and paid for locally through negotiation between the provider and community. **For example:** A community may decide they wish to invest $50,000 in capitol and related items over the term of the franchise. That cost will be amortized on a per customer basis over the term of the franchise and adjusted annually to account for fluctuations in the customer count.

These additional costs can vary significantly by community as larger communities may wish to have the capacity to originate PEG programing from multiple locations. Multiple municipal buildings, public safety, school facilities and even community centers are not uncommon.

Some statewide franchises set aside a percentage of the franchise fee for PEG if that were to be the Maine approach how would that money be distributed and what would it be used for in the majority of communities who are not interested in PEG?

How will the state determine whether and how much PEG infrastructure a town will receive? How will the needs and priority of a community be determined and how will the costs be shared? Will consumers in a small town who do not wish to pay for their own PEG infrastructure be required to pay for the benefits another community receives or conversely will consumers in an urban area pay for PEG received in towns who haven't previously seen value in PEG?

Role of Ascertainment in determining PEG, line extensions and other demands: Federal law requires that a community's cable related needs be based on ascertainment. Ascertainment is the means through which the community's cable related needs and willingness to pay for those needs is determined. PEG and network extensions are frequently the primary issue considered while conducting ascertainment. This can be done through survey's, hearings, etc. and must be considered as part of a franchise agreement. Community need and willingness to pay varies widely from community to community. **How will ascertainment be conducted, and priorities determined on a statewide basis, is this a bureaucratic function?**

Public**, E**ducational and **G**overnment **Access (Community TV): To PEG or not to PEG**? Whether or not a community chooses to use the proceeds from the franchise fee to fund PEG is currently a local community decision. The community balances the benefits of PEG with the costs and what other priority uses for the franchise fee the community may have.

If the franchise were state issued the state would have to determine which towns receive channels and how many channels they receive and where they are viewed.

PEG consortia in smaller communities: In some states smaller communities have set up consortiums which operate PEG systems. Will those consortia negotiate with the state to gain access to channels? What is the formula for membership and governance, how does the state allocate the funds to set-up and operate these consortia? How many channels does each consortium gets? How is channel placement determined and prioritized relative to other PEG operations in the state? Do consortia contract with the state to receive funding or is funding received from the local community?

PEG network capital investment: In addition to the use of channel space on provider networks, substantial capital investment is required to operate and maintain PEG systems. The purchase, upgrade, replacement and maintenance of equipment is the responsibility of local communities and their PEG operators. In addition to cameras, microphones, mixers and recording equipment, electronics designed to upload and transmit signals on the provider network is necessary. If the franchise fee and other revenue currently collected by the municipalities is collected by the state how will budgeting and purchasing decisions be made? Will all consumers pay a pro rata share of the entire state's PEG Capital costs regardless whether or not they receive PEG. Costs associated with these investments can amount to additional dollars per customer per month.

Over the top (OTT) providers and PEG: If OTT providers are subject to a Statewide Franchise Fee, as some proponents of a state issued franchise have suggested, will they be subject to the PEG obligations? How will PEG channels be carried on OTT services? If they are not subject to the PEG provisions how are parity issues addressed with providers who are required to get a franchise?

Origination Locations: Studios, etc. PEG programing originates in a variety of locations within the community it serves. These facilities may be a dedicated studio, auditorium, or other public location. All such origination locations must be outfitted with the proper equipment and connectivity to the network to accommodate live or taped video production. The cost of outfitting and maintaining these facilities is born by the local community. If the franchise is issued by the state who will decide where and how many locations, if any, a community will receive? A major cost associated with origination locations is the fiber connection to the provider's network which cannot be used elsewhere or shared. How will this cost be shared if franchise fees are collected at the state level? Given the small population of many Maine communities how will decisions about who gets originations locations and cost sharing be made?

Personnel: If the franchise fee and other related revenue is collected by the state and part of a revenue sharing agreement how will decisions about employees be made? As some PEG operations are currently town employees will they continue to be town employees? While some PEG operations are town departments many are non-profits how will the state determine which non-profit serves which community and will they be contracted to be a PEG operator or be competitively bid?

Management of the Right of Way: Providers secure a franchise as an authorization to use the right of way. If that authority is now issued by the state how will other permitting, including construction permitting be handled? ME RSA currently gives municipalities or MEDOT authority to issue ROW permits. Given this dual authority will a state issuing authority to use the municipal ROW impact the current permitting system?

Build Out Requirements and Cost Sharing Formulas: Local franchises frequently include certain local priorities such as provider buildout requirements, formulas for customer or municipality contribution when buildout requirements are not met or the terms of municipal contributions to complete network construction. These terms reflect the unique objectives and needs of the community. How will those needs be accommodated and paid for in a state issued franchise system?

Customer Service Offices: Certain franchises require that a customer service center be in or near the municipality. In a statewide model how will those priorities be determined? Will towns be able to advocate to the keep or expand these facilities?

Customer Service Terms in Excess of FCC regulations: Should a municipality determine that consumer protections in addition to those proscribed by the FCC are desirable, the additional cost is born by the local customers. With a state issued franchise these standards will be determined statewide, how will the additional costs be apportioned?

Institutional Networks: Through the franchise, some communities have negotiated the construction and maintenance of provider owned fiber networks connecting municipal facilities for the purpose of providing communications connectivity between public facilities. The cost of construction and maintenance of these facilities is borne by the customers through the franchise. Under the recent FCC 621 order the value of these networks must now be included in the 5% cap. How will the cost of these private networks be socialized under a statewide franchise regime and will the cost of maintenance and their value be shifted from the franchise fee to the communities who have prioritized their construction?

Courtesy Service: Franchise terms may include courtesy or discounted service to certain locations within a municipality. Examples of common locations receiving such service include town hall, public safety facilities, public works, and sanitation facilities as well as schools, libraries, and PEG facilities. The recent 621 Order by the Federal Communications Commissions has determined that the fair value of these services must be included in the calculation of the franchise fee maximum. Who will decide which towns receive courtesy service, how many accounts they receive and where those services are delivered under a state franchise regime?

With the franchise fee collected by the state and the maximum amount limited to 5%, minus other items such the value of courtesy services will communities who utilize large number of courtesy service accounts receive a disproportionate benefit over small towns who don't desire courtesy accounts?

Existing franchises: Currently approximately 300 local franchises are in effect in Maine. Will providers or municipalities be able to opt into or out of a new state issued franchise? Can existing franchises be renewed?

Term of franchise: Currently franchise terms vary from 5-15. It should not be presumed that either the community or the provider prefers a particular term. Like many other elements of a franchise the term is negotiated. Terms such as network extensions, franchise fee, capital support, customer service and PEG infrastructure all contribute to the analysis of the preferred term by both parties.