
Competitive Franchising

**City of Eagan, MN
June 2, 2015**

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Federal Cable Act

- One of the stated purposes of the Cable Act is to:

"promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."

See 47 U.S.C. § 521 (6) – emphasis added

Federal Cable Act

- A franchising authority may award one or more franchises within its jurisdiction:
"except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise."

See 47 U.S.C. § 541 (a)(1) - emphasis added
- codified in the Cable Act as Section 621

Existing Comcast Franchise

- **Level Playing Field** - §2.2(d)
- Whatever agreement the City grants to CenturyLink -- Comcast has the right to the same agreement.
 - Should any other multichannel video programming distributor (“MVPD”) over which the City has regulatory jurisdiction provide Cable Services in the current cable service area, the City shall not grant more favorable terms, taken as a whole, to such MVPD than are granted to the Grantee.

Minnesota Statutes - Process

- Minn. Stat. § 238.081 Subd. 1 provides that the City must:
 - Publish once each week for two successive weeks in a newspaper of general circulation
 - a notice of intent to consider an application for a franchise.
 - Send notice to potential candidates
 - CenturyLink - Comcast
 - Provide an official application form
 - Follow the state statutory procedure

Franchise Application Timeline

- June 2, 2015 City considers publication of Notice of Intent to Franchise
- June 12 and 19, 2015 City publishes Notice of Intent to Franchise
 - once each week for 2 successive weeks in local newspaper
 - Notice also mailed directly to CenturyLink and Comcast

Franchise Application Timeline

- July 3, 2015 Closing date for submission of applications
 - must be at least 20 days from date of first publication of Notice
- June 16, 2015 City calls public hearing
 - City publishes Notice of Public Hearing
 - 10 to 14 days before conduct of hearing
- July 21, 2015 City conducts Public Hearing regarding Franchise Applications
 - Council considers resolution regarding qualifications.

Franchise Application Timeline

- July 2015 City Consideration of Franchise Application
- June - July 2015 Preparation of report by Moss & Barnett regarding qualifications of applicants
- June - July negotiations regarding franchise terms
 - with prospective applicants - CenturyLink
 - Existing franchise with Comcast will serve as the "base document."

Franchise Application Timeline

- August 2015 City Council considers award of Franchise to successful applicant(s)
 - must be at least 7 days after Public Hearing
 - no time limit on when action must be taken
- August, 2015 successful applicant(s) accepts franchise document
- New Grantee submits required closing documentation
 - typically within 30 days of grant of franchise

Minnesota Statutes - Build Out

- Minn. Stat. § 238.08 Subd. 1(b):

No municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to:

- (1) the area served;*
- (2) public, educational, or governmental access requirements; or*
- (3) franchise fees.*

Minnesota Statutes - Build Out

- Minn. Stat. § 238.084 Subd. 1(m)
- Initial franchises must include a schedule showing:
 - *that construction throughout the authorized franchise area must be substantially completed within five years of the granting of the franchise*
 - This requirement can be waived by the franchising authority only upon occurrence of unforeseen events or acts of God.

Federal Law – Build Out

- 12/20/06 FCC adopted
 - *Report and Order and Further Notice of Proposed Rulemaking implementing Section 621(a)(1) of the Communications Act of 1934.*
- **621 Order**
- FCC concluded
 - *“that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates.”*

FCC Identified Build Out Mandates

Unreasonable

- Absent other factors, require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone.
- Require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service.
- Absent other factors, require more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator; or requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve.
- Require the new entrant to build out and provide service to buildings or developments to which the new entrant cannot obtain access on reasonable terms.
- Require new entrant to build out to certain areas or customers that the entrant cannot reach using standard technical solutions.
- Require the new entrant to build out and provide service to areas where it cannot obtain reasonable access to and use of the public rights of way.

Reasonable

- To consider the new entrant's market penetration.
- To consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.

State v Fed – Build out

- Minnesota law may not be consistent with the FCC's interpretation in 621 Order.
- Inconsistency between the federal and state requirements raises the question of federal preemption.

FCC 621 Order

- Applies to actions or inactions at the local level where a state has not specifically circumscribed the LFAs authority and only addresses decisions made by municipal-level franchising authorities.
- Does not address any aspect of a LFAs decision-making to the extent that such aspect is specifically addressed by state law.
- The only items preempted by the *621 Order* are local laws, regulations, practices, and requirements that conflict with the guidance adopted in the *621 Order* and that are not specifically authorized by state law.

FCC Order on Reconsideration

- Adopted on Jan 21, 2015
- The FCC reiterated its position that its findings in the 621 Order were limited to the local level
- Question:
 - Are Minnesota statutory requirements preempted by Federal law and the FCC 621 Order?
- Award of cable franchise in Minnesota
 - Quasi-judicial
 - Weigh evidence before issuing decision

Questions

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