



Legislation Details (With Text)

File #:	12-1130	Version:	1	Name:	8/20/12 Reso to Deny Comcast Franchise Application
Type:	Resolution	Status:			Passed
File created:	8/17/2012	In control:			City Council
On agenda:	8/20/2012	Final action:			8/20/2012
Enactment date:	8/20/2012	Enactment #:			R-12-395
Title:	Resolution to Deny Application of Comcast of the South, Inc., for a Uniform Video Services Local Franchise and to Establish Video Service or Cable Franchise Fees and PEG Fees				
Sponsors:	Marcia Higgins, Stephen Kunselman				
Indexes:					
Code sections:					
Attachments:	1. Comcast UVSLFA Application.pdf, 2. 7-17-12 Letter from Comcast.pdf, 3. 8-14-12 Resolution-AA Cable Commission.pdf				

Date	Ver.	Action By	Action	Result
8/20/2012	1	City Council	Approved	Pass

Resolution to Deny Application of Comcast of the South, Inc., for a Uniform Video Services Local Franchise and to Establish Video Service or Cable Franchise Fees and PEG Fees

The City Clerk's Office received an application with a July 17 cover letter from Comcast of the South, Inc. ("Comcast"), for a franchise to allow it to provide cable service within the city of Ann Arbor, which Comcast and the City agreed should be deemed submitted on July 23, 2012 notwithstanding other dates appearing on the document and associated cover letter. Comcast purported to submit that application pursuant to the Michigan Uniform Video Services Local Franchise Act, MCL 484.3301 *et seq* (the "UVSLFA" or the "Act"). Copies of the Application and cover letter are attached.

On July 10, 2012, the United States District Court for the Eastern District of Michigan issued a decision in a lawsuit between the City of Detroit and Comcast, and ruled that the UVSLFA permits a locality to either grant or deny an application for renewal, provided that it does so within 30 days of the date a complete application is submitted. The City Council therefore should act at its August 20, 2012, meeting.

It is recommended that the City deny the application:

First, the application is premature. Under the UVSLFA, unless a local franchise is terminated in accordance with the Act, it continues for its full term. Neither Comcast nor the City ever terminated the existing franchise agreement between Comcast and the City, which was approved in August of 2002. The franchise was for fifteen years, although the franchise also provided that it would terminate sooner under certain conditions, for example, if (a) the City conducted a mid-term technical review, the City required Comcast to undertake an upgrade as a result of that review, and Comcast refused to upgrade. The City did not conduct the mid-term technical review, require the upgrade, or otherwise take any step that would shorten the term. Therefore, the term of the franchise runs through 2017. Under the UVSLFA, Comcast is not permitted to apply for a state franchise at this time.

Second, Comcast has taken the position that upon approval by the City of its application, it will have no further obligation to permit the City to use the institutional network that the City uses for vital data connections that are necessary for public health and safety purposes, as well as to provide services to the public. Under the 2002 franchise, the City paid for the institutional network as provided in the franchise, and Comcast promised, among other things, that the City would have an indefeasible right to use that network that survived the franchise itself and continued for so long as Comcast provides cable services in the city. These obligations are fully enforceable as a matter of contract, and are also fully enforceable under the federal Cable Act, as interpreted by federal district courts in Michigan. Although Comcast has expressed a willingness to address the institutional network issues through negotiations with the City, they are not addressed by the application. To the extent that Comcast purports to use the application process to evade this enforceable obligation, and to the extent that Comcast's application has the effect of avoiding this obligation, its application must be denied.

Third, the application does not meet the current or future needs and interests of the community and, if approved, would result in a reduction in facilities and services available to the community. It also would call into question certain obligations of Comcast with respect to the use of the rights-of-way that are embodied in the City Code. Hence, approval of the submitted form of franchise, which grants rights to use public rights-of-way, is not in the interest of the community absent further conditions.

More specifically, the application Comcast submitted consists of the franchise agreement in the form developed by the Michigan Public Service Commission ("UVSLFA form"), already executed by Comcast.

The franchise submitted by Comcast does not include provisions that are included in the current Comcast franchise and cable ordinance and are of interest to the community, and does not otherwise address these issues. These include provisions relating to the institutional network, provisions requiring the operator to provide the facilities and channel capacity necessary to carry PEG programming from various points in the community to the operator's headend, for distribution to customers, provisions for free service to certain public buildings, and provisions that ensure PEG access channels are available to all subscribers. The franchise also contains federal Cable Act required provisions preventing discrimination against customers based on income and explicit promises to comply with the City's cable ordinance, which sets out various conditions on use of public streets important to public health and safety and consumer protection.

Fourth, prior to submission of its application, Comcast had activated the formal renewal provisions of the federal Cable Act, 47 U.S.C. Sec. 546(a)-(g), which is designed to ensure that an operator submits a renewal proposal reasonable to meet the future, cable-related needs and interests of the community. Under the federal Cable Act, the only other way in which a franchise may be renewed is through the informal process set out at 47 U.S.C. Section 546(h). Under the informal process, a franchise may only be renewed after providing the public adequate notice, and opportunity to comment on the proposed franchise. As Comcast has to this point indicated it will agree only to the UVSLFA franchise terms, its application is not consistent with either the formal process, as it does not purport to reasonably meet local needs. It is also not consistent with the informal process under the federal Cable Act: because the terms of the franchise are fixed as far as Comcast is concerned, the public will have no adequate opportunity to comment on the proposed franchise; any comments would necessarily be meaningless. The City has received comments from the Cable Commission discussed below that would require modification to the proposed franchise.

These four reasons considered individually or collectively justify denial of the application.

The application also provides that Comcast will pay a fee to support PEG (public, education and government access channels) equal to 2% of gross revenues. This is the percentage that Comcast pays now to support PEG use of the system.

In accordance with the UVSLFA procedure, the application leaves a blank for the franchise fee (part of the compensation Comcast must pay to the City for use of City streets) to be filled in by the City. The amount the City should establish as the amount to insert in this and any other franchise agreement is 5%.

At a meeting held on August 14, 2012, the Ann Arbor Cable Commission passed a resolution recommending that the City Council proceed in a manner that maintains the status and financial support for the PEG Channels within the Comcast system. The Cable Commission reserved its right to make further recommendations. A copy of the resolution is attached.

A denial of Comcast's application will allow the City and Comcast to negotiate the terms of a franchise in advance of the actual expiration date of Comcast's current franchise in 2017, although we cannot predict how Comcast will choose to proceed.

Negotiated terms should include but should not necessarily be limited to requirements that (1) preserve the obligations under the existing franchise, and under the cable ordinance as far as possible, as indicated above; (2) ensure PEG channels are included in any basic cable subscription package and, if technically possible, kept at the low end of channel numbers; (3) provide for Comcast to bear the cost of converting Community Television Network's feed for PEG channels to whatever format and equipment Comcast chooses to use to broadcast those channels, including the equipment costs for the transmission; (5) protect consumers and ensure the company is complying with applicable customer service requirements, including but not limited to reports on customer service outages; and (6) resolve any disputes about the City's continued right to use and interest in the institutional network. Comcast and the City may agree to other provisions and terms that the City determines are in the interest of the public. It is recommended that City Council authorize the City Administrator and City Attorney to proceed with such negotiations, subject to approval of the negotiated franchise agreement by City Council.

It is also recommended that City Council authorize the City Administrator and City Attorney to take whatever steps are necessary to enforce continuation in effect of the existing franchise agreement and its terms.

Finally, because the decision in the Detroit case remains subject to appeal, adding some uncertainty as the precise obligations and rights of local franchising authorities and cable operators under the UVSLFA, staff recommends that, should any court find that Comcast's application must be deemed approved without condition, the City should affirm that the proper franchise fee is 5% of gross revenues, that the proper PEG fee is 2% of gross revenues, that the proper number of end-to-end PEG channels actually in use and that must continue to be provided is four (4) and that any City action with respect to the franchise is not intended to limit any rights the City may have under any provision of the existing franchise, including the provisions related to the institutional network.

Prepared by: Lisa Wondrash, Communications Unit Manager
Abigail Elias, Chief Assistant City Attorney

Approved by: Steven D. Powers, City Administrator

Whereas, The Michigan Uniform Video Services Local Franchise Act, Public Act 480 of 2006 (the "UVSLFA"), requires video service providers to obtain a franchise from a municipality by means of a Uniform Video Service Local Franchise Agreement ("Uniform Franchise");

Whereas, The Michigan Public Service Commission ("MPSC") on January 30, 2007 issued an order ("Order") that provided a Uniform Franchise form;

Whereas, The UVSLFA provides a local unit of government, as franchising authority, fifteen (15) business days from the date an application for a Uniform Franchise is filed with it to respond as to the completeness of the Uniform Franchise;

Whereas, The UVSLFA provides a local unit of government, as franchising authority, thirty (30) business days from the submission date of the complete application for a Uniform Franchise in which to act to approve, deny or otherwise act on the proposed Uniform Franchise;

Whereas, Comcast Cablevision of the South, Inc. ("Comcast"), filed an application for a Uniform Franchise with the City Clerk's office using the Uniform Franchise form of application and proposed franchise which the City and Comcast agreed should be deemed submitted on July 23, 2012, notwithstanding any other date appearing on the application or cover letter;

Whereas, As recently interpreted by the United States District Court for the Eastern District of Michigan, the City has until August 22, 2012, to either grant or deny the application submitted;

Whereas, For reasons set forth in the attached Memorandum, which is incorporated as if fully set forth herein, the City finds that it is neither timely or appropriate to approve the application;

Whereas, By resolution adopted on August 14, 2012, the Cable Commission has recommended that City Council act on the application in a manner that maintains the status and financial support for the PEG channels;

Whereas, Denial of Comcast's application serves the objective of the Cable Commission;

Whereas, On January 1, 2007, the effective date of the UVSLFA, Comcast was the incumbent video provider with the largest number of subscribers in the city of Ann Arbor, and that under its existing franchise agreement with the City, entered into effective August 26, 2002, Comcast was and is paying the City a franchise fee of five percent (5%) of gross revenues and fees in support for PEG services of two percent (2%) of gross revenues as required by the existing franchise agreement;

Whereas, There were four (4) end-to-end public, educational and governmental access channels in actual use on Comcast's system in the city of Ann Arbor on January 1, 2007, the effective date of the UVSLFA;

Whereas, A fee of five percent (5%) of gross revenues from video service providers is the fee that should be included, and is hereby established as the annual video service provider franchise fee under any uniform franchise application; and

Whereas, In addition to the five percent (5%) franchise fee, a video service provider shall pay to the City an annual fee of two percent (2%) of gross revenues as support for the cost of PEG channels;

RESOLVED, That the July 23, 2012, application of Comcast for a UVSLFA franchise agreement to allow it to provide cable service within the city of Ann Arbor be and is hereby denied for the reasons set forth in the attached Memorandum, considered individually and collectively, including the failure to include appropriate franchise conditions, as described in the Memorandum.

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RESOLVED, That the City Administrator and City Attorney be and are authorized to undertake such negotiations at such time as is appropriate, with the negotiated franchise agreement subject to the review and approval of the City Council;

RESOLVED, That the City Administrator and City Attorney be and are authorized to take whatever steps are necessary to enforce continuation in effect of the existing franchise agreement and its terms;

RESOLVED, That the City Administrator and City Attorney be and are hereby authorized and directed to take all actions otherwise necessary to implement the provisions of this resolution;

RESOLVED, That should it be determined that, notwithstanding the City's resolution, Comcast's application is deemed approved as a matter of law, the City affirms and establishes that the proper franchise fee must be 5% of gross revenues, that the proper PEG fee is 2% of gross revenues, and that the proper number of end-to-end PEG channels actually in use and that must continue to be provided is four (4); and

RESOLVED, That no approvals, deemed approvals under the UVSLFA or negotiations with Comcast relative to terms in a franchise agreement shall be construed or understood to be a waiver by the City of its police powers, rights it may possess under the existing franchise, the City's cable ordinance, the UVSLFA, Michigan law, the Michigan Constitution, federal law, or court decisions regarding the UVSLFA; or the City's right to challenge or modify a Uniform Franchise to the extent the UVSLFA is already overturned in part by the courts and if the UVSLFA in whole or in part is amended by the legislature or is otherwise modified or overturned by the courts.

Sponsored by: Councilmembers Higgins and Kunselman