

TEN STEPS TO SUCCESSFUL

FRANCHISE RENEWAL

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Introduction

There are currently over 10,000 franchising authorities in the United States. Each has granted a cable television operator the authority to provide cable television service within its jurisdiction. This authority may take the form of a resolution, license, permit, agreement or a lengthy franchise document in excess of 200 pages. No matter the form, the authorization will eventually expire, requiring the operator to again seek authorization to provide service in the community.

Typically, franchises across the United States were granted for 15 year terms. The vast majority of franchises were initially granted in the late '70s and early '80s. Many of these franchises (unless superseded by state franchising) are now being renewed for the 2nd, 3rd or even fourth time. Prior to franchise expiration, however, cable operators and franchising authorities are expected to consider renewal using the procedures specified in the Cable Communications Policy Act of 1984, as amended by the Cable Consumer Protection and Competition Act of 1992 (hereinafter collectively referred to as the "Cable Act").

Section 626 of the Cable Act (47 U.S.C. 546) identifies specific procedures to be followed in order to renew cable television franchises. The Cable Act contemplates both a "formal" and "informal" procedure to accomplish renewal. Typically, the process begins approximately three years prior to franchise expiration, with the cable operator sending a letter to the franchising authority requesting renewal.

Most commentary on franchise renewal deals with procedural issues outlined under the "formal" renewal process of the Cable Act. A handful of cases have helped to interpret some of the more confusing aspects of the formal renewal process and the process was slightly amended in 1992 to clarify certain ambiguities. In practice, however, the vast majority of cable television franchises are renewed "informally." While cable operators are wise to reserve their rights to the formal protections identified in Section 626 of the Cable Act, most cable operators and franchising authorities prefer the flexibility of the informal renewal process.

Unless a franchising authority has had ongoing disputes with its cable operator or otherwise has reason to anticipate a difficult franchise renewal process, the informal renewal process should be far preferable. The informal process affords the franchising authority significant flexibility and allows for a greater exchange of information with the cable operator, ultimately resulting in greatly improved franchise documents.

This paper focuses on the "informal" renewal process. Reference is made to significant court cases which help to clarify certain formal procedural issues; however, the steps identified are intended to assist franchising authorities (cities) in handling franchise renewal using the more flexible informal process to arrive at franchise documentation which best serves the needs and interests of the city.

Step # 1 Initial response to operator's renewal request

The city's goal:

Conduct renewal process “informally” while reserving the right to reenter the formal process if the city and operator cannot agree upon franchise documents.

Why is this goal important?

- Allows city to conduct renewal process without “formal” timing requirements.
- Affords greater flexibility to negotiate franchise provisions.
- Places city in control of the process and the documents to be considered.
- Satisfies statutory requirement.

What the city must do to accomplish this goal:

The operator's written request for renewal will be sent between 36 and 30 months prior to the expiration of its franchise. The request will trigger the formal renewal process but will likely encourage informal negotiations. 47 U.S.C. 546 (a)(1) requires that the city “commence a needs assessment proceeding” not later than six (6) months after the date such notice is submitted. Upon receipt of this letter, the city should respond by agreeing to proceed informally and requesting that the operator agree in writing to place the formal renewal process “on hold” until the parties determine whether renewal can be achieved through informal negotiations. This written agreement is often referred to as a “standstill agreement.” The standstill agreement should clarify that the city's obligation to “commence” a needs assessment proceeding is also on hold or is satisfied by virtue of the agreement.

What to expect from the cable operator:

Most cable operators prefer the informal renewal process and will execute a standstill agreement so long as each party has the right to reenter the formal process at any time. Typically, the operator will request information on the timing and details of the informal process to be undertaken by the city. The city should endeavor to keep the operator informed of the informal renewal procedure as it moves toward the negotiation stage. However, recognize that in the informal process neither party has any statutory requirements to respond in a prescribed time period or to negotiate at all. Therefore, if both sides are not willing to commit to an informal process it may result in wasted time and money.

Key legal considerations:

Triad CATV, Inc. v. City of Hastings, No. L89-30090, slip op. (W.D. Mich. December 21, 1989), aff'd without published opinion, 916 F.2d 713 (6th Cir. 1990). A cable operator is not entitled to “formal” renewal protections unless the city receives written notice between 36 and 30 months prior to franchise expiration. Triad sent notice 12 days late and, thus, waived “formal” protections.

Step #2 Development of informal process

The city's goal:

Place the city in control of informal renewal proceedings and all document preparation.

Why is this goal important?

- Ensures renewal process reflects city's timetable.
 - City staff can anticipate appropriate city meetings for consideration of key issues.
 - Process can be arranged to avoid difficult times of the year, i.e., holidays, summer vacation season, etc.
- The party which drafts the key documents negotiates from a position of strength.
- It is always preferable to negotiate from your own documents.
- Ensures sufficient time to consider responses from operator.

What the city must do to accomplish this goal:

Shortly after a standstill agreement is signed, the city should draft an outline of the steps to be undertaken in its informal renewal process. The informal renewal process should include information gathering/needs assessment, document preparation, analysis of the operator's response and negotiation. Particular emphasis should be placed on the information gathering/needs assessment stage, during which the city should solicit information from all interested parties within the city. The informal renewal process should also outline a general time frame to assist the parties in moving forward in the process.

What to expect from the cable operator:

Most cable operators prefer to handle franchise renewal as quickly and painlessly as possible. Some operators will suggest that the old franchise documents should simply be extended for an additional 3-5 years – often they may believe that state franchising will occur during that time period and they do not want to commit to a longer term. Other operators may suggest a face-to-face meeting between the company's general manager and the city's mayor or city manager. The operator may appear to be surprised to find the city has developed a detailed informal renewal process. Remember, however, that the operator needs the city's authorization to continue providing service in the community. In the end, operators will participate with an informal process developed by the city. Although, if an operator chooses to delay responses, meetings, etc., the city has little or no leverage to force a more timely schedule. The only recourse available to the city is to pursue renewal via the "formal" process.

Key legal considerations:

Eastern Telecom Corp. v. Borough of East Conemaugh, 872 F.2d 30 (3rd Cir. 1989), cert denied, 493 U.S. 811 (1989). In the formal renewal process, franchising authority must provide operator "written" notice of filing deadline for renewal proposal, even though not required by Cable Act.

Step #3 Identify city's cable-related needs

The city's goal:

Develop a list of cable-related needs and interests of the city's residents, educational institutions, key community groups and governmental agencies.

Why is this goal important?

- Provides foundation for franchise documents and negotiations.
- Can be used to rebut operator's argument that no demand exists for certain services.
- Ensures that significant issues will not arise during the "eleventh hour" of the process because an opportunity did not exist for public participation.

What the city must do to accomplish this goal:

The city may use a variety of methods to gather information. Often, cities will conduct a subscriber/non-subscriber survey asking for responses on key issues, such as signal quality, customer service, public access channels, equipment and facilities, and related matters. Cities may also employ the services of a technical consultant to review the quality of the existing cable system and make recommendations for upgrades/rebuilds and the need for institutional network services. The city should conduct public hearings to solicit information from members of the general public and may use focus groups comprised of key city leaders, local programming producers or educational leaders to identify needs in specific areas. Finally, the city may solicit information from the cable operator regarding existing policies and procedures and the technical capabilities of the cable system.

Be careful not to spend time and effort on issues over which the city has limited control such as rates and programming preferences. Also, pay close attention to the distinction between "cable services" over which the city has control and "telecommunications" over which the city likely has far less control.

What to expect from the cable operator:

Some cable operators may wish to participate in various information gathering steps. However, most choose to simply observe public hearings and request copies of reports on any surveys conducted. Operators are generally cooperative, completing information requests so long as sufficient time is provided.

The key is to gather the information simultaneously so that when a needs assessment report is prepared certain data is not considered irrelevant given the time period when it was collected.

Key legal considerations:

Time Warner Entertainment Company, L.P. v. Briggs, et al., C.A. No. 92-401 17-6N (D.C. Mass., January 14, 1993). Franchising authority cannot require operator to accept franchise which incorporates provisions which conflict with the Cable Act.

47 U.S.C. § 541(b)(D) "... a franchising authority may not require a cable operator to provide any telecommunications service or facilities other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise."

Step #4 Identify deficiencies in operator's past performance

The city's goal:

Document operator's performance deficiencies for use (a) if informal process is unsuccessful and (b) to improve deficiencies in existing franchise documents.

Why is this goal important?

- Protects the city's right to identify operator's past deficiencies as a basis for non-renewal should informal negotiations break down and the parties choose to proceed under the formal renewal process.
- Deficiencies in a cable operator's performance often result from franchise provisions which lack specificity or are otherwise ambiguous.
 - New franchise documents should correct these mistakes.
- May result in financial benefit for city prior to franchise renewal, i.e., discovery of franchise fee underpayments.

What the city must do to accomplish this goal:

The city should carefully review the existing franchise documents and outline all requirements with which the operator must comply. The city should verify whether the operator has complied with these requirements, using technical and/or financial expertise as required. One area typically scrutinized is the operator's payment of franchise fees. Many cities conduct franchise fee audits to ensure the payments have been correctly made and often discover underpayments going back several years, resulting in a financial benefit to the city. These issues, if properly documented, can also be used to strengthen the city's negotiation position during franchise renewal.

What to expect from the cable operator:

In order to effectively deal with an operator's deficient past performance, the city must issue a written notice of franchise violations and provide the operator an opportunity to cure the deficiency. Operators will argue that if written notice was not provided, the city waived its right to raise objections.

Key legal considerations:

Rolla Cable Systems, Inc. v. City of Rolla, 745 F. Supp. 574 (E.D. Mo. 1990); Rolla Cable Systems, Inc. v. City of Rolla, 761 F. Supp. 1398 (E.D. Mo. 1991). Cable operator may be denied renewal if past performance is inadequate even if operator has capability to provide quality service.

Step #5 Preparation of needs assessment report

The city's goal:

Preparation of a concise document which clearly outlines the cable-related needs and interests of the community as well as any deficiencies in operator's past performance.

Why is this goal important?

- The process of preparing the report helps the city to focus on key issues to be addressed in document preparation and negotiations.
- Provides a roadmap for the city's negotiation team on key issues.
- Provides solid foundation on which to base negotiations and rebut claims made by cable operator.

What the city must do to accomplish this goal:

The city should assimilate all information obtained during the information gathering/needs assessment stage. This includes all survey information, public hearing and focus group information, responses from key city leaders, local programming producers, educational leaders, and any responses received from the cable operator. If outside technical or financial consultants are involved, their recommendations should be incorporated into the report. The report should be concise in order to be of maximum benefit for document preparation and negotiations, but should be supported by ample documentation and exhibits.

What to expect from the cable operator:

The cable operator will likely challenge many of the conclusions made in the needs assessment report. In some cases, the operator will conduct separate surveys or evaluations of the system to rebut the city's conclusions. If properly prepared, the city's needs assessment report will nevertheless serve as a valuable tool to ensure the legitimate needs and interests of the city are addressed in the new franchise documents.

Key legal considerations:

Section 626 of the Cable Act (47 U.S.C. 546 (d)) provides that an operator's request for renewal can be denied during formal renewal process based only on the following criteria:

- Whether operator has substantially complied with the material terms of the existing franchise and with applicable law.*
- The quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix of quality of cable services or other service provided over the system, has been reasonable in light of community needs.
- The operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

* Must provide operator written notice of noncompliance and opportunity to cure.

Step #6 Draft model franchise documents

The city's goal:

Adopt either a separate regulatory ordinance and franchise agreement or single franchise which include provisions addressing all of the needs and interests identified in the needs assessment report.

Why is this goal important?

- A regulatory ordinance can be incorporated into the city's code and thereafter unilaterally amended as necessary.
- Franchise agreement can be executed based on a procedure identified within the regulatory ordinance.
 - If more than one operator seeks a franchise from the city, the franchise agreement can address issues which may be unique to that operator.
- A single, all inclusive, franchise may be appropriate based on state and local law.

What the city must do to accomplish this goal:

In preparing a regulatory ordinance, the city should incorporate all rights and regulatory authority allowed under the Cable Act and applicable FCC regulations. The regulatory ordinance should include provisions regarding customer service, technical standards, public educational and governmental access channels, franchise fee requirements, transfer, renewal, indemnification and insurance and related provisions. The franchise agreement should include provisions authorizing operations within the city, line extension criteria, public access equipment and facilities, institutional network provisions, performance bond and/or security fund provisions, franchise term, and other issues unique to the relationship between the operator and the city.

What to expect from the cable operator:

It is not uncommon for a cable operator to provide the city with its own draft franchise document for the city's review and consideration. The cable operator will prefer to negotiate from their own document since it is far easier for the operator to work from language which generally favors its position and which may maintain consistency with franchises in a given region. The city should avoid working from the cable operator's franchise document. The city will incur far greater expense attempting to negotiate additions/deletions to the operator's proposed franchise than would be expended in drafting its own model document.

Key legal considerations:

Birmingham Cable Communications, Inc. v. City of Birmingham, CV-87-L-0755-S (N.D. Ala., May 5, 1989). Franchising authority cannot adopt an ordinance prior to completion of the ascertainment proceedings because it is in direct conflict with Cable Act formal renewal requirements.

Step #7

Analysis of operator's response to model documents

The city's goal:

Develop a list of open issues to be negotiated with the cable operator and identify strengths and weaknesses of city's position.

Why is this goal important?

- Some of the changes proposed by the operator will be acceptable to the city because they deal with routine, practical issues not affecting the substance of the documents.
- The city's negotiation team will need a list of topics to focus on as opposed to negotiating the franchise line by line.
- Preparation for negotiations is essential to ensure the city's negotiation team is coordinated and knowledgeable of the pros and cons of each issue.

What the city must do to accomplish this goal:

When presenting the model franchise documents to the cable operator, the city should specifically request that the operator respond using the legislative format. That is, the operator should strike over language it wishes to delete and underscore all new language proposed to be added to the documents. The city should also require that the operator provide written rationale for each change made to the documents to assist the city in understanding the operator's response. Upon review of the operator's response, the city can then identify those changes which are acceptable and those which will require negotiation between the parties. A short list of key issues should emerge to help focus the negotiations.

What to expect from the cable operator:

The operator's response will likely reflect changes which the operator may desire but may not require to reach agreement. In other words, the operator will attempt to position itself to have some bargaining power as negotiations proceed. The key for the city is to identify any "false demands" contained in the operator's response so as not to unknowingly negotiate away valuable franchise provisions.

Key legal considerations:

TCI of South Carolina v. City of Bennettsville, No. 89-0334-2 (D.S.C. July 17, 1990). City can't deny renewal without conducting formal renewal proceedings. City's actions may be reviewed by court at any time during formal renewal process even when negotiating informally.

Step #8 Develop negotiation strategy

The city's goal:

Ensure that the city's negotiation team clearly understands the key elements which must be included in franchise documents in order to obtain city approval.

Why is this goal important?

- Cities typically have several layers of administration which must approve franchise documents.
 - Cable advisory committees and city staff must understand the desires of elected officials.
- City will be negotiating against individuals who negotiate cable television franchises year-round.
 - Many operators have regional staff which work exclusively on government relations and franchise documents.
 - The cable operator will be well coordinated and prepared on each and every issue to be discussed.

What the city must do to accomplish this goal:

The city should establish a negotiation team which consists of individuals with expertise on each particular provision to be negotiated. In other words, if technical or financial issues are to be addressed, the city's negotiation team should consist of individuals knowledgeable in these areas. It is often helpful to have an elected official (city council member) serve on an advisory committee or even the negotiation team to ensure the documents ultimately negotiated will meet the expectations and desires of the city. The negotiation strategy itself should identify all open issues, the strengths and weaknesses of each provision and how the city plans to rebut the cable operator's arguments.

What to expect from the cable operator:

The cable operator's negotiation team will consist of experienced industry professionals who deal in cable television 365 days a year. They will know the cable television industry better than most city representatives and will reference federal laws, regulations or trends to bolster their position. It is important for the city to place on its negotiation team individuals with sufficient expertise in cable television laws and regulations and the likely industry trends so that the operator's arguments can be effectively rebutted.

Step #9 Negotiate franchise language with operator

The city's goal:

Reach agreement with operator on strong franchise documents which retain sufficient flexibility to adapt to changes in the law and the industry.

Why is this goal important?

- Even if the city has a positive relationship with the cable operator, it is entirely possible the system may be sold or transferred during the franchise term.
 - Franchise documents should be as strong as possible to ensure a reasonable level of service will be provided.
 - The stronger the franchise documents, the less likely the city will be forced to spend time and money arguing over enforcement issues.
- Even if existing city officials are disinclined to be aggressive regulators, subsequent elected officials may find the need to become more aggressive in franchise enforcement.

What the city must do to accomplish this goal:

City should take charge of negotiations by establishing the timetable for meetings and topics to be discussed. Whenever possible, the city should draft all rewrites of various franchise provisions and should retain control over authorship of the franchise documents. The city should avoid allowing time pressures to impact negotiations and should base negotiations on conclusions made within the needs assessment report.

What to expect from the cable operator:

The cable operator will likely begin negotiations with the local general manager. If negotiations become protracted, a state or regional manager will become involved. Typically, these individuals lack authority to bind the company on any franchise provisions. Operators will also continually remind the city of the costs associated with each and every requirement within the franchise and may even threaten political pressure on existing elected officials. Finally, If the operator is unable to work effectively with the city's negotiation team, operators may attempt to circumvent the negotiation team, going directly to elected officials even to the point of attempting to discredit the city's negotiation team.

Key legal considerations:

Continental Cablevision of Massachusetts, Inc. v. Rodney H. Irvin, No. 91-1 1256-N (U.S.D.C. Mass. June 4, 1991). Operator can challenge procedures during formal renewal administrative hearings at any time.

Step # 10 Adopt franchise documents

The city's goal:

Ensure all federal, state and local procedural steps are satisfied when adopting franchise documents.

Why is this goal important?

- Typically there are numerous procedural steps to be followed when adopting an ordinance and entering into a contract with a private entity.
 - Procedure must be coordinated to ensure that necessary steps at city council level are fulfilled.

What the city must do to accomplish this goal:

The city should outline all federal, state and local procedural requirements to be followed in adopting franchise documents. If the city is within the informal renewal process and a public hearing has already been held, no federal procedural requirements will exist. Typically, under state and local law, adoption of an ordinance requires published notice given approximately two weeks before the scheduled meeting in a newspaper of general circulation. There may be multiple reading requirements, depending upon local law, and typically the ordinance, or a summary of it, must be published within two weeks following adoption. The franchise should identify various acceptance documents to be provided by the cable operator which may include security funds, performance bonds, insurance documents, payment of franchise renewal expenses, and acceptance agreements.

What to expect from the cable operator:

The cable operator will likely attempt to delay acceptance of the franchise documents for as long as possible. Many operators are now requesting between 60 and 90 days to accept a franchise once approved by a city council. Assuming the process proceeds informally, there is no reason an operator should need more than 30 days to obtain necessary signatures for acceptance of franchise documents.

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