

## **SECTION BY SECTION ANALYSIS “COMPETITIVE CABLE AND VIDEO SERVICE ACT”**

**Sections 1-3**—These introductory sections explain that the new act will amend the existing cable law (Title 7, Chapter 59), name the act and summarize certain provisions and limitations of the law. This part does not alter existing state law regarding local control of public right of way or the police powers of local government and does not alter or restrict the right of any municipality or county to impose additional generally applicable taxes.

### **Section 4—Definitions of key terms.**

The following are among key terms defined:

- “Access” means that a provider is capable of providing cable service or video service at the household address regardless of whether any customer has ordered service or whether the owner or landlord or other responsible person has granted access to the household.
- “Broadband Internet Service” means an asymmetrical connection to the internet from a home computer with an expected download data transfer rate of at least 1.5 megabits per second (Mbps), or, after January 1, 2012, a data transfer rate equal to the speed which 30% or more of the provider’s internet service subscribers actually purchase, and shall not include direct-to-home satellite service or direct broadcast satellite service.
- “Cable service” is defined as in the federal Cable Act, except that it excludes video provided by a commercial mobile service provider and information provided over the public Internet. The addition of this exception brings some parity with the “video service” definition, which excludes “cable service.”
- “Department” means the Tennessee Regulatory Authority.
- “Franchise Area” means, with respect to a large telecommunications provider, the aggregate geographic area containing its basic local exchange wire-line telephone service areas within the state. “Franchise Area” for all other holders of a state-issued certificates of franchise authority means the geographical area described in the application for a certificate of franchise within which a holder of a state-issued certificate of franchise authority is seeking authority to deliver video services.
- “Franchise authority” means “franchising authority” as set forth in 47 U.S.C. § 522(10) or other governmental entity empowered by federal, state, or local law to grant a franchise. With regard to the holder of a state-issued certificate of franchise authority within the areas covered by such certificate, the Department is the sole franchising authority. With respect to a franchise agreement with a municipality or county governing

authority, that municipality or county is the sole franchising authority within the service area governed by that franchise agreement.

- “Incumbent cable service provider” means any cable operator providing cable service on the effective date under an expired or unexpired franchise.
- “Gross revenues” for state franchisees is defined to include revenues from the provision of cable or video service, including advertising revenue and home shopping revenue commissions. Local franchisees will be subject to the gross revenue definitions in local franchises unless a state franchise is obtained. Gross revenues shall not include any tax, surcharge, or governmental fee; any revenue not actually received such as bad debt; refunds; Internet access services; late fees; and inside wiring; but at the discretion of a local government may include franchise fees collected.
- “Large telecommunications provider” means a telecommunications entity providing cable or video service with 1 million access lines in the state as of January 1, 2008. This status triggers certain deployment and reporting obligations and remedies, if necessary.
- “Low-income household” with respect to a large telecommunications provider means a household with an average annual income of less than \$35,000 or median household income within the holder’s franchise area. For other providers median household income may be the threshold for determining low-income households.
- “Video service” is video programming provided through wireline facilities that are located at least in part in the public rights-of-way without regard to delivery technology including Internet protocol. Cable service is not included within this definition. Video service does not include satellite, commercial mobile service or information provided over the public Internet.
- “Video service provider” is defined as a provider of video service or cable service that obtains a state certificate of franchise authority.

**Section 5—Two parallel franchising procedures for cable and video service providers beginning on the effective date of July 1, 2008.**

The local franchise process is preserved at the option of the cable or video provider. Alternatively, beginning on July 1, 2008, a provider can seek a certificate of franchise authority from the Department. In addition, a provider may opt into the terms of another cable or video service provider’s local franchise.

There is immediate opt-in option to the state franchise process for incumbents beginning on July 1, 2008.

For an incumbent with an expired franchise, an application for a state franchise must be made within 180 days after the effective date if no local franchise has been negotiated.

The issuance of a state franchise terminates any unexpired local franchise and requirements therein are unenforceable, except franchise fees will continue to be paid as under the terminated franchise unless the locality changes the franchise fee or until the date the local franchise would have expired.

The municipal and/or county franchise is terminated on the date the Department issues the certificate of franchise authority and no provision of such terminated local franchise is enforceable, except that until the date upon which the local franchise would have naturally expired, an incumbent cable service provider or entity or person providing cable or video services under a franchise agreement which is terminated pursuant to this part shall not reduce or otherwise diminish access to cable or video services of any subscriber as of the date of termination if such subscriber does not have access to cable or video services from another local franchise holder or a holder of a state-issued certificate of franchise authority.

### **Section 6—Application procedures for a state franchise.**

To receive a certificate of franchise authority, a cable or video service provider shall file an application with the Department. A copy of such application shall be provided simultaneously to any affected municipality or unincorporated county. The applicant must submit an affidavit containing key contact information and a service area description must be submitted along with a filing fee and an amendment fee based upon a tiered schedule that is based on the size of the applicant's service area. State-issued franchise holders will also be assessed an annual fee if the total filing and amendment fees for an annual period do not amount to the cost to administer.

The application for a certificate of franchise authority shall consist of an affidavit (no other application form is required) signed by an officer or partner that affirms each of the following requirements:

- The applicant must agree to comply with applicable federal, state and local laws, to make necessary FCC filings, and to provide emergency alert system services to all video service customers in accordance with the standards set forth in including any FCC waivers thereof.
- A written description of the municipalities and unincorporated counties to be served.
- That the service provider intends to begin to offer video service or cable service for purchase within (24) months of the date of the issuance of a certificate of franchise authority.
- That the applicant agrees to indemnify and hold harmless the state, municipality, county and any employee or representative.
- The location and telephone number of the principal place of business, the names of the principal executive officers of the applicant and the names of any persons authorized to represent the applicant before the Department.
- The applicant must affirm it is managerially, financially and technically qualified.
- A description of the applicant's customer service complaint handling process.
- The applicant will notify localities of their right to receive a franchise fee on or before providing service, that it will provide notice to a locality before commencing service and that it will comply with the non-discrimination and service deployment provisions of the

law. In addition, applicants, including an incumbent cable providers under certain circumstances must provide a deployment plan demonstrating how it will comply with the non-discrimination (and if applicable, deployment) provisions of the bill.

- The applicant agrees to comply with buildout requirements in Sections 12 & 13 as applicable.
- The applicant agrees to provide notice to an affected local governing authority 10 days prior to providing service in the jurisdiction.
- The Department must notify the applicant within 15 days of any incomplete application. After determining that an application is complete, the Department must determine whether the applicant is managerially, financially and technically qualified. Incumbent cable and large telecommunications providers are deemed qualified (unless the incumbent doubles its operations area or does not have cable and/or video assets of at least \$10 Million in the state). The Department must also find the deployment plan of applicants that have no existing network to be sufficient.

If the Department does not issue a certificate to an incumbent or to a large telecommunications provider within 45 days of receipt of a completed application, it is deemed granted. For other applicants, if the certificate is not issued within 180 days of the submission of a completed application, the applicant receives “temporary” authority until the Department finally approves or denies the application.

A certificate:

- Costs up to \$15,000;
- Has 10 a year term;
- Is transferable upon 10 days prior notice and application for a state certificate within 90 days of consummation;
- Is terminable by the holder upon notice to the Department, localities and customers;
- Can be amended, but the Department cannot deny amendment unless it has determined bad faith;
- Must be amended when there is a change in the application information (up to \$1,000 fee for amendments); and
- Supersedes any local franchise for an area for that franchisee.

Large telecommunications providers must apply for its initial state-issued certificate of franchise authority within one (1) year after the effective date of this Act. A large telecommunications company may apply for a local franchise at any time.

### **Section 7—Franchise fees.**

State franchisee shall pay a franchise fee equal to 5% of gross revenues. The municipality or county may adopt a resolution to change the franchise fee equal to 5% on incumbent providers who convert to a state franchise.

The incumbent cable operator who obtains a state franchise shall continue to pay franchise fee required until it naturally expires provided they continue to comply with access and deployment or future buildout requirements.

The locality has the right to audit relevant books annually to ensure compliance with franchise fee payments (looking back no more than 3 years) and there is a 6 year limitations period to pursue a claim for underpayments or overpayments. Each party bears its own costs in this process except for travel costs of the auditor if a payment of more than 10% is due from the provider. A municipality or county may contract with the Comptroller of the Treasury or a third party for the audit and/or review of records and contingency fees are prohibited.

In the event of fraud, the Comptroller can conduct an audit beyond the 6-year period.

The locality can impose local taxes and fees of general applicability but no other fees on video or cable service.

### **Section 8—Limits on the authority of state and local governments.**

Localities cannot require providers to negotiate a local franchise. The decision to choose whether to utilize either a state franchise or a local franchise is within the sole discretion of the cable or video service provider. The existing state law for a provider with a local franchise remains in tact.

Other than the franchise fee, no governmental entity can request anything of value from a video service provider or impose other franchise related requirements. No regulation of retail VoIP is permitted.

### **Section 9—Customer service.**

The FCC customer service standards apply to state franchisees while local franchise requirements apply to local franchisees.

For providers operating under local franchises, the customer service standards in the franchise apply and the locality will handle complaints consistent with the terms of the franchise.

For state franchisees, complaints regarding compliance with the FCC standards are subject to subscriber agreement provisions and procedures. A customer or locality can file a complaint with the Department. The Department can order cure or up to a 3-month service credit. The Department can only review individual complaints (not investigate a provider generally).

Any rights of consumers under the Consumer Protection Act are preserved.

### **Section 10—PEG channels and support –**

PEG channels that exist today are continued and new providers must carry those channels. Standards are provided for utilization of multiple PEG channels and those not being utilized can be reclaimed by the provider.

Communities who do not have PEG channels are entitled to have channels based upon population tiers.

No additional costs will fall on PEG channels, the costs of hook-up and transmission must be paid by the provider.

Under certain circumstances and over time, PEG channels may be migrated to digital service tiers thereby freeing up bandwidth for additional channels or services. Providers are responsible for maintaining availability of most PEG channels to subscribers to the lowest cost plan even if the provider is required to provide converter boxes at a low cost to subscribers.

Communities currently receiving PEG support would continue to receive PEG support payments. New PEG communities not receiving support payments could require payments in the future but would be limited to 5% on a combined basis counting franchise fees and PEG payments.

#### **Section 11—Police Power Preservation.**

This section generally preserves local police powers and the locality's right to regulate the right of ways in a non-discriminatory manner, including the authority to regulate the installation and placement of video or cable facilities for the purpose of addressing the aesthetic concerns of the community.

To promote competition, the section establishes a condition to all trenching permits issued to utilities that are under-grounding their facilities to new developments to notify all cable and video providers 60 days in advance of when trenches will be opened.

#### **Section 12—Red-lining prohibition and service deployment requirements.**

State franchisees shall not discriminate in offering cable or video service based on income, race, gender, or ethnicity of potential customers.

Large telecommunications providers are required to offer service to 30% of all the households in its franchise area that the provider offers telephone service to within 42 months after receiving a state franchise.

Large telecommunications providers are required to offer their cable or video service so that no less than 25% of total households that have access to the service are "low-income" households within 42 months after receiving a state franchise.

Incumbent cable providers are deemed to have satisfied this affirmative obligation, except for new areas not covered under an existing local franchise.

After the forty-two (42) months referenced above has elapsed, except as provided for herein, all holders of a state-issued certificate of franchise authority shall prepare an annual report on the estimated percentage of low-income households with access to its service. Incumbent providers are exempt with respect to areas currently served.

A large telecommunications provider may satisfy the percentage thresholds by using an alternative technology that offers substantially similar services and capabilities (including PEG and Emergency Alert System Services), except satellite cannot be used.

### **Broadband Deployment Incentive**

A holder of state franchise may for purposes of calculating 30% buildout requirement may count each household that did not have access to the holder's broadband service as two households and each household that did not have access to any broadband services as four households.

### **Section 13 –Department Oversight of Provider Compliance**

Individuals and localities on behalf of their citizens have standing for claims of violation of non-discrimination & deployment, franchise authorization & termination notice, amendments, PEG, minority participation plans and reporting.

The Department shall investigate complaints and make determination. Upon finding a violation, the Department can generally order the provider to:

- Cure;
- Assess civil penalties for non-compliance as appropriate; and/or
- Revoke the certificate upon finding of bad faith.

Any penalties assessed shall be deposited into the Tennessee Broadband Deployment Fund.

### **Section 14—Hiring and contracting with minorities, women and other disadvantaged groups.**

This section requires video service providers to provide plans and reports relating to contracting with minorities, women, disabled veterans and other disadvantaged groups with regard the construction of video systems.

By January 31 of each year, any holder of a state-issued certificate of franchise authority shall prepare and submit a report to the Department entitled the "Video Services Minority, Women and Disabled Veteran-Owned Business Participation Report."

### **Section 15—Annual Report from Department to General Assembly**

On March 1, 2009, and March 1 of each year until 2011, the Department shall file a report with the General Assembly that includes information on the number of state franchise applications received, approved and denied. The report will also include the areas covered, the number of

consumer complaints received and the number of localities with two or more providers and aggregate summary of low income households' access reports submitted by state franchise holders.

The report will be based on public information and cable and video providers cannot be required to provide information (regarding new services, future deployment plans and competition).

### **Section 16—Creates Tennessee Broadband Deployment Fund**

This section creates the Tennessee Broadband Deployment Fund as a separate account in the state treasury separate from the general fund. Moneys shall be deposited into the fund as provided by law or provisions of the general appropriation act.

The fund shall be used by Department to promote the deployment of broadband Internet service to unserved areas of the state pursuant to guidelines developed by the Department in consultation with the Broadband Taskforce and Connected Tennessee.

### **Section 17 –Telecommunications Joint Ventures**

Municipalities, counties and cooperatives are authorized to form telecommunications joint ventures with other entities (“TJV”) for the limited purpose of providing broadband service, which may include Internet service, VoIP, or video over IP.

TJV's subject to local, state and federal cable and video franchise laws.

A TJV is only eligible to provide broadband service in historically un-served areas defined as:

- Are residential and have no broadband for at least 5 years; and
- Are located outside the service area of a video or cable service provider (state or locally franchised).

Current law restrictions and prohibitions on cooperatives and municipal electrics cross subsidization and limitation on service provision would be maintained.

Electric coops and munis cannot charge cable more than 50% of the current cable pole rent rate in areas with no existing broadband Internet service that a cable operator extends service to and they must provide pole access to cable operators serving areas described above that have no broadband.

Electric coops and munis must apply to the Department for finding that a target area is historically unserved and that no private provider intends to serve the area.

The application requirements:

- Serve all cable, video and telecommunications providers within 50 miles with copy of application; and



- Include proof that electric coops /munis publicly advertised intent to form TJV and provided notice to area cable, video and telecommunications providers of intent apply to Department 60 days in advance.

All Area Broadband Providers have the right to submit comments regarding any application to the Department and all records of TJV shall be available for disclosure and public inspection.

The Comptroller (with Department cooperation) must provide an annual report to the General Assembly not later than January 31, 2011, and every year after by January 31, on the status of broadband services under this section.

### **Section 18 – Notices**

Certain notices, including service inception, transfers, terminations, etc. are required to go to local governments within certain timeframes.

### **Section 19 – Indemnification**

State and local governments are held harmless from legal actions against any holder of a state franchise related to their use of public rights-of-way.

### **Sections 20-28**

Conforms existing cable television law with the provisions of the bill.

### **Section 29 - Severability**

If any provisions of the law are struck down the rest survives.

### **Section 30 - Effective Date.**

The effective date is July 1, 2008