

HERBERT, VAN NESS, CAYCI & GOODELL

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MEMORANDUM

**TO: Mayor Liz Lempert
Princeton Council**

FROM: Steven P. Goodell, Esq., Special Counsel

DATE: July 7, 2014

**RE: COMCAST APPLICATION FOR RENEWAL OF MUNICIPAL
CONSENT**

On January 13, 2014, Comcast of Central Jersey II, LLC, applied to the town for “Renewal of Municipal Consent.” On Monday, July 14, 2014, the Mayor and Council will hold a public hearing on the application. This memorandum will provide background about the cable television franchise process and what to expect at the hearing.

The memorandum is divided into three sections: first, general background about the legal requirements for cable television franchises in New Jersey; second, a description from the Office of Cable Television about how to handle the municipal hearing; third, a synopsis of what Princeton’s current franchise includes and what Comcast has preliminarily told us it is willing to provide; and fourth, a conclusion with recommendations for next steps.

1. Legal Background

A public utility that wants to provide cable television service in a municipality must first receive a “certificate of approval” from the BPU. The process for obtaining a certificate of approval is complex. Traditionally, a cable operator like Comcast would apply to a town for permission to set cable lines within the public right-of-way. This was called “municipal consent,” and was typically granted after significant study by the municipality and negotiation with the cable company. Once municipal consent was granted, the cable operator could apply to the BPU for a certificate of approval, which served as the company’s license to do business.

Princeton’s cable television providers (except FiOS -- more about that later) have all had to go through this municipal consent process. Patriot Media, which was eventually purchased by Comcast, was the most recent, obtaining its municipal consent in 2002. That municipal consent is set to expire on October 15, 2014, and Comcast, as Patriot’s successor, has now filed for renewal of municipal consent.

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You may be aware that in 2007 the New Jersey Legislature changed the rules governing cable television. At that time Verizon, the telephone company, wanted to become a cable operator with its FiOS product. Verizon argued to the Legislature that it would be too costly and time consuming to obtain municipal consents from every town in the state, and persuaded the Legislature to create a streamlined procedure for obtaining a certificate of approval. The streamlined procedure allowed a provider like Verizon, which had plant and equipment throughout the state, to apply for a single "system-wide" franchise. As a result of the new law, Verizon did not have to seek municipal consent. Cable operators now have a choice: they can opt for a traditional municipal consent-based franchise, or they can opt for a system-wide franchise. Comcast has chosen the former, believing that it creates better ties with the community. Under the new rules, however, Comcast could at any time switch its municipal consent-based franchise to a system-wide franchise. It would do so if it believed the municipal consent process was becoming onerous or if it were not able to negotiate a satisfactory deal with the municipality.

2. Hearing on Application for Municipal Consent

Having applied for municipal consent, Comcast's next step is to formally present its application at a public hearing. This section of the memo describes the public hearing. It is copied from the *Guide to Franchise Renewal* (February, 2012) prepared by the BPU's Office of Cable Television:

The purpose of the mandatory public hearings ("hearings") is for the governing body to take comment from the concerned citizens in the municipality about the application submitted by the cable operator.

The community concerns expressed at the public hearings can be incorporated into the issues addressed in any subsequent negotiations with the cable operator. Public hearings support the documentation needed for a successful franchise agreement. If, for example, a municipality is negotiating for equipment to be used for an educational access channel, there should be evidence supporting the request from the community documented in the hearing record. (See "Negotiations").

The cable operator can respond to any questions or concerns raised by the municipal governing body or the cable television advisory committee at this time. Any commitments that have been promised by the cable operator to this point can be documented on the record.

The time frames for holding the public hearings are specified in the State Act and the New Jersey Administrative Code and are outlined below. When the cable operator submits the application, the municipality must schedule mandatory

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public hearings. The hearings are required by law to begin between 60 to 90 days after the application is filed. (N.J.S.A. 48:5A-23(b), N.J.A.C. 14:18-13.4(a)(1)) and N.J.A.C. 14:18-11.4.) The hearings must be completed within 120 days after the application is filed. (N.J.A.C. 14:18-13.4(a)(2)) 28.)

The municipality must give notice of the public hearings in a newspaper of general circulation at least 45 days before the scheduled date. The notice must be published again, between 14 and seven days prior to the hearings. Copies of the proposed notices must be submitted to the OCTV. The notice must include: the identity of the applicant; the time and place of the hearing; and where and when the application is available for public inspection. (N.J.A.C. 14:18-11.6(a) and (b).) A sample notice is provided in this Guide at Appendix IV.

The public hearings must be held before the municipal governing body. (N.J.A.C. 14:18-11.7.) During these proceedings the cable operator must be allotted time to give a presentation. Most municipalities allow the cable operator to give a brief opening presentation at the beginning of the hearings. Comments from the public may be limited to reasonable time periods. The public may question the cable operator concerning the information required in the application. (N.J.A.C. 14:18-11.8(c) and (d).)

Any written correspondence from individuals, community organizations, or municipal agencies can be read into the record at the hearing. The results from the municipal survey, as well as the municipal report, and any other research documents relating to cable television can be incorporated into the record. A transcript must be made in the method that the municipality causes its other public hearing transcripts to be made. (N.J.A.C. 14:18-11.11.)

The municipality must complete the public hearings within 120 days from the filing of the application by the cable operator. (N.J.A.C. 14:18-13.4(a)(2).) The municipality may adjourn the hearings, however, all hearings must be concluded no later than 30 days after the initial hearing. (N.J.A.C. 14:18-11.12.) If negotiations between the municipality and the cable operator are taking place, an adjournment allows time for further negotiations and allows the municipality to announce the commitments made by the municipality and the cable operator publicly at the subsequent hearing.

Note: The municipality is entitled to an administrative fee of \$50.00 per day for each hearing to be paid by the cable operator. (N.J.S.A. 48:5A-23(f).)

[<http://www.state.nj.us/bpu/pdf/cablepdfs/FranchiseRenewalGuide.pdf>.]

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3. Comcast Negotiations

2002 Negotiations. The key terms negotiated during the 2002 franchise renewal were the following:

- a. Franchise Term. Franchise Term was contingent on the cable company completing its upgrade of the Princeton system. The Franchise Term was 12 years, measured from October 15, 2002, however the Franchise Term was 2 years if the company failed to complete its rebuild of the system by September 30, 2003.
- b. Public Access Programming. The cable company agreed to make available 6 channels for public, educational, and government (PEG use), including (1) K-12 Educational Access Channel; (2) Public Access Channel; (3) Princeton Township Access Channel; (4) Princeton Borough Access Channel; (5) Mercer County Community College Access Channel; (6) Princeton University Access Channel.
- c. Mercer County Community College generally prefers to maintain its channel position. The cable company would not guarantee this, but agreed “to continue to provide programming offered by Mercer County Community College as it has in the past, unless it is prevented from doing so due to circumstances beyond its control.”
- d. The PEG Channel’s broadcast quality had to meet accepted standards and be equal to that of other channels the company transmits.
- e. The cable company agreed to provide up to \$5,000 per year in material and services to support the extension of the Institutional Network (I-Net).
- f. The cable company agreed to extend the I-Net to the Harrison Street Rescue Squad, the Chestnut Street Fire Station, and the Princeton Charter School.
- g. The cable company was required to provide Princeton public schools and municipal sites “service and access to expand basic service and the entertainment and institutional cable systems at least equal to that which they currently receive.”
- h. The cable company agreed to provide technical assistance without charge to the cable committee or its designee to assure signal quality over the PEG stations.
- i. The cable company agreed to provide 17 cents per subscriber per month for the production of PEG programming.
- j. The cable company agreed to provide \$40,000 per year, increased annually based on the CPI, for production of PEG programming.

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- k. The cable company agreed to co-produce no fewer than 10 special events per year.
- l. The cable company agreed to provide and maintain the modulators to allow programming to be originated live from borough hall, township hall, PHS, and the local origination site.
- m. The cable company agreed to provide and maintain character generators at the borough and township halls, and provide origination capability at no charge.
- n. The cable company agreed to notify the municipalities prior to disposing of any old equipment.
- o. The cable company agreed to lend video tapes of programming relating to the municipality.

2014 Negotiations. Members of the Negotiating Committee met once with Rob Clifton of Comcast to preliminarily discuss the franchise. After the public hearing has been held, the full Committee will meet with him again to discuss terms. The key issues the Committee is considering include the following:

- a. Franchise Term. Rob Clifton from Comcast has said Comcast wants a 15 year term with an automatic tenure renewal. (This is the maximum permitted by law.)
- b. Clifton has said Comcast is unwilling to renew the 17 cent subscriber fee or \$40,000 programming grant. (The \$40,000 programming grant has grown to \$52,340 in 2013 as a result of CPI increases; the 17 cent subscriber fee results in a payment of \$7,232 per year.) Comcast is willing to make a one-time, lump sum payment based on a formula that considers the number of subscribers in the system and number of years of the franchise.
- c. Princeton would like to keep the six PEG channels it currently has. The borough channel may be repurposed as a statewide, locally produced, public affairs station.
- d. Princeton would like at least one, and possibly two of the PEG stations to be high-definition (HD). (This may require trading the unused borough station for the extra band width needed for an HD station.)
- e. Princeton needs to verify that the 3.5% franchise fee includes contracts for bulk customers like Princeton University and the Theological Seminary.
- f. Princeton understands that Comcast does not plan to produce programming.

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- g. According to Clifton, Comcast will not agree to subsidize the I-Net in the franchise, but may agree to a “side agreement” involving the I-Net.
- h. Princeton recognizes that since the 2002 Franchise Agreement was reached, the law has changed and Comcast is now required to pay a franchise fee of 3.5% on gross revenues from all services, including premium tier and pay-per-view. In the past, Comcast was required to pay 2% of gross revenues on basic service only. As a result, the franchise fee has jumped from approximately \$20,000 to approximately \$129,000 annually. In addition, Verizon/FIOS pays a franchise fee of approximately \$148,000.
- i. Princeton would like more cable boxes in the municipal buildings and schools. (Comcast now provides one modem and three cable boxes in each building.)
- j. Princeton must verify that the municipal buildings, fire stations, library, and schools are receiving a free internet and free cable connection.

4. Conclusion

I recommend that the Monday night hearing be opened; that Comcast present its application; that comments be taken from the public; and that the hearing be continued to at least one other date. This will give the Negotiating Committee a chance to meet again with Comcast to try to work out an agreement on terms of the municipal consent. Since there is a 30-day time limit for completing the hearing, Comcast should be asked for consent to waive and extend that time limit.