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## **GUIDE TO FRANCHISE RENEWAL**

### **OFFICE OF CABLE TELEVISION & TELECOMMUNICATIONS**

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## **GUIDE TO FRANCHISE RENEWAL**

**THE OFFICE OF CABLE TELEVISION IS PLEASED TO PRESENT THE GUIDE TO FRANCHISE RENEWAL. THE GUIDE TO FRANCHISE RENEWAL PROVIDES MUNICIPALITIES AND CABLE COMPANIES WITH THE INFORMATION NEEDED TO NEGOTIATE A SUCCESSFUL FRANCHISE AGREEMENT.**

**THE GUIDE COVERS ALL ASPECTS OF CABLE TELEVISION FRANCHISE RENEWAL IN NEW JERSEY AND IS AN INVALUABLE RESOURCE FOR ANYONE IN THE FRANCHISE RENEWAL PROCESS.**

**IF YOU HAVE ANY QUESTIONS OR COMMENTS REGARDING ANY ASPECT OF THE GUIDE, PLEASE CONTACT OUR STATE AND LOCAL PLANNING UNIT AT (609) 341-9186.**

**LAWANDA R. GILBERT  
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## OVERVIEW

Franchise renewal or "refranchising" is the process by which municipalities negotiate franchise agreements with their cable operators. It is the responsibility of the municipality to act as the voice of the cable subscriber and the citizens of their community. Therefore, the ability to effectively follow the franchise renewal procedures will insure that the community's cable-related needs are met.

It is suggested that the municipality and the cable operator to become familiar with the federal, state and local laws regarding refranchising. Franchise renewal in New Jersey begins approximately three years before the franchise expires. As outlined in this Guide, the state's renewal process is divided into three phases: "Ascertainment", "Municipal" and "Certificate of Approval". These terms are useful shorthand but do not necessarily appear in the state or federal statute.

For purposes of state and federal law, the "franchising authority" in New Jersey is the Board of Public Utilities ("Board"), Office of Cable Television ("OCTV"), as established in 1972 by the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq. Therefore, the ultimate decision to renew or deny a franchise in New Jersey rests with the Board. However, the municipality is responsible for adopting a "municipal consent ordinance" granting renewal that includes terms and conditions for the franchise. Alternatively, the municipality can issue a "resolution of denial". (See "Resolution of Denial")

In accordance with federal and state regulations, a municipality that seeks to substantially alter the franchise commitments must do so by a thorough "ascertainment" record evaluating the cable operator based on specific federal tests.

The municipality should review the municipal consent ordinance, Certificate of Approval and other related documents for compliance. If the municipality finds that there are any substantial violations of the current franchise, it must give the cable operator "notice and opportunity to cure". (47 U.S.C.A. §546(d)) The municipality may wish to monitor the cable

operator not only during the three-year franchise renewal period, but also for the life of the franchise.

The Guide outlines some of the services offered by the OCTV. This includes the procedures for implementing a successful franchise agreement and monitoring of the cable operator's performance. Should one need any assistance in franchise renewal, please contact the State and Local Planning Unit at the Office of Cable Television, 44 South Clinton Ave. – 9<sup>th</sup> Floor, PO Box 350, Trenton, NJ 08625-0350. Telephone number: (609) 341-9186. Facsimile number: (609) 777-3325.

As information technology develops, the OCTV anticipates that information will be available on the Board's web site: [www.nj.gov/bpu](http://www.nj.gov/bpu).

## **I. MUNICIPAL AGGREGATION**

**Summary: P.L. 2003, Chapter 38 changes municipal law and the State Cable Television Act to allow municipalities to collectively negotiate cable television franchises (both initial and renewal) with cable television operators either directly or through the use of a consultant or “aggregator”.**

The new law became effective August 12, 2003. The Board of Public Utilities is in the process of proposing rules to govern the registration of private aggregators, who would represent groups of municipalities in the franchise process. Also, the Board will consider any new procedures needed to govern the aggregation process itself. Interested parties should check the BPU website ([www.nj.gov/bpu](http://www.nj.gov/bpu)) for updated information on any forms, orders, proposals or procedures promulgated by the Board of Public Utilities. Affected statutes are N.J.S.A 40:48-1, N.J.S.A 40A:11-1, and N.J.S.A 48:5A-64.

## II. ASCERTAINMENT PHASE

**Summary:** The optional two year fact-finding period where the municipality examines the past performance of the cable operator and determines the future cable-related needs of the community.

Franchise renewal in New Jersey is governed by the federal Communications Policy Act of 1934, as amended ("Federal Act"), the New Jersey Cable Television Act of 1972 ("State Act") as amended, and the New Jersey Administrative Code. It is the stated intention of the State Act that federal law is controlling and that "all provisions, regulations and requirements" in the State Act stand unless they are in conflict with federal law. (N.J.S.A. 48:5A-10(g))

The ascertainment phase ("ascertainment") begins approximately 36 months before the franchise agreement is due to expire. Ascertainment is the term utilized to explain the fact-finding process described in the Federal Act. The purpose of ascertainment is to examine the past performance of the cable operator and identify the future cable-related needs of the community. The OCTV recommends that the municipality engage in the ascertainment phase of franchise renewal for the reasons outlined below.

Although ascertainment is optional, it is necessary if the municipality wants to substantially modify the terms of the franchise or to deny the franchise renewal outright. The community's needs may have changed since the initial franchise or the previous renewal. Moreover, the record that the municipality develops during ascertainment will help the municipality effectively complete negotiations with the cable operator. During negotiations, a municipality may require certain provisions in the municipal consent ordinance ("ordinance") only if the requirements are based on a record developed during ascertainment. For example, a municipality may require public, educational and/or governmental ("PEG") access channels and equipment, a system rebuild, expanded channel capacity, etc. (see "Franchise Proposal List") only if such requests are based on the community's cable-related needs established during the ascertainment phase and provided that costs are reasonable in light of these needs. There are additional items that the municipality can negotiate for during renewal. (See "Franchise Proposal List" for a full discussion of these items.)

Renewal of a franchise can only be denied for one or more of the following reasons (47 U.S.C.A. §546(d)):

1. The cable operator has not substantially complied with the material terms of the existing franchise and with applicable law.
2. The quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services other services provided over the system, have not been reasonable in light of community needs.
3. The operator does not have the financial, legal, and technical ability to provide the services, facilities and equipment it has proposed to provide.
4. The operator's franchise renewal proposal is not reasonable to meet the future cable-related needs and interests of the community, taking into account the cost of meeting such needs and interests.

The above standards should be examined and documented during ascertainment. Upon issuance of a resolution of denial by the municipality, the Board must make a determination of whether these standards have been met. The Board, as the franchising authority in New Jersey, is responsible for regulation of cable within the state and therefore, is responsible for final determination of whether the standards have been met. The Board's actions to renew or deny a franchise may be based on the findings from the ascertainment proceedings. (N.J.A.C. 14:18-13.2(f))

At the conclusion of the ascertainment proceedings, the municipality issues a municipal report (see "Municipal Report"). Municipal reports vary in length and content according to the individual municipality, but must be completed 12 months before the franchise expires. (N.J.A.C. 14:18-13.2(c))



Note: If the municipality does not wish to pursue ascertainment and/or issue a municipal report, the cable operator must begin the municipal phase of renewal one year before the franchise expires (see "Municipal Phase"). However, the municipality must begin ascertainment within six months if notified by the cable operator to begin proceedings. (N.J.A.C. 14:18-13.1(a)(1); 47 U.S.C.A. §546(a)(1))

**THE FOLLOWING IS A CHECKLIST THAT CAN BE UTILIZED DURING THE ASCERTAINMENT PHASE:**

**1. FEDERAL AND STATE STATUTES \_\_\_\_\_**

The municipality should be familiar with the federal laws pertaining to cable television, specifically Title VI--Cable Communications, of the Federal Act (47 U.S.C.A. §521 et seq.), as well as the New Jersey State Cable Act (N.J.S.A. 48:5A-1 et seq.) and the New Jersey Administrative Code (N.J.A.C. 14:17 and 14:18)

The Board has the responsibility to ensure that the ordinance conforms to state and federal law. However, it is the OCTV's policy not to recommend that the Board strike clauses from ordinances unless state and federal law preempt them. Therefore, it is the responsibility of the municipality to have a general understanding of cable regulations so they will know what the municipality can and cannot ask for during renewal negotiations. The OCTV's staff is available to confer with the municipality to insure conformity with all applicable provisions of law as to any item in discussion.

Note: Local officials handling cable matters should try to stay current on changes in state or federal law. To receive copies of the pending state legislation, the municipality may contact the Office of Legislative Services at (800) 792-8630 or (609) 292-4840. This information is also available on the Internet at: [www.njleg.state.nj.us](http://www.njleg.state.nj.us).

## 2. NOTIFICATION \_\_\_\_\_

Either the municipality or the cable operator may begin the ascertainment phase of franchise renewal. The interested party must file notice with the OCTV and the other party no sooner than 36 months or later than 30 months before the franchise expires. (N.J.A.C. 14:18-13.1(a)(1); 47 U.S.C.A. §546(a)(1))

The municipality must start ascertainment proceedings within six months of notification by the cable operator. (47 U.S.C.A. §546(c)(2)) To find out the date the franchise expires, contact the OCTV. The list is also available on the Board's website, [www.nj.gov/bpu](http://www.nj.gov/bpu). The Certificate of Approval issued to the cable operator for the municipality is the document that contains the appropriate expiration date.

A party's rights may be limited if there has not been timely notification within the six month window specified above. Without timely notification, the ascertainment process would not be legally binding. However, many municipalities have continued to conduct ascertainment proceedings regardless of timely notification. Often, the cable operator is willing to negotiate on the basis of abbreviated ascertainment proceedings regardless of timely notification and proceedings will allow the municipality to determine what its citizens concerns are.

If neither party files notice of ascertainment, the cable operator must start the municipal phase no later than nine months before the franchise expires by filing a municipal consent application ("application"). (See "Municipal Phase"). Municipalities should be aware that they are not obligated to begin the municipal phase if the cable operator files an application earlier than one year prior to the expiration of the franchise. However, the cable operator and the municipality can agree to an earlier filing of the application if they have already reached agreement on the terms for renewal.

Note: While a municipality can informally negotiate a renewal agreement during the ascertainment phase, it must acknowledge that it is waiving completion of the formal ascertainment phase, and it still must adhere to the state statutory process regarding the application and ordinance adoption in N.J.S.A. 48:5A-23 and -24.

If the municipality proceeds along informal lines without complying with the ascertainment phase proceedings and deadlines, it must be careful not to unintentionally waive any of its rights to deny the franchise. (47 U.S.C.A. §546(h)) The "informal" process for that portion of the renewal can be beneficial to municipalities with limited time and resources. (N.J.A.C. 14:18-13.2)

### **3. CABLE TELEVISION ADVISORY COMMITTEE \_\_\_\_\_**

The municipal governing body may conduct ascertainment itself, or appoint a cable television advisory committee ("committee") to oversee the franchise renewal process and make recommendations. It is important to have a municipal attorney or one familiar with cable television law involved in the process to provide legal advice and guidance.

A committee should have broad representation, for example, the governing officials, educators, library personnel, community leaders, citizen volunteers and financial, technical, or legal experts interested in cable communications. The municipality determines the size and make-up of the committee. The names of the committee and a mailing address for the committee must be sent to the OCTV and the cable operator. (N.J.A.C. 14:18-13.2(a)(1))

The municipal governing body or the committee may establish its own procedural rules. Some of the suggested duties of the committee are:

- A. Making recommendations to the governing body;
- B. Developing an understanding of cable television issues;
- C. Analyzing which services can be required of a cable operator;
- D. Evaluating the cable operator's reliability and performance;
- E. Ascertaining community needs;
- F. Producing a municipal report;
- G. Establishing a dialogue with the cable operator; and
- H. Participating in franchise negotiations to the extent permitted or allowed by the governing body. (N.J.A.C. 14:18-11.3)

Assignments may be given to each committee member from the ascertainment phase and municipal phase checklists outlined in this Guide.

Note: The municipality may establish a committee for the life of the franchise, rather than only during renewal. It may be helpful to have rotating members for a specified time period in order to keep the committee members up-to-date on cable issues. The appointments of committee members can be staggered in order to maintain a level of expertise on the franchise renewal process and cable monitoring (see "Cable Monitoring").

#### **4. LOCAL ORDINANCE AND RELEVANT DOCUMENTS \_\_\_\_\_**

The committee should review the expiring franchise agreement (municipal consent ordinance), as well as the Certificate of Approval issued by the Board.

The municipality should consider establishing a system for monitoring franchise compliance. If the municipality finds any alleged franchise violations, it should notify the cable operator in order to protect its rights under the franchise. According to the Federal Act, the cable operator must be provided with "notice and opportunity to cure" any alleged franchise violations. The municipality should also notify the OCTV of any alleged violations. Enforcement actions for violations of the franchise rest with the Board and the OCTV. (47 U.S.C.A. §546(d)) If the municipality neglects to notify the cable operator, or if the municipality does not object to the cable operator's written notice of its failure or inability to cure such alleged violations, the discussion of the non-compliance at issue may be limited.

In addition to the expiring franchise agreement, the municipality may wish to review other documents, if available, from the previous franchise decision such as:

- **the expiring ordinance, which is also known as "request for proposal;"**
- **The proposal of franchise applicant;**
- **The expiring municipal consent application;**
- **Any amendments to the franchise or the Certificate of Approval;**

- **Any regulations or agreements concerning PEG access channels; and**
- **Any records of public hearings or meetings.**

These documents will identify areas where the cable operator has failed to meet or has exceeded its original commitments. Once again, these past records must show that the cable operator has been given reasonable "notice and opportunity to cure" franchise non-compliance in order to serve as a basis for denial.

## **5. REQUESTS FOR INFORMATION \_\_\_\_\_**

A municipality should have some understanding of the operations and reporting requirements of their local cable operator. Knowing the "business" of cable television assists the municipality in making an informed decision and in negotiating a successful and realistic franchise agreement. During negotiations, if the cable operator explains its financial or technical limitations for not fulfilling a request, the municipality may examine the justification given by the cable operator. The municipality can then request that alternative options from the cable operator be disclosed.

A municipality can request from the cable operator and the OCTV certain financial, technical, and consumer information in order to document the cable operator's performance in the municipal report. Collecting these reports throughout the life of the franchise can provide a useful record at renewal time.

### **Documents that may be requested from the cable operator include the following:**

- A. Complaints received by the cable operator. The names, addresses and telephone numbers of individual subscribers must be "blacked out" to comply with state and federal subscriber privacy laws.
- B. Cable operator filings with the Federal Communications Commission ("FCC"), such as the Annual Employment Report Form 395A and Initial Registration Statements.

- C. Franchise fee reports (including the dollar amount on which the fee is based); and an itemized list of revenues for: basic, premium, non-recurring services, and advertising.
- D. Copies of relevant correspondence, petitions, reports, applications and other non-proprietary documents filed with the OCTV and the FCC relating to cable matters.
- E. Annual reports and other non-proprietary financial documents that the cable operator may be required to issue.

**N.J.S.A. 48:5A-27 provides that a municipality may request that the Director of the OCTV advise the municipality as to the fitness of the cable operator. Documents that may be requested from the OCTV (and/or reviewed by the OCTV) include the following:**

- A. Records of consumer complaints. The OCTV is the complaint officer for most of the municipalities in the state and as such handles subscriber complaints that cannot be resolved with the cable operator. However, the municipality may have chosen to be the designated complaint officer in order to receive complaints in the first instance. The OCTV may have some complaints on file for the municipality even if it is not designated as complaint officer. Please contact the OCTV for information.
- B. Reports of outages of service of over two hours duration which affect more than 50 subscribers required to be filed by N.J.A.C. 14:18-6.6.
- C. Information and analysis concerning the technical performance and operations of the cable operator. This is particularly important if there have been any recent complaints about signal/picture quality and/or reliability.

- D. Analysis of rebuild/upgrade construction progress reports and service area maps. The OCTV can provide a review of whether the cable operator has met its commitment to extend or rebuild/upgrade plant as promised.
- E. Non-proprietary reports on financial condition, ownership, sales and transfers of the cable system.
- F. Non-proprietary annual reports of the cable operator's gross revenues.
- G. Rates charged subscribers.
- H. Program offerings.

Note: Except for certain proprietary information, such as subscriber names, addresses and telephone numbers, and certain financial, technical and legal documents, these reports and data are considered public information and should be available to municipalities both for their own system and other systems in the state.

## **6. PERFORMANCE EVALUATION \_\_\_\_\_**

The municipality may examine whether the cable operator has complied with the franchise agreement, as well as all the financial, technical, and consumer requirements as outlined in the federal and the state regulations. New Jersey subscribers are covered by stricter consumer protection standards than those required by federal law, and those standards will remain in effect.

Moreover, municipalities may document the effectiveness of the cable operator's consumer responsiveness, technical performance, and financial and reporting requirements; as well as the customer service practices of the cable operator pursuant to N.J.A.C. 14:17 and 14:18.

**The Consumer Responsiveness areas to examine may include the following:**

**A. Services**

- i. Problems with notification of subscribers as to deletions or additions in programming services within the required timeframe. (30 day notice for deletions and repositioning.)
- ii. Review of the level of service, including the channel capacity and the number of channels offered, as well as any plans for upgrading the system.
- iii. Review of PEG access programming commitments and the promotion of PEG access.
- iv. Review of the cable operator's policies, rules and guidelines regarding PEG access programming. These rules must be posted for inspection if the cable operator is responsible for the PEG channel or scheduling programming.

Note: A municipality cannot require specific programming or other information services, except for "broad categories" of programming. (47 U.S.C.A. § 544(b)(2)(B)) Any municipal requirements for "broad categories" of programming must be documented in the municipal report and incorporated in the municipal consent ordinance.

Cable operators are required to carry local broadcast stations in their basic service if the station so requests ("must carry rule"). Cable operators do not have to carry stations that elect to charge a fee to the cable operator ("retransmission consent"). Thus, state and local authorities are preempted by federal law from including franchise requirements concerning local broadcast stations.



## **B. Rates**

- i. Review of the required 30-day rate change notices to customers for compliance with any relevant consumer protection laws.
- ii. Review of rate changes for installation, reconnection, bad checks, changes in service, additional outlets, and remote control devices.

Note: The Board has the responsibility of regulating basic service rates in New Jersey. However, subscribers and the municipalities can present their views and such parties will be given notice and a reasonable opportunity to comment on rate cases.

## **C. Notices**

There a number of subscriber notice requirements outlined in N.J.A.C. 14:18-3.18. For example, the municipality may review whether the "privacy policy" and "complaint officer" notices have been sent to subscribers in a timely fashion as required by 47 U.S.C.A. §551(a), N.J.S.A. 48:5A-56(b) and N.J.A.C. 14:18-3.18(a) and (b).

Note: The cable operator is required by the Board to provide subscribers notice of its privacy policy at least once a year and provide quarterly notice of how to contact the designated complaint officer.

## **D. Telephone Responsiveness**

If the municipality believes there may be a problem with telephone responsiveness, it may review information available from the cable operator or the OCTV. It may also consult with the OCTV concerning telephone responsiveness, as the OCTV requires cable operators to submit periodic reports on telephone performance and system capabilities. Additionally, the designated complaint officer for the municipality may be able to provide a report on telephone responsiveness complaints.

## **E. Customer Rights**

It is important for the municipality to note the concerns of the local citizens, both cable subscribers and non-subscribers, during franchise renewal. The problems subscribers' face may vary. When soliciting information during ascertainment proceedings, the municipality should be aware of the consumer's rights. The rules pertaining to customer rights are located in Subchapter 3 of the Regulations of Cable Television. (N.J.A.C. 14:18-3.1 et seq.)

### **The Technical Performance areas to examine may include the following:**

- i. Review the OCTV's report of technical performance and overall operations of the cable operator as well as the proposed design, construction, and operation of the system, if any. Contact the OCTV for assistance.
- ii. Review of compliance with the technical standards of the FCC, applicable federal and state law, and the franchise agreement.
- iii. Examination of outage (service interruption) reports.

### **The Financial Requirement areas to examine may include the following:**

- i. Reports on non-proprietary information of the financial condition, ownership, stock sales, and transfers of the cable system.
- ii. Reports on the franchise fee paid to the municipality.

### **Other areas to examine may include the following:**

- i. Does the cable operator provide service to all areas of the municipality?

- ii. Is the cable operator meeting the construction commitments as specified in the ordinance?
- iii. If required by the franchise, does the cable operator provide appropriate equipment and staff for the PEG access studio or the local origination studio?

After examining all of the above, municipalities must determine whether the cable operator has complied with the franchise agreement. It is possible for a municipality to hear numerous complaints from residents about cable service, only to find that a cable operator is actually living up to the terms of its franchise.

In addition, a municipality may evaluate its cable system not only at renewal time, but also throughout the life of the renewed franchise (see "Cable Monitoring"). By doing so, the municipality and the cable operator may develop a mutually beneficial working relationship.

## **7. ACCESS CHANNELS AND LOCAL ORIGINATION CHANNELS \_\_\_\_\_**

Federal law permits municipalities to require provisions for public, educational, and governmental access ("PEG access") channels and equipment as part of the franchise agreement. (47 U.S.C.A. §531) These PEG access channels enable community members, schools, and governmental agencies to air programs over the cable system. PEG access channels can be used to air local high school sporting events, school or community plays, fire and police safety messages, and town council meetings. These are but some of the possibilities that may be considered. Some municipalities have even developed their own nightly news show.

A municipality should be aware of the differences among PEG access, leased access and local origination programming when negotiating a franchise agreement. The following definitions may help to clarify them:

Public Access: Non-commercial local programming cablecast without advertising for use by individuals in a community, usually on a first come, first served basis.

Educational Access: Non-commercial local programming cablecast without advertising utilized by school systems and colleges according to local needs and the franchise.

Governmental Access: Non-commercial local programming cablecast without advertising which is reserved for governmental entities to cablecast public meetings, governmental messages and other information.

Leased Access: Channel space made available by the cable operator for commercial use. It should be noted that the number of channels to be reserved for leased access is dictated by federal law and is outside of the franchise process.

Local Origination: A channel that is operated and programmed by the local cable operator as its own television station, usually carrying local advertising.

The difference between PEG access channels and a local origination ("L.O.") channel is that the L.O. channel is owned, controlled, managed, and programmed by the cable operator. The municipality does not have any editorial control over the L.O. channel. The selection of community programs that is produced and the slotted airtime of the programs on the L.O. channel are at the discretion of the cable operator. Cable operators may not exercise any editorial control over PEG access channels or charge for use of facilities and equipment.

Each community will have its own mix of interests and needs that PEG access channels could serve. Before requesting PEG access channels, the municipality should assess what level of PEG access programming it can reasonably support. Although federal law does not limit the number of PEG access channels a community may request, the number required by the municipality must be reasonable in light of the community's cable-related needs. Under the Federal Act, the cable operator is required to carry all PEG access channels on its basic tier of cable service. (47 U.S.C.A. §543(b)(7)(A)(ii))

In addition to requiring PEG access channels, the municipality may negotiate for certain PEG access services, equipment, and facilities. Specifically, typical items subject to negotiation are: cable operator-provided PEG access equipment, a studio for the production of PEG access

programming, maintenance and replacement of equipment as needed, financial support for PEG access programming, personnel to operate the PEG access production facility, promotion of the programs by means of a cable guide, and/or training for the creation of programs (video production courses). Again, the cost of these items must be reasonable in light of the community's cable-related needs.

The provisions for PEG access should be negotiated during franchise renewal and detailed in the ordinance.

The municipality can play a large role in developing and operating PEG access channels. For example, a public access channel may be operated by a non-profit organization; the educational access channel can be administered by the municipal school system; and the municipal governing body can manage the governmental access channel. The municipality should establish its policies and procedures for managing the PEG access channels, if it has negotiated for the channel(s) during renewal. It may be helpful for the municipality to designate in the ordinance a municipal official or entity to perform these functions. Some municipalities request that the cable operator designate a PEG access coordinator.

The franchise requirements to support PEG access channels or the use of PEG access channels or any other services required under the franchise are factors that can increase rates. These costs can be itemized by the cable operator on the monthly bill as costs attributable to satisfy the franchise commitments. (47 U.S.C.A. §543(b)(4) and §542(c)(2))

Note: No entity can have editorial control over the content of public access programming. There are national and regional PEG access organizations that serve as clearing houses for PEG access user groups. These organizations can provide interested parties with an overview of PEG access channels and PEG access programming.

## **8. INSTITUTIONAL NETWORKS \_\_\_\_\_**

The municipality may request that an Institutional Network ("I-Net") be implemented. According to the Federal Act, an I-Net is a communication network which is constructed or

operated by the cable operator and which is generally available only to subscribers who are not residential subscribers. (47 U.S.C.A. §531(f)) Schools, police or fire departments, for example, could be interconnected for various purposes. I-Nets may consist of an individual channel on the cable system or a separate facility connecting two or more locations. Programs on an I-Net may be viewed at selected closed circuit sites such as, in schools, the municipal building, public buildings, and libraries. I-Nets enable schools and governmental agencies to create programs specifically geared to a selected audience, such as students or municipal employees. For example, municipal governments may use I-Nets for staff training; colleges and universities may offer courses for credit; and schools can utilize call-in homework programs.

Note: The cost of franchise commitments made by the cable operator for an I-Net can be itemized on the monthly cable bill. The mix of financial support for an I-Net for the municipality, users and operator can vary with the terms of the franchise. (47 U.S.C.A. §543(b)(4) and §542(c)(2))

## **9. COMPARISON \_\_\_\_\_**

While the ultimate standard for a viable franchise requirement is the reasonableness of the particular community's cable-related needs in light of the costs, the municipality may wish to have a sense of what is being negotiated by other municipalities.

The municipality can review other municipal reports and ordinances. Most likely, the cable operator serving the municipality serves other communities as well. A careful comparative study can be made of what franchise commitments the cable operator has offered other municipalities it serves. What franchise benefits do similar and adjacent communities receive from other cable operators that the municipality does not receive? At what cost to subscribers?

## **10. SURVEYS \_\_\_\_\_**

One of the best means of assessing the past performance of the cable operator and the community's future cable-related needs is through the use of a survey. This can also help to

identify the quality of existing service. The survey results should be introduced for the record at the public hearing and incorporated in the municipal report.

Examples of surveys may be obtained from the OCTV (see Appendix II, "Sample Survey"), as well as by contacting other municipalities directly. The New Jersey State League of Municipalities can also provide sample surveys used by municipalities in the State of New Jersey. The League can be contacted at (609) 695-3481 or [www.njslom.com](http://www.njslom.com).

There are many ways to reach the subscribers and citizens of the community. The municipality can conduct a telephone survey or poll residents at a local community event. Many municipalities send out cable television surveys with tax bills, water bills, or within a municipal newsletter.

Note: A survey is an important document during franchise renewal. The results will highlight what areas need improvement or additional effort, as well as the strengths of the cable operator. The surveys should not only cover existing subscribers, but residents who do not subscribe or who no longer subscribe to the cable operator. This may help the municipality determine whether community needs have been met.

## **11. PUBLIC HEARINGS \_\_\_\_\_**

During ascertainment, the municipality can choose to hold one or more public hearings in order to solicit comments about the cable operator.

A public hearing will serve the following purposes: to create a record of the cable operator's compliance with the current franchise agreement; to document the community's evaluation of the quality of service that the cable operator has provided; and to directly ask the community what its cable-related needs are.

Federal law requires that the public be given "appropriate notice" and a chance to participate in the fact-finding process. (47 U.S.C.A. §546(a)) Formal public hearings in the ascertainment phase are not required, but are recommended. If a municipality decides to conduct

public hearings during the ascertainment phase of renewal, state regulations require that notice must be provided to the public and to the cable operator at least 15 days prior to the hearing. If a hearing is held, transcripts of such a hearing are required and are made at the expense of the municipality. In addition, the public must be given the opportunity to comment on the proceeding. These comments can be either written or oral. (N.J.A.C. 14:18-13.2(a)(2), (3)) Regardless of whether a hearing is held, the public should still be afforded a chance to participate and comment on the cable operator's performance. (47 U.S.C.A. §546(a)) As noted above, the cable survey can be a valuable tool in this regard.

Examples of factors that may be reviewed at a public hearing include the following:

- A. Statewide needs and requirements that have been established by the regulations of the Office of Cable Television.
- B. Regional community cable-related needs; for example, an Educational Interconnect or shared public access channel.
- C. Local community cable-related needs.
- D. The performance and the substantial compliance with the terms of the current franchise.
- E. Documents filed at the OCTV.

An ascertainment hearing may take place before either the municipality's governing body or before the cable television advisory committee appointed by the municipality. At the hearing, all parties, including the cable operator, have the right to present relevant evidence.

The municipality, upon notice to the cable operator, may want to prepare a list of significant cable-related concerns, questions and problems and request that the cable operator address them during the hearing. A synopsis of the transcripts of the public hearing should be



incorporated into the municipal report. Municipal requirements and/or requests made during negotiations can be justified if based on documented community needs.

## 12. MUNICIPAL REPORT \_\_\_\_\_

The end result of the ascertainment phase is a compilation of all the records in a municipal report (N.J.A.C. 14:18-13.2(b), (c)) There is no predetermined format or length required for a municipal report. Each report is unique in that it should document problems, benefits, and the individual community's cable-related needs. The municipality may request from the OCTV examples of other municipal reports issued in New Jersey. Historically, the length of the municipal report has varied from one page to 100 pages or more.

Incorporated into the report should be all of the relevant findings gathered during the ascertainment phase by the municipality. Information may be obtained from sources such as:

- **Surveys;**
- **Comparative studies;**
- **Meetings;**
- **Public hearings;**
- **Reports obtained from the OCTV and the cable operator;**
- **Recorded complaint reports obtained from the complaint officer and/or the OCTV;**
- **Other franchise agreements; and**
- **Community cable-related needs provided by organizations and institutions in the municipality.**

The municipal report must be issued no later than **one year before** the cable franchise is due to expire. If, for example, the municipality's franchise expires on August 10, 2009, the report would be due on August 10, 2008. This permits the timely filing of the application for municipal consent.

It should be noted that one or both parties might request an extension of the due date in writing. Because state law mandates these time frames, the OCTV can neither grant nor deny

extensions. However, if both parties have agreed to the extension and there is no harm to the public interest, the OCTV will permit the process to continue. The municipality should be aware that there has been no adjudication of the extent to which operating outside the franchise renewal time frames would affect the subsequent rights of the parties in administrative proceedings or in state or federal courts.

The municipality must issue the municipal report to the cable operator and the OCTV, and must make it available for public inspection. If the municipality has begun ascertainment proceedings and then decides not to issue a municipal report, it must notify the OCTV in writing promptly and explain its reasons. (N.J.A.C. 14:18-13.2(e))

Upon filing of a municipal report, the cable operator must submit a municipal consent application to the municipality. The municipal report should ask the cable operator to address specific concerns raised by the community. The municipal report should also provide the necessary information to determine renewal or denial of the franchise. The municipality can ask for a broad range of changes, including: the upgrading or rebuilding of the cable system; greater allocation of facilities or improved equipment for PEG access channels; expansion of cable service to cover the entire community; and improved customer service.

Note: Although the formal ascertainment process is optional, any attempt by a municipality to modify the original franchise agreement or deny renewal altogether must be based on documented findings that should be recorded in the municipal report. The report is the basis for negotiating a beneficial franchise agreement as well as the basis upon which a municipality recommends to the OCTV a denial of a cable operator's request to renew the franchise.

It should be noted that a cable operator may file with the Board for direct certification of the franchise stating that the municipality has been "arbitrary and capricious" in denying the franchise or in granting an ordinance unfavorable to the cable operator. (N.J.S.A. 48:5A-17(d)) The Board must then ascertain if the basis for the municipality's request for denial of the franchise, or the grant of unfavorable terms to the cable operator, is reasonable and in accordance

with federal requirements. Essential to that determination is a timely and complete municipal report.

### **13. DIALOGUE \_\_\_\_\_**

During franchise renewal, and throughout the term of the franchise, the municipality should establish a dialogue with its cable operator. The municipality should keep the lines of communication open with the cable operator by calling the company representative regularly and if necessary scheduling periodic meetings with the cable operator to discuss concerns. These provisions can be incorporated in the ordinance. It can be an opportunity for the municipality and the cable operator to better serve the community.

Sometimes, as a starting point for negotiations, a municipality will request that the cable operator submit an informal plan or "proposal" for renewal. However, the cable operator might construe this request to mean a filing of an application. Once the cable operator files the formal municipal consent application pursuant to N.J.S.A. 48:5A-23, and the municipality acts upon it, the municipality may have effectively waived its right to the ascertainment phase proceedings. Therefore, the municipality must be careful how it requests information from the cable operator.

### III. MUNICIPAL PHASE

**Summary: The period following the filing by the cable operator of a municipal consent application ("application") to the municipality. During this period, the governing body reviews the application and makes a decision concerning the renewal of the franchise.**

The municipal phase begins when the cable operator files its application with the municipality and the OCTV. The OCTV will review all filings to ensure adherence to the statutory procedures.

**Note: During the municipal phase, both parties must copy the OCTV on all correspondence between the municipality and the cable operator. (N.J.A.C. 14:18-13.4(a)(6))**

While the ascertainment phase itself is optional, the municipal phase is mandatory. The municipality is required by federal and state statute to follow the procedures detailed in this section of the guide. Moreover, these steps in the process must be completed within a specified time frame.

The filing of an application by the cable operator initiates the time frames in which the municipality is mandated by state law to act on the request for renewal of the ordinance that grants the municipal consent. These requirements must be completed no later than 150 days from the application filing.

During the municipal phase, the governing body is responsible for reviewing the application, holding public hearings, and issuing an ordinance granting renewal municipal consent or passing a resolution denying renewal of the consent. Initially, the decision to renew or deny the franchise is made by the municipality's governing body.

Note: State law mandates the adherence to specific time frames. Because these time frames are mandated by statute, the OCTV can neither grant nor deny extensions. However, if both parties agree to an extension, and there is no harm to the public interest, the OCTV will

permit the process to continue. Often franchises in New Jersey have expired while the municipality and cable operator continued to negotiate during the municipal phase. It should be noted that there has been no adjudication of how operating outside the franchise renewal time frames would affect the subsequent rights of the parties in administrative proceedings or in the state or federal courts. The OCTV will encourage parties actively pursuing resolution. However, the OCTV may request updates or specific action if neither party takes action on the application.

The following is a checklist that can be utilized during the municipal phase.

## 1. MUNICIPAL CONSENT APPLICATION \_\_\_\_\_

Once the municipality files the municipal report, the cable operator has 90 days to file an application. (N.J.A.C. 14:18-13.2(d) and N.J.A.C. 14:18-13.3(a)(1))

If the municipality does not file a municipal report, the cable operator must file an application between one year and nine months before the Certificate of Approval expires. (N.J.A.C. 14:18-13.3(a)(2))

If the municipality submits its municipal report earlier than required (see "municipal report"), the cable operator must file an application within 90 days of its receipt. (N.J.A.C. 14:18-13.2(d)) The cable operator must submit to the municipality a filing fee with the application in the amount of \$100.00. (N.J.A.C. 14:18-11.1(b))

The cable operator must submit the application on a standardized form as required by the Director of the OCTV. (N.J.A.C. 14:18-11.1(b)) The municipality may contact the OCTV for a copy of the application form. Although the requirements for filing are detailed by the regulations (N.J.A.C. 14:18-11.2(a)), the application should also **specifically** address the questions and concerns contained in the municipal report.

The OCTV will not process any incomplete applications. The cable operator will be notified of any deficiencies found by the OCTV and must respond to the OCTV in a timely manner. The municipality must be copied on the cable operator's response to the OCTV.

Note: Because exclusive franchises are prohibited, the municipality may at any time receive applications from other cable operators requesting to serve the community. (47 U.S.C.A. §541(a)(1)) However, such an application cannot be compared or considered in connection with the present cable operator's renewal. Hence, renewal or denial of the incumbent cable operator's franchise renewal cannot be based on an application submitted by other cable operators. (47 U.S.C.A. §546(c)(1)) Therefore, consideration of applications from other cable operators must be handled in a separate proceeding.

## **2. PUBLIC HEARINGS** \_\_\_\_\_

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 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))

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))

### **3. FRANCHISE PROPOSAL LIST \_\_\_\_\_**

Keeping in mind that the standard for a valid franchise requirement is that it is reasonable to meet future cable related community needs and interests, taking into account the cost of meeting such needs and interests (47 U.S.C.A. §546 (c)(1)(d)), a municipality may want to develop what is known as a "Franchise Proposal List" prior to negotiations with the cable operator.

The municipality should consider talking to other municipal officials who have gone through the franchise renewal process. They can share their experience and accomplishments, as well as make some suggestions. However, any franchise renewal discussion must be based on the facts and circumstances applicable to the individual municipality.

The municipality also might request copies of ordinances from other municipalities, or from the OCTV. The municipality can look at what cable operators are offering other municipalities in New Jersey and around the country in comparable systems and communities.

Technology and the cable industry are evolving. In order to stay on top of the issues, the municipality should stay in touch with sources of current information on the industry and its technology. The Internet is a valuable source of information to the municipality. The following suggestions will help the municipality collect information on its cable operator, as well as the cable industry:

- A.     Subscribe to trade publications or utilize libraries that do;
  
- B.     Join cable-related organizations and associations;
  
- C.     Exchange information with colleagues;



- D. Develop information on franchise renewal results in other communities; and
- E. Browse the Internet. Visit various sites including the cable operator's (local or national); the FCC: [www.fcc.gov](http://www.fcc.gov); the National Cable Television Association: [www.ncta.com](http://www.ncta.com); the Alliance for Community Media: [www.alliancecm.com](http://www.alliancecm.com); etc.

The municipality can ask for a broad range of changes in its franchise including: upgrading or rebuilding of the cable system; greater channel allocation for or improved equipment for PEG access channels; expansion of cable service to cover the unserved portions of the municipality; and improved customer service.

The following list includes items that are commonly the subject of negotiations:

### **FRANCHISE PROPOSAL LIST**

Some of the items listed below can be required during franchise renewal. Other provisions are negotiable items. However, the municipality must document a need for these provisions through ascertainment proceedings.

### **SERVICE AREAS**

#### Full Build of Municipality

The availability of cable television service to the entire municipality regardless of zoning or conditional factors such as housing density.

#### Primary Service Area ("P.S.A.")

The area of a municipality where the cable operator, in its original municipal application, has committed to construct plant at its own expense.

### Expansion of Primary Service Area

Extension of cable service beyond the area previously committed to in the original municipal application by the cable operator. Extension of cable plant would be at the sole cost of the cable operator, except that the potential subscriber would be required to pay installation costs. One example of expansion of the P.S.A. is to include the provision of service to new developments.

### Service to all Residential Areas

Availability of cable television service to any area within the municipality zoned residential, at no cost other than the "standard" or "non-standard" residential installation charge.

### Service to all Commercial Areas

Availability of cable television service to any area within the municipality zoned commercial, at no cost other than the "standard" or "non-standard" commercial installation charge.

### Service to Residents Located in Commercially Zoned Areas

Availability of cable television service to residents located in commercially-zoned areas within the municipality at no cost other than the "standard" or "non-standard" residential installation charge, when the municipality is not a full build.

### Construction Deadlines

Dates committed to by the cable operator for completion of construction.

### Construction Reporting Schedule

Time frame (usually monthly or bimonthly) by which a cable operator reports its construction progress to a municipality and/or the OCTV.

### Line Extension Policy

Cost sharing formula that determines the dollar amount to be shared between the cable operator and the potential customer for construction along public right-of-way outside the primary service area.

### Programming

A municipality cannot require specific programming or other information services, except for "broad categories" of programming. (47 U.S.C.A. §544(b)(2)(B)) Any municipal requirements for "broad categories" of programming must be documented in the municipal report and incorporated in the ordinance.

### Term of Franchise

There is no minimum term specified in state and federal statutes. However, a franchise term of three years would virtually start the ascertainment phase proceedings again the same day as the renewed term. The maximum franchise term allowed in the state is 15 years with a possibility of an automatic renewal term for an additional 10 years. A franchise term of 10 years is not unusual. There have been some franchise renewals granted in the state for less than 10 years. Currently, the average franchise term length is approximately 12 years. Overall, the length of the term must be reasonable in light of future commitments by the cable operator.

## **REBUILD/UPGRADE**

### Upgrade of Cable System "Channel" Capacity

The replacement or addition of electronic equipment to provide increased channel capacity.

### Rebuild of Distribution Plant

The replacement of cable, electronic equipment and other equipment necessary to provide increased channel capacity and/or improve picture quality and system reliability.

## **SPECIAL/EDUCATIONAL SERVICES**

### Institutional Network ("I-Net")

A dedicated system in addition to the regular cable television system's cables. Such a system may employ various technical configurations, including combinations of coaxial and fiber optic cable. Institutional cables are usually placed adjacent to the regular cables, but represent an independent and entirely separate transmission facility. It may also be possible to use the existing system to achieve the same effect. The intent is to provide facilities for data, voice or video signals that are not part of the cable television system and to provide this capability to commercial or other potential users along the cable route. Some examples of use for an I-Net are to interconnect schools or other municipal properties.

### Free Service

Cable service (i.e., installation and monthly service) provided free of charge to municipal buildings, emergency service providers, educational facilities, and other institutions necessary for the public interest. The parties must have agreed upon the provision of free service voluntarily; the record should support the need for free service at the specified locations; and the provision of free service must serve a specific public interest.

## Two-Way Capability

The capability of a transmission system that allows the simultaneous transport of signals in both upstream (towards the headend) and downstream (away from the headend) directions. One example of use of this capability is to have the signals that originate away from the cable operator's headend sent "upstream" back to the cable operator's headend. These signals could then be transported "downstream" to subscribers.

## Public, Educational and Governmental ("PEG") Access Channels

A variety of channel arrangements dedicating channel space to local access use is possible. It is important to understand the distinctions in PEG access terminology:

Public Access: Non-commercial local programming cablecast without advertising for use by individuals in a community, usually on a first come, first served basis.

Educational Access: Non-commercial local programming cablecast without advertising utilized by school systems and colleges according to local needs and the franchise.

Governmental Access: Non-commercial local programming cablecast without advertising which is reserved for governmental entities to cablecast public meetings, governmental messages and other information.

Leased Access: Channel space made available by the cable operator for commercial use. It should be noted that the number of channels to be reserved for leased access is dictated by federal law and is not a subject for the franchise process.

Local Origination: A channel that is operated and programmed by the local cable operator as its own television station, usually carrying local advertising.

### Equipment/ Facilities/ Support Staff for PEG Access

The mix of equipment, facilities, and PEG staff support offered by the cable operator or required by the municipality for use in the production of PEG access programming. The municipality may request that the cable operator provide training on PEG access equipment or facilities.

### Local Office Locations and Office Hours

The municipality may request the cable operator to provide specific reasonable office hours that meet the needs of the community.

### Increase Performance Bond Requirements

The municipality may request a higher performance bond than the \$25,000.00 required by the State Act upon an established need. This is usually requested when there is significant construction to be performed by the cable operator. A request for an increased performance bond is subject to review and approval by the Board.

### Prohibition of Obscene Services

There are state and federal statutes prohibiting obscenity on cable channels, as well as FCC regulations that allows the cable operator to refuse to transmit any public access program or portion of a public access program that it reasonably believes contains obscenity. 47 C.F.R. § 76.701(a) allows cable operators to prohibit the use of PEG channels to carry "obscene material, sexually explicit content or material soliciting or promoting unlawful conduct." 47 C.F.R. § 76.701(b) permits a cable operator to prohibit certain programming that it believes is patently offensive as measured by contemporary community standards on leased access channels. Cable operators that choose to allow indecent programming on leased access channels must do so on a separate channel and to block the channel until the subscriber requests that programming in writing.

Note: As the franchise authority in the State of New Jersey, the OCTV sets the customer service standards applicable statewide through rulemaking. All cable operators, regardless of the municipal franchise agreement, must conform to state law.

Although the OCTV maintains authority over the operations of cable operators, the OCTV does permit the municipalities and cable operators to negotiate certain requirements during the franchising process. For example, the OCTV would permit an agreement that establishes local business office hours of operation. However, any additional requirements cannot interfere with the OCTV's regulatory authority and cannot adversely impact the provision of service to neighboring communities.

#### **4. NEGOTIATIONS \_\_\_\_\_**

Whatever provisions a municipality wishes to require or negotiate (see "Franchise Proposal List") can be detailed in a "draft" document prior to negotiations. These provisions will give the municipality and the cable operator a clear idea of what is on the table. A municipality should incorporate the community needs, which were documented in the municipal report, into the draft.

A common point of discussion is the length of the franchise term a municipality grants the cable operator. There is no minimum term specified in state and federal statutes. However, a franchise term of three years would virtually start the ascertainment phase proceedings again. The maximum franchise term allowed in the state is for 15 years with an automatic renewal term of ten years. A franchise term of 10 years is not unusual. There have been a few franchise renewals granted in the state for less than 10 years. Overall, the length of the term must be reasonable in light of future commitments by the cable operator.

Sometimes cable operators and municipalities agree on provisions that are unenforceable and/or preempted by federal and state law. The OCTV must take exception to these commitments, and a municipality can lose a negotiated item as a result. Unless the municipality is aware of what can and cannot be requested, these provisions might be lost and the

municipality will have missed its opportunity to negotiate for alternate provisions. Please refer to the annotated ordinance (Appendix "VI" of the Guide). It clarifies numerous provisions.

## **5. DECISION TO RENEW OR DENY \_\_\_\_\_**

The culmination of the process is the decision by the municipality to renew or deny the franchise. The municipality must make its decision no later than 150 days from the filing of the application by the cable operator and no later than 30 days from the last public hearing.

(N.J.A.C. 14:18-11.13 and N.J.A.C. 14:18-13.4(a)(3))

The municipality must issue a municipal consent ordinance or pass a resolution of denial. A failure to act may be interpreted by the Board as a preliminary assessment of denial. (N.J.A.C. 14:18-13.5(b))

Note: An ordinance is often adopted after extensive negotiations with the cable operator. A "resolution of denial" is passed if the municipality determines it will not renew with the cable operator. In other cases, the municipality may adopt an ordinance with provisions that may not be acceptable to the cable operator. The cable operator would then file an "arbitrary petition" (see "Certificate of Approval Phase") with the Board for direct certification.

## **6. MUNICIPAL CONSENT ORDINANCE \_\_\_\_\_**

When the municipality decides to issue an ordinance, all provisions negotiated with the cable operator should be included in the document. The provisions in the ordinance should be as detailed as possible. The municipality should specify, among other things, any scheduled commitment dates, PEG access equipment to be provided, an agreement for interconnects with other municipalities, and monetary funds allocated to PEG access and other cable-related needs. The draft document can be helpful in putting together the final ordinance.

**The municipality must submit a draft ordinance to the OCTV for review no later than 45 days from the municipality's decision to grant renewal to the cable operator.**

(N.J.A.C. 14:18-11.18)



Upon review by the OCTV, the municipality must introduce the ordinance at its next regularly scheduled municipal meeting. The ordinance must then be reintroduced for final consideration no later than 30 days after the initial reading. (N.J.A.C. 14:18-11.18)

An ordinance granting renewal municipal consent should reflect the result of negotiations between the municipality and the cable operator. It should also reflect the result of the findings of the formal needs assessment, the performance review, and the public hearings. The ordinance must conform to the substantive requirements of federal and state law. (N.J.A.C. 14:18-11.15)

The contents of the ordinance will vary depending upon the individual needs and concerns of each municipality. The demographics, population, and location of a municipality are factors that should be addressed in tailoring the contents of an ordinance to the particular municipality. For example, some municipalities may require that the cable operator wire the entire community, while other municipalities may designate low-density areas for service under a line extension policy.

The ordinance is **required** to include the following information pursuant to N.J.S.A. 48:5A-24, -25, and -26:

- A. The territory to which the ordinance applies;
- B. The franchise term;
- C. The designation of a complaint officer;
- D. A local business office or agent for operations and its location;
- E. The incorporation of the municipal consent application;
- F. The franchise fee payable to the municipality; and

- G. Any modifications to the information contained in the municipal consent application.

For a detailed description/explanation of these provisions, as well as an explanation of certain provisions the municipality may include, see the sample municipal consent ordinance provided at the end of the Guide (Appendix "VI").

The municipality must submit the ordinance to the cable operator within two working days after the final vote. (N.J.A.C. 14:18-11.19(a)) The cable operator must decide whether or not to accept the ordinance in writing within ten days. (N.J.S.A. 48:5A-24 and N.J.A.C. 14:18-11.19(b))

Note: A resolution indicating the municipality's intentions to grant municipal consent to the cable operator may be issued by the municipality, if it appears the ordinance will not be completed and adopted within the specified time frame. However, the proposed ordinance must be completed as soon as possible and sent to the OCTV for review. If there are any outstanding issues that need to be resolved, the municipality should not issue a resolution. Once a resolution has been passed, the municipality may have effectively waived its ability to pursue other options.

## **7. RESOLUTION OF DENIAL \_\_\_\_\_**

If the municipality decides to issue a resolution of denial, it must base its decision on the answers to the following questions:

- A. Has the cable operator substantially complied with the material terms of the existing franchise and applicable law?
- B. Has the quality of the cable operator's service, including signal quality, response to consumer complaints, and billing practices, been reasonable in light of community needs?

- C. Does the cable operator have the financial, legal, and technical ability to provide the services, facilities, and equipment it is proposing to provide?
  
- D. Is the cable operator's franchise renewal proposal reasonable to meet the future cable-related needs and interests of the community, taking into account the cost of meeting such needs and interests? (47 U.S.C.A. §546(c)(1); N.J.A.C. 14:18-13.7(a))

A decision not to renew cannot be based on the cable operator's past performance unless the cable operator has been given "notice and opportunity to cure". (47 U.S.C.A. §546(c), (d)) Also, the mix or quality of cable services cannot be considered in determining whether or not to renew a franchise. (47 U.S.C.A. §546(c)(1)(B))

Note: In order to deny the renewal franchise, the formal ascertainment phase renewal process must be followed. (47 U.S.C.A. §546(a)-(g)). The OCTV recommends that the municipality undertake the ascertainment phase proceedings and issue a timely municipal report (see "Ascertainment Phase").

#### **IV. CERTIFICATE OF APPROVAL PHASE**

**Summary: Final phase that the Board, as franchising authority, issues the document that enables the cable operator to activate and operate, or continue to operate, a cable television system in the municipality. The variations are outlined below.**

During the Certificate of Approval phase, the Board takes certain steps to complete the franchise renewal process. In the State of New Jersey, the Board, as the "franchising authority", must ultimately decide whether or not to renew a franchise. Once an ordinance is adopted by the municipality and accepted by the cable operator, the municipality generally does not participate in the Certificate of Approval phase. Unless there are any problems with the cable operator's filing, no further action by the municipality is needed. It is the responsibility of the Board to issue the Certificate of Approval granting renewal to the cable operator. However, if the municipality passes a "resolution of denial" or the cable operator does not accept the municipality's ordinance, there are certain procedures the municipality must follow.

If an ordinance is adopted by the municipality and accepted by the cable operator, the Board will issue a Certificate of Approval renewing the franchise unless substantial problems exist with the agreement. If the ordinance is granted and accepted, the cable operator has 30 days to file its petition with the OCTV. The cable operator must send a copy to the municipality. (N.J.A.C. 14:18-13.5(c)) The Board will review the Certificate of Approval application and the petition submitted by the cable operator. Any deficiencies in the petition will be brought to the attention of the cable operator. The cable operator generally will be given 15 days to respond to the OCTV and the municipality must be copied. Upon satisfactory resolution of any deficiency, the case will be processed to the Board for final consideration. The Board will then issue the Certificate of Approval.

A Board decision to uphold the denial of a franchise will consider the record established by the municipality, including records in evidence from the ascertainment and municipal phase proceedings conducted by the municipality. The municipality may decide to issue a resolution of denial or adopt an ordinance that it believes will not be accepted by the cable operator. The cable operator would then file a petition, within 30 days of service by the municipality of the

municipality's decision, alleging that the municipality "arbitrarily refused" consent and requesting "direct certification" of the franchise. (N.J.S.A. 48 5A-17(d) and N.J.A.C. 14:18-13.5(a)) The cable operator must also enclose a Certificate of Approval application with the filing, as well as a copy of the municipal report and the resolution of denial if applicable. The cable operator must submit a copy of the petition to the municipality. (N.J.A.C. 14:18-13.5(a)(1), (2))

If the cable operator files a petition alleging arbitrary refusal, the municipality will be afforded an opportunity to respond with an answer. The municipality must file an answer to the petition with the Board within 20 days of receipt of the petition and must copy the cable operator. (N.J.A.C. 14:17-7.1 et seq.)

The OCTV may decide to transmit a contested case to the Office of Administrative Law ("OAL") for determination. Before transmitting the petition to the OAL, the OCTV may offer the municipality and the cable operator an opportunity to settle or at least narrow the issues in dispute at a "pre-transmittal settlement conference". If agreed to by the municipality and the cable operator, the OCTV will attempt to facilitate a settlement. (N.J.A.C. 14:17-8.1 et seq.)

If the matter is transmitted to the OAL, an Administrative Law Judge will hear the case based on the renewal proceedings. It is the municipality's responsibility to present its case at the OAL. The municipality's involvement during the ascertainment phase will help to substantiate its case. The OAL may hold hearings to determine:

- A) Whether the cable operator has substantially complied with the franchise.
- B) The quality of the cable operator's service.
- C) The cable operator's ability to meet its financial, legal and technical obligations under the franchise.
- D) Whether the cable operator's proposal is reasonable to meet the future cable needs of a municipality.

Upon completion of the OAL hearings, or upon settlement by the parties, the Administrative Law Judge will issue an "Initial Decision". The Board can accept, reject or modify an Initial Decision. (N.J.S.A. 52:14B-10(c)) The municipality and the cable operator will be given notice of the Board's decision to either grant renewal or deny the franchise. (N.J.A.C. 14:18-13.5(e)(1))

## V. CABLE MONITORING

A central theme to the franchise renewal process is the importance of establishing a record that will provide a basis for renewal negotiations and decisions. Although the Board has broad enforcement authority, the municipality should bring instances of non-compliance to the Board's attention so that all parties can be put on notice and the cable operator can be afforded its legal right to cure any defects.

A municipality should therefore keep the lines of communication with the cable operator open by doing the following:

- A. Calling the company representative regularly to discuss franchise issues.
- B. Promptly notifying the cable operator in writing of suspected franchise violations and/or inadequate service.
- C. If an alleged franchise violation has not been resolved, contacting the OCTV for further assistance.

An additional tool in monitoring the franchise is the "complaint officer." Within its ordinance, the municipality must designate a complaint officer. (N.J.S.A. 48:5A-26) The complaint officer is responsible for handling subscriber complaints that cannot first be resolved by the cable operator and the subscriber. The municipality may designate the OCTV or itself to handle subscriber complaints. If the municipality chooses to act as the complaint officer, it will have first hand knowledge of the areas the cable operator needs to improve. If the municipality chooses to be the designated complaint officer, it must establish procedures to take complaints. The OCTV is available to assist any municipality in establishing procedures to process complaints. However, the majority of municipalities in the state designate the OCTV as complaint officer. The OCTV is available to assist any municipality in establishing procedures to process complaints.

In order to negotiate a successful franchise agreement and ensure compliance a municipality should monitor its cable system not only at renewal time, but also during the life of the franchise. It is possible to establish a working relationship with the cable operator before it is time to renew a franchise. Municipal officials or liaisons should take certain steps to ensure a productive and mutually beneficial franchise. For example:

- A. Know what is contained in your municipal consent ordinance (franchise agreement) and the Certificate of Approval and review them for compliance.
- B. Establish a cable television advisory committee for the life of the franchise term and charge them with the duty of annual review of the ordinance.
- C. Monitor the use of public, educational, and governmental ("PEG") access channels in the municipality. Educate community leaders, educators, and government officials about PEG access programming possibilities.
- D. Look at what other cable systems are offering municipalities in and out of the state. Review other municipal reports and ordinances.
- E. Attempt to resolve issues as they arise.
- F. Notify the cable operator and the OCTV of any suspected franchise violations.
- G. Review subscriber complaints.
- H. Discuss concerns with the cable operator at regularly scheduled meetings. Establish provisions for meetings with the cable operator in the ordinance.
- I. Prepare an annual report on the cable operator's performance documented by files and records. The report may also assist in preparing the ascertainment report.



- J. Contact regional and national organizations involved in cable-related matters. It is important to share experiences with other municipalities and stay on top of the technological changes in the industry.

An informed municipality is better prepared to enter the franchise renewal process. The municipality should develop an ongoing dialogue with its operator throughout the life of the franchise. A municipality should track the positive actions taken by the cable operator, as well as the problems that may arise. If the municipality effectively monitors its cable operator, by the time franchise renewal begins, both the municipality and the cable operator will have a clearer understanding of what is needed to best serve the local residents.

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**APPENDIX "I"**  
**FRANCHISE RENEWAL TIMETABLE**

**FROM EXPIRATION DATE:**

**NOTICE**  
**36 MONTHS**

MUNICIPALITY OR OPERATOR FILES NOTICE OF THE OPENING OF THE ASCERTAINMENT PROCESS (N.J.A.C. 14:18-13.1(a)(1))

**ASCERTAINMENT**  
**36 - 12 MONTHS**

MUNICIPALITY CONDUCTS THE ASCERTAINMENT PROCESS TO EXAMINE THE PAST PERFORMANCE OF THE OPERATOR AND DETERMINE THE FUTURE CABLE-RELATED NEEDS OF THE COMMUNITY (OPTIONAL HEARING) (N.J.A.C. 14:18-13.2(a))

**REPORT**  
**12 MONTHS**

AT LEAST **12** MONTHS PRIOR TO THE EXPIRATION OF THE CERTIFICATE OF APPROVAL ("COA"), THE MUNICIPALITY ISSUES A REPORT ON THE OPERATOR'S PAST PERFORMANCE AND THE FUTURE CABLE-RELATED NEEDS OF THE COMMUNITY (N.J.A.C. 14:18-13.2(c))

**APPLICATION**  
**9 MONTHS**

UPON RECEIPT OF THE MUNICIPAL REPORT, THE CABLE OPERATOR SHALL HAVE **90** DAYS IN WHICH TO FILE A MUNICIPAL APPLICATION (N.J.A.C. 14:18-13.2(d)) AND N.J.A.C. 14:18-13.3)

**HEARING OPENS**  
**6 - 7 MONTHS**

MUNICIPALITY COMMENCES CONSENT HEARING **60 TO 90** DAYS AFTER APPLICATION IS FILED (N.J.A.C. 14:18-13.4(a)(1))

**HEARING CONCLUDES**  
**5 MONTHS**

ANY HEARINGS CONCERNING THE CONSENT APPLICATION SHALL BE COMPLETED WITHIN **120** DAYS AFTER THE CONSENT APPLICATION IS FILED (N.J.A.C. 14:18-13.4(a)(2)). THE PROPOSED ORDINANCE SHOULD BE SUBMITTED TO THE OFFICE, PRIOR TO THE FIRST READING, FOR A PRELIMINARY REVIEW (N.J.A.C. 14:18-11.16)

**ORDINANCE OR**  
**RESOLUTION**

MUNICIPALITY MAKES A DECISION TO ISSUE A RENEWAL BY ISSUING A CONSENT ORDINANCE OR TO RECOMMEND DENIAL OF RENEWAL BY PASSING A RESOLUTION OF DENIAL. THE MUNICIPAL GOVERNING BODY SHALL RENDER A DECISION NO LATER THAN **150** DAYS FROM THE FILING (N.J.A.C. 14:18-13.4(a)(3), (b)(1), (b)(2))

**PETITION**  
**3 MONTHS**

IF A RENEWAL CONSENT ORDINANCE IS GRANTED, THE OPERATOR SHALL HAVE **30** DAYS IN WHICH TO FILE A CERTIFICATE OF APPROVAL ("COA") PETITION (N.J.A.C. 14:18-13.5(c))

**COA**

WITHIN **30** DAYS, THE BOARD OF PUBLIC UTILITIES ("BPU") ISSUES A COA AND NOTICES MUNICIPALITY AND CABLE COMPANY (N.J.A.C. 14:18-13.5(e))

**OR**

**OAL**

WITHIN **30** DAYS, THE BPU MAKES A PRELIMINARY ASSESSMENT OF DENIAL AND REFERS THE MATTER TO THE OFFICE OF ADMINISTRATIVE LAW ("OAL") FOR HEARING; MUNICIPALITY AND CABLE COMPANY ARE NOTIFIED (N.J.A.C. 14:18-13.5(e))

**APPENDIX "II"**

OFFICE OF CABLE TELEVISION

CABLE TELEVISION SURVEY

1. Are you presently a subscriber to cable television?

Yes \_\_\_\_\_ No \_\_\_\_\_ Not Available \_\_\_\_\_

If yes, number of sets connected to cable: \_\_\_\_\_

If no, have you ever subscribed to cable within the municipality?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes:

Why? \_\_\_\_\_

2. Have you changed your cable service since your cable was installed (i.e. level of service)?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes:

Why? \_\_\_\_\_

What changes did you make? \_\_\_\_\_

3. Have you ever subscribed to another cable system?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, how does (the local cable company) compare to the other system?

- a) better
- b) worse
- c) same

Comments on the other cable system: \_\_\_\_\_

\_\_\_\_\_

4. Why do you subscribe to cable television?
- a) no reception or poor reception without it
  - b) movies
  - c) variety of programs
  - d) sports
  - e) other \_\_\_\_\_
5. Are you satisfied with (the local cable company's) service?
- Yes \_\_\_\_\_ No \_\_\_\_\_
6. Have you had any problems with your cable service in the past six months?
- Yes \_\_\_\_\_ No \_\_\_\_\_
7. Which if any of these problems have you had in the past six months?
- a) complete loss of cable for several hours (outage)
  - b) picture quality poor on all stations
  - c) picture quality poor on specific stations
  - d) equipment problems
  - e) other \_\_\_\_\_
8. Would you say that outages occur...
- a) frequently?
  - b) only during bad weather?
  - c) occasionally?
  - d) hardly ever?
9. Has (the local cable company) field technician. representative made a service call to your home in the past six months?
- Yes \_\_\_\_\_ No \_\_\_\_\_
- If so, for what reason? \_\_\_\_\_

10. How many days did you wait for a service appointment?

- a) less than one day
- b) 1 to 2 days
- c) 3 to 5 days
- d) 6 to 10 days
- e) over 10 days

If longer than three days, was it for a specific appointment (e.g., Saturday, at your special request)?

Yes \_\_\_\_\_ No \_\_\_\_\_

11. Have you contacted (the local cable company) with complaints or questions by telephone?

Yes \_\_\_\_\_ No \_\_\_\_\_

12. Have you had any billing problems with (the local cable company)?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, explain. \_\_\_\_\_

13. Please rate (the local cable company's) service in the following areas:  
(G=Good; S=Satisfactory; P=Poor; N/A=Not Applicable)

a)	Reception	G	S	P	N/A
b)	Routine service response including installation	G	S	P	N/A
c)	Emergency service response	G	S	P	N/A
d)	Telephone accessibility	G	S	P	N/A
e)	Billing adjustments	G	S	P	N/A
f)	Courtesy of employees	G	S	P	N/A
g)	Basic programming selection	G	S	P	N/A
h)	Premium programming selection	G	S	P	N/A

14. Have you ever watched locally originated programming?

Yes \_\_\_\_\_ No \_\_\_\_\_

15. Have you ever watched public, educational and governmental ("PEG") access programming?

Yes \_\_\_\_\_ No \_\_\_\_\_

16. Would you be interested in seeing more municipality specific programming?

Yes \_\_\_\_\_ No \_\_\_\_\_

17. Rank local programming in order of importance to you on a scale of 1 to 5.  
(5=very important; 1=Not important)

- a) local news \_\_\_\_\_
- b) Board of Education meetings \_\_\_\_\_
- c) local public opinion \_\_\_\_\_
- d) senior citizen programs \_\_\_\_\_
- e) children's programs \_\_\_\_\_
- f) local sports \_\_\_\_\_
- g) educational programs \_\_\_\_\_
- h) council meetings \_\_\_\_\_
- i) other \_\_\_\_\_ (specify) \_\_\_\_\_

18. How important are the following to you?  
(5=very important; 1=Not important)

- a) expansion of channel capacity/programming \_\_\_\_\_
- b) quality of service \_\_\_\_\_
- c) cost \_\_\_\_\_
- d) local programming:
  - educational \_\_\_\_\_
  - governmental \_\_\_\_\_
  - public \_\_\_\_\_

19. What types of additional programming services would you like to see?

- a) sports programming
- b) informational and educational programming
- c) cultural programming
- d) children's programming
- e) first run popular movies
- f) music programming
- g) other \_\_\_\_\_

COMMENTS:

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## APPENDIX "III"

### Office of Cable Television Line Extension Policy

Company \_\_\_\_\_  
Municipality \_\_\_\_\_

A cable operator is required to absorb the cost of extensions to the system in the same proportion that the extension is to the remainder of the system.

Actual subscribers served by the extension are required to absorb the remainder of the cost.

If new subscribers are added to the extension the cost is adjusted and those who previously paid receive an appropriate rebate.

1.  $\frac{\text{\# of homes in extension}}{\text{mileage of extension}}$  = homes per mile (HPM) of extension
2.  $\frac{\text{HPM of extension}}{\text{Minimum HPM that company actually constructs in the system*}}$  = ratio of the density of the extension to the minimum density which the company constructs in the system or "A"
3. Total cost of building the extension times "A" = company's share of extension cost
4. Total cost of building extension less company's share of extension cost = total amount to be recovered from subscribers
5.  $\frac{\text{Total amount to be recovered from subs}}{\text{Total subscribers in extension}}$  = each subscriber's share

In any case, the company shall extend its plant along public rights of way to:

1. All residences and businesses within 150 aerial feet of the operator's existing plant at no cost beyond the normal installation rate.
2. All residences and businesses within 100 underground feet of the operator's plant at no cost beyond the normal installation rate.

-----  
\* The minimum HPM that the company actually constructs in the system or municipality is the minimum number of homes which the company has historically constructed at its own cost. This is a function of the operator's break even point and its rate of return. **Unbuilt systems will use the primary service area as the basis for HPM rather than constructed areas.**



The operator's installation policies shall apply to construction beyond the public right of way.

Detailed accounting and/or financial information to support the minimum HPM shall be supplied to the Office for its approval in such form as required. The minimum HPM shall be updated as appropriate.

When a request for service is received, and unless good cause is shown, cable companies shall:

1. Provide a written estimate within 30 days of such a request.
2. Begin construction within 60 days of receipt of any deposit monies from potential subscribers.
3. Complete construction within six months of receipt of any deposit monies from potential subscribers.
4. Inform each home passed along the extension of the potential costs for subscribers.

Subscribers who pay for an extension shall be entitled to rebates in the following manner:

1. If the company acquires new subscribers subsequent to the initial calculation of step 5 above, the formula will be adjusted and those who have previously paid for the extension will be entitled to an appropriate rebate. In no event shall the amount of the rebate exceed the subscriber's contribution.
2. The company shall keep accurate records of the cost of the extension, the amounts paid by subscribers and any appropriate adjustments.
3. The company shall notify subscribers in the extension of their rights and responsibilities concerning the extension.
4. Once an individual dwelling has paid its share of the extension cost future reconnections or installations shall be made at the company's standard rates.
5. After a period of five years from the installation of the first dwelling unit in the extension no further adjustments shall be made. Installations after five years shall be at the company's standard rate.
6. Once a subscriber is installed, that person shall not normally be entitled to a refund of any monies paid for the installations, except in accordance with the rebate procedure outlined in this policy.

## **Definitions**

### Primary Service Area

The Primary Service Area (PSA) can be an entire municipality but in many instances the PSA is a limited area within a community outside of which a line extension policy may apply. The PSA is depicted by a franchise map and narrative, presented and recorded during the franchise proceedings. It normally remains a fixed geographic area throughout the life of the franchise.

### Line Extension Survey

Potential subscribers residing outside the PSA who request service are entitled to an estimate of their share of the cost to secure service. When conducting a survey and estimating costs, a cable company should factor-in all potential subscribers who could practicably be included in the extension and give consideration to apparent residential construction in areas contiguous to the proposed extension.

## APPENDIX "IV"

This notice may be used in lieu of one drafted by the municipality. Public notice must be given in accordance with N.J.S.A. 48:5A-23c and N.J.A.C. 14:18-11.6.

### PROPOSED 45 DAY PUBLIC NOTICE

(BOROUGH/TOWNSHIP/TOWN/CITY/VILLAGE) OF \_\_\_\_\_

**PLEASE TAKE NOTICE** that the (Borough/Township/Town/City/Village) of \_\_\_\_\_ will hold a municipal consent hearing on (day of week) (month and day) (year) at (time) in the (Borough/Township/Town/City/Village) Hall.

This hearing will be held for the purpose of evaluating the application of (cable company's name) for the renewal of its municipal consent to own, operate, extend, and maintain a cable television and cable communications system in the (Borough/Township/Town/City/Village) of \_\_\_\_\_ and is held in accordance with N.J.S.A. 48:5A-23, and N.J.A.C. 14:18-11.6, and all other applicable statutory and regulatory provisions.

All interested parties are invited to attend and be heard with respect to this application. Copies of the application will be on file with the (Borough/Township/Town/City/Village) Clerk and can be reviewed Monday through Friday between the hours of (time) A.M. and (time) P.M. at the (Borough/Township/Town/City/Village) Hall.

This notice will be published again between the fourteenth (14th) and seventh (7th) day prior to the hearing.

## APPENDIX "V" ORDINANCE CHECKLIST

**PLEASE NOTE THE INFORMATION BELOW HAS BEEN PROVIDED IN A SUGGESTED ORDER TO ENABLE THE MUNICIPALITY TO PRODUCE AN ORDINANCE IN A FORMAT THAT MAY BE UTILIZED. OUR GUIDELINES FOR DRAFTING OF AN ORDINANCE INCLUDE THE FOLLOWING:**

- \_\_\_\_\_ INTRODUCTORY PROVISIONS/PURPOSE OF ORDINANCE (GRANTING OF MUNICIPAL CONSENT)
- \_\_\_\_\_ DEFINITIONS
- \_\_\_\_\_ STATEMENT OF FINDINGS
- \_\_\_\_\_ DURATION OF THE FRANCHISE/TERM FOR WHICH IT IS ISSUED \*
- \_\_\_\_\_ AUTOMATIC RENEWAL TERM (IF APPLICABLE)\*
- \_\_\_\_\_ FRANCHISE FEE PAYABLE TO THE MUNICIPALITY \*
- \_\_\_\_\_ CONSTRUCTION TIMETABLE (BUILD-OUTS, REBUILDS, ETC.)
- \_\_\_\_\_ TERRITORY \*
- \_\_\_\_\_ EXTENSION OF SERVICE (LINE EXTENSION POLICY, ETC.)
- \_\_\_\_\_ CONSTRUCTION REQUIREMENTS
- \_\_\_\_\_ REQUIREMENT FOR A "LOCAL OFFICE" \*
- \_\_\_\_\_ MUNICIPAL COMPLAINT OFFICER \*
- \_\_\_\_\_ PERFORMANCE BONDS
- \_\_\_\_\_ RATE REGULATION (RESERVATION OF RIGHTS)
- \_\_\_\_\_ LOCAL ACCESS/ ACCESS EQUIPMENT AND PERSONNEL (PEG CHANNELS AND PROVISIONS FOR PEG ACCESS/LOCAL ORIGINATION)
- \_\_\_\_\_ FREE SERVICES (SCHOOLS, LIBRARIES...)
- \_\_\_\_\_ REDUCED RATES FOR SENIOR CITIZENS
- \_\_\_\_\_ TWO-WAY INTERACTIVE SERVICES
- \_\_\_\_\_ INTERCONNECTION
- \_\_\_\_\_ LIABILITY INSURANCE
- \_\_\_\_\_ EMERGENCY USES
- \_\_\_\_\_ INCORPORATION OF THE MUNICIPAL CONSENT APPLICATION (WHICH INCLUDES ANY MODIFICATIONS OF THE INFORMATION CONTAINED IN THE MUNICIPAL APPLICATION) \*
- \_\_\_\_\_ SEPARABILITY

**\* DENOTES PROVISIONS THAT ARE NECESSARY TO INCLUDE PURSUANT TO N.J.A.C. 14:18-11.16 (N.J.S.A. 48:5A-24, 48:5A-25, 48:5A-26).**

## **APPENDIX "VI"**

### **SAMPLE ORDINANCE LANGUAGE**

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## **1. INTRODUCTORY PROVISIONS/PURPOSE OF THE ORDINANCE**

The purpose of the municipal consent ordinance ("ordinance"), as prescribed by N.J.S.A. 48:5A-22, is to grant authority to one or more cable companies to operate in the municipality to place its facilities "in, upon, along, across, above, over and under the highways, streets, alleys, sidewalks, public ways, and public places in the municipality". As mandated by N.J.S.A. 48:5A-20(a), the placement of these facilities requires prior approval by the Board of Public Utilities ("Board"). Purposes contained in the ordinance beyond those defined in N.J.S.A. 48:5A-22 are prohibited by the Board. See Appendix "VII" for a discussion of problematic provisions. It must be noted that the purpose of the ordinance is not for setting forth regulatory or enforcement powers of the municipality relative to its cable television system. Although one company might receive municipal consent, such consent must be non-exclusive.

Sample Language:

### **INTRODUCTORY PROVISIONS/PURPOSE OF THE ORDINANCE**

**The municipality hereby grants to the company its non-exclusive consent to place in, upon, along, across, above, over and under the highways, streets, alleys, sidewalks, public ways, and public places in the municipality poles, wires, cables, and fixtures necessary for the maintenance and operation in the municipality of a cable television system and cable communications system. Operation and construction, pursuant to said consent, is conditioned upon prior approval of the Board of Public Utilities.**

## **2. DEFINITIONS**

The definitions contained in the Communications Policy Act of 1934 as amended at 47 U.S.C. §521 et seq.; FCC Rules and Regulations, 47 C.F.R. § 76.1 et seq., New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., as subsequently amended; and the Rules of Practice and Procedure of the Office of Cable Television and Regulations of Cable Television, N.J.A.C. 14:17 and 14:18, should be incorporated by reference. The ordinance also should specify the municipality and successful applicant(s).

Any definition in the ordinance that is already included in the statutes and rules cited above would be duplicative and unnecessary and must be avoided. Different definitions of the terms defined in the above will conflict with these and must be avoided.

Sample Language:

## **DEFINITIONS**

**For the purposes of this ordinance, the following terms, phrases, words and their derivations shall have the meaning given herein. Such meaning or definition of terms is supplemental to those definitions given by the Federal Communications Commission, FCC Rules and Regulations 47 C.F.R. § 76.1 et seq., and the Communications Act of 1934 at 47 U.S.C. §521 et seq., as amended, and the Cable Television Act, N.J.S.A. 48:5A-1 et seq. and shall in no way be construed to broaden, alter or conflict with federal or state definitions:**

(a) **"Municipality" is the Municipality of \_\_\_\_\_, County of \_\_\_\_\_, State of New Jersey.**

(b) **"Company" is the grantee of rights under this ordinance and is known as \_\_\_\_\_.**

(c) **"Act" or "Cable Television Act" is Chapter 186 of the General Laws of New Jersey, and subsequent amendment thereto, Section 48:5A-1 et seq.**

### **3. STATEMENT OF FINDINGS**

The New Jersey State Cable Television Act ("State Act") requires that the municipal consent application ("application") contain sufficient evidence that the cable operator has the necessary financial ability, technical capacity and legal qualifications to own, operate and maintain a cable television system. (N.J.S.A. 48:5A-28(c)) The Office of Cable Television ("OCTV") also requires that the application provide information concerning the overall design of the proposed (or existing) system, methods of financing the system, and the legal, technical and financial background of those involved in the operation of the proposed (or existing) system. A municipality may request from the OCTV advice as to whether the applicant would be a fit subject of consideration for municipal consent. Such advice would be without prejudice to any



future determinations the Board or the OCTV may be required to make. (N.J.S.A. 48:5A-27) The municipality should make requests for review pursuant to Section 27, as soon as possible after receipt of the application.

Sample Language:

### **STATEMENT OF FINDINGS**

**A public hearing concerning the consent herein granted to the company was held after proper public notice pursuant to the terms and conditions of the Act. Said hearing having been held and fully open to the public, and the municipality having received all comments regarding the qualifications of the company to receive this consent, the Municipality hereby finds the company possesses the necessary legal, technical, character, financial and other qualifications and that the company's operating and construction arrangements are adequate and feasible.**

#### **4. DURATION OF FRANCHISE**

The renewed ordinance must contain a provision stating the duration for which the franchise is granted. N.J.S.A. 48:5A-25 further provides that the franchise term shall not exceed 15 years. It must be stressed that the 15-year franchise is a maximum term; the municipality can set shorter periods of duration. It should be noted, however, that too short a renewal period might significantly reduce the viability of the cable system's construction and/or operation.

The term of a renewal generally runs for a period of years measured from the date of expiration of the previous franchise (that is, the Certificate of Approval expiration date). The OCTV is required to maintain a list of expiration dates; a municipality may contact the OCTV to obtain the official expiration date of the franchise.

Sample Language:

### **DURATION OF FRANCHISE**

**The consent herein granted shall expire \_\_\_\_ years from the date of expiration of the previous Certificate of Approval as issued by the Board of Public Utilities.**

### **5. AUTOMATIC RENEWALS**

The State Act has a provision that allows for an automatic renewal term, for a maximum of ten years. Municipalities use this option occasionally. The municipality may wish to add a provision granting an automatic renewal to the applicant. An automatic renewal is optional and would allow the Board to issue a renewal to the cable company without any participation by the municipality. The company would be required to petition for a Certificate of Approval 60 days prior to the expiration of the franchise. If the municipality subsequently decides not to grant automatic renewal, it must send notice to the cable company of its intention. The notice not to accept must be based on a finding that the company has not complied with the material terms of the existing franchise outlined in N.J.A.C. 14:18-13.6(a).

Please note the above provision might be problematic to the municipality if it does not wish to exercise that option. This is because of the renewal procedure as referenced in the Communications Policy Act of 1934, as amended. The Federal Act allows for an ascertainment period to be used during the renewal of the franchise. This process takes place approximately 36 months prior in order to establish a record to be used during renewal.

Sample Language:

### **AUTOMATIC RENEWAL TERM**

**The consent granted herein is subject to an automatic renewal term of \_\_\_\_ years in accordance with the procedures set forth in N.J.S.A. 48:5A-19 and 25 and N.J.A.C. 14:18-13.6 et seq.**

## 6. FRANCHISE FEE

The cable operator shall pay to the municipality a franchise fee equal to two percent of "gross revenues from all recurring charges in the nature of subscription fees paid by subscribers to its cable television reception service..." Such a fee is paid to the municipality "in lieu of all other franchise taxes and municipal license fees...as a yearly franchise revenue for the use of the streets" pursuant to N.J.S.A. 48:5A-30(a).

The Board has held that this fee is in lieu of any other franchise fees, municipal license fees or fees paid to the municipality for the use of the streets. Township of Middletown v. Storer Cable Communications, Inc. 206 N.J. Super. 572 (App. Div. 1985). Therefore, municipalities may not charge cable operators fees for road opening permits, or any other municipal fees.

The term "gross revenues from...cable television reception service" includes only revenues derived from basic subscriber service, such as the transmission of broadcast signals and PEG access and local origination channels, if any. It does not include installation fees, per program (pay-per view) or per-channel charges (premium services), leased channel revenues, advertising revenues, or any other municipal income derived from the system. [See N.J.S.A. 48:5A-3(e)]

Sample Language:

### FRANCHISE FEE

**Pursuant to the terms and conditions of the Cable Television Act, the company shall, during each year of operation under the consent granted herein, pay to the municipality two percent (2%) of the gross revenues from all recurring charges in the nature of subscription fees paid by subscribers to its cable television reception service in the municipality or any amount permitted by the Act or otherwise allowable by law.**

In New Jersey, a municipality must petition the Board for an increase of a franchise fee in excess of the New Jersey cap of 2%. The municipality may petition the Board for permission to charge a franchise fee in excess of two percent by way of a provision in the municipal consent ordinance. In its petition, the municipality must show that the additional franchise fee is "warranted by the expense to the municipality with respect to the regulation or supervision within its territory of cable television, or any other expenses caused by the existence and operation within its territory of cable television." (N.J.S.A. 48:5A-30(c)) The limit to such additional fees a municipality and the State may collect is based on the federal cap of 5% of gross revenues derived from the operation of the cable system. (47 U.S.C. §542) A provision in the ordinance

setting a fee in excess of 2% is deemed to be a petition to charge the additional fee. [See also N.J.A.C. 14:17-6.20]

Sample Language:

### **PETITION FOR A FRANCHISE FEE IN EXCESS OF 2%**

**The company shall, during each year of operation under the consent granted herein, pay to the municipality \_\_\_ percent of the gross revenues received by the company from cable television service in the municipality. The municipality has determined that such a fee is necessitated by \_\_\_\_\_ [describe factors warranting the levy of franchise fees in excess of two percent].**

### **7. CONSTRUCTION TIMETABLE**

The municipal consent ordinance should contain, or incorporate by reference to the application, a construction timetable, if applicable. In the renewal process, this section would only be necessary if the company is proposing to rebuild the existing plant or otherwise proposing to build significant areas of new plant or if construction is an item that was negotiated by the municipality but not included in the application.

The municipality may modify both the sequence of the schedule of the proposed construction and the timetable for the proposed construction, if it deems it to be in the public interest.

It should be noted that a recent Federal Communications Commission ("FCC") decision, I/M/O the Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, FCC 99-57, CS Docket No. 96-85, adopted March 25, 1999, affirmed a provision of the 1996 Telecommunications Act that stated while expanded channel capacity can be required from a cable operator, specification of the method by which it is achieved is not allowed. That means that a cable operator can be required, if need is shown to provide a certain number of channels, but the municipality may not require any specific method be used. For example, if a municipality requires the cable operator to provide 80 channels, the cable operator may decide to use digital technology, instead of rebuilding its whole system, to achieve that result. However, the cable company may agree to specific provisions regarding how channel capacity will be expanded.

Sample Language 1:

### **CONSTRUCTION TIMETABLE**

**The company shall be required to complete any proposed construction within the service area described in the application. The timetable as presented in the application incorporated herein has been determined to be reasonable by the municipality.**

OR:

Sample Language 2:

### **CONSTRUCTION TIMETABLE**

**The municipality requires completion of the proposed [extension/rebuild/construction] by \_\_\_\_\_ [date]. More specifically, the construction timetable shall be as follows: [Attach municipal modification within this section or as a schedule.]**

## **8. TERRITORY**

Pursuant to N.J.S.A. 48:5A-25, the municipal consent ordinance must "specify with particularity" the territory to which it applies. With few notable exceptions, such as where there is more than one cable operator serving different areas of the municipality, cable operators are required to provide for the eventual extension to all areas of the municipality. However, the company may require that potential subscribers in sparsely populated areas share construction costs through use of a line extension policy.

Sample Language:

## **TERRITORY**

**The consent granted herein to the company shall apply to the entirety of the municipality and any property hereafter annexed.**

### **9. EXTENSION OF SERVICE**

The cable company's application should include a cable system map for the entire municipality, as well as a description of the area served or to be served. The map should designate the "primary service area" ("PSA"), which is the portion of the municipality in which a cable television company has promised to make service available to all present and future customers at standard and non-standard installation rates. The municipality may find that the company has not provided for cable service to the entire municipality. The cable company must provide a plan of how it will extend service to those areas.

The cable company may furnish, in its application, a line extension policy (or "LEP") that will detail the method of extension of cable plant to any area outside the PSA. In most such policies, the cable company would provide a number of homes per (cable) mile ("HPM") figure. The HPM figure determines the threshold by which the cable operator will provide service at its tariffed rates (i.e. standard and non-standard installation rates). For example, a standard figure of 35 HPM might be employed. Any areas not part of the PSA, which do not meet the HPM threshold, would receive service employing the formula in the line extension policy based on a sharing of costs between the cable company and subscribers. Although the cable operator may provide a line extension policy in its application, the municipality may negotiate for a full build. A "full build" means that the cable company will provide service to all areas of the municipality by installation of standard, or if the service drop is unusually long, at non-standard installation rates.

The cable operator may also utilize a separate policy for commercial areas of the municipality. A common formula for commercial rates is calculated on a cost plus materials basis.

Please refer to the OCTV's line extension policy (Appendix "III"). Some cable operators may have a different formula.

Sample Language:

### **EXTENSION OF SERVICE**

**The company shall be required to proffer service along any public right-of-way to any person's residence or business located in those areas of the franchise territory described herein. Any additional extension of the system will be made in accordance with the company's line extension policy. [Specify LEP]**

OR:

Conversely, the cable television operator may provide service to all residences and/or businesses in the municipality without cost above standard and non-standard rates. In that case, the municipality should state so specifically in the ordinance, this is referred to as a full build.

Sample Language 2:

### **EXTENSION OF SERVICE**

**The company shall be required to proffer service along any public right-of-way to any person's residence or business located in to all areas of the franchise territory described herein, at tariffed rates for standard or non-standard installation.**

## **10. CONSTRUCTION REQUIREMENTS**

The OCTV considers its authority to have preempted municipal ability to set specifications for the construction of cable television facilities. (N.J.S.A. 48:5A-10(a)) Pursuant to that authority, every cable television company is mandated to perform construction and installation of its plant and facilities in accordance with the requirements of N.J.A.C. 14:18-2.1.

The preemption does not affect those duties that the municipality is authorized to perform pursuant to its police powers for the purpose of protecting its citizens. However, the all inclusive franchisee fee supersedes and covers all individual permit fees, such as for road opening and other costs attributable to cable operations.

In its ordinance, the municipality may not impose sanctions upon the cable company that would prohibit or restrict the work necessary for serving a certified area. However, if the municipal consent is granted with any such provision, the cable company may apply to the Board for an order setting aside such municipal refusal and permitting such location of facilities as requested and/or required by the cable company. (N.J.S.A. 48:5A-17(e))

It should be noted that the OCTV monitors construction and restoration practices of cable operators to insure safe, adequate and proper services provided.

Sample Language:

### **CONSTRUCTION REQUIREMENTS**

**Restoration: In the event that the company or its agents shall disturb any pavement, street surfaces, sidewalks, driveways or other surfaces in the natural topography, the company shall at its sole expense restore and replace such places or things so disturbed in as good condition as existed prior to the commencement of said work.**

**Relocation: If at any time during the period of this consent, the municipality shall alter or change the grade of any street, alley or other way or place, the company, upon reasonable notice by the municipality, shall remove, re-lay and relocate its equipment, at the expense of the company.**

**Temporary Removal of Cables: The company shall temporarily move or remove appropriate parts of its facilities to allow for the moving of buildings, and machinery, or in other similar circumstances. The expense shall be borne by the party requesting such**



**action, except when requested by the municipality, in which case the company shall bear the cost.**

**Removal or Trimming of Trees: During the exercise of its rights and privileges under this franchise, the company shall have the authority to trim trees upon and overhanging streets, alleys, sidewalks and public places of the municipality so as to prevent the branches of such trees from coming in contact with the wires and cables of the company. Such trimming shall be only to the extent necessary to maintain proper clearance for the company's facilities.**

## **11. LOCAL OFFICE**

The ordinance must include a provision for a local business office or agent of the cable company. The purpose of this office or agent is to receive, investigate and resolve any problems that the subscriber may encounter regarding equipment malfunctions, quality of service and other similar matters. While N.J.S.A. 48:5A-26(d) does not specify the meaning of "local", the OCTV's interpretation has been that it is within the range of a local non-toll telephone call. N.J.A.C. 14:18-5.1(a) requires that the company maintain the office "... in or within reasonable proximity of its service area". The ordinance must contain a provision for a local business office or agent.

The cable operator may propose more stringent standards for its local office or agent or specific language to be used for the designation of the local office or agent. In this case, the municipality may include these provisions in the ordinance, such as the hours the cable operator has proposed the office to be open to the general public. The municipality should be clear as to its intention. The municipality must determine if it wants to insure a presence in the municipality or simply to insure adequate and proper service, and should draft language to reflect its decision.

Please note: N.J.A.C. 14:18-5.1(c) requires a cable operator to petition the Board and receive approval prior to closing or relocating any office.

Sample Language:

## **LOCAL OFFICE**

**During the term of this franchise, and any renewal thereof, the company shall maintain a local business office (or agent) for the purpose of receiving, investigating and resolving all complaints regarding the quality of service, equipment malfunctions and similar matters. Such local business office shall be open during normal business hours, and in no event less than 9:00 a.m. to 5:00 p.m., Monday through Friday.**

### **12. MUNICIPAL COMPLAINT OFFICER**

The municipality must designate a "complaint officer" in the ordinance to receive and act upon subscriber complaints "alleging inadequate, unsafe or improper service or failure by the company to comply with the terms of the municipal consent ordinance." (N.J.S.A. 48:5A-26) The complaint officer may either be the Office of Cable Television or some officer, office, bureau or other agency of the municipality government.

Most municipalities in the state have designated the OCTV as the "complaint officer". As the state regulatory agency, the OCTV has the investigative and technical personnel and the expertise to monitor the performance of cable systems. In addition, many of the complaints are legal or administrative in nature and thus may be very time consuming. It should also be noted that the Board and the OCTV possess the exclusive authority for the enforcement of the terms of all the provisions of the Cable Television Act including the terms of any municipal consent issued pursuant to the Act.

If the OCTV is designated the complaint officer, all complaints shall be received and processed in accordance with N.J.A.C. 14:17-6.5. Municipal modification of how the OCTV will proceed if it is the designated complaint officer is prohibited.

Sample Language 1:

**MUNICIPAL COMPLAINT OFFICER**

**The Office of Cable Television is hereby designated as the complaint officer for the municipality, pursuant to N.J.S.A. 48:5A-26(b).**

**All complaints shall be received and processed in accordance with N.J.A.C. 14:17-6.5.**

OR:

Should the municipality designate itself as the complaint officer, it must utilize the complaint procedures specified in N.J.S.A. 48:5A-26(a), but the ordinance also "shall provide for the establishment of procedures and methods by which such complaints shall be received, processed and acted on..."

Sample Language 2:

**MUNICIPAL COMPLAINT OFFICER**

**\_\_\_\_\_ is hereby designated as the municipal complaint officer to receive and act on complaints by subscribers to cable television reception service provided pursuant to N.J.S.A. 48:5A-26a.**

**All complaints shall be received and processed in accordance with the policy established by**

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\_\_\_\_ [Specify here the procedures adopted by which complaints shall be acted upon, and resolved.]

### **13. PERFORMANCE BONDS**

The Cable Television Act requires that, within its application, the cable operator include evidence of or a commitment for a bond in an amount of not less than \$25,000.00. (N.J.S.A. 48:5A-28(d)) The purpose of this bond is to ensure all undertakings as promised in the application and ordinance. The municipality may ask for a higher amount; however, the sufficiency and reasonableness of the bond is subject to review of the OCTV and approval by the Board.

Sample Language:

#### **PERFORMANCE BONDS**

**During the life of the franchise the company shall give a bond to the municipality, which bond shall be in the amount of \$\_\_\_\_\_.**

**Such bond shall be to insure the faithful performance of all undertakings of the company as represented in its application and incorporated herein.**

### **14. RATES**

The 1934 Communications Policy Act, as amended, provides for rate regulation by "qualified" franchising authorities. As the "franchising authority" in the state, the OCTV has the authority to regulate basic cable service rates.

Sample Language:

## **RATES**

**The rates of the company shall be subject to regulation as permitted by federal and state law.**

### **15. LOCAL ACCESS/ACCESS EQUIPMENT AND PERSONNEL**

The Communications Policy Act of 1934, as amended, specifically allows franchise agreements to include provisions for channel capacity dedicated for public, educational or governmental ("PEG") access use. These access channels allow individuals and local or governmental agencies to air programming on the cable system.

The federal act provides no limits on the number of channels which may be requested, however, the number of access channels required by a municipality must be reasonable in light of the cable system's capacity. Requirements for PEG access are to be determined by the individual municipalities.

In its application, the cable operator will specify what is offered or proposed with regard to PEG access and local origination. The municipality will determine the sufficiency of the cable operator's proposal. The groundwork for these determinations should be done in the ascertainment phase and finalized during the course of municipal negotiations. In its ordinance, the municipality should **clearly state** the access requirements. In addition, the municipality should state which entities would be entitled to program the channel.

The following definitions may assist the municipality:

A Local Origination (L.O.) channel is defined as a cable channel that is operated and programmed by the local cable company as its own television station, usually carrying local advertising.

An Access channel is a non-commercial cable channel reserved for the municipality (or group of municipalities) under the terms of the franchise, where the municipality retains editorial control. Categories are public, educational and governmental (PEG) and can include any combination thereof.

Some cable companies may provide time on its L.O. channel for use by interested parties. The municipality should determine sufficiency of such a proposal in lieu of an access channel. The cable operator may also propose a shared access channel, which allow several municipalities time on the channel. Such channels may be shared or may be dedicated for an exclusively

specific or stated purpose such as governmental use, school or educational use, or general public access.

It is mandated by N.J.A.C. 14:18-7.5, that cable operators establish guidelines for those access channels over which they retain day to day traffic management or control. All access users of such channels shall be subject to guidelines for use of equipment and facilities. These are also recommended as a guideline for formulation of access rules by a municipality or its designated access coordinator or agency.

It should be noted that the Communications Act of 1934, as amended, Section 623(b)(4) (47 U.S.C. §543(b)(4)) allows the cable operator to itemize and/or identify "[t]he amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise".

Sample Language:

#### **PUBLIC, EDUCATIONAL OR GOVERNMENTAL ACCESS CHANNELS**

**The cable operator shall provide access time to non-commercial public, governmental and educational entities to the extent such access was promised to the municipality.** [Include specific requirements for the municipality in question, including, e.g., whether a channel is dedicated for use by a single municipality; whether the channel is shared by several municipalities or entities, or whether the channel is to be used by public (general use), educational (schools and/or colleges) and/or governmental (municipal governing body or designee thereof); what the specific times the municipality is granted the use of a shared channel; etc.]

AND:

## ACCESS EQUIPMENT AND PERSONNEL

**The company shall provide the listed equipment and/or personnel for public, educational or governmental use** [specify access equipment and/or personnel requirements].

### 16. FREE SERVICES

In 1972, the Legislature determined that free service would constitute "unduly preferential, arbitrarily or unjustly discriminatory" service. (N.J.S.A. 48:5A-39(a))

However, in keeping with the legislative objective of the Cable Television Act to "foster and develop the educational and community service potentials of cable television", the Board determined that a cable company would be permitted to provide installation of one outlet and basic monthly service to each school and library at no cost. *Futurevision Cable T.V.*, BPU Docket No. 7511C-6136 (August 12, 1976).

In BPU Docket No. CE89070646, *Order Adopting Initial Decision - Settlement I/M/O the Petition of Cablevision Systems d/b/a Cablevision of Bayonne*, the Board allowed for the provision of free service to the City Hall, the Fire Department, the Police Department, and the Board of Education. Based on the record in that proceeding, the Board found that these institutions provide a valuable public safety and public information source and therefore the provision of free services to them is reasonable and in accordance with law. Subsequently, the Board also approved additional outlet installations, free of charge, to the noted institutions.

In BPU Docket No. CE92060646 *Order Adopting Initial Decision - Settlement I/M/O the Petition of TKR Cable Company/Tri-System for a Renewal Certificate of Approval for the Construction and Operation of a Cable Television System in the Township of Green Brook*, the Board allowed the provision of free service to the senior citizen's center. The Board found that cable television is a principal source of recreation and entertainment for the elderly and that "a public exigency exists" which makes the provision of a reduced or discounted rate services to the elderly a "public necessity".

It should be clearly stated that the Board has approved the provision of free services to municipal service properties when it is voluntarily agreed upon and the need is supported by the record. The Board has approved free service to the above noted municipal service properties or schools after review and substantiation of the public need for such service.

Sample Language:

### **FREE SERVICES**

**The company shall provide the installation [of \_\_\_ outlet(s)] and basic monthly service to each school (and/or library and \_\_\_\_\_) in the municipality free of charge.**

**[Each additional outlet installed, if any, shall be paid for, by the institution requesting the same on a materials plus labor basis. Monthly service charges shall be charged at the regular tariffed rates for additional outlets.]**

### **17. REDUCED RATES FOR SENIOR CITIZENS**

N.J.S.A. 48:5A-11.1 and 11.2 allows for reduced or discounted rates to the elderly and or disabled to be offered. The Legislature found that cable television is a principal source of recreation and entertainment and that a public need exists which makes the provision of reduced or discounted rates to the elderly a public necessity that would promote their health and welfare.

It should be noted that in order to be eligible for the above discount the person must meet the requirements of the Pharmaceutical Assistance to Aged and Disabled pursuant to N.J.S.A. 30:4D-21 and N.J.A.C. 14:18-3.20.

However, unless the cable operator proposes the above it cannot be required within the municipal consent ordinance.

Sample Language:

### **REDUCED RATES FOR SENIOR CITIZENS**

**The company has agreed to implement a senior citizen's discount in the amount of \_\_\_ % of the monthly basic service rate to any person 62 years of age or older who subscribes to cable services and does not share the subscription with more than one person in the same household who is less than 62 years of age. Such subscribers must meet the**



**income and residence requirements of the Pharmaceutical Assistance to Aged and Disabled pursuant to N.J.S.A. 30:4D-21. The company has agreed to apply the same discount rate to the disabled with the same PAAD eligibility requirements.**

**18. TWO-WAY INTERACTIVE SERVICES**

Two-way interactive cable service includes those services that have the capability of transmitting information in both directions through the cable wires. This includes security alarm systems, data retrieval systems and other information handling systems. The municipality may require that the system provide any of the above services, but the ordinance cannot require the service be provided at the cable operator's own cost, unless the cable operator has agreed to do so.

The municipality may be required to absorb some or all of the costs involved in the provision of the two-way services. It should be also noted that if the municipality does not absorb these costs, the Communications Act of 1934, as amended, Section 623(b)(4) (47 U.S.C. §543(b)(4)) allows the cable operator to itemize and/or identify "[t]he amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise".

Sample Language:

**TWO-WAY INTERACTIVE SERVICES**

**The municipality has determined that it is in the interests of public convenience and necessity for the company to provide \_\_\_\_\_**

**[description of two-way services to be provided].**

**19. INTERCONNECTION**

It may become feasible, either during the franchise process or at a later point in time, for the cable company to connect several contiguous communities into an institutional network for the purpose of supplying broadband signals to the communities involved. The cable company

may also be able to set up a local institutional link between institutions in the same municipality. One of the possible ways the cable company can set up such a system is to establish a "return line" for cable television signals from one point (or several points) in the company's operating area back to the origination point of the cable television reception service (i.e., studio or headend). This "return line" does not have to be an actual line but may be the capability for transmission of pictures and sound in both directions through the cable line. The cable company can then take the signal it receives and rebroadcast it through the entire system, possibly on an access channel.

Provisions requiring or prohibiting interconnection for other users may not be included in the ordinance.

It should be noted, however, that the municipality might include interconnection capability as part of a PEG access requirement. It should be noted that the Communications Act of 1934, as amended, Section 623(b)(4) (47 U.S.C. §543(b)(4)) allows the cable operator to itemize and/or identify "[t]he amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise".

Sample Language:

## **INTERCONNECTION**

**The municipality has determined that it is necessary and feasible for it to contract with the company for providing [description of interconnect services and/or facilities provided].**

**The company agrees to apply for Board approval of the terms and conditions of such contract if applicable.**

## **20. LIABILITY INSURANCE**

N.J.S.A. 48:5A-28(f) requires that the cable operator's application contain "[e]vidence of sufficient insurance insuring the municipality...with respect to all liability... arising out of the company's construction and operation of its CATV system." While the amount specified by section 28(f) may be modified by the municipality in the provisions of the ordinance, the sufficiency of these amounts is subject to review and approval by the Board.

Sample Language:

## **LIABILITY INSURANCE**

**The company agrees to maintain and keep in full force and effect at its sole expense at all times during the term of this consent, sufficient liability insurance naming the municipality as an insured and insuring against loss by any such claim, suit, judgment, execution or demand in the minimum amounts of \$ \_\_\_\_\_ for bodily injury or death to one person, and \$ \_\_\_\_\_ for property damage resulting from any one accident.**

### **21. EMERGENCY USES**

Currently, there is a federal Emergency Alert System ("EAS") that cable operators are required to participate in as of December 31, 1998. This system was established to allow the President of the United States and other federal officials to warn the public about specific emergency situations.

According to the federal mandate, the transmission of state and local messages is optional. The EAS may be utilized as a tool by state and local entities, pursuant to state and federal requirements, to warn the public about emergency situations. According to the plan approved by the Federal Communications Commission ("FCC"), the EAS is to be used to alert the public to tornadoes, chemical spills, and initial states of emergency. Language has been provided that could be applicable and may be incorporated into the ordinance, if the municipality and the cable operator agree.

Note: Notwithstanding a local agreement, the cable company is required to participate in the federal EAS program.

Sample Language:

### **EMERGENCY USES**

**The company shall be required to have the capability to override the audio portion of the system in order to permit the broadcasting of emergency messages by the municipality**

**pursuant to state and federal requirements. The company shall in no way be held liable for any injury suffered by the municipality or any other person, during an emergency, if for any reason the municipality is unable to make full use of the cable television system as contemplated herein. The municipality shall utilize the state-approved procedures for such emergency uses.**

## **22. INCORPORATION OF THE APPLICATION**

The terms of the cable company's application for municipal consent must be incorporated into the ordinance granting that consent pursuant to N.J.S.A. 48:5A-24. If the municipality, wishes to modify the terms of the application it may do so provided the record supports the requirement. It must be noted that an ordinance making such modifications shall be valid only if the company accepts the terms and conditions of such an ordinance in writing within ten days of the issuance of the ordinance as long as they do not conflict with state or federal law.

Sample Language:

### **INCORPORATION OF THE APPLICATION**

**All of the commitments and statements contained in the application and any amendment thereto submitted in writing to the municipality by the company except as modified herein, are binding upon the company as terms and conditions of this consent. The application and any other relevant writings submitted by the company shall be annexed hereto and made a part hereof by reference as long as they do not conflict with state or federal law.**

## **23. SEPARABILITY**

In order to insure that any one section of the municipal consent ordinance does not invalidate the entire ordinance by being in conflict with applicable law, it is suggested that the municipality include a "separability" provision.

Sample Language:

### **SEPARABILITY**

**If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of federal or state agency of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not effect the validity of the remaining portions hereof.**

## **APPENDIX "VII"**

### **PROBLEMATIC ORDINANCE PROVISIONS**

Municipalities sometimes seek to include provisions that are unnecessary, duplicative and burdensome or are preempted by federal or state law. Below are listed the provisions that cannot be included in a municipal consent ordinance and a brief description of why the subject is not necessary and/or prohibited.

Please note that the Board may strike many of the following provisions if they are included in the municipality's ordinance.

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## **PAYMENT OF THE FRANCHISE FEE**

While the municipality is required to indicate in its municipal consent ordinance ("ordinance") the amount of the franchise fee, it is not necessary to include provisions prescribing the method of payment or procedures since they are defined in N.J.S.A. 48:5A-30(a).

## **ACCESS TO PREMISES BY CABLE OPERATOR**

N.J.S.A. 48:5A-49 provides that owners of a dwelling may not prohibit a tenant from receiving cable television service. This also applies to residents of cooperatives, condominiums and mobile homes.

This section has been interpreted to mean that while landlords cannot deny access to cable television companies, they must receive nominal compensation for the use of their property.

Since the OCTV's rules clearly outline the method of access by the cable operator, the municipality is preempted from including such a provision within its ordinance.

## **INSPECTION OF CABLE SERVICE**

The municipality may wish to add provisions within its ordinance for the inspection of the cable television system. The OCTV however, for the purposes of securing a desirable degree of uniformity and having had its authority vested by the Legislature, determined that any such



provisions (not in conflict with the jurisdiction of the Federal Communications Commission ("FCC")) should be promulgated by the State. (N.J.S.A. 48:5A-10(a))

## **REPORTING REQUIREMENTS AND INSPECTION OF RECORDS**

The Office of Cable Television has promulgated regulations pursuant to N.J.S.A. 48:5A-44(c), which defines reporting procedures that must be met by the cable company (see N.J.A.C. 14:18-6.1 et seq. and 7.1 et seq.) A provision in the ordinance requiring the submission to the municipality of any reports filed with the state has been determined to be unnecessarily duplicative and burdensome.

Any reports filed with the OCTV pursuant to N.J.S.A. 48:5A-44(c) are considered to be public information, except where confidential treatment has been accorded, and are available for review and inspection during normal business hours of the OCTV. Duplicates of such information can be obtained with payment of the appropriate fees.

## **TRANSFER OF OWNERSHIP**

The municipality may not include a provision in its ordinance prohibiting or setting conditions for the transfer of ownership. Such authority is vested in the OCTV and the Board. (N.J.S.A. 48:5A-43) Cable television systems certificated by the Board are prohibited from transferring any rights conferred by the Certificate of Approval except after approval by the Board pursuant to N.J.S.A. 48:5A-19.

The Board rules require that all municipalities in the franchise area be notified when any franchise transfer petition is filed so that they have an opportunity to bring any concern or problem to the Board's attention. (N.J.A.C. 14:17-6.8(b))

## **TECHNICAL STANDARDS**

The FCC has developed guidelines that may be used as technical standards for cable television operators. (47 C.F.R. § 76.605) Standards that exceed these guidelines are not permitted. The Legislature vested in the OCTV the authority to develop and enforce technical standards not inconsistent with FCC requirements. This authority, therefore, preempts the field in terms of the municipality's ability to set such technical requirements.

## **REVOCAATION**

The revocation of a franchise is permissible only upon petition to and approval by the Board pursuant to N.J.S.A. 48:5A-47. Since N.J.S.A. 48:5A-15 grants authority to the Board to enable a cable television company to construct, extend or operate a cable television system through the municipal consent. Municipal revocation without Board approval would constitute the assertion by the municipality that it has the authority that has been vested exclusively in the Board.

The municipality may wish to add review periods into the ordinance that would allow for recommendations to the Board requesting it to review and/or take administrative action on issues of non-compliance. The municipality should contact the OCTV for further information.

## **PENALTIES FOR NON-COMPLIANCE WITH THE TERMS OF THE ORDINANCE**

N.J.S.A. 48:5A-51(b) contains specific penalties for the violation of any provisions of the Cable Television Act or any order issued pursuant to it, which includes any Certificate of Approval and the municipal consent ordinance incorporated by that Certificate. N.J.S.A. 48:5A-51(c) provides that the authority rests with the Board to determine if any violation has occurred and, if so, to institute civil action. Based upon the above statute, any additional penalty provision included in the municipal consent ordinance would be prohibited by the Board and the OCTV. While the municipality may recommend that the Board take action against the cable company, it may not prescribe the action to be taken.

## **DISCONTINUANCE OF SERVICE AND ABANDONMENT**

According to N.J.S.A. 48:5A-37, any cable television company desiring to discontinue service or temporarily suspend service must first obtain approval of the Board. Therefore, provisions included in the ordinance that define additional procedures or require municipal approval of the discontinuance of cable television service would be invalidated in a Certificate of Approval as preempted by state law.

## **RECEIVERSHIP**

N.J.S.A. 48:5A-45 refers to the keeping of books and records within the state and the designation of an agent as well as a stipulation of process for the establishment and enforcement

of a receivership if it is deemed necessary. This section specifically provides that the Board may bring suit for the appointment of a receiver for "the property in this state of any CATV company failing to comply..." with the requirements of this section. N.J.S.A. 48:5A-51(c) and N.J.S.A. 48:5A-45(c) permits the Board to institute a civil action in the Superior Court for "such...relief as may be appropriate in the circumstances..." for any violation of the Cable Television Act. The OCTV has interpreted this authority to include the ability to request the appointment of a receiver. Under these circumstances, the municipality does not have the authority to bring suit for such appointment but rather must petition the Board to take such action.

### **REDUCED RATES FOR SPECIAL CLASSES OF USERS**

Although N.J.S.A. 48:5A-39(a) and Federal law state that no cable television company can offer preferential or arbitrarily discriminatory rates for services to any group, there are exceptions which have previously been addressed. The municipality may require the cable company provide free services to schools, libraries and certain public buildings. The Cable Television Act also permits cable television operators to offer a discount of cable television rates to senior citizens and disabled individuals pursuant to N.J.S.A. 48:5A-11.1 and 11.2. However, the municipality may not require such discounts as a condition of renewal. (N.J.S.A. 48:5A-11.3)

Therefore, the ordinance cannot include any rate and service differentials among various classes of users, except as provided herein.

## **BILLING AND PAYMENT PROCEDURES**

The regulations promulgated by the OCTV outline procedures for bills and payments for service. (N.J.A.C. 14:18-3.7 et seq.) Therefore, it unnecessarily duplicative and burdensome for the municipality to include such provisions in its content.

## **DISCONTINUANCE OF SERVICE AT SUBSCRIBER'S REQUEST**

The cable operator is required to include in the municipal consent application ("application") the terms by which service is to be provided. (N.J.A.C. 14:18-11.20) Such information would include a description of the manner by which service would be discontinued at the subscriber's request. Additionally, N.J.A.C. 14:18-4.3(b) sets forth the responsibilities of the subscriber relative to notification of the cable operator for the purpose of discontinuing service. Provisions contained in the ordinance concerning this matter would therefore be preempted.

## **PAY PROGRAMMING**

Under federal law, the rates for pay services are determined by the system operator and are not subject to regulation by any governmental or regulatory agency. (47 U.S.C. §543.) Therefore, the municipality may not prohibit, in its ordinance, the provision of pay cable unless it is determined obscene or indecent as defined by 47 U.S.C. §544(d)(1).

It should be noted that 47 U.S.C. §544(d)(2)(A) requires the cable operator to provide locking devices, by sale or lease, so that a subscriber may restrict viewing of certain channels. This regulation has been incorporated in N.J.A.C. 14:18-3.14(a)(2).

### **SAVE HARMLESS CLAUSE**

Every application must contain an undertaking to hold the municipality harmless from any liability arising out of the operation or construction of the cable system. (N.J.S.A. 48:5A-28(e)) Therefore, it is unnecessary to state this in the ordinance.

### **COMPARABLE TERMS/COMPETITIVE SERVICES**

The Board has disallowed language that states that if a municipality agrees to permit another operator in the municipality on terms and conditions more favorable or less burdensome than those contained in the ordinance, those same terms shall be applicable to the preexisting franchise. This language could potentially allow the modification of franchise obligations without Board review or approval.

The parties may consider modifying the terms and conditions of an ordinance at any time, however, any modification to the ordinance would require an agreement between the parties and a formal petition for approval to the Board pursuant to N.J.S.A. 48:5A-47 and N.J.A.C. 14:17-6.7.

## **TELECOMMUNICATION SERVICES**

The Federal Act at 47 U.S.C. §541(b)(3) prohibits a franchising authority from imposing any requirement within its cable television franchise document that "has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof." Telecommunications services provided by the cable operator may be subject to regulation by a State entity under Title II, Common Carriers, of the Federal Act, pursuant to 47 U.S.C. §541(d)(2), but the cable operator cannot be required to obtain a franchise under Title VI, Cable Communications, of the Federal Act for this purpose. Therefore, any provision that is incorporated within the ordinance that references provision of telecommunications services by the cable operator, except with regard to the provision of an interconnection, or institutional network (I-Net), will be disallowed.