

**LOVELAND CITY COUNCIL
SPECIAL MEETING
TUESDAY, JUNE 25, 2013
CITY COUNCIL CHAMBERS
500 EAST THIRD STREET
LOVELAND, COLORADO**

The City of Loveland is committed to providing an equal opportunity for citizens and does not discriminate on the basis of disability, race, age, color, national origin, religion, sexual orientation or gender. The City will make reasonable accommodations for citizens in accordance with the Americans with Disabilities Act. For more information, please contact the City's ADA Coordinator at bettie.greenberg@cityofloveland.org or 970-962-3319.

6:30 P.M. Special Meeting - City Council Chambers

SPECIAL MEETING AGENDA

CALL TO ORDER

ROLL CALL

1. **CITY MANAGER** (presenter: Rod Wensing)
Public Comment Regarding Renewal of the Comcast Franchise Agreement
At the June 18, 2013 City Council Meeting, Council requested that prior to the Executive Session regarding renewal of the Comcast Franchise Agreement, the public have an opportunity to comment on this issue.

2. **CITY MANAGER** (presenter: Rod Wensing)
Executive Session Regarding Renewal of the Comcast Franchise Agreement
This Executive Session is requested for the purposes of receiving a report and legal advice from the City Attorney and the City's outside legal counsel, Ken Fellman of Kissinger & Fellman, PC, regarding renewal of the City's franchise agreement with Comcast, and to instruct City negotiators going forward.

ADJOURN



CITY OF LOVELAND
CITY MANAGER'S OFFICE

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AGENDA ITEM: 2
MEETING DATE: 6/25/2013
TO: Mayor and City Council
FROM: Rod Wensing, Assistant City Manager
Sharon Citino, Assistant City Attorney
PRESENTER: Ken Fellman, Esq. of Kissinger & Fellman, PC

TITLE:

Executive Session To Receive a Report and Legal Advice From the City Attorney and Outside Legal Counsel Regarding Renewal of the City's Franchise Agreement with Comcast and to Instruct City Negotiators Going Forward

DESCRIPTION:

This Executive Session is requested for the purposes of receiving a report and legal advice from the City Attorney and the City's outside legal counsel, Ken Fellman of Kissinger & Fellman, PC, regarding renewal of the City's franchise agreement with Comcast, and to instruct City negotiators going forward.

At the June 18, 2013 City Council Meeting, Council requested that prior to the Executive Session, the public have an opportunity to comment on this issue.

BUDGET IMPACT:

- Positive
 - Negative
 - Neutral or negligible
-

REVIEWED BY CITY MANAGER:

LIST OF ATTACHMENTS:

Cable Franchise Renewal Process Memo

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1941 - 2002

MEMORANDUM

TO: Hon. Mayor Gutierrez and Members of City Council
City of Loveland, Colorado

VIA: John Duval, City Attorney

FROM: Ken Fellman, Esq.

CC: Sharon Citino, Assistant City Attorney
Rod Wensing, Assistant City Manager

DATE: June 14, 2013

RE: The Cable Franchise Renewal Process and Upcoming Negotiations with Comcast

Federal law dictates the process, and scope of the City's authority to address issues in a cable franchise. This memo is intended to describe the overall franchise renewal process, some particular issues that may be of interest, and will briefly describe recent negotiations between Comcast, Aurora and Denver that will result in a franchise document with many provisions that will be available and beneficial to Loveland.

I. FRANCHISE RENEWAL PROCESS

A. A Brief Description of Cable Franchising.

A cable franchise is a contract between the cable operator and the local government that the cable operator serves. To provide cable services to subscribers, cable companies must locate facilities within public rights of way, either on utility poles or underground. In consideration for a cable operator's right to utilize the City's rights of way the City requires the cable operator to enter into a franchise agreement. Federal law governs what issues can be addressed in that contract.

Franchise agreements cover a wide range of topics including: compensation paid to the City by the cable company (the *franchise fee*); requirements for provision of public, educational and government access channels (commonly referred to as *PEG channels*) and financial support for capital expenditures related to PEG channels; requirements for compliance with conditions under which work in the rights of way can be conducted; customer service standards; the variety of cable services provided; compliance with federal technical standards; procedures for addressing franchise transfers; procedures for remedying franchise violations; and franchise termination. By law, franchise agreements are non-exclusive, but to date, there has been little competition.

B. Federal Entitlement of Franchise Renewal.

Under federal law, Comcast is *entitled* to a franchise renewal if it offers and has the legal, technical, and financial ability to comply with a franchise agreement that meets the future cable-related needs of the City. Since Comcast clearly has the capability to comply with almost any franchise condition, the foundational question becomes whether Comcast will agree to a franchise document that will meet the City's future cable-related needs.

Aurora's new franchise will come to its Council for first reading in early July. Due to some Denver-specific issues, Denver is about a month or so behind that schedule. Comcast has agreed to work with me on a "generic" version of the Aurora agreement, and that document will be shared with Loveland and a number of other Colorado communities about to begin their renewal negotiations. While all provisions in this model document may not be appropriate for all communities (for example, the number of PEG channels will differ in each community), Comcast will be willing to offer most of the terms in the new Aurora franchises to other Colorado communities.

Federal law provides for two types of franchise renewals. The first, and more common, is an informal renewal process. In an informal process, which we are already engaged in, the parties meet and negotiate a mutually acceptable franchise. The informal process is less structured, usually less confrontational, and less costly.

If the City and Comcast are unable to informally negotiate an acceptable franchise, under the federal Cable Act, either party may pursue a formal franchise renewal. To commence a formal franchise renewal proceeding, a cable operator may make a written demand for formal proceedings. Within a very structured and limited time period, the franchising authority determines its future cable-related needs and submits that information to the cable operator. The cable operator then submits a proposed franchise. The franchising authority, within four months of the submission date, must make a preliminary assessment of whether it will accept or deny the cable operator's offered franchise. If the franchising authority does not accept the proposed franchise, the end result, in all likelihood, is federal court litigation. It is not uncommon however, that even when the parties are proceeding through a "formal" renewal process, they will continue to negotiate informally, and the threat of litigation at the end of the process often leads to an eventual "informal" resolution.

C. Federal Limitations on City Authority.

It is important to understand the *limitations* imposed by federal law. The City may require an upgrade of the cable system to provide certain cable services and may require that the cable operator meet the technical standards that have been promulgated by the FCC, but cannot require specific transmission technologies (e.g., fiber to the home). The City may not use the franchise to negotiate for any communications services that are not considered cable services under federal law, such as telephone services or high speed Internet services, nor can the City charge franchise fees on non-cable service revenues. The City may not require Comcast to offer particular channels (e.g., ESPN or CNN), but may require Comcast to offer particular programming categories (e.g, sports channels or news

channels). Federal law *does* allow the City to adopt customer service standards which Loveland has done in Chapter 13.16 of City Code , without Comcast's consent.

The City has already required financial support (over and above the franchise fee) for PEG channels, but federal law limits the use of these funds for capital expenses. It is common in Colorado for Comcast to pay fifty cents per subscriber per month to the local franchising authority. It is completely within the City's discretion to use these funds for capital expenditures for the government channel, or to share some of these funds the educational and/or public access entities if there are any. When imposing any requirement on the cable operator, federal law provides that it should be reasonable in light of the costs of providing cable services to your community. The cable operator is allowed to pass through to subscribers to costs it incurs in meeting community needs through the franchise agreement.

One of the major issues that many local governments will face in their next franchise negotiation involves new technologies and PEG channels. As you probably know, many cable programs can now be viewed on-demand. Comcast has been hesitant to provide on-demand programming for PEG channels. Based upon the new Aurora franchise, there will be an opportunity to negotiate with Comcast for support for enhancing on-demand programming that can be streamed over the internet (and therefore available to anyone with a broadband connection – not just Comcast subscribers), if this is of interest to Loveland.

In addition, many cable channels can currently be viewed in both standard definition (SD) and high definition (HD). Those cable channels that are not currently available in HD will likely be made available in that format during the term of the next franchise. For a period of time all cities will have some citizens that continue to watch video programming in SD, while others will (or already have) chosen to watch most of their programming in HD. The City should consider whether it is important to make your access channels (or at least your government channel) available to Loveland subscribers in both SD and HD. While Comcast prefers not to give additional bandwidth to local governments (since they are not paid for it) to allow for access channels to be seen in both SD and HD, based upon the new Aurora and Denver franchises, there will likely be an opportunity to obtain an HD channel for government access.

Within the framework of the federal limitations on local authority, the new Aurora and Denver agreements will have better definitions of "gross revenues" (upon which franchise fees are calculated), better language on the City's right to audit Comcast's payment obligations to the City, and better language to address relatively recent changes in the law governing the respective rights of the City and the cable operator, when a competing cable provider seeks its own franchise from the City.

D. Understanding Cable Services

Federal law authorizes the City to require one or more public, educational or governmental ("PEG") access channels. These are three distinct categories. The City currently operates a government access effort on channel 16. Operating a channel includes acquiring the capital equipment, developing programming, and staffing. A government access channel typically includes

programming such as a community message board, City Planning and Zoning meetings, City Council meetings, and other programming providing information about local issues. This channel may also be used in conjunction with other governmental entities.

An education access effort is currently operated by Thompson Valley School District on channel 14 which is typically used for broadcasting school board meetings, athletic activities, performing arts, programming created by students, or other scholastic/educational type events.

The general public may also operate a public access channel. A public access channel should be separate from the government access channel. Content programmed on government access is controlled by the governmental entity, and can be limited to government related issues. Public access is open to anyone, and the content of the programming is subject to First Amendment protections.

Federal law classifies telephone as a telecommunications service. It is regulated by the Colorado PUC and the Federal Communications Commission, not through a cable franchise. Federal law classifies high speed Internet as an "information service." Information services may not be regulated in a cable franchise.

II. PROCESS MOVING FORWARD

A. Prior to Negotiations

The current franchise expires December 31, 2013. I have already had an opportunity to begin discussing the franchise renewal process and Loveland's issues with City Staff and have engaged in a discussion with an outside professional firm to complete a Loveland specific franchise fee audit. Going forward, it will be helpful to obtain the Council's direction regarding customer service issues, and a position on PEG SD or HD programming.

B. Commencing Negotiations

After completing the evaluation described above and developing a strategy for what the City seeks to accomplish in the new franchise agreement, I will draft and propose a new agreement to Comcast to begin the negotiation process. As noted, this document will likely be based in large part on the terms and conditions Comcast has agreed to in Aurora and Denver.

I look forward to discussing these issues with you at the executive session on June 25th.