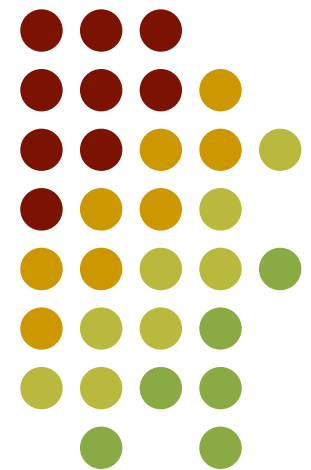


Cable License Renewal

Legal Framework & Strategies

Jeffrey I. Fialky, Esq.



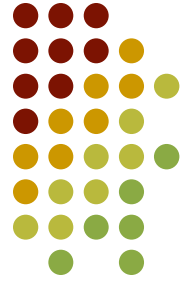
Bacon / **Wilson**
ATTORNEYS AT LAW



Overview

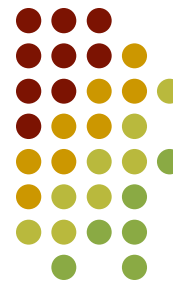
- Federal Statutory Framework
 - Formal vs. Informal Renewal Process
- Massachusetts Requirements
- Renewal Negotiation Issues/Strategies

Legal Framework for Regulation of CATV



- Federal jurisdiction:
 - i) 47 USC (Cable Act-Title VI)
 - ii) Code Federal Regulations (Part 76-FCC rules)
 - FCC jurisdiction
- State jurisdiction:
 - MGL (C. 166A)
 - Code Massachusetts Regulations (207 CMR 2.00)
 - DTC jurisdiction (Cable Division): Former Department of Telecommunications and Energy (DTE): now Department of Telecommunications and Cable (DTC) and Department of Public Utilities (DPU)

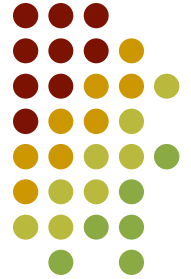
Cable Renewal (Federal)



Renewal Regulation subject to Section 626 of the Cable Act (47 U.S.C. §546)

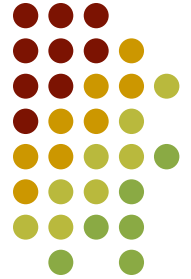
- Formal Renewal Process
- vs.
- Informal Renewal Process
- Concurrent processes

Formal Renewal Process Chronology



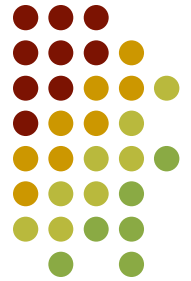
- Within first 6 months of 36 month window, Cable Operator must preserve its rights (626 Letter)
- Public Policy: Due Process Protection for Incumbent cable operator
 - Public Policy to protect Cable operator investment
- Courts: Presumption of renewal- places burden on Local Franchising Authority to prove why renewal not appropriate

Commencement of Ascertainment Process



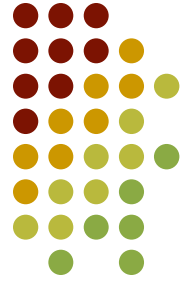
- Local franchising authority (LFA) may, on its own initiative, during first 6 months of 36 month renewal window commence Ascertainment proceeding; or
- If cable operator requests commencement of the proceeding during the first 6 months of 36 month window, the LFA shall commence the proceeding no later than 6 months after the date the notice is Submitted

Ascertainment Proceeding

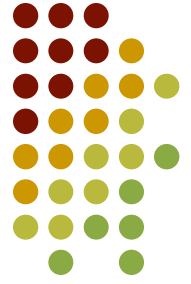


- During ascertainment: LFA to elicit facts to determine:
- (a) future cable related community needs and interests; and
- (b) review the performance of the cable operator under the existing franchise

RFP

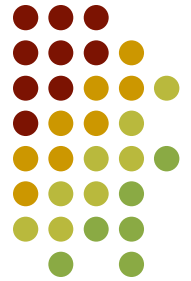


- Upon completion of ascertainment:
- LFA shall submit Request For Proposal (RFP) to Cable Operator requesting Proposal for Renewal (“Proposal”); or
- Cable Operator may submit Proposal on its own initiative



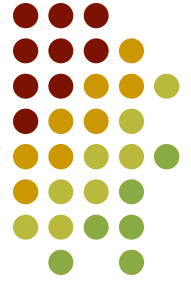
- Upon receipt of Proposal from the Cable Operator, the LFA shall provide public notice of receipt of the proposal and shall have 4 months to review the proposal and:
 - •(i) renew franchise,
 - •(ii) issue (preliminary) denial of franchise; or
 - •(iii) commence administrative proceeding

LFA Administrative Proceeding



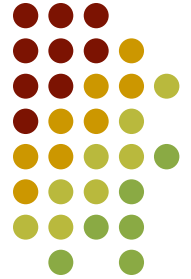
- Administrative proceeding requires:
- (i) notice to cable operator
- (ii) fair opportunity for full participation including the right to introduce evidence and right to question witnesses, and a transcript shall be made of the proceeding.
- Following administrative proceeding, LFA may issue an approval or (final) denial of license renewal

LFA Standard of Review for Renewal



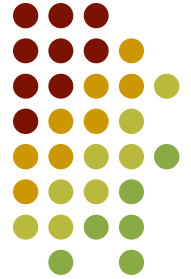
- 1. The cable operator has substantially complied with the material terms of the existing franchise and with applicable law.
- 2. The quality of the operator service including response to consumer complaints and billing practices, but without regard to the mix or quality of cable services provided over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

Outside of Renewal Parameters



- Rates (BBT/E&I regulated by DTC)
- Telecommunications service (§621)
- Cable Modem/Internet (Brand X Decision)
- Specific Services or Facilities (Except I-Net) (§624)
- Channels (except broad categories of programming and PEG)

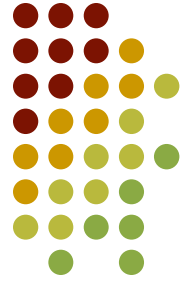
Non-Compliance Denial



- No denial by the LFA of the Proposal shall be based upon the failure of the cable operator to substantially comply with the terms of the existing franchise or in the quality of the operator service unless the LFA has provided the operator with notice and opportunity to cure, which cure has not occurred within a reasonable time after receipt of notice



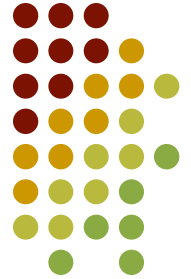
- Upon (final) Denial of Cable License Renewal in MA:
 - Appeal to the Cable Division
 - Further appeal to MA Supreme Judicial Court



Informal Renewal Process

- 47 U.S.C. §546(h): Notwithstanding any other provision of §546, the Cable Operator may submit a Proposal at any time, and an LFA may, after notice and opportunity for public comment, grant or deny such proposal at any time
- Caveat: bear in mind (120) review period under formal process- if proposal provided late, Operator may forfeit rights

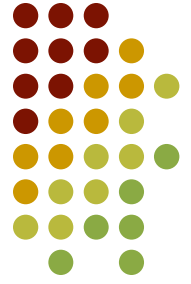
Massachusetts Considerations



- Proposal in MA submitted with Cable Division Form 100 (Revised CTV 03-3, Cable Division Review of Form 100, November 2004) (includes: proposed term, financial information, channel line-up, strand map, disclosure of legitimate findings of breach/final license denial)
- Initial License Term: maximum 15 years (MGL c. 166A, §3)
- Renewal License Term: maximum 10 years (MGL c. 166A, §13) Extensions of less than three (3) years (to 10 year licenses) could result in enforceability issue)

Massachusetts Considerations

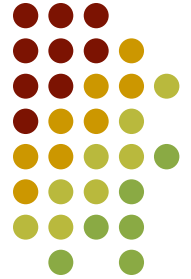
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- Cable Division recommends that LFA complete ascertainment 12 months (but no later than 6 months) prior to license expiration (Cable Division Form 100 proceeding)
- LFA must notify cable operator upon completion of ascertainment (207CMR Section 3.05(4))

Massachusetts Considerations

(Cont.)



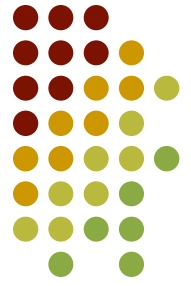
- LFA failure to comply with ascertainment time line does not subject LFA to penalties, but “such failures would be factors to be considered on appeal”



RENEWAL CONSIDERATIONS

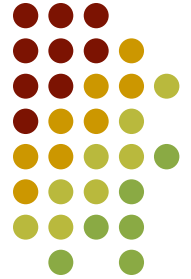
Issues, Tips and Strategies

In-Kind Renewal Benefits to LFA



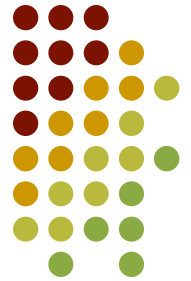
- What may LFA require as a future “cable related need”?
- May 30, 1997 letter ruling from Cable Division interpreting (“cable related needs”):
 - In-kind benefits that bear no relationship to the cable television system shall be barred
 - In-kind benefits that do not directly benefit each subscriber, shall be considered to the extent that they are reasonable and in the public interest

Ascertainment



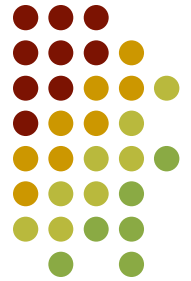
- Ascertainment: Establishes the LFA's "record" for purposes of determining community needs
- Ascertainment Activities:
 - Review current cable license to identify compliance with current terms (I-Net drops, cable drops, capital grants, build out requirements)
 - Compliance review hearings
 - Review Town's records of complaints as well as state records as to customer complaints
 - Meetings with municipal officials including school department, police and fire and DPW and other municipal departments to determine specific needs

Ascertainment (Cont.)



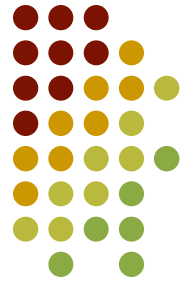
- Review strand map and compare with new development and unserved areas (future build out requirements)
- Review and inventory PEG facilities: look at life span of current equipment (depreciation schedule-most equipment fully depreciated over course of current license)
- Review strategic plan for growth of PEG programming (need to purchase future equipment to expand current facilities, need to retain future staff as facilities and production grows)
- Access corporation: ensure good standing (annual reports, financial filings)
 - review prior 501(c)(3) financial records filed with the State (Form PC Tax Returns etc.) (cable operator will be reviewing for purposes of determining cash surplus and investments).

Ascertainment (Cont.)



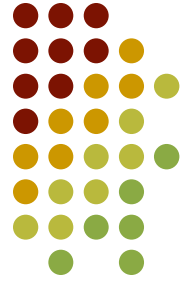
- Conduct survey
 - well balanced- include questions regarding subscribers willingness to pay for renewal concession costs
- Public hearing:
 - Encourage attendance by representatives of groups expressing respective “need” (access volunteers, seniors, school dept., etc.)
 - Stenographer
 - Attendees providing testimony provide their name and address.
- LFA to notify cable operator in writing upon completion of ascertainment

Following Ascertainment: Request for Proposal (RFP)

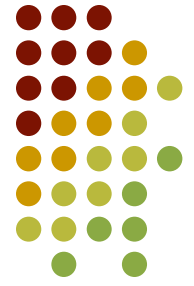


- Include an index of ascertainment activities and results of the ascertainment to substantiate “community needs”
- Provide results of surveys, results of hearings (including excerpts of transcripts where appropriate)
- Include draft license or draft license bullet points

RFP (Cont.)



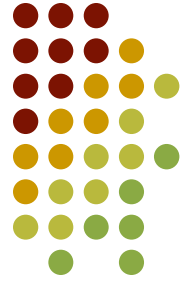
- If level playing field language contained in prior license, then Town must include in RFP a specific request that no level playing field provision be contained in new license (CTV 05-2 interlocutory order re: Town of Framingham).
- Provide reasonable period of time for cable operator to respond to RFP (generally 30 to 90 days, bearing in mind that LFA has 4 months to review proposal from cable operator once received).



Costs (FRC's)

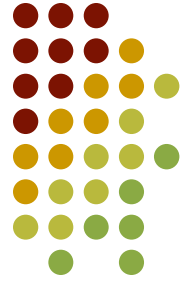
- Proposal “reasonable to meet cable related needs in light of **costs**”
- Costs incurred by Cable Operator arising out of license “passed through” as *franchise related costs*
- Cable Operator may line item on bill (§622)
- Franchise Fees capped at 5% cable Operator’s *gross revenues* (§622)
- Note: Cable Operator must pass through decreases in FRCs
- Exceptions: barter for non-compliance, reduction in PEG channels, etc.

Negotiating Terms



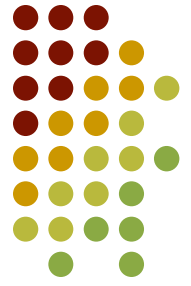
- Term (length of License):
- Maximum Renewal Term 10 Years
 - **OLD:** Cable Operator insist on longest term possible, Town desires shorter term
 - **NEW:** In legislative landscape with potential for state wide regulation- cable operator may consider shorter term of 5 to 7 years, community may desire longer

Area to be Served - Build-out Area



- Matters in:
 - New building developments
 - rural areas
 - commercial districts
- Build-out may require C.I.A.C
- Negotiating point: negotiate minimum density requirements (10 to 15 residential homes per one mile of cable plant)
- Also potential issue with initial service area of competitor

Level Playing Field Language (MFN)



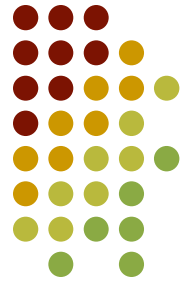
- Cable Operator wants to:
- i. Insure that any additional license granted shall not contain terms more favorable or less burdensome to the competitive entrant
- ii. If Operator demonstrates that additional license granted on terms more favorable or less burdensome, Operator may require LFA to hold a hearing to permit Operator opportunity to amend license accordingly



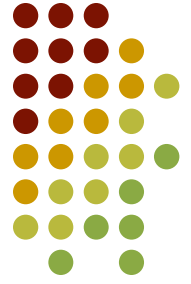
Level Playing Field (Cont.)

- Compare with Modification (Section 625 of Cable Act)
- Cable Operator may obtain modification to existing franchise due to commercial impracticability
 - “a change in conditions beyond the control of the cable operator, the non-occurrence of which was a basic assumption on which the requirement was based”
- Negotiating arguments for Town:
 - MFN constitutes barrier to entry for competitor
 - Cable Operators has inherent modification rights

Institutional Network (I-NET)



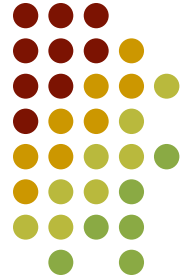
- **OLD:** hard wire, fiber, or HFC network connecting municipal buildings for voice, data, and video (costly)
- **NEW:** combination of connectivity through cable modem and other IP solutions, and point to point video returns on hardline coax or fiber runs (less costly)
- Issue: maintenance of existing I-NET determined as an upfront estimated cost amortized over term of license as in FRC (negotiation: not a 'hard cost')
- negotiating point: If reduce I-NET expenses by negotiating cable modem installations (least costly)



PEG Channels

- One 6 MHz channel= (3) HD channels to cable operator, thus valuable real estate
- During ascertainment, examine schedules of all PEG programming on each channel for purposes of determining first run programming, etc.
- negotiating points:
- Request analog and digital and/or HD channels
- avoid agreeing to cable operator's right to reclaim unused channel time
- Alternative to channel: web streaming

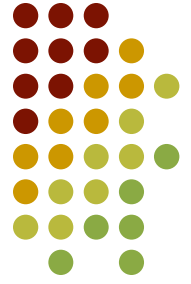
PEG Facilities and Funding



- **OLD:** L.O. facilities staffed by cable operator with training for local residents, and produced local programming
- **NEW:** nearly all L.O. facilities have been eliminated, with a migration to access corporations- additional burden on access corp. (e.g. cover municipal meetings, etc.)

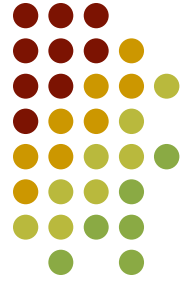
PEG Facilities and Funding

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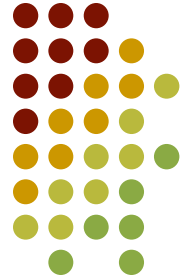
- Funding by way of percentage of gross revenue for franchise fee plus some capital grants (vs. all capital grants historically)
- Capped at 5%
- Gross revenue definition to be negotiated – exclusive of revenue from telephone and cable modem; inclusive of digital cable services, home shopping services and advertising revenues on a pro rata basis.

PEG Facilities and Funding (Cont.)



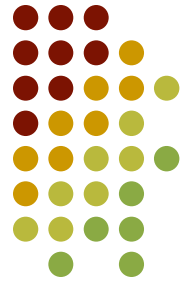
- Negotiating Point: needs based, ascertainment driven
 - Avoid remaining cash surplus if possible
 - have realistic budget forecasts including expected growth, inflation, increase in staffing and salary needs,
 - Realistic life span and replacement for existing equipment, replacement of transportation and vehicles
 - Account for negotiation of lease space and training costs
 - *needs versus costs*: from ascertainment, document willingness of municipal residents to pay for the value received in PEG programming
 - Operator may hire consultant to inspect studio and equipment
- Interconnection Agreements: connectivity with incumbent and competitive providers to ensure distribution of PEG programming – generally done as a private agreement between commercial providers.

Senior Citizen Discount



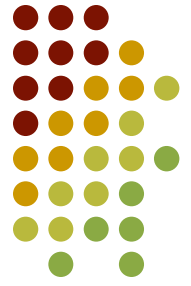
- Per *Framingham* decision – not eligible for external cost treatment, thus voluntary and may not be required
- Cable operators failure to provide senior discount may not be a factor in denying a license renewal as a matter of law but
- To the extent agreed upon in the license, however, shall be upheld as a matter of contract law
- Discount (10%) off basic service tier only versus standard
- Cable Operator may offer senior discount over a certain age (63, 65 years) plus limiting requirements (e.g. medicaid eligible etc.)
- Generally agreed to as a side letter, thus not enforceable under terms of contract and not available from DTC other than in response to freedom of information request
- Note: Include in RFP

Enforcement Provisions: Performance Bond and Liquidated Damages



- Liquidated Damages: ensures immediate, predetermined, and quantifiable damages
- Performance Bond: provides immediate funding mechanism in the event of breach
- Negotiating Point:
 - As a result of *Framingham* decision, include both request for liquidated damages and performance bond in RFP
 - Look to other licenses (equity)

Miscellaneous Negotiating Issues



- Negotiate provisions for determination of breach – avoid language that could lead to procedural defects on the part of the LFA.
- Performance review hearings – request right to hold hearings on an annual, or as needed basis- contractually obligate cable operator's attendance