

CABLE TELEVISION LICENSE RENEWAL PROCESS

A PRACTICAL GUIDE

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Telecommunications and Cable**

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INTRODUCTION

This Practical Guide is presented by the Massachusetts Department of Telecommunications and Cable (“Department”) in our supervisory role with respect to cable television licensing. Under both federal and Massachusetts law, no cable operator may construct and/or operate a cable television system in a community without first obtaining a license. In Massachusetts, the city manager, mayor or board of selectmen is responsible for issuing a license and, hence, is designated as the Issuing Authority. Since Massachusetts law limits the term of a license, Issuing Authorities must periodically review and renew licenses. The Department oversees the licensing renewal process, which has been established under federal law, and supplemented by our regulations.

By establishing a formal renewal process, Congress sought to protect a municipality’s right to a cable system that is responsive to the needs and interests of the local community. Congress also sought to protect cable operators, which have invested in infrastructure in a community, from an unfair denial of a renewal license. The Department’s goal in developing this Practical Guide is to ensure that both municipalities and cable operators are aware of their rights and responsibilities as they contemplate license renewal and to guide them through the process.

In this Practical Guide, the Department first presents an overview of the role of government in cable television licensing. We describe each level of regulatory oversight with a focus on the resources available to Issuing Authorities. Next, the Department outlines the formal renewal process, highlighting the rights and responsibilities of each party under that process. Lastly, we discuss an alternative method by which parties may negotiate informally to reach an agreement. Since there are no procedural protections in informal negotiations, we recommend that this method be used only where there are no contested issues between the parties.

The guidance we provide herein offers both Issuing Authorities and cable operators direction on the most prudent manner in which to proceed under the rules established by Congress so that each party’s rights and interests are protected. The information in this Practical Guide is necessarily general in nature. The Practical Guide is not a substitute for particularized advice from an attorney. In addition, federal and Massachusetts laws and regulations are subject to change. Therefore, persons should refer to the current Massachusetts General Laws, the Code of Massachusetts Regulations, the federal Communications Act of 1934, as amended, or the appropriate federal rules and regulations, or they may consult the Department with case-specific questions.

THE ROLE OF GOVERNMENT

Licenses to construct and/or operate cable television systems are granted by the “Issuing Authority” of a city or town. Pursuant to section 1 of chapter 166A of the Massachusetts General Laws, the Issuing Authority is the mayor of a city, the board of selectmen of a town, or the city manager of a city with a plan D or E charter. The Issuing Authority decides initially whether to go forward with the licensing process, recommends services and terms to be included in the license, and decides whether to grant a license. Upon license renewal, the Issuing Authority reviews the performance of the cable operator, determines the services and terms to be included in the renewal license, and decides whether to grant a renewal license.

The Issuing Authority takes these actions within the framework provided by federal and state law. Congress has enacted a series of laws that establish many of the substantive and procedural requirements governing cable television licensing. For example, federal law requires that each operator obtain a license to service a particular area, and that the license be non-exclusive. Federal law also specifically addresses local access programming and franchise fees. Further, federal law establishes the process by which licenses are granted and renewed. The Federal Communications Commission (“FCC”) is charged with ensuring that cable operators and licensing authorities comply with federal law.

In addition to federal oversight regulation, many states have enacted laws regarding cable television regulation. In Massachusetts, the Department oversees cable television licensing and ensures that municipalities and cable operators comply with both federal and state law, particularly where state law is more restrictive than federal law. For example, state law limits the term of a license to 15 years for an initial license and ten years for a renewal license. The Department also acts as an appellate body, as a cable operator may appeal to the Department for review of an Issuing Authority decision.

Since it is the Department’s enabling legislation and regulations promulgated thereunder that establish the regulatory framework for Issuing Authorities to follow, the Competition Division has created the position of Municipal Liaison to bridge these two bodies. The Municipal Liaison’s chief function is to assist municipal officials as they work through the licensing process. The Municipal Liaison will meet with local governments to explain the statutory and regulatory requirements. The Department maintains, as public records available for inspection, a copy of each license granted in Massachusetts. In addition, we maintain, on our website, an electronic library of many of the licenses executed in Massachusetts. By providing this assistance, the Department seeks to ensure that Issuing Authorities act in compliance with federal and state law to obtain a license that best serves the needs of the community.

THE FORMAL RENEWAL PROCESS

Under federal and Massachusetts law, cable operators may not provide cable television service without obtaining a license from the Issuing Authority. Congress anticipated that cable operators would seek renewal licenses in order to continue providing cable television service in areas where money has been invested in infrastructure. Congress also recognized that municipalities should review the performance of a cable operator and ensure that the operator continues to meet the community's needs and interests. Thus, Congress established a formal renewal process that considers each of these interests. By following the formal renewal process, Issuing Authorities protect their right to a cable television system that serves the needs and interests of the community and cable operators protect their investment from a unfair denial of a renewal license. An Issuing Authority or cable operator must explicitly invoke the protections of the formal renewal process. Generally, each party must notify the other that it intends to proceed under the formal process.

The framework set forth by federal law provides a 36-month period in which to conduct license renewal proceedings. This 36-month period is often referred to as the "Renewal Window." The process consists of two phases: 1) reviewing the cable operator's performance under the current license and ascertaining the needs and interests of the community ("Ascertainment"); and 2) applying the results of the first phase to the review of the cable operator's proposal. The Department recommends that a municipality complete the first phase within 24 months. At most, the ascertainment phase should not extend longer than 30 months. This timeframe affords the municipality sufficient time to review and consider the cable operator's proposal and make a determination whether to grant renewal of the license before the current license expires.

PHASE I -ASCERTAINMENT

COMMENCEMENT

The formal renewal process must begin between 36 and 30 months prior to expiration of the license. The Issuing Authority may commence the formal renewal process on its own initiative and must inform the cable operator that it has done so. While there is no specific action that an Issuing Authority must take in order to demonstrate it has commenced the formal renewal process, the Issuing Authority should perform some tangible act to begin to ascertain the community's cable-related needs and interests. For example, the Issuing Authority could begin to survey the community or hold a public hearing.

Most often, the cable operator will request, in writing, that the Issuing Authority commence the renewal process. The cable operator will make this request between 36 and 30 months prior to the expiration of the license. If the cable operator requests that the Issuing Authority commence the renewal process, the Issuing Authority must begin ascertaining the community's cable-related needs and interests within six months of receiving the cable operator's request.

In either case, the letter requesting commencement of the formal license renewal process or advising that a community has commenced the formal renewal process is called a "Renewal Letter." The Renewal Letter is often referred to as the "626 letter" (626 refers to the section of the federal Communications Act that sets forth the franchise renewal process).

The protections of the formal renewal process must be invoked in a timely manner, that is between 36 and 30 months prior to the expiration of the current license. If neither the Issuing Authority nor the cable operator requests commencement of the formal process within this period, the

opportunity to conduct the renewal license under the formal renewal process expires and neither party is able to claim the protections provided by federal law.

ASCERTAINMENT

Ascertainment is a series of actions taken by the Issuing Authority by which the Issuing Authority reviews the cable operator's performance under the existing license and identifies the cable-related needs and interests of the community. Many Issuing Authorities find it helpful to appoint a committee to assist in gathering information about a cable operator's performance and the community's needs and interests. The size and make-up of the cable advisory committee ("CAC") is determined by the Issuing Authority, and its members may include both residents and non-residents of the community. A CAC is considered a governmental body within the purview of the Massachusetts conflict of interest laws, at General Laws chapters 268A and 268B, and is subject to the guidelines contained therein.

The Issuing Authority, in appointing a CAC, should define the CAC's role and duties. Under Massachusetts law, only the Issuing Authority may make the final licensing decision. However, this does not preclude the Issuing Authority from relying on the CAC's recommendations.

An Issuing Authority and its CAC may choose a wide variety of methods to assess the cable operator's past performance and determine the future needs and interests of the community. An Issuing Authority may:

- Hold a public hearing. While a public hearing is required after receipt of the cable operator's proposal as part of the Issuing Authority's deliberative process, some municipalities choose to hold additional hearings during the ascertainment phase to solicit input from the community with respect to the cable operator's performance as well as the future needs and interests of the community;
- Conduct a municipality-wide survey;
- Meet with community organizations such as schools, senior citizen centers, and police and fire services to determine their proposed needs;
- Review the current license held by the cable operator in the municipality to determine, for example, which terms and conditions have been particularly beneficial to the community;
- Review the cable operator's financial forms (CTV Forms 200 and 400);
- Review consumer complaint records, including CTV Form 500 and municipal records;
- Obtain and review a map of the service area (often referred to as a street or strand map) to determine, in part, whether there are unserved parts of the community;
- Tour the cable operator's technical facilities (i.e., headend) and PEG access studio; and
- Review licenses granted by other communities in Massachusetts (many have been filed electronically and are available at the Department's web page).

There is no law or regulation that explicitly establishes a deadline by which an Issuing Authority must complete ascertainment. The Department has interpreted federal law as requiring Issuing Authorities to complete ascertainment no later than six months prior to the current license expiration date. The better practice, however, is to ensure that ascertainment is complete 12 months prior to license expiration in order to maximize the amount of time an Issuing Authority has to review a cable operator's proposal. Under federal law, a cable operator may not submit a formal renewal proposal until the Issuing Authority has completed ascertainment. This timeline allows a cable operator to respond to the results of the ascertainment studies in preparing its proposal. Upon receipt of the proposal, an Issuing Authority has only four months, or until the expiration of the current license, whichever occurs first, to make a determination on the proposal. Prolonging completion of the ascertainment thus reduces the amount of time during which an Issuing Authority may review and deliberate on a cable operator's proposal.

Under Massachusetts regulations, the Issuing Authority must notify the cable operator in writing upon completion of ascertainment. In its written notification, the Issuing Authority must specifically state the date that ascertainment was complete. The Issuing Authority should provide its ascertainment results as a part of a Request for Proposals ("RFP"). Presenting the ascertainment results to the cable operator is critical in demonstrating the community's needs and without it, a proposal in response to an RFP may not accurately represent the community's needs.

As part of the RFP, the Issuing Authority may provide the cable operator with a draft license in its RFP that contains terms and conditions consistent with the ascertainment results. The Issuing Authority should provide a reasonable deadline for the cable operator to respond to the RFP, that is, to submit what is known as the Formal Renewal Proposal. Generally, a period of at least 30 days is considered a reasonable response time. However, in establishing a deadline for responses, the Issuing Authority must be aware of the length of time remaining before the current license expires.

PHASE II - REVIEW OF PROPOSAL

After the Issuing Authority has completed ascertainment, the cable operator may (on its own initiative) or must (within the time frame established by the Issuing Authority in the RFP) submit its renewal proposal. The cable operator submits its proposal on the Department's Form 100 and often supplements it with additional information.

Upon receipt of the proposal, the Issuing Authority must:

- 1) provide prompt public notice that the cable operator has submitted a renewal proposal; and
- 2) during the four-month period that begins upon the receipt of the proposal, renew the franchise or issue a preliminary assessment that the franchise should not be renewed; and
- 3) at the request of the cable operator or on its own, commence an administrative proceeding to consider whether:
 - A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;
 - B) the quality of the cable operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the cable system, has been reasonable in light of community needs;

- C) the cable operator has the legal, financial, and technical ability to provide the services, facilities, and equipment as set forth in the cable operator's proposal; and
- D) the cable 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.

If the Issuing Authority determines, upon initial review of the proposal, that it will accept the cable operator's proposal and grant the license, there is no need to commence an administrative proceeding. Nonetheless, under the Department's regulations, the Issuing Authority must conduct a public hearing to allow the public an opportunity to comment on the cable operator's proposal.

The administrative proceeding is an evidence gathering proceeding that must be conducted so as to afford both the Issuing Authority and cable operator due process, including the right to introduce evidence, question witnesses, and require the production of evidence. If the Issuing Authority bases the preliminary denial of the renewal proposal on criteria (A) or (B), the Issuing Authority must provide the cable operator with notice of non-compliance and an opportunity to cure.

At the conclusion of the administrative proceeding, the Issuing Authority must issue a written decision granting or denying the cable operator's proposal for renewal.

GRANTING A RENEWAL LICENSE

If the Issuing Authority determines that the cable operator satisfies each of the four criteria, and decides to grant a renewal license to the cable operator, the Issuing Authority must issue a public, written statement detailing the reasons for the grant of the renewal. The Issuing Authority must file a copy of the issuing statement, renewal license, and license application (Form 100) with the Department within seven days of granting the license. In addition, the Department requests that the Issuing Authority also submit the license in electronic format.

DENYING A RENEWAL LICENSE

If the Issuing Authority determines that the cable operator has failed to satisfy one or more of the criteria, and has not cured any claimed non-compliance, the Issuing Authority must issue a written statement detailing the reasons for its denial within 14 days of the decision to deny. The written decision must include the basis for the denial, that is, identify which of the four criteria the cable operator did not satisfy. The Issuing Authority must file a copy of this statement along with the renewal proposal (Form 100) with the Department.

APPEAL OF ISSUING AUTHORITY DECISION

A cable operator who is aggrieved by a decision of an Issuing Authority to deny a renewal license may appeal to the Department for review of that decision. Any such appeal must be filed within 30 days of the date of the Issuing Authority decision.

INFORMAL NEGOTIATIONS

While Congress established the formal renewal process, Congress also determined that where Issuing Authorities and cable operators are able to negotiate an agreement outside of the formal renewal process, they should be allowed to do so in a manner that best fits the parties' needs. That is, where a municipality has a good working relationship with a cable operator and there are no compliance issues, the parties are not required to follow the formal process. Rather, the parties may negotiate an agreement informally. Since there are no procedural safeguards in informal negotiations, this method should be used only where there are no contested issues between the parties.

When negotiating informally, a cable operator may submit a proposal for the renewal of a license at any time, and the Issuing Authority may, after affording the public adequate notice and an opportunity to be heard, grant or deny such a proposal. By negotiating informally, parties avoid the time requirements of the formal process. For example, Issuing Authorities are not obligated to review a cable operator's proposal within 120 days, as required under the formal process. However, even with informal negotiations, state law requires that the Issuing Authority hold a public hearing on the cable operator's proposal.

There is no regulatory requirement that an Issuing Authority conduct ascertainment if it chooses to negotiate with a cable operator rather than follow the formal process. Nevertheless, the Issuing Authority's negotiating position can only be enhanced if it has ascertainment results to substantiate its requests. It is highly recommended that an Issuing Authority conduct some form of ascertainment prior to entering into negotiations with a cable operator.

In practice, cable operators in Massachusetts will often request an Issuing Authority to commence the formal renewal process, but simultaneously request that the parties negotiate informally. Thus, the parties actually enter into informal negotiations while conducting the formal renewal process. While this is acceptable, there are two potential areas where confusion may result:

1) The Nature of the Proposal - Formal Proposal versus Informal Proposal

There is a distinction between a proposal submitted for discussion purposes and one that is submitted as a formal renewal proposal, namely, the submission of the formal renewal proposal triggers the 120-day review period. In order to avoid any confusion or violation of process, an Issuing Authority negotiating informally should ensure that the cable operator identify any informal proposal submitted as "Informal" or "For Informational Purposes Only."

2) "Reservation of Rights"

As indicated above, often a cable operator will request that the parties negotiate informally, while "reserving its rights" under the formal renewal process. In essence, the cable operator protects itself from an unfair license denial, but is relieved of following the strict time requirements of the formal process. The Issuing Authority is similarly relieved of the strict requirements of the formal process, including the requirement to conduct ascertainment. However, it is unlikely that a decision to deny a license will stand without appropriate ascertainment to support it. Thus, it is recommended that an Issuing Authority conduct ascertainment even when negotiating informally. Moreover, if informal negotiations do not result in a renewal license, the cable operator may revert back to the formal process, and submit a formal renewal proposal for the Issuing Authority's consideration. The review is limited to 120 days under federal law. Therefore, in order to ensure that sufficient time exists

for the Issuing Authority to review a formal proposal, the Department recommends that an Issuing Authority complete ascertainment 12 months prior to the license expiration date, but absolutely no later than six months prior to the license expiration date.

Informal negotiations may be a productive and efficient means for many Issuing Authorities and cable operators to reach mutually agreeable license terms, particularly where the parties have developed a solid professional relationship. However, where a party which has agreed to proceed informally has “reserved its rights” under the formal renewal process, both parties should proceed with the understanding that the requirements of the formal process may become applicable.

REFERENCES

RELEVANT LAWS AND REGULATIONS

Massachusetts General Laws, Chapter 166A

Code of Massachusetts Regulations, 207 C.M.R. §§ 3.00-10.00

United States Code, 47 U.S.C. § 546

ADDITIONAL RESOURCES

Information regarding cable television licensing may be found on the Department's website at www.mass.gov/ocabr/government/oca-agencies/dtc-lp/competition-division/cable-tv-division/municipal-info/. The Department's website also provides several licenses in electronic format that are available for download.

A comprehensive glossary of cable-related terms is available on the Department's website at www.mass.gov/ocabr/government/oca-agencies/dtc-lp/competition-division/cable-tv-division/glossary-of-cable-television-terms.html.