

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1914/P1dn
MDK:cjs:rs

February 19, 2007

Rep. Montgomery:

Please note the following about this draft, which makes changes to LRB-0131/1:

Legislative findings; construction

1. I included a brief legislative finding to rebut the possible challenge that the bill violates the constitutional and statutory home rule powers of cities and villages. Much of the proposed legislative findings that you provided don't appear to me to relate to this issue. In addition, the proposed findings use undefined terms that might allow a court to interpret the bill more broadly or narrowly than intended.
2. I did not include the proposed language regarding "construction of chapter." If there are statutes that are inconsistent with this bill, those statutes should be addressed directly. Also, this bill repeals s. 66.0419, which provides the basis for municipal regulation of cable television. Therefore, it would be redundant to state that the bill supersedes municipal authority on this matter.

Definitions

3. I think it clarifies matters to create a new definition of "interim cable operator," which is an incumbent cable operator that has ***not*** elected to convert to a video service franchise under the bill.
4. The term "cable operator" is only used once in proposed s. 66.0420, in the definition of "service tier." Instead, the bill refers to "incumbent cable operators" or "interim cable operators." As a result, the definition of "cable operator" should probably be deleted, and the "service tier" definition should refer instead to an "incumbent cable operator." However, several statutes have cross references to the definition of "cable operator" and I can't delete that term until I know how to treat the cross references.
5. Because "video service" is defined to include "cable service," can't references to cable service throughout the statutes be changed to "video service"? For example, see this draft's treatment of ss. 66.0421 and 66.0422. Instead of referring to both cable and video service in those statutes, why not refer only to video service?
6. Instead of referring to an FCC user fee in the definition of "gross receipts," I refer to regulatory fees paid to the FCC under 47 USC 159.

7. In proposed s. 66.0420 (2) (i) 1. (intro.), I refer to “revenues received” instead of “revenues actually received.” I think this change is necessary to make some of the exceptions (such as discounts) more logically connected to the definition.

8. I created a definition for “institutional network” based on 47 USC 531 (f). I did not want to incorporate the federal definition by reference because the federal definition is limited to cable operators.

9. I deleted the reference to the U.S. Census Bureau in the definition of “household” because I don’t think it adds any substantive requirement to the definition.

10. In the definition of “incumbent cable operator,” I deleted the reference to providing “video service” because the franchises under s. 66.0419 apply to cable service, not video service. Also, I don’t think it’s necessary to refer to ordinances. A municipality’s authority to grant franchises is based on the statute. Therefore, a “franchise granted under s. 66.0419 (3) (b)” encompasses both franchises granted under the statute and franchises granted under an ordinance enacted pursuant to the statute.

11. I’m not sure what the proposed definition for “low-income household” means. Also, how are adjustments to the proposed \$30,000 income level supposed to be made? In this draft, I modified the definition found in s. 16.957 (1) (m), which may not be sufficient for your purposes. If it isn’t sufficient, please advise as to what your proposed definition means.

12. I defined “PEG channel” based on the federal definition for “public, educational, or governmental access facilities”.

13. Is my reference to “open video system” in the definition of “video service” okay?

14. I still don’t fully understand the “public Internet” exception in the definition of “video service.” “Public Internet” doesn’t appear to be a commonly understood term.

15. I made consistent references to “successor technology” in the definitions of “video service” and “video service network.”

16. I created definitions for “cable franchise,” “video service franchise,” and “video franchise area.”

17. The draft refers to both “subscribers” and “customers,” which I think mean the same thing. Perhaps only one term should be used. However, note that federal law uses both terms. Compare, for example, the definition of “institutional network” in 47 USC 531 (f), which refers to subscribers, and 47 CFR 76.309 (c), which refers to customer service standards.

Authority to provide video service

18. I added a 30-day deadline for a municipality’s notice required under proposed s. 66.0420 (3) (d) 2. I think you need a deadline for other provisions of the bill to work. See, for example, proposed s. 66.0420 (5) (b) 2. Also note that in proposed s. 66.0420 (5) (b) 2., I added a 90-day deadline. Are these deadlines okay?

PEG channels and institutional networks

19. The draft requires video service providers to “provide” PEG channels. Is there more specific language that can be used to describe video service providers’ and interim cable operators’ duties in this regard? For example, should the draft be revised to say that they must carry PEG channels in their channel line-ups, or designate certain channels as PEG channels?

20. Upon further reflection, I don’t understand how the exception in the proposal’s sub. (4) (b) applies to sub. (4) (a), and I did not include the exception. Please review the requirements I drafted in proposed s. 66.0420 (5) (a) and please advise how a cable franchise could trump these requirements.

21. The proposal includes a rule that all video service providers and incumbent cable operators must provide the same number of PEG channels. Isn’t that rule incorporated in what I drafted in proposed s. 66.0420 (5) (a) 1.?

22. I still don’t understand the “first 200 feet” rule. Please review proposed s. 66.0420 (5) (d) 1. I also don’t understand the interconnection requirements. (For example, although video service providers and interim cable operators must negotiate rates for interconnection, the video service provider or interim cable operator who requests interconnection is responsible for certain costs. Does this mean that those costs are not subject to negotiation?) Please review proposed s. 66.4020 (5) (d) 2.

23. Proposed s. 66.0420 (5) (a) 4., which is based on the proposal’s sub. (2) (c), creates a rule for when a video service provider must begin providing PEG channels. Logically, I’m not sure whether a similar rule should apply to interim cable operators. Should something be added to refer to interim cable operators?

Video service provider fee

24. Because the parties **must** engage in good faith settlement negotiations, the statute of limitations will always begin to run upon the completion of the negotiations, right? Therefore, I did not include the alternative for the statute of limitations to begin running at the end of a calendar quarter (see sub. (5) (c) 3. of the proposal).

25. I revised the “in lieu of” language in the proposal’s sub. (5) (e) to more directly state the prohibition. See proposed s. 66.0420 (7) (g).

Discrimination; access

26. The defense in the proposal’s sub. (6) (b) is confusing. The proposal’s sub. (6) (a) prohibits discrimination based on race or income. However, the defense is limited to income. Therefore, I assume that the defense can only apply to violations concerning income, not race. However, even with respect to income, the defense refers to milestones occurring 3 and 5 years after the effective date of the bill. What happens to allegations made in the first or 2nd year after the effective date? The defense can’t logically apply, correct? And in the 4th year after the effective date, the 5–year defense can’t logically apply, correct? Furthermore, the situation is complicated by the fact that you’ve given the DFI the power to extend the 3–year and 5–year milestones.

27. I remain confused over what the defense in the proposal’s sub. (6) (b) actually means. The response to my first round of questions states that it “is still possible that

a violation of [sub.] 6 (a) could be found even if [sub.] 6 (b) was satisfied.” If this is true, then how is sub. (6) (b) a defense? I have resolved this question in my mind by assuming that sub. (6) (b) applies only to allegations concerning income, not race.

28. Instead of creating a defense, is your intent actually to require compliance with the conditions set forth in the defense? If that is the case, the draft needs to be revised on this point.

29. In proposed s. 66.0420 (8) (c), I allow DFI to waive compliance with proposed s. 66.0420 (8) (a) 1. only with respect to income discrimination, not race. Is that okay?

30. In proposed s. 66.0420 (8) (b) 1. a., I refer to basic local exchange service areas on file at the PSC on the effective date of the bill. Is that okay?

31. The proposal’s sub. (6) (h) doesn’t appear necessary and I did not include it. Nothing in the proposal’s sub. (6) or in my proposed s. 66.0420 (8) appears to require video service providers to provide service in the areas mentioned in sub. (6) (h). As a result, there does not appear anything to “notwithstanding.” As for the proposal’s sub. (6) (i), the response to my first round of questions states that sub. (6) (i) “clarifies that a local government may not use any rights-of-way management authority remaining under the bill to impose additional or different build-out requirements.” However, nothing in my proposed s. 66.0420 (8), or in any other provision of the bill, appears give a local government, or DFI, any such authority. Because there appears nothing to “notwithstanding,” I did not include sub. (6) (i).

Customer service standards

32. The response to my first round of questions states that direct-to-home satellite service is not a type of video service. Therefore, there is no need to exclude direct-to-home satellite service in proposed s. 66.0420 (9) (b).

33. In proposed s. 66.0420 (9) (b), note that I changed “two or more persons” to “at least one other person.” I made a comparable change in proposed s. 66.0420 (10).

34. Who determines whether the test for effective competition specified in the Code of Federal Regulations is satisfied? As with other issues, you want a court to resolve disputes on this issue, rather than DFI, correct? (Note that proposed s. 66.0420 (13) (a) prohibits DFI from promulgating rules interpreting “effective competition.”)

Limitation on rate regulation

35. Proposed s. 66.0420 (10) assumes that there are some circumstances under which municipalities may regulate rates. Is this assumption correct? What authority would allow them to do so?

36. The prohibition in proposed s. 66.0420 (10) applies only to municipalities, rather than to the state, any instrumentality of the state, or DFI. Regarding the state, the bill cannot prohibit future legislatures from imposing rate regulation. As for instrumentalities of the state and DFI, those entities may only exercise authority that is expressed in the statutes. If no statute gives them the authority to impose rate regulation, then it is not necessary to state that they cannot exercise such authority.

37. The 2nd sentence in the proposal's sub. (11) is not necessary. Proposed s. 66.0420 (10) prohibits municipalities from imposing rate regulation under specified circumstances. Once the circumstances apply, a municipality has no authority to impose rate regulation and any rate regulation that it has imposed is therefore invalid. There's no need to specify that such regulation must automatically cease. As for the "regardless" language referring to the FCC, why do you need to include that language? The prohibition applies if the circumstances are satisfied. The "regardless" language is irrelevant to whether the circumstances apply and is therefore unnecessary. If you include the language, you might invite a court make an interpretation that gives it a meaning that you don't want it to have.

Rule making; enforcement

38. I added proposed s. 66.0420 (13) (a) to clarify that DFI may not promulgate rules to administer the bill. Is that okay? Also, see my changes to the enforcement language.

Municipal cable system costs

39. Note that I moved s. 66.0419 (3m) to proposed s. 66.0420 (12). I have assumed that municipalities will construct cable systems, rather than video service networks. If so, then it is not necessary to add references to "video service" in this subsection.

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