

# Local Government Law News

Salmon P. Chase College of Law ♦ Kentucky Department for Local Government ♦ Northern Kentucky University

Volume 1, Issue 1

May 1998

## The *New* Chase Local Government Law Center

Effective July 1, 1997, the former Kentucky Municipal Law Center became the Chase Local Government Law Center by agreement between the Kentucky Department for Local Government, Northern Kentucky University, and Chase College of Law. The new Local Government Law Center is working to enhance legal services to cities while adding services to counties and special districts. In addition the new Center has added a clinical education component for law students (*see clinic article by Assistant Director, Kathleen Hughes.*) The Center will continue to publish this newsletter. Funding for the Center is jointly provided by the Department for Local Government, the law school, and the University.

The new Center became fully staffed August 11, 1997. The staff consists of:

Professor Linda S. Taylor, Director

Professor Kathleen Gormley Hughes,  
Assistant Director

Jackie Rowe, Secretary

Professor Taylor earned her J.D. at the University of Minnesota Law School and will be awarded an LL.M. degree in natural resources and environmental law from Northwestern School of Law of Lewis and Clark College in 1998. Linda served as an attorney/legislative analyst in various nonpartisan committee counsel positions with the Minnesota House of Representatives for ten years, working on environmental, public utilities, telecommunications, tort, and real estate issues. She also worked briefly as an Assistant Hennepin County Attorney in Minneapolis before entering the LL.M. program.

Professor Hughes is a native Kentuckian from Versailles. She received her undergraduate degree from Georgetown University in Washington D.C. and her J. D. from the University of Kentucky Law School. Kathleen came to the Center from the Kentucky Office of the Attorney General where she worked as an Assistant Attorney General, Special Prosecutions Division. As a Special Prosecutor, Kathleen prosecuted criminal cases throughout the state.

Jackie Rowe, also a native Kentuckian, attended Northern Kentucky University. She has held various positions at the University over time and has recently returned to

the University after several years working at home with her family.

While the changes being implemented at the Center necessarily have involved some temporary disruption and discontinuity, we look forward to providing the same high quality research and legal services provided in the past, while expanding the community to whom the services will be provided. In addition, we are very enthusiastic about the new clinical program for law students, both to enhance their educational experience and to provide the community greater access to these bright, talented, and energetic students.

As we are restructuring the continuing program and designing the new aspects, we would appreciate your advice. Please let us know if you have suggestions for making the Center more relevant to you. We are also very interested in potential placements for students in the extern program. If you may be interested in having a student extern in your office, please call Professor Hughes at 606-572-6313.

We look forward to serving you and to providing a strong link between local governments, practitioners of local government law, the law school, and its students.

### *articles in this issue*

**Cable Franchise Renewal Process—  
An Overview** ..... page 2

**Chase Local Government Law Center Develops  
Legal Clinical Program** ..... page 12

**Internet Assistance for  
Local Governments**..... page 13

**OAG Opinions**..... page 14

# Cable Franchise Renewal Process—An Overview

by  
William C. Gullett

*William C. Gullett is an attorney with the law firm of Brown, Todd & Heyburn PLLC in Covington, Kentucky. Prior to joining this firm, he served as house counsel for Ashland Oil, Inc., The LTV Corporation, and AMVEST Corporation. His legal practice includes the areas of corporate, commercial, and cable television law. He received a B.A. degree in 1971 from Cumberland College and a J.D. degree in 1977 from the University of Kentucky.*

## I. INTRODUCTION

Prior to 1976, cable television was made available to communities across the country by small businesses. At that time, cable was nothing more than a means of retransmitting television broadcast signals, especially to rural communities where television reception was poor.<sup>1</sup> Its reach was to less than ten percent of the nation's televisions.<sup>2</sup>

With the advent of satellite programming services such as HBO, ShowTime, MTV, and other services unique to cable, the cable industry changed dramatically.<sup>3</sup> Cable operators now had an unrivaled product they could offer major suburban and urban viewers. This resulted in tremendous growth for the industry and to secure such growth, cable operators sought the required franchises from local governments. By the early 1980s, the industry's cable systems went from passing 20 percent of television households to over 90 percent of television households.<sup>4</sup> It is estimated that more than 60 percent of the households in the United States subscribe to cable. Because of the high cost in constructing cable systems and a finite pool of subscribers from which to recapture this cost, overbuilds (construction of a second cable system) in the same suburban or urban areas were and are very rare. Essentially, this resulted in a natural monopoly, much like the local telephone, electric, and water companies.

In order to combat these monopolies, local governments or franchising authorities employed cable television franchises to regulate subscriber rates, service charges, and conduct of cable operators. Local governments also utilized the franchise bidding process to recapture for the public the fair value of the rights-of-way which were occupied by cable systems.<sup>5</sup> In reaction to the local franchise process, the cable industry sought relief from the Federal Communications Commission ("FCC") first and then from Congress.

Congress, in response to the cable industry's appeal for relief, enacted the Cable Communications Policy Act of 1984<sup>6</sup> (the "1984 Cable Act"). It deregulated cable rates, but as one of the six main purposes of the 1984 Cable Act, it "establish[ed] an orderly process for franchise renewal which protects cable operators against unfair denials of

renewals where the operator's past performance and proposal for future performance meet the standards established by [the Act]."<sup>7</sup> Essentially, Congress endorsed the cable television franchise process as a mechanism for obtaining community benefits and designed the procedures to encourage investment by cable operators and to add stability and certainty to the renewal process.<sup>8</sup> On the other hand, Congress wrested considerable control from local governments.<sup>9</sup>

Following rate deregulation implemented by the 1984 Cable Act, cable rates shot skyward. Congress responded, enacting the Cable Television Consumer Protection and Competition Act of 1992<sup>10</sup> (the "1992 Cable Act"). It permitted rate regulation of basic service tier rates by local governments, which met the certification requirements of the FCC, and of cable programming service tier rates by the FCC. The 1992 Cable Act did not alter, however, the fundamental rights of a cable operator to renewal under the procedures prescribed in § 626 of the 1984 Cable Act.<sup>11</sup> This remains true, even with respect to Congress' recent enactment of the Telecommunications Act of 1996 (the "1996 Telecommunications Act"),<sup>12</sup> which revolutionizes the communications industry by introducing and encouraging full-scale competition. Overall, local government authority over cable, including the franchise renewal process and authority to require cable operators to provide upgraded cable systems and public, education, and government ("PEG") access facilities and institutional networks, has not been affected.<sup>13</sup>

## II. THE RENEWAL PROCESS

The 1984 Cable Act, as amended by the 1992 Cable Act, implemented detailed provisions that include procedural and substantive requirements for the franchise renewal process.<sup>14</sup> This process, of course, contemplates the existence of an earlier franchise that will expire in the near future. While the process for franchise renewal is designed to protect cable operators from "unfair denials of renewal" and appears to create a presumption in favor of renewal, it does not guarantee renewal.<sup>15</sup> So long as the local government or franchising authority adheres to the procedures and develops an appropriate record, it may deny renewal in certain limited situations. Two of the more prominent bases for non-renewal revolve around the unsatisfactory performance of the cable operator and/or the unwillingness or inability of a cable operator to provide services, facilities, and equipment to meet the "future cable-related community needs and interests."<sup>16, 17</sup>

The 1984 and 1992 Cable Acts (collectively hereinafter referred to as the "Cable Act" established two distinguishable renewal processes, the formal and informal processes.

The formal process provides for elaborate procedures and specific substantive standards which, if not followed by the local government, could mean disaster for the affected community. The informal process permits the cable operator and local government to ignore the formal process and proceed with an informal, negotiated renewal.<sup>18</sup> The informal process is far simpler than the formal process and more preferable from local governments' point of view. In fact, most renewals are achieved through the informal process. Furthermore, these two processes are not mutually exclusive; often, they proceed simultaneously.<sup>19</sup>

### **III. THE FORMAL PROCESS**

The formal process is governed by § 626(a)-(g) of the 1984 Cable Act, as amended.<sup>20</sup> The provisions of this process set forth notice requirements, time frames, and procedures that must be adhered to by the local government or franchising authority (as well as the cable operator in certain limited situations) once the process is commenced. Failure of a local government to follow the formal process procedurally or substantively may result in the issuance of a renewed franchise that does not meet the cable-related needs and interests of the community. In other words, it is possible for an unfavorable franchise to be forced upon a local government. To avoid this dilemma, a local government must be prepared to move forward under both the formal and informal processes with a carefully developed work plan which meets all requirements of the Cable Act.

#### **A. Notification – Commencement of Process**

The formal process is typically begun by the cable operator by sending written notice of renewal to the local government during a six-month window that occurs between 36 months and 30 months prior to the expiration date of the then current franchise.<sup>21</sup> The notice should explicitly request that the local government commence the formal proceedings pursuant to 47 U.S.C. § 546. The notice may also request that the formal process be deferred while renewal proceeds through the informal, negotiated process.

In the event the cable operator does not submit the notice in a timely fashion, it will lose its right to invoke the formal procedures.<sup>22</sup> While a local government itself can begin the formal process, it will choose not to do so in most cases to avoid the heavy burden of the process. Where this occurs, the local government would only be subject to the requirements of state and local law respecting cable or other types of franchises.

#### **B. Ascertainment Proceedings**

If the cable operator submits a formal renewal notice, the local government must commence within six months from the submission of such notice a hearing "which affords the public in the franchise area appropriate notice and participation."<sup>23</sup> While the Cable Act does not specify what constitutes public notice or adequate public participation, the United States Court of Appeals for the Third

Circuit concluded that state law should govern.<sup>24</sup> The Cable Act does not specify any time frame within which these initial hearings are to be concluded. Authorities state that the local government can take as much time as it deems necessary to review and consider the matters discussed below, and to provide its citizens opportunity to express their views.<sup>25</sup>

The underlying purpose of these hearings or proceedings is to (1) identify or ascertain the future cable-related needs and interests of the community and (2) review the past "performance of the cable operator under franchise during the then current franchise term."<sup>26</sup> With respect to the needs and interests of the community, the local government will appoint a committee which will gather information through a controlled system of surveys, interviews of public officials, focus groups, and public meetings to discern what those needs and interests are. This committee will solicit input from and/or involve PEG procedures and supporters who can provide valuable information, especially relating to PEG access and the operator's performance respecting the same, and who can "rally" access viewers in support of continued and/or enhanced PEG access support. After the information is gathered, the ascertainment committee will translate those needs and interests into specific, identifiable goals which may address technological, equipment, programming, facilities, and service needs and interests.

In evaluating the cable operator's past performance, the committee will conduct or cause to be conducted by professionals or experts (1) a franchise fee payment audit, (2) a general financial analysis of the operator's operations, (3) a technical review of the cable system, and (4) a franchise compliance audit. These audits, analyses, or reviews will provide the local government with a wealth of information about the operator, its operations, performance, and cable system. The franchise fee audit will demonstrate whether all payments have been made and all sources of income have been included in the payment formula. A financial analysis will show whether the operator has the means to meet present and future franchise requirements. The technical audit will disclose (1) the health of the system (whether it is well maintained), (2) the quality of the signals in comparison with FCC and franchise requirements, and (3) cost estimates regarding necessary and possible upgrading and/or maintenance of the system. Finally, the franchise compliance audit will provide information as to what terms or requirements have or have not been satisfied and which require further verification.

As indicated above, the franchise renewal process requires the local government and/or the ascertainment committee to be well prepared. Preparation for renewal requires a complete and thorough review/evaluation and the development of a record regarding the needs and interest of the community and the past performance of the cable operator.

### C. Submission of Renewal Proposal and Preliminary Assessment

Upon completion of the ascertainment/needs-assessment hearings or proceedings, a cable operator may submit a formal proposal for renewal, either on its own initiative or at the request of the local government or franchising authority.<sup>27</sup> Subject to other provisions of the Cable Act, the local government can (and it is more advantageous to) establish minimum terms and conditions for the proposal, including a proposal for upgrading the cable system.<sup>28</sup> The local government may also establish a date by which the formal proposal must be submitted.<sup>29</sup> However, the procedures for establishing the proposal deadline must conform with the requirements of state or local laws.<sup>30</sup> Additionally, the deadline must be communicated to the cable operator in writing.<sup>31</sup>

Upon receipt of the formal proposal for renewal, the local government must provide “prompt public notice” of the proposal and, within four months after the proposal is submitted, the local government must either (1) renew the franchise or (2) issue a “preliminary assessment that the franchise should not be renewed.”<sup>32</sup> If the local government accepts the proposal and renews the franchise, the formal renewal process ends.

Because of the criticalness of the mentioned four-month period, the local government must pay close attention to it. Failure of the local government to provide the timely response may produce a franchise by default. This is so only with respect to a proposal submitted under the formal process. A proposal submitted under the informal process is not subject to such time constraint.<sup>33</sup> Accordingly, where the cable operator and local government are concurrently negotiating informally and proceeding under the formal process, the local government should clearly identify and segregate the informal negotiation proposal from the formal renewal proposal.

### D. Administrative Review for Denial

If the local government makes a preliminary decision not to review the franchise, upon the cable operator’s request or on its own initiative, the local government must commence an administrative proceeding to determine whether it has the ability not to renew the franchise under the Cable Act.<sup>34</sup> The local government must give adequate notice and afford the cable operator with a fair opportunity for full participation in the proceeding.<sup>35</sup> Such participation includes “the right to introduce evidence, . . . to require the production of evidence, and to question witnesses.”<sup>36</sup> A transcript must be made of the proceeding which, for the most part, will be conducted much like a hearing before an administrative law judge.<sup>37</sup> The local government is required to produce evidence and witnesses and cannot set an arbitrary amount of time for presentation by the cable operator.<sup>38</sup>

Upon completion of the administrative proceeding, the

local government must issue a written decision renewing or denying the formal franchise proposal, and stating the reasons for its decision.<sup>39</sup> This decision must be based upon the record in the proceeding and be transmitted to the cable operator.<sup>40</sup> A decision granting renewal upon acceptance of specific terms that are unacceptable to the cable operator may be considered as a denial by the cable operator.<sup>41</sup> The local government’s final decision not to renew a franchise must be based on an adverse finding with respect to at least one of the following four statutory criteria:<sup>42</sup>

1. *Substantial Compliance with Franchise and Law.* Denial under this first factor requires the local government to find that the cable operator has not substantially complied with the material terms of the existing franchise and with applicable law.<sup>43</sup> Any non-compliances occurring after the effective date of the 1984 Cable Act may not be charged against the cable operator unless the local government had provided the operator with notice and the opportunity to cure the non-compliance.<sup>44</sup> Such notice must come from the local government and must be specific enough so that the opportunity to cure is not meaningless.<sup>45</sup> Where the cable operator provides written notice of its failure or inability to cure any non-compliance, and the local government does not object within a reasonable time after receipt of such notice, the failure to object will be deemed a waiver by the local government.<sup>46</sup> It is paramount that the local government be diligent and responsive in ensuring compliance with the franchise and not wait until commencement of the renewal process to enforce compliance.
2. *Quality of Service.* Denial under the second factor requires the local government to find that “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 or other services provided over the system, has [not] been reasonable in light of community needs.”<sup>47</sup> This criterion requires the local government to assess the quality of service associated with the daily operations of the cable company over the life of the franchise. As with the first factor, non-compliance occurring after the effective date of the 1984 Cable Act cannot be charged against the cable operator unless it had been given prior notice and an opportunity to cure the non-compliance.<sup>48</sup> The 1992 Cable Act permits consideration of the “level” of cable services (not the mix or quality of programming) over the life of the franchise as part of a quality of service evaluation. A denial of the formal franchise proposal cannot be based on the cable operator’s signal quality if the cable system satisfies the FCC technical standards.<sup>49</sup> Where a transfer of the franchise is made to another cable operator, the second cable

operator cannot be made responsible for the quality of service of the first operator, unless the second cable operator agrees that such quality of service issues are not waived, but are preserved for enforcement purposes by the local government.<sup>50</sup>

3. *Financial, Legal and Technical Ability.* Denial of the formal proposal under this factor requires the local government to find that the cable operator does not have “the financial, legal and technical ability to provide the services, facilities, and equipment as set forth in the operator’s proposal.”<sup>51</sup> With respect to larger, substantial cable companies, it is very difficult, if not impossible, to make an adverse finding under this criterion. Realistically, such an adverse finding will be made against the smaller and usually independent cable company. However, the United States District Court for the Eastern District of Missouri found that “the past performance of a company could be relevant and may be considered in reaching a decision on the operator’s technical ability.”<sup>52</sup>
4. *Reasonableness of Proposal.* Upon denial of the formal proposal on the basis that it is unreasonable, the local government is required to find that the operator’s proposal cannot reasonably “meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.”<sup>53</sup> This final criterion is pivotal to the resolution of the formal process. Most of the disagreements arising under and most of the energy expended in the formal process will be based on this criterion. If a franchise proposal is to be denied, in most cases it will be by virtue of the operator’s unwillingness or inability to meet the future cable-related community needs and interests. The needs and interests of the community are to be considered as a whole, instead of every person or group expressing an interest in a particular service or facility. The costs associated with the cable-related community needs and interests require the consideration of a fair rate of return on the operator’s investment and the impact on subscriber rates. Any significant increase in subscriber rates resulting from aggressive requirements of the local government could create future political fallout. Finally, denial of proposal cannot be based upon a comparative bid. Presumably, the reasonableness of a renewal is not to be determined by another cable operator’s ability to provide cable service.<sup>54</sup>

### E. Judicial Review

The concluding state of the formal process entails judicial review. This stage is set when the local government or franchising authority makes a final decision to deny renewal.<sup>55</sup> Additionally, judicial review may be sought during any state of the renewal process (even prior to the fi-

nal denial) if the cable operator believes that the actions of the local government are not in compliance with procedural requirements of the Cable Act.<sup>56</sup> For example, the U.S. District Court in Massachusetts found the failure of two local franchising authorities to either renew the franchises or complete the formal process prior to their expiration to be in violation of the procedural protections contained in the Cable Act.<sup>57</sup> It appears that the court is saying the renewal process must be completed (by way of renewal or final denial of the franchise) within the three-year window discussed above.

Within 120 days after its receipt of the final decision denying renewal, the cable operator must file its appeal if it intends to make an appeal.<sup>58</sup> Such appeal can be filed in the district court of the United States for any judicial district in which the cable system is located or in any state court of general jurisdiction having jurisdiction over the parties.<sup>59</sup> If the court should find that “any action of the [local government] . . . is not in compliance with the procedural requirements of [the Cable Act] . . . or that the final adverse decision of the local government. . . is not supported by a preponderance of the evidence, based on the record of the [administrative] proceeding . . . ,” the Cable Act requires the court to grant appropriate relief.<sup>60</sup> This relief can include an order directing the local government to grant a renewal of the franchise if the court finds that the cable operator has met the four renewal criteria.<sup>61</sup> However, the 1992 Cable Act precludes judicial relief if the non-compliance of the local government with the procedural requirements was “harmless error.”<sup>62</sup> In *TCI of South Carolina, Inc. v. Bennettsville*,<sup>63</sup> the District Court of South Carolina issued an order requiring the local government, which had denied the renewal of a franchise, to start the renewal process over as it had failed to comply with the procedural requirements of the Cable Act.<sup>64</sup>

### IV. THE INFORMAL PROCESS

As an alternative to the rigid formal process, the Cable Act permits franchises to be renewed through informal negotiations.<sup>65</sup> Informal renewal of a franchise can be initiated and completed at any time during the franchise term.<sup>66</sup> More often than not, the formal and informal processes occur simultaneously. As discussed above, many franchise renewals move into the informal process after the formal renewal notice (which commences the formal process) has been sent by either the cable operator or local government, and public ascertainment hearings have been conducted but not completed.<sup>67</sup> Once a decision has been made to pursue the informal process, the parties should sign a letter agreement clearly stating that they are operating informally until such time as either party notifies the other of its intent to return to the formal process.<sup>68</sup> To confirm that negotiations are occurring on an informal basis and to avoid any subsequent claim by the operator that a franchise proposal was submitted under the formal process, the local government should make clear, preferably in writing, that

all proposals are submitted under the informal process.<sup>69</sup>

Under the informal process, negotiations will transpire in almost the same manner as any other commercial contract negotiations. The parties will give and take, make demands and concessions, and do some bluffing. If the ascertainment hearings and proceedings progressed in favor of the local government so that the cable-related needs and interests of the community have been clearly identified, the local government will obviously use such information and data to its advantage. Without such supportive information or data, cable operators tend to balk at any proposal favoring upgrades of the cable system, PEG access, line extension to less densely populated areas of the community, enhanced construction standards, and more stringent customer services standards. Good ascertainment proceedings are essential to the negotiation and consummation of a franchise, whether through the formal or informal process.

If a successful franchise renewal has been negotiated under the informal process, the local government must notify the public and provide an opportunity to comment on the renewal before it is finally or officially granted.<sup>70</sup> On the other hand, if the informal process does not produce a renewed franchise, the local government or franchising authority remains obligated to comply with the formal process, so long as it has been commenced in a timely manner.<sup>71</sup>

In order to assist the reader in better understanding or forming a picture of the formal and informal processes, the following table is provided:

### **Formal**

#### **47 U.S.C. § 546(a-g)**

1. Notification Letter from Operator  
(36-30 months before expiration of franchise)
2. Franchising Authority Action within 6 Months
3. Needs Assessment/Ascertainment Proceedings
4. Issue RFP to Operator upon Completion of Ascertainment
5. Operator Responds with Proposal
6. Within 4 Months—Preliminary Decision by Franchising Authority (grant or deny franchise)
7. Administrative Hearing if Preliminarily Denied—Then Issue Final Decision
8. Judicial Review – within 120 Days after Final Decision
9. Standard of Judicial Review—Preponderance of Evidence

Franchising authority can only deny based upon:

1. Operator's failure to comply with material terms of existing franchise
2. Quality of operator's service (signal quality)
3. Operator's legal, technical, and financial qualifications to satisfy its proposal.

4. Reasonableness of operator's proposal to meet future cable-related needs and interests of community, taking into account cost of meeting such needs and interests

### **Informal**

#### **47 U.S.C. § 546(h)**

1. Agreed-upon Process (Proposal Submitted Anytime)
2. Negotiations
3. Renew or Back to Formal Process
4. Public Notice and Hearing if Franchise is to be Renewed

## **V. SELECTED RENEWAL ISSUES**

The renewal process is more than a maze of procedural maneuvers. It is a dynamic process of public decision-making and advocacy where substantive issues or terms take shape. As discussed above, these issues will begin to emerge through the ascertainment proceedings of the formal process where the local government should identify or ascertain the future cable-related needs and interests of the community and review the past performance of the cable operator under the then-existing franchise. The local government will want to identify these issues early in the process, marshal adequate public support and data for them, and promote their inclusion in the formal and/or informal franchise proposals. The balance of this article will briefly review some of the key substantive issues, including salient considerations respecting these issues.

### **A. Grant of Authority**

The franchise should be specific as to the type of services the cable operator will be permitted to provide over its cable system. Since public rights-of-way and easements constitute one of the most valuable assets of a local government, the local government will want to control their use, prevent cable operators and other franchisees from damaging or even destroying them, and receive fair value from cable operators and franchisees for their usage. Typically, cable television franchises permit only the distribution of video programming. On the other hand, cable operators often desire to provide other "non-cable services" over their systems, including data or other electronic intelligence transmissions, burglar alarms, facsimile reproductions, and telephone services. Many legal experts in this field advise local governments to limit the operator's services to video programming, requiring the operator to seek additional approval from the local government to provide non-cable services to the extent not inconsistent with federal and state law. This advice is sound in view of the enactment by Congress of the 1996 Telecommunications Act which, among other things, (1) precludes local governments from requiring cable operators to obtain cable franchises before providing telecommunications services,<sup>72</sup> (2) removes the provision of telecommunications services from the requirements of the 1984 and 1992 Cable Acts which

govern cable television services and franchises,<sup>73</sup> and (3) precludes local governments from using their cable franchising powers to order a cable operator to stop providing telecommunication services or to stop operating its cable system for the purpose of providing such services.<sup>74, 75</sup> Accordingly, it would be prudent for a local government to include language in the franchise, specifying exactly what services the operator can and cannot provide over the cable system.

The real issue becomes whether or not an operator is entitled under the Cable Act to use its cable system for any purpose it desires. The Cable Act defines "cable system" as "a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community."<sup>76</sup> "Cable service" is defined, in part, as "the one-way transmission to subscribers of video programming, or other programming service . . ."<sup>77</sup> And the term "other programming service" is defined as "information that an operator makes available to all subscribers generally."<sup>78</sup> A cursory review of these definitions might lead one to believe a cable operator can provide whatever it desires over its cable system. However, the legislative history of the Cable Act indicates otherwise:

Making available a cable system for voice communication between cable subscribers would not be a cable service because the information transmitted between the parties would not be generally available to all. Similarly, offering cable system capacity for the transmission of private data such as bank records or payrolls (for instance to and from data processing centers or between the separate locations of a single business in a local area) would not be a cable service because only specific subscribers would have access to this information . . . all services offered by a cable system that go beyond providing generally available video programming or other programming are not cable services. For instance, a cable service may not include "active" information services such as at-home shopping and banking that allow transactions between subscribers and operators or third parties. In general, services providing subscribers with the capacity to engage in transactions or to store, transform, forward, manipulate, or otherwise process information or data would not be cable services.<sup>79</sup>

This legislative history is strong support for the proposition that a cable operator cannot use its cable system for any purpose it desires, unless authorization has been specifically provided. A local government may desire that the operator provide non-related services on the cable system and, if it does, then it is important to retain the necessary regulatory authority to address legitimate health, safety, and welfare concerns regarding the operator's use of the public rights-of-way and easements. These regulations

could include payment of a reasonable fee for such use.

## **B. Duration of Franchise**

Traditionally, most cable franchises have had a term of 15 years or more.<sup>80</sup> Nowhere in the Cable Act is there an express provision governing the duration of franchise. Prior to the adoption of the 1984 Cable Act, the FCC recommended a 15-year term.<sup>81</sup> In Kentucky, a franchise cannot exceed the maximum term of 20 years.<sup>82</sup> Kentucky law does not specify or establish a minimum term. There exists a district court decision which held that a five-year franchise term exerted a "potentially chilling effect" on operators and therefore was unconstitutional.<sup>83</sup> It should be noted, however, that the facts in this case dealt with an "initial" franchise where the operator was forced to expend considerable capital to build out the entire system. Thus, this very restricted requirement essentially stripped the operator of its right to obtain an acceptable return on invested capital.

Today, local governments or franchising authorities are being advised by consultants to grant franchises with shorter terms. This is to ensure that the cable system serving the community does not become antiquated and lose pace with the ever-changing cable television industry. The length of the franchise term is very directly related to other commitments made by the cable operator. If the operator is being requested to finance an upgrade or rebuild of the cable system, commit capital to PEG access equipment, and/or to install an institutional network, an operator will require a longer term so it can obtain an acceptable or reasonable return on invested capital. A local government should use the term issue as an effective bargaining tool. Should a cable operator refuse to or is unable to finance an upgrade or provide other cable-related requirements, the local government should impose a shorter term. Some local governments have used a graduated franchise term in an effort to preserve flexibility. Here, an operator will be granted an initial franchise term of five years and will be rewarded with an additional term of five or more years if certain prescribed conditions are satisfied by the operator. In no event should a local government agree to an automatic extension of the franchise term, especially where the initial and extended term equals or exceeds 15 years. The franchise should provide that any extension or renewal is subject to the franchise renewal processes under the Cable Act.

## **C. Franchise Fees and Gross Revenues**

The Cable Act permits a local authority to charge an annual franchise fee of no more than five percent (5%) of the cable operator's gross revenues "derived in such period from the operation of the cable system."<sup>84</sup> The payment of the fee is considered compensation for the use of the local government's public rights-of-way and other public property, as well as for the ongoing enforcement and administration of the franchise. Aside from the local government's responsibility to ensure that the public health, safety, and welfare are protected with respect to

the operator's use of public rights-of-way, the local government has the right to obtain fair compensation for allowing a public resource to be used for the benefit of a private company. The failure of a city to charge a franchise fee forces those residents not receiving or subscribing to cable television to subsidize cable subscribers.

Most of the controversies surrounding franchise fees and renewal involve (1) the services on which franchise fees have to be paid, (2) whose gross revenues are included in the calculation, and (3) whether other fees imposed by the local government should be included in the franchise fee calculation. Typically, local authorities through the definition of "gross revenues" cast a broad net around services and companies, even if such services or companies are unrelated to the provision of cable service and the community.<sup>85</sup> Consequently, it is most important to pay particular attention to the definition assigned to the term "gross revenues." It should be the local government's goal to define this term as broadly as possible.<sup>86</sup>

A local authority needs to pay particular attention to other costs and expenses it attempts to require a cable operator to pay, as such costs and expenses could be offset against the franchise fee if the operator is paying the maximum fee of 5% of gross revenues. The 1984 Cable Act broadly defines the term "franchise fee" as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."<sup>87</sup> Thus, by way of definition, these other costs or expenses can be charged against the franchise fee if it is already established at 5%. The 1984 Cable Act excludes from the definition of "franchise fee" the following five items:

1. Any generally applicable tax, fee, or assessment (unless it is unlawfully discriminatory against a cable operator or subscriber);
2. Any payments by the cable operator that are required by a franchise agreement in effect before the effective date of the 1984 Cable Act, for or in support of PEG access facilities;
3. Any capital costs that are incurred by a cable operator in a franchise granted after the effective date of the 1984 Cable Act for PEG facilities;
4. Any requirements or charges incurred by a cable operator "incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages;"

- and
5. Any fee imposed under Title XVII (Federal Copyright Laws).<sup>88</sup> Any item of cost or expense which a local government imposes upon an operator and which does not fall within the exceptions set forth above, that operator will likely offset such cost or expense against the franchise fee if the operator is paying the maximum fee of 5%. (If the maximum fee of 5% is not being charged,

then such cost or expense will be considered as an addition to the franchise fee, effectively increasing the lower established fee to the 5% maximum.) For example, the cost of providing PEG access facilities (e.g., capital improvements or equipment) would not, by definition, constitute a franchise fee. On the other hand, requiring the cable operator to pay for operational costs and expenses associated with a PEG access facility could be construed or considered as a franchise fee. Accordingly, the local government needs to be very careful as to what costs and expenses it imposes upon a cable operator and how they are to be addressed within the franchise agreement itself.

#### **D. Cable System Upgrade**

The Cable Act allows local governments to require proposals for an upgrade of the cable system as part of the franchise renewal process.<sup>89</sup> Before this requirement can be imposed, the local government must determine what the community's future cable-related needs and interests are and this, as discussed above, is usually accomplished in the ascertainment proceedings of the formal process. In making a determination requiring the operator to include an upgrade of some sort in its proposal, the local government must take into account the cost of meeting the upgrade.<sup>90</sup> Such cost will, of course, impact the cable operator from a capital investment standpoint and the subscriber, whose cable rates will undoubtedly be increased to pay for the upgraded system. The technical consultant/engineer, who should be retained to provide an evaluation of the cable system, will be able to assist the local government in its analysis of the cost, as well as the upgrade proposal. If the cost of upgrade is significant, which it generally is, the operator will require a sufficient length of time in the franchise term to ensure amortization of the capital investment and a sufficient rate of return on the system.

When considering a system upgrade or system rebuild, the following three issues should be considered: (1) Channel capacity; (2) system reliability; and (3) quality of signal. As new programming services continue to come online, available channel capacity has become a major issue for local governments and their citizens. Any required increase in channel capacity will require a system upgrade of some type. Channel capacities of cable systems in Kentucky range from as few as 30 channels to as many as 80 channels.<sup>91</sup> Twenty-five percent of the cable systems across the country, which serve 60% of the people, have 54 channels. Some systems have as many as 100 channels and, with the introduction of digital compression in the next two years, such channels can be increased twelve-fold. Some systems have as many as 100 channels. As to system reliability, the concern of local government revolves around the issue of whether the cable plant and/or supporting electronics lack sufficient integrity to ensure a good, reliable signal. This is especially true with respect to antiquated systems, where frequent system outages occur regularly or, given the re-

maining useful life of the system, frequent outages are expected to occur.

Quality of the signal depends upon the configuration of the system. The older systems consisting of a single- or dual-coaxial architecture (high capacity copper cable) rely on amplifiers to transmit signals from the headend to system extremities. In some cases, the number of amplifiers in line (cascade) can exceed 30. This type of configuration results in significant degradation of signal quality, particularly for subscribers located at the outer reaches of the system. These deficiencies can and are being resolved by employing hybrid fiber/coaxial (“HFC”) technology. Fiber optic cable (glass wire strands) is used to replace existing coaxial trunk cable in the backbone of cable networks, leaving only the last portion directly in front of subscriber homes as analog coaxial cable. By doing this, amplifier cascades are reduced to no more than three active devices.

Some operators, especially those that will be facing competition from telephone companies, electric companies, and direct broadcast satellite, have an interest in improving the technical capabilities of their systems. Also, in order to meet the growing demand for digital television and ancillary services beyond video programming, such as high speed data transmission and telephony, additional capacity and digital transmission capability are required. These features will require fiber optic technology (e.g., HFC) which employs digital signals (as opposed to analog) and which has a much greater capacity to carry information faster using high quality signals. Those cities and counties in Kentucky which have a significant population base or are near larger metropolitan centers will likely see upgraded systems or rebuilds before the less populated areas. The chief limitation for operators is the expense associated with a system upgrade/rebuild. If an operator can be assured that it will be able to amortize the cost over the life of the franchise and receive a fair rate of return on the system, it will proceed with an upgrade/rebuild; *provided* that the rates to be paid by the subscribers remain competitive with other telecommunication systems in that area.

### **E. Public, Education and Government Access**

Prior to the 1984 Cable Act, many of the cable television franchises contained extensive PEG access requirements, including PEG channel capacity, cameras, camcorders, editing and associated equipment, studios, production vans, and operating support to finance access operations. Such operating support was used to pay salaries and various other associated expenses. The costs incurred by the cable operator in meeting these requirements were not included within the definition of franchise fees.<sup>92</sup> Post-Cable Act franchises can still require a cable operator to provide funds for capital equipment for PEG access without such funds being included within the definition of franchise fees.<sup>93</sup> However, funds required for operating support and maintenance of PEG access are included within the definition of franchise fees.<sup>94</sup> Thus, if a

local government is receiving the maximum 5% franchise fee, any operating and maintenance support provided by the cable operator under a franchise can be offset against franchise fee payments to be made by the operator. Some franchises attempt to require cable operators to pay operating and maintenance costs and waive their right to include them within the calculation of franchise fees. Needless to say, there is a real resistance by cable operators to such an arrangement.

Generally, cable operators view PEG access channels and support payments as unnecessary and burdensome. Often, PEG access channels are not properly utilized, if at all, and associated equipment will sit in storage unused. In part, this is because there is no organization or structure overseeing and/or promoting PEG access programming. This is typically the case in smaller communities around the country, where sufficient funding to run an access program is also lacking. Even in larger communities where more sophisticated access centers have been developed, cable operators resist funding requirements, arguing that the local government or franchising authority should absorb much of the funding cost or use a portion of the franchise fee payment to defray the cost. No matter how one views it, most cable operators are very reluctant to provide PEG access channels and associated equipment and funding. In order for the local government to keep or acquire PEG access, it will need to demonstrate through ascertainment proceedings that the community’s needs and interests require it.

The Cable Act clearly confers upon a local government the right to establish requirements in a franchise with respect to PEG access.<sup>95</sup> It may require (1) channel capacity for public, educational, and/or government use<sup>96</sup> and facilities (e.g., studios) and equipment for the use of such channel capacity.<sup>97</sup> The issue central to PEG access programming is whether or not a local government desires to have it. If it does, the local government must consider the following sub-issues:

- (1) The appropriate number of channels to accommodate the PEG access programming needs within the community;
- (2) Who will control the programming of the PEG access channels—the operator or local government?
- (3) Identify the needed capital support to purchase equipment and facilities to produce programming to be aired on PEG access channels; and
- (4) Identify funding sources for personnel to manage and produce PEG access programming.

In considering these sub-issues, especially the programming control, the local government might consider negotiating a transfer of control to the local government and/or a non-profit entity. This will place PEG access obligations in the local government’s control, which may then have more of an opportunity and incentive to produce or

cause to be produced good programming. As many cable operators are not overly interested in promoting access programming, a local government, which does have an interest in it, should consider assuming control of all PEG access programming and requiring the cable operator to fund capital (and even perhaps operating) expenditures required to support such programming. The larger the cable operator's subscription base, the easier and more cost-effective such transfer of control becomes. For example, the cities of Cincinnati, Ohio, Ft. Worth, Texas, Pittsburgh, Pennsylvania and St. Louis, Missouri have developed, with funding from the cable operator (and the use of franchise fees), access centers which not only manage and provide training for access programming, but actually produce award-winning access programs/films.

Smaller cities or local governments may not be able to manage or afford control of the PEG access programming. However, to offset this size/subscriber base issue, some cities and counties which are geographically close or contiguous to one another and are served by the same cable system, have joined together to form a non-profit organization or public agency which, with the cooperation of the cable operator, assumed control of and provide PEG access functions and programming. An example is the Inter-Community Regulator Commission ("ICRC") based outside Cincinnati, Ohio. The ICRC was founded by and represents in excess of twenty separate municipalities and townships surrounding Cincinnati. Its primary function, of course, is to provide all PEG access programming for such cities and townships using channel capacity and certain funding made available by Warner Cable. Additional funding is made available by the local governments by designating a portion of the franchise fee to be paid by the cable operator. The Telecommunications Board of Northern Kentucky, which was formed by and represents the counties of Boone and Kenton and most cities therein, is contemplating taking control of PEG access programming and forming a non-profit entity similar to the ICRC to provide similar PEG-related services.

## F. Technical Standards

The 1992 Cable Act requires the FCC to "prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality."<sup>98</sup> Such standards are set forth in 47 CFR, Part 76 and are periodically updated by the FCC.<sup>99</sup> A franchising authority is pre-empted from establishing inconsistent technical standards.<sup>100</sup> However, a local government can petition the FCC for a waiver, allowing it "to impose standards that are more stringent than the standards prescribed by the [FCC] . . ."<sup>101</sup> If the local government does not seek more stringent standards, it may require, as part of a franchise, provisions for the enforcement of technical standards adopted by the FCC. In fact, most franchises contain such enforcement provisions.

## G. Customer Service Standards

The 1992 Cable Act requires the FCC to establish customer service standards by which cable operators may fulfill their customer service requirements.<sup>102</sup> Accordingly, the FCC has adopted at 47 CFR § 76.309 such standards which include aggressive requirements for office hours, telephone response times, repair service, installation, outages and service calls, billing practices and system reliability, and communications between operators and cable subscribers.<sup>103</sup> Local governments are permitted to enact and enforce more stringent customer service standards.<sup>104</sup> However, the cost of complying with standards that exceed the FCC customer service standards may be passed through to customers as external costs.<sup>105</sup> Rather than developing custom-made service standards, local governments choose to incorporate by reference the FCC's customer service standards. It is far better, however, to specifically set forth the standards within the franchise than to run the risk of losing referenced standards by virtue of the FCC either amending or deleting from its rules such standards.

## H. Other Key Issues

Due to assigned space limitations respecting this article, it is impossible to address all key substantive issues. However, it is possible, as well as prudent, to at least identify these other issues for future reference and consideration by the reader. By no means is the following list all-inclusive: Non-exclusive grant; rate regulation; inspection of books and records; transfer of franchise and reimbursement of costs incurred by local government considering the same; default and penalty provisions; liquidated damages provisions with enumerated amounts which vary depending upon the franchise violation; foreclosure and receivership provisions; safety requirements and operational standards; line extension and density; conditions of system construction; conditions and timing of rebuild and upgrade requirements; installation of institutional networks having two-way capability and addressability; requirement for providing facilities to public schools and major government buildings; provide cable facilities and services at no charge to government office buildings, fire and police stations, libraries, etc.; interconnecting with other cable systems; provide staffing, training, and live cable casting of government meetings; indemnification and insurance requirements; bonding requirements/letters of credit provisions; parental control devices; local origination programs produced by cable operator; test and compliance procedures respecting the cable system; protection of privacy; continuity of cable television services; emergency alert system; removal of system following expiration, revocation, or termination of franchise; compliance with all applicable state, federal, and local laws provision; compliance with all building, electrical, structural, and technical codes and regulations; modification or amendment; reimbursement of local government costs investigating or considering amendments or modifications to the franchise.

## VI. CONCLUSION

The cable renewal process is unquestionably complex and ever-changing. The laws which govern it (including FCC rules and regulations) attribute significantly to this complexion. Also, the process can and often does take as long as three or more years to complete. The length of the process, of course, is directly related to the relationship between the local government and the cable operator, and the preparedness of the parties. The keys to a successful franchise renewal are (1) familiarity with the federal and state laws regulating the industry, (2) productive ascertainment/needs hearings and (3) effective control of the process overall. If these elements are met, the renewal process will proceed more fairly and expeditiously. The party which all too often is not as prepared as it should be is the local government, which becomes concerned with this process once every ten to fifteen years. The cable operator, on the other hand, deals with these issues on a daily basis. Again, the best advice for local governments is to be well-prepared, and this preparedness can be expressed through the use of competent legal, technical, and financial consultants.

1. Miller, Canfield, Paddock and Store, P.L.C., *The Telecommunications Act of 1996: What It Means to Local Governments*, National League of Cities, 1996, at 6.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Public L. No. 98-549, 98 Stat. 2779, (1984) (*codified* in 47 U.S.C. §§ 521, et seq. (1988)).
7. 47 U.S.C. § 521(5).
8. H.R. Rep. No. 98-934 at 72 (1984).
9. Ernest I. Reveal & Sarah D. Mott, *Cable Franchise Renewals, Modifications and Revocations*, 289 PLI at 280 (1990).
10. Public L. No 102-385, 106 Stat. 1460, (1992) (*codified* in 47 U.S.C. §§ 521, et seq. (Supp. IV 1992)).
11. 47 U.S.C. § 546.
12. Public Law No. 104-104, 110 Stat. 56 (1996) (*codified* in 47 U.S.C. § 151, et seq. (1996)).
13. Miller, *supra*, note 1, at 23.
14. 47 U.S.C. § 546.
15. 47 U.S.C. § 521(5).
16. 47 U.S.C. § 546.
17. Tillman, L. Lay, *The Renewal Process Under the Cable Act*, 405 PLI at 461 (1995).
18. 47 U.S.C. § 546(h).
19. John F. Gibbs, Kathleen A. Manon, Sara A. Poulos & Randall Tietjen, *Cable Franchise Renewals and Transfers*, 405 PLI at 497 (1995).
20. 47 U.S.C. § 546(a)-(g).
21. 47 U.S.C. § 546(a) (1).
22. 47 U.S.C. § 546(a) (2).
23. *Id.*
24. *Eastern Telecom Corp. v. Borough East Conemaugh*, 872 F. 2d 30, 34 (1989), *cert. denied* 493 U.S. 811 (1989).
25. Lay, *supra*, note 17, at 463.
26. 47 U.S.C. § 546(a) (1).
27. 47 U.S.C. § 546(b) (1).
28. 47 U.S.C. § 546(b) (2).
29. 47 U.S.C. § 546(3).
30. See *Eastern Telecom Corp. V. Borough East Conemaugh*, 872 F.2d 30, 35 (1989), *cert. denied* 493 U.S. 811 (1989).
31. *Id.*
32. 47 U.S.C. § 546(c) (1).
33. 47 U.S.C. § 546(h).
34. 47 U.S.C. § 546(c) (1).
35. 47 U.S.C. § 546(c) (2).
36. *Id.*
37. *Id.*
38. *Continental Cablevision of Massachusetts v. Irwin*, 91-11256-N (D. Mass. June 4, 1991).
39. 47 U.S.C. § 546(c) (3).
40. *Id.*
41. See *Time Warner Entertainment Co. v. Briggs*, 1993 WL 23710 (D. Mass. Jan 14, 1993).
42. 47 U.S.C. § 546(c) (1).
43. 47 U.S.C. § 546 (c) (1) (A).
44. 47 U.S.C. § 546(d).
45. *Rolla Cable System, Inc. v. City of Rolla*, 761 F. Supp. 1398 (E.D. Mo. 1991).
46. 1992 Cable Act, 47 U.S.C. § 546(d) (Supp. IV 1992).
47. 47 U.S.C. § 546(c) (1) (B).
48. 47 U.S.C. § 546(d).
49. *City of New York v. Federal Communications Commission*, 814 F.2d 720, (D.C. Cir. 1987), *aff'd* 1986 U.S. 57 (1988).
50. H.R. Rep. No. 98-934, at 74.
51. 47 U.S.C. § 546(c) (1) (C).
52. *Rolla Cable System, Inc. v. City of Rolla*, 761 F.Supp. 1398 (E.D. Mo. 1991).
53. 47 U.S.C. § 546(c) (1) (C).
54. H.R. Rep. No. 98-934, at 74.
55. 47 U.S.C. § 546(e) (1).
56. *Id.*
57. *Time Warner Entertainment Company v. Briggs*, C.A. No . 92-40117-XX-K (D.C. Mass. July 22, 1992).
58. 47 U.S.C. § 555(a).
59. *Id.*
60. 47 U.S.C. § 546(e) (2) (A) and (B).
61. H.R. Rep. No 98-934 at 75 (1984).
62. 47 U.S.C. § 546 (e) (2) (A).
63. 4.89-0334-2 (D.S.C. filed July 17, 1990).
64. *Id.*
65. 47 U.S.C. § 546(h).
66. *Id.*
67. If the public ascertainment hearings or proceedings are "completed" or declared at an end (as specified in 47 U.S.C. § 546(b)), the cable operator can submit a formal proposal thus requiring the local government to renew the franchise or issue a preliminary denial of the same within four months after receipt of the proposal. Consequently, the local government should not complete or conclude the ascertainment proceedings, until it is fully prepared to return, seek, or deny a franchise under the formal process.
68. John F. Gibbs, Kathleen A. Manon, Sara A. Poulos & Randall Tietjen, *Cable Franchise Renewals and Transfers*, 405 PLI at 497 (1995).
69. See note 67 for explanation.
70. 47 U.S.C. § 546(h).
71. *Id.*
72. 47 U.S.C. § 541(b) (3) (A).
73. 47 U.S.C. § 541(b) (3) (B).
74. 47 U.S.C. § 541 (b) (3) (C).
75. The 1996 Telecommunications Act does not prevent, however, local governments that have authority under state or local law from requiring all telecommunications providers, including cable operators, from obtaining franchises to provide telecommunication services or to pay compensation for use of the public rights-of-way and easements. Section 163 of the Kentucky Constitution requires a person or business association to obtain a franchise from the affected county or city before using the streets, rights-of-way, and easements for public services.
76. 47 U.S.C. § 522(7).
77. 47 U.S.C. § 522(5).
78. 47 U.S.C. § 522(13).

79. H.R. Rep. No. 98-934, at 42.
  80. *Id.* at 74.
  81. 47 C.F.R. § 76.31 (note) (1982) (deleted 1985).
  82. Ky. Const. § 164.
  83. *Preferred Communications, Inc. v. City of Los Angeles*, No. CV83-5846-CBM (C.D. Ca. Jan 5, 1990).
  84. 47 U.S.C. § 542(a) and (b).
  85. Madie D. Gustafson, *Formal and Informal Renewal of Cable Television Franchises*, 405 PLI at 580 (1995).
  86. The following is a typical definition of “gross revenues”: “Annual gross revenues” means any, and all, compensation, in whatever form (except as exempted by this definition), exchange or otherwise derived from all cable services, cable operations, and cable-related activities within the City including, but not limited to, revenues from subscriber rates, pay television, premium channels, service tiers, service clusters, institutional networks, advertising, installations, rebates or commissions received from travel or home-shopping services, or commercial access. Also, unless prohibited or pre-empted by either federal or state law, ‘annual gross revenues’ shall mean any and all compensation from all ancillary cable services, cable operations, and cable-related activities within the City, including, but not limited to, sale of cable or cable equipment, advertising stuffers inserted into periodic billing statements or other notices, rental or sale of video discs, rental or sale of remote control devices (including those with volume control), rental or sale of a/b or input switches, rental or sales of interactive games or software, rental or sale of digital radio equipment, sale of satellite antenna dishes, sale of satellite antenna-received programming for a programmer or distributor of services, or from revenues received as the billing agent, collector, or retailer of satellite antenna-received service.”
- However, ‘annual gross revenues’ does not mean any taxes imposed and/or assessed by law on subscribers (including state sales taxes, but excluding any state or local franchise fees) which a franchised cable operator is obligated to collect and pay in full to the applicable taxing authorities.”
87. 47 U.S.C. § 542(g) (1).
  88. 47 U.S.C. § 542(g).
  89. 47 U.S.C. § 546(b) (2).
  90. 47 U.S.C. § 546(c) (1) (D).
  91. The cable television system in Louisville, Kentucky, which is owned and operated by TKR Cable of Greater Louisville, is in the process of rebuilding the system using hybrid fiber/coaxial technology. This rebuild will increase its channel capacity from approximately 38 channels to 80 and perhaps 108 channels.
  92. 47 U.S.C. § 542(2) (B).
  93. 47 U.S.C. § 542(2) (C).
  94. 47 U.S.C. § 542(1).
  95. 47 U.S.C. § 531(1).
  96. 47 U.S.C. § 531(2).
  97. 47 U.S.C. § 522(15) and 542(g) (C).
  98. 47 U.S.C. § 544(e).
  99. *Id.*
  100. *City of New York v. Federal Communications Commission*, 814 F.2d 720 at 727 (1987).
  101. 47 U.S.C. § 544(e).
  102. 47 U.S.C. § 552(b).
  103. *Id.*
  104. 47 U.S.C. § 551(a) and (c).
  105. See Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking issued August 27, 1993 (MM Docket 92-266). ¶ 102.

---

## Chase Local Government Law Center Develops Legal Clinical Program

by  
*Kathleen Gormley Hughes*

In 1997, the Chase College of Law, Northern Kentucky University, and the Department for Local Government formed the Chase Local Government Law Center. As part of its expanded mission, the Law Center coordinates a local government clinical program for law students. This innovative program provides law students with opportunities to gain practical legal experience through externship and internship assignments across the Commonwealth. Externs and interns work with local government officials, attorneys, and state agencies throughout Kentucky. In addition to opportunities for students, local communities and agencies benefit from the extra legal assistance at no cost.

Examples of externship placements for this semester include, the Department for Local Government; the Governor’s Office; the Attorney General’s Office; Rep. Mike Bowling’s Office; the Campbell County Attorney’s Office and the cities of Silver Grove, Wilder, and Cold Spring; and the Tri-County Economic Development Corporation. The law students in the externships are reviewing legislation, meeting with lobbyists, assisting with criminal trials, researching economic

issues, and working on other exciting projects.

As part of the externship program, some of our externs qualify for a limited license to practice law under Kentucky Supreme Court Rule 2.540. This license allows law students to speak in court, under the supervision of a licensed attorney. Further, students with the license may be permitted to conduct voir dire, opening statements, examination of witnesses, and closing statements, among other things.

The Law Center also has interns assisting the legal staff. The interns’ duties include researching questions for local government officials and assisting with long-term projects for local governments, area development districts, and attorneys. There are currently two interns in the Law Center. One works primarily on projects for the Northern Kentucky Area Development District, assisting with implementing Family Medical Leave Act policies, updating a tax revenue manual, and other projects. The other intern works with the Kentucky Association of Counties, developing a tracking and analytical system for litigation involving counties.

Students participating in the clinical program receive

course credit, rather than compensation, for their work. In addition, the students must participate in a 14-hour classroom component during the semester. The course includes instruction on state and local government law, legislative issues, ethics, and specific legal issues.

This semester, several experts in state and local government law will address the class. Covington City Solicitor Joe Condit, Dan Tobergte of Tri-ED, Kentucky Supreme Court Justice Donald Wintersheimer, Mark Guilfoyle, former General Counsel and Secretary of the Cabinet for Governor Brereton Jones, Alexandria City Attorney Mike Duncan, and Rep. Jim Callahan are scheduled as guest lecturers. In addition, Linda Smith, Bob Montfort, and Kate Hendrickson comprised a panel to discuss issues related to criminal prosecution and defense.

Local officials and law students have enthusiastically received the clinical program. In December 1997, Virginia

Baker, a third year law student at Chase, completed an externship with the Department for Local Government. In her opinion, the placements in state agencies give law students "an overall prospective of what it is like to work in state government in addition to invaluable experience which will enhance [their] profession in years to come." By participating in the clinical program, law students receive hands-on experience with the General Assembly, see the everyday operations of district court, and learn how city councils and fiscal courts function. These opportunities will prove invaluable when the law students enter the practice of law.

The Chase Local Government Law Center welcomes new ideas for the clinical program. If you are interested in having a legal extern, or having the Law Center work on a long-term project, please contact Prof. Kathleen Hughes at (606) 572-6313.

---

## Internet Assistance for Local Governments

by  
Linda S. Taylor

The World Wide Web has an increasing number of sites that are useful for local government attorneys and managers. Here are a few helpful sites. As we come across more we will include them in future issues of *Local Government Law News*. The Kentucky Department for Local Government's Web site is [www.state.ky.us/agencies/local\\_gov/](http://www.state.ky.us/agencies/local_gov/). It has links to other state agency sites and the area development districts. Also, a number of municipal and county sites are listed in the section of the Kentucky home page titled "Other Kentucky Web Sites." The state home page is [www.state.ky.us](http://www.state.ky.us).

The Seattle Public Library's site for the text of local ordinances from around the country is [www.spl.lib.wa.us/collec/lawcoll/municode.html](http://www.spl.lib.wa.us/collec/lawcoll/municode.html). The only codes from Kentucky on the site are Boone County and Lexington/Fayette County. Other Kentucky local governments that have their ordinances on-line may want to contact the Seattle Public Library and authorize a link to their sites.

For attorneys, the International Municipal Lawyers' Association site, [www.imla.org](http://www.imla.org), has interesting information and links to other useful sites. Members have access on-line to a large number of IMLA's services. The Local Government Law Center is a member of IMLA and can access information for Kentucky local government attorneys or other local officials who are not members. There also is information that is accessible to everyone.

The Municipal Code Corporation, located in Florida, has a site at [www.municode.com](http://www.municode.com). This group is a membership organization as well, but has links to other sites. In addition it offers several free E-mail list services. There are separate services for attorneys, clerks, managers, and in-

formation systems. Go to the main site and follow directions to join a list service. We are finding simply reading the E-mail questions and responses very informative. They tend to address issues that are common to many local governments. It also is a good way to ask a general question and get back responses from others in a similar position related to how they are dealing with the same problems.

The Local Government Institute, also located in Seattle, Washington, is a non-profit organization that provides technical assistance to local governments particularly in the areas of human resources administration, governance, and public administration. It has a site at [www.lgi.org](http://www.lgi.org). They provide mainly fee-based services but have some information available on-line and also have links to other sites of interest.

Another site is <http://localgov.org>. It is another membership organization but has links to other sites, including the text of local ordinances.

A more local site is [www.nkcapc.cog.ky.us](http://www.nkcapc.cog.ky.us), the site for the Northern Kentucky Area Planning Commission and the Kenton County Municipal Planning and Zoning Commission, including the text of ordinances and regulations, as well as forms and procedures.

The Chase Local Government Law Center will have its site available soon. We will let you know when it is up and running. We intend to put this newsletter, as well as basic legal information pieces, on the site. We will, of course, continue to mail the newsletter to anyone who wants it mailed. In the meantime, if you have suggestions for the site or a request for information, please E-mail us at [clglc@nku.edu](mailto:clglc@nku.edu), call us at 606-572-6313, or fax us at 606-572-6302.

# OAG Opinions

## January and February 1998

Opinions of the Attorney General are legal opinions that the Attorney General's Office provides to public officials. These opinions clarify Kentucky law for public officials, and represent the official position of the Attorney General's Office. Although these opinions do not have the force of law, they are persuasive and may be cited in court.

OAGs are called formal opinions. The Attorney General's Office may also issue letters to public officials providing informal advice or information. These letters do not receive the same review as OAGs, and are not considered legal authority. Therefore, this newsletter will not publish informal opinion letters.

Following is an overview of formal OAGs issued since August 1, 1997, which discuss local government issues. Portions are reprinted directly from the OAGs. If you would like a copy of a complete OAG, please contact our office.

### OAG 97-25: Length of school term

**Issue:** Length of school term for teachers is 185 days, although the length of school term for students may vary depending on the number of instructional hours per day.

**Requested by:** E. Joy Arnold, attorney for Kentucky Education Association

**Date:** August 8, 1997

**Synopsis:** A 1996 amendment to KRS 158.170(1) states: "The minimum school term shall be one hundred eighty-five (185) days, including *no less than the equivalent* [at least] one hundred seventy-five (175) *six (6) hour* instructional days."

Prior to this amendment, students had to attend 175 calendar days. This amendment permits students to attend the equivalent of 175 days, based on six hour school days. School districts with longer school days may not have to attend 175 calendar days.

The issue is whether teachers in school districts with longer days may attend fewer than 185 calendar days. Pursuant to KRS 158.170(1) teachers must attend 185 calendar days, despite the length of the school day. The statute computes instructional days by hours, and makes absolute reference to calendar days for teachers.

### OAG 97-26 Compulsory school attendance law

**Issue:** Compulsory school attendance law does not exempt a mother caring for a young child.

**Requested by:** Virginia W. Gregg, general counsel to Board of Education for Fayette County

**Date:** August 8, 1997

**Synopsis:** This opinion addresses the issue of whether fathers are exempted from the compulsory school attendance rule. OAG 81-73 created an exception for married students and mothers, stating that they do not need to attend school. Pursuant to OAG 97-26, KRS 159.030 does

not list mothers, fathers, and married students as exemptions. In short, OAG 97-26 overrules OAG 81-73, and requires that fathers, mothers, and married students attend school.

### OAG 97-28 Paying school employees for unused sick leave

**Issue:** School districts choosing to pay employees for unused sick leave days must base payments on all unused sick leave days.

**Requested by:** State Senator David Boswell

**Date:** August 8, 1997

**Synopsis:** KRS 161.155(8) allows "a district board of education to compensate, at the time of retirement, an employee or a teacher for each unused sick leave day. . . . The accumulation of these days includes unused sick leave days held by the employee or teacher at the time of implementation of the program."

This opinion addresses whether a school district may impose conditions on this benefit, such as employment for at least eight years or payment of a lower rate for sick leave earned outside the school district. According to the Attorney General, the statute clearly states that payment must be based on the number of sick leave days accumulated at the time of retirement. Allowing school districts to place conditions on sick leave pay, would authorize school districts to reduce the number of sick leave days. Because school districts may not reduce the number of sick leave days, school districts offering to pay for unused sick leave may not place conditions on this benefit.

### OAG 97-30 Ouster of an official who has pleaded guilty to a felony

**Issue:** A Commonwealth Attorney may, but should not, commence ouster proceedings against an official who has pleaded guilty to a felony but has not yet been sentenced.

**Requested by:** Anna D. Melvin, Commonwealth Attorney for the 24th Judicial Circuit

**Date:** August 8, 1997

**Synopsis:** Pursuant to section 150 of the Kentucky Constitution, a public official convicted of a felony must be ousted from office. Under KRS 415.040 and KRS 415.050, the Commonwealth Attorney commences removal proceedings for county officials, and the Attorney General's office begins the removal process for all other officials.

OAG 97-30 states that a guilty plea is the equivalent of a conviction; final sentencing is not necessary for a conviction. Because section 150 of the Kentucky Constitution only requires a conviction for the removal process to begin, ouster proceedings may commence before final sentencing. However, because many things may happen between

a guilty plea and final sentencing, such as a motion to withdraw a guilty plea, a Commonwealth Attorney should wait until final sentencing to begin ouster proceedings.

### **OAG 97-31 County regulation of industrial-scale hog operations**

**Issue:** A local government may regulate industrial-scale hog operations because they are not reasonable, prudent, and accepted farming methods subject to KRS 413.072, the Kentucky Right to Farm Act.

**Requested by:** Thomas, H. Bugg, Hickman County Attorney; Greg Pruitt, Hickman County Judge/Executive; Bill Graves, Ballard County Judge/Executive; J. D. Williams, Calloway County Judge/Executive; Vicki Ray, Assistant Calloway County Attorney; John Roberts, Carlisle County Judge/Executive; Roy Davis, Carlisle County Magistrate; Harold Garrison, Fulton County Judge/Executive; Leanna Puckett, Assistant Fulton County Attorney; Tony Smith, Graves County Judge/Executive; Gayle Robbins, Graves County Attorney; Mike Miller, Marshall County Judge/Executive; Jeff Edwards, Marshall County Attorney; Danny Orazine, McCracken County Judge/Executive; Dan Boaz, McCracken County Attorney

**Date:** August 21, 1997

**Synopsis:** In a lengthy analysis, the Attorney General addressed whether KRS 413.072, the Kentucky Right to Farm Act, prohibits a local government from regulating, by zoning or other ordinance, industrial-scale hog operations. The Attorney General stated that KRS 413.072 allows a local government to regulate industrial-scale hog operations because they are industrial operations, not an accepted, reasonable, prudent, and customary farming method in Kentucky.

The Attorney General pointed out several ambiguities and issues raised by the 1996 amendments to KRS 413.072. However, the opinion only addressed how the amendments relate to industrial-scale hog operations. The opinion analyzed that the hog operations are a manufacturing operation, rather than an agricultural farm. They produce large amounts of waste, which have lasting effects. Therefore, industrial-scale hog operations are industrial operations, not customary agricultural operations, and may be regulated by local governments.

### **OAG 97-32 Filing fee of bail bonds**

**Issue:** Clarifies OAG 97-3 and states that the filing fee of a bail bond is \$21.00.

**Requested by:** Katherine Mercer, Meade County Court Clerk and Donald Blevins, Fayette County Court Clerk

**Date:** September 11, 1997

**Synopsis:** This OAG clarifies OAG 97-3 and answers several questions regarding KRS 382.290(4) and KRS 382.470. Modifying OAG 97-3 and relying on OAG 76-354, the Attorney General concludes “that the miscellaneous encumbrance being recorded in the form of a bail bond should be treated and charged as a clerk would the

recording of a mortgage of real estate. The total cost is follows:

\$8.00 Bond filing, KRS 64.012  
\$1.00 Postage, KRS 382.240  
\$3.00 Legal Process Tax, KRS 142.010(b)  
\$8.00 Filing a release, KRS 64.012  
\$1.00 Postage for mailing release, KRS 382.240  
\$21.00 Total Filing Fee”

In short, the filing fee for a bail bond is \$21.00.

### **OAG 97-33 Municipal taxation of life insurance premiums**

**Issue:** KRS 91A.080 authorizes taxation on all life insurance premiums paid in the first year, including amounts paid in advance.

**Requested by:** Ernie Sampson

**Date:** September 11, 1997

**Synopsis:** Pursuant to KRS 91A.080, cities, counties, and urban-county governments may impose a tax on insurance businesses through a levy on collected premiums. A local government may only levy a tax against the first-year premiums for life insurance policies. This opinion addresses whether the tax may be levied against all first year premiums, or only those premiums which apply to policy coverage for the first year.

Because the statute does not distinguish between the reasons life insurance premiums are collected, the tax may be levied against all first year premiums, regardless of how the premiums are attributed to coverage.

### **OAG 97-35 Acting superintendent may not fill the position of superintendent**

**Issue:** A public school board of education may not appoint an acting superintendent as the permanent superintendent.

**Requested by:** Gorman Bradley, Jr., counsel for McCracken County Board of Education

**Date:** September 23, 1997

**Synopsis:** This Attorney General opinion addresses an issue of first impression. Pursuant to KRS 160.352, a school board may appoint an acting superintendent while selecting a permanent superintendent. However, the statute is ambiguous as to whether the acting superintendent may be an applicant for, or appointed to, the position of superintendent. In order to maintain the purpose and objective behind the statute, the opinion states that an acting superintendent may not be appointed superintendent.

### **OAG 97-36 Residency requirements for school superintendents**

**Issue:** All public school superintendents must establish Kentucky residency.

**Requested by:** John C. Fogle III

**Date:** November 12, 1997

**Synopsis:** The 1996 General Assembly amended KRS

160.350(2) to read, “[f]ollowing appointment, the superintendent shall establish residency in Kentucky.” This opinion addresses whether this amendment applies retroactively to superintendents appointed before the effective date of the act.

The Attorney General states that the amendment is not retroactive because it imposes a present duty. A retroactive amendment requires that a duty have been performed in the past. Also, the statute does not set forth a time limit to perform this present duty. Therefore, a reasonable time limit is presumed. Because the amendment is not retroactive, the Attorney General concludes that all superintendents must establish Kentucky residency within a reasonable time period.

## The Chase Local Government Law Center

Telephone (606) 572-6313

FAX (606) 572-6302

E-mail: [clglc@nku.edu](mailto:clglc@nku.edu)

### *Local Government Law News*

A publication of the  
Chase Local Government Law Center

Nonprofit Organization U.S. Postage Paid, Newport, Kentucky, Permit No. 2

*Local Government Law News* is published three times each year by the Chase Local Government Law Center, offices located in Room 406, Nunn Hall, Northern Kentucky University, Nunn Drive, Highland Heights, Kentucky 41099. *Local Government Law News* is printed by Northern Kentucky University with state funds (KRS 57.357) under a grant from the Kentucky Department for Local Government and is distributed free of charge to local government officials, attorneys, managers, and others in Kentucky. Articles and manuscripts for publication in the newsletter are solicited and may be submitted to the Local Government Law Center for consideration. Articles contributed are printed as received from the contributors. Articles printed represent the views of the contributors and do not necessarily reflect the views of the Department for Local Government, Northern Kentucky University, or the Chase Local Government Law Center.

Linda S. Taylor  
Director

Kathleen Gormley Hughes  
Assistant Director

Northern Kentucky University is an Equal Opportunity/  
Affirmative Action Institution. 02702

Nonprofit Organization  
U.S. Postage  
**PAID**  
Newport, KY  
Permit No. 2

Northern Kentucky University  
Chase Local Government Law Center  
406 Nunn Hall  
Nunn Drive  
Highland Heights, Kentucky 41099