

Cable Franchise Assignments and Transfers

**by
John W. Pestle**

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Updated**

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John Pestle

- Over 25 years experience in cable, communications, utility and energy law
- Partner in firm, heads Varnum's communications law practice
- Graduate of Harvard College, Yale Graduate School and the University of Michigan Law School
- Past Chair of Municipal Lawyers Section of Michigan Bar and Legal Section of American Public Power Association.
- Held FCC license to work on radio, TV, ship radar transmitters
- jwpestle@varnumlaw.com
- (616) 336-6725

Introduction

- Sale of cable company or franchise (“transfer”) requires local approval if franchise so requires.
- Summary of important issues, practical advice on transfers.
 - Based on representing over 100 municipalities on transfers.
- Topics
 - What is driving transfers and mergers
 - Transfers generally

Quick Summary

- Transfers can lead to limited but significant improvements for a municipality and its residents, and help make sure they are no worse off after the transfer than before. Examples:
 - Current problems, franchise violations addressed
 - Costs, attorneys fees usually reimbursed
 - Rights preserved for those problems not corrected
 - Prevention against harmful changes after the transfer has occurred
 - But municipalities must act promptly due to 120 day Federal “shot clock” to act on transfer requests

Why Transfers?

- Programming
 - Ownership of programming becoming more concentrated
 - Mergers give cable companies more bargaining power vs. programmers
- Competition from satellite providers
 - Response – Obtain exclusive programming contracts
 - Keeps costs down
- Consolidate markets
 - One cable company per market reduces costs, increases revenues

Transfers (cont'd)

- Legal
 - FCC limits on size of cable companies, programming ownership overturned and remanded. *Time-Warner*, 240 F. 3rd 1126; FCC 01-263.
 - FCC ban on ownership of cable systems and TV stations in same city vacated. *Fox TV*, 280 F. 3d 1027.
 - FCC cap on number of TV stations one company can own overturned and remanded. *Id.*

Transfers (cont'd)

- Financial problems causing some sales, such as former Adelphia systems
- Other
 - Buyout of overbuilders, other cable companies in same municipality or area
 - Ripple effect from prior sales
- But some cable companies are family controlled, unwilling to give up control
 - Cox, Cablevision, Charter, Comcast

Law Applicable

- Summary:
 - Substance and some procedure – Cable franchise
 - General procedural overlay – Federal law
- When is municipal approval required?
 - Cable franchise governs
 - Assignments – Franchisee changes due to asset sale. Ownership may or may not change. Approval often required.
 - Change of control – Franchisee unchanged but its ownership changes. Approval less often required.
 - Some franchises silent on transfers.

Law Applicable (cont'd)

- What must be filed to request approval?
 - All documents required by franchise, and
 - FCC Form 394 (if used)
- FCC Form 394 and related
 - See Cable Act § 617, 47 CFR § 76.502 and FCC orders
 - Optional with cable operator, not always used
 - Provides generally standard application package and process
 - Automatic approval if no action in 120 days

Law Applicable (cont'd)

- What additional information can cities request?
 - Expressly provided for in some franchises
 - Implicit in others
 - Expressly allowed by Federal law. Cable Act § 617 and 1992 House Report 102-628 at p. 120: Form 394 only provides information to “begin an evaluation,” does not limit city authority to require “additional information.”
 - FCC’s order states companies must supply “all information reasonably requested by [city].” FCC 95-21 ¶ 52.

Law Applicable (cont'd)

- How long does the city have to act?
 - 120 days if complete Form 394 filed, or
 - Shorter time if provided in franchise
 - No time limit if no Form 394, none in a franchise

Law Applicable (cont'd)

- Timing – 47 CFR § 76.502
 - 120 days to act on transfer
 - Otherwise, transfer automatically approved
 - Time starts with delivery to municipality of complete Form 394
 - 120 days goes very quickly – start approval process ASAP
- Objections to accuracy within 30 days or deemed complete
 - Santa Cruz District Court case (reversed on appeal) extended to completeness of Form 394 application.

Law Applicable (cont'd)

- What are the substantive grounds for denial or conditioning a transfer?
 - Generally set forth in franchise, often quite broad, “will not unreasonably withhold approval”
 - Federal law does not limit cities to “legal, technical and financial” (“LTF”) qualifications (not in Cable Act § 617)
 - 1992 House Report 102-628 at p. 120: Cable Act does not “limit, or give the FCC authority to limit” city’s right to grant or deny approval “in its discretion”
 - 1993/1995 FCC orders cannot (and do not) undercut this. See, e.g. – FCC 93-332 ¶ 86; FCC 95-21 ¶ 52
 - Compare Mass Cable Division regs, which add “managerial experience” to LTF, 207 C.M.R. § 4.04 (1)(a)

Law Applicable (cont'd)

- Substantive grounds for denial (cont'd):
 - Franchise violations: See 1992 Committee Report 102-862 at pp. 91: “[Cities] should address any deficiencies in the service of the original franchisee at the time of the transfer.” Accord 1984 Committee Report p. 74
 - Reductions in competition:
 - Transferee owns or controls “any other cable system” in city, Cable Act § 613(d), or
 - City “determines that the acquisition of such cable system may eliminate or reduce competition in the delivery of cable service.” Id.

Law Applicable (cont'd)

- Will the city's costs be reimbursed?
 - Yes, if express reimbursement provision in franchise
 - Yes, if implicit reimbursement provision (not unreasonably withheld)
 - But see Santa Cruz District Court decision sometimes cited by cable companies

Santa Cruz Case

- Charter Communications v County of Santa Cruz 133 F. Supp. 2d 1184 (N.D. Cal 2001)
 - Reversed on appeal by Ninth Circuit U.S. Court of Appeals, 304 F.3d 927 (2002).
 - But still sometimes cited by cable companies
 - Opinion is about 50 pages long, some highlights follow
- FCC Rules “purely procedural”, do not affect what cities may ask about
 - Cities not limited to legal, technical and financial qualifications
- Thirty days to question Form 394 application for accuracy or completeness
 - To be prudent, ask questions in all subject matter areas within 30 days

Santa Cruz Case (cont'd)

- Requests must be reasonable
 - Boilerplate questions problematic
 - Burdensome requests (e.g. – get data from third parties) not reasonable
 - Shouldn't bury OK requests in unreasonable requests
- Can't infringe on areas where municipalities are barred from acting by Cable Act, other law
 - Rate regulation
 - First Amendment
- Can deny transfer due to adverse impact on
 - Rates and/or services
- Costs, attorney fees for transfer included in 5% franchise fee

Potential Results

- Agreement with cable company
 - Most common result
 - Approval by municipality with agreed upon conditions (see next slides)
- No agreement
 - Do nothing. Automatically approved?
 - Conditional approval (with conditions not agreed to)
 - Denial
 - Seek injunction against transfer.
 - Grounds to deny next renewal. Notice of violation and opportunity to cure letter to cable company. Cable Act § 626(d).

Transfer Topics

- Major items frequently addressed in transfers
 - Existing problems, disputes and violations corrected
 - Examine qualifications, track record of purchaser, especially if purchaser is new entity, highly leveraged
 - Sometimes consider effect on, protections against rate increases (number, timing, certain costs not passed through)
- Key: Municipality and its residents no worse off after the transfer than before
 - Informal commitments formalized
 - Beneficial practices formalized, e.g. – number of local offices in city, their hours

Transfer Topics (cont'd)

- Customer service protections
 - No diminution in current service
 - Reports on compliance with FCC standards
 - Damages if violate FCC standards
- On PEG channels, assurances of current operation, support; prior commitments reaffirmed
- Protections against discounts on bundled service (cable, Internet, telephone) being applied solely to cable and cable franchise fees
- EEO issues examined, resolved
- Parental guarantees revised, if necessary, due to transfer

Transfer Topics (cont'd)

- Defaults, problems occurring prior to the transfer not waived by the municipality (if not cured, corrected as part of transfer)
 - Otherwise cable company claims “slate is wiped clean” at time of transfer. See 1992 House, 1984 Committee Report
 - Especially important for renewals in near future
- No increase in the number of channels where cable company has exclusive rights to the programming
 - Aids competing cable companies, satellite providers
- Municipality’s costs and attorneys fees usually reimbursed, but often last issue resolved

Practical Suggestions

- Start promptly, as 120 days goes very quickly
- Compute lead times needed for local approval
 - Date documents must be complete for city approval in ordinary course of business
 - Include agenda review committee, any multiple reading requirements, date council packets go out, etc.
 - Often 2-4 weeks prior to 120th day
- Extend or toll 120 day deadline if necessary
 - By agreement with cable company
 - Unilaterally, by denial
- Recognize that usually question is not whether transfer will be approved, but on what terms

Conclusion

- Municipalities can correct current problems, obtain benefits, prevent loss of rights due to transfers if franchise so provides
- But need to act promptly due to 120 day Federal “shot clock” on cable company’s request for local approval of the transfer.