

# MEMORANDUM

To: Jodie Miller, Executive Director  
NDC4 Commission

From: Brian Grogan

Date: June 3, 2009

Re: Summary of H.F. No. 2396

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The Commission requested that I prepare this summary of a bill introduced in the Minnesota House of Representatives on May 17, 2009, now referenced as H.F. No. 2396 regarding state video franchising (the “Bill”). The Bill would amend Minnesota Statutes Chapter 238 and create a new “State-authorized video provider” that would be able to obtain a certificate to provide video service within 30 days from submission of an application. Below I summarize and provide comments regarding H.F. No. 2396.

1. **Definitions** The Bill creates new definitions for “State-authorized video provider” as well as “video service.” These definitions are generally consistent with legislation in other states that have recently moved to a state franchising model. A State-authorized video provider is defined to include all existing cable operators, telephone companies and any other entity that provides multi-channel programming. It specifically excludes satellite master antenna systems, which may offer service to hotels and large apartment buildings as well as direct broadcast satellite systems such as DirecTV.

2. **Effective Date** Any person who seeks to provide video service in Minnesota after January 1, 2016 must file an application with the Minnesota Public Utilities Commission (MPUC). Interestingly, the Bill does not repeal the existing local franchise requirements contained in Chapter 238 which allow a cable operator to obtain a traditional cable television franchise, although after 2016 there would be very little incentive to do so given the minimal regulatory burdens required under a state certificate to provide video service.

It is not exactly clear why January 1, 2016 was selected, although, it is interesting to note that the NDC4 cable franchise with Comcast will expire on or about April 1, 2015. At first glance this may appear to work in the Commission’s favor in that the Commission could obtain a new long-term franchise with Comcast before state video service franchising goes into effect. However, it would likely be very difficult to negotiate a new franchise with Comcast when Comcast is aware that it will have a far easier path to obtain a new certificate from the state by simply delaying local negotiations and applying for a state certificate.

It is also curious how one could argue that this legislation would help promote competition if does not become effective for six (6) or more years. Typically, the advocates of this type of legislation argue that authorization is needed immediately to allow for the investment of capital to provide competitive services in the state. Delaying the effective date until 2016 seems to suggest there is no immediate demand for this legislation.

3. **Application** The application requirements to obtain a state certificate are very minimal and generally parallel the requirements contained in the FCC's model application released in 2007. However, to the best of my knowledge few if any providers nationwide have utilized the FCC's application. Also curiously absent from the proposed state application procedure is authority allowing the MPUC to establish the length of a state certificate. Presumably once a certificate is granted it is perpetual.

The Bill does not specify any minimum or maximum term but does provide that a video service provider can unilaterally terminate the certificate by simply filing notice with the MPUC. In other words, if a video service provider were to obtain a state certificate, begin construction, but then decide to change its plans, it could immediately terminate the certification and would have no further obligation to construct its system or to provide competing services.

4. **Timing** The grant of a certificate must occur within 30 days of submission of an application which means there would be little opportunity for input by affected jurisdictions and very limited time for serious consideration by the MPUC. There also appears to be no criteria on which an application could be rejected or denied by the MPUC. Legislation in other states generally requires that the agency charged with granting certificates adopt rules and procedures to implement an application and certification process. The Bill contains no such regulatory authority for the MPUC. Moreover, the Bill contains no enforcement authority for the MPUC once a certificate is granted.

5. **Interconnection** Once a certificate is granted the Bill imposes a burden on incumbent cable operators to interconnect with video service providers so the video service provider can offer PEG access channels. The Bill requires "reasonable efforts" for interconnection but does not clarify what payment terms may be imposed, nor does it mandate interconnection. I suspect Comcast will have serious concerns allowing a low cost interconnection to facilitate the provision of PEG channels by Qwest or any other competing system. This is particularly true given the substantial investment Comcast has made in interconnecting public facilities throughout the seven cities as well as ongoing maintenance related to the institutional network. It is not at all clear how the institutional network would be addressed, as that issue is silent under the Bill.

6. **Advertising** The incumbent operator is required to allow the competing video service provider to advertise on the incumbent's cable system to promote the new competitive service. There is no reciprocal obligation for the video service provider to provide advertising availability for the incumbent cable operator. I suspect the incumbent cable operators will have serious concerns regarding this provision.

7. **Build-out** There is no build-out criteria in the Bill. A video service provider can build to any portion of a jurisdiction that it may choose. The only prohibition is that it may not deny access to service to any group of subscribers because of income, race or ethnic characteristics in the local area in which the subscribers reside. This language, however, would not prevent a competitor from coming in and serving only a more densely populated portion of a community, multiple dwelling units, high value homes, or simply cherry picking off the best areas to provide service.

There is also no clarification in the Bill how this anti-discrimination prohibition would be enforced. For example, it is not clear whether a violation must be asserted by subscribers individually, local units of government, or the MPUC. It is also not clear how enforcement would take place. States that have chosen to adopt similar legislation generally include at least some type of build-out requirement that imposes a state wide or service area obligation on new video service providers to serve low income areas, serve in areas where they have existing facilities (i.e. existing telephone infrastructure) or otherwise prevent blatant cherry picking.

Arguably, if Comcast were to obtain a state issued certificate on or after January 1, 2016, Comcast would be free from any build-out requirements. Thus an incumbent operator such as Comcast could abandon facilities in areas where it is simply too expensive to maintain facilities. Incumbent operators could also limit upgrades to only high value areas in a region. In a worst case scenario, competition would exist in high value pockets in the Commission's franchise area but some areas could go un-served or could have very antiquated infrastructure because no entity would have authority to mandate upgrades.

8. **PEG Access** The Bill requires video service providers to: a) match the same number of PEG channels provided by an incumbent operator; and b) match any monthly PEG fee that is imposed to support PEG programming. The PEG support is not limited to "capital," although the federal distinction between capital and operational PEG support would arguably remain. The Bill is silent regarding how to address upfront PEG payments or other in kind PEG or I-Net contributions which may have been provided by an incumbent operator. Other states have included language that provides for a PEG surcharge fee assessed on a per subscriber basis to help make up the difference in these one time payments. No such language appears in this Bill.

In addition, the burden is placed on the municipality (Commission) to provide PEG signals in a format acceptable to the video service provider. Thus, even though the Commission may produce programming in a particular format today, the Commission, not the video service provider, would bear the burden of converting the signal to accommodate whatever technology platform may be used by Comcast or any other competitor. This could mean multiple formats depending upon the number of providers serving the Commission.

The Bill is also vague regarding how the PEG programming is to be transported to the video service provider. It is not at all clear if the video service provider would be required to extend facilities to city halls, the Commission's main studio, schools and other origination locations. The Bill contains vague interconnection language but assuming interconnection is not accomplished with Comcast, it is not clear how PEG content would be transmitted to the video service provider. I suspect a video service provider would attempt to make the argument that the

Commission, city or schools must bear the financial burden to deliver the programming to their location for transmission on their system.

9. **Franchise fee** The Bill includes a requirement that the video service provider match the franchise fee paid by the incumbent service provider with one significant exception. The video service provider is allowed to offset “all costs, fees and other mandatory payments or compensation the state authorized video service provider is required to pay by the municipality.” This phrase could be interpreted to mean that if a city were to impose right-of-way (ROW) permit fees, inspection fees or any other costs, those fees and costs could be offset against the franchise fee to be paid by the video service provider. This could be a very significant issue and one that would differ greatly depending upon who the competitor may be.

Assume for a moment that Qwest were to become a video service provider but did not need to undertake significant construction because certain facilities were already in place. Contrast that scenario to a start up video service provider that would be required to undertake significant construction in the ROW and required to pull a substantial number of permits for follow-up inspections of its work in the ROW. Would the start up video service provider be able to offset all of its permit and inspection fees (even restoration fees) imposed by a city against its future franchise fee payments? This also would create an imbalance between Comcast and the video service provider since Comcast would be not be afforded a similar regulatory offset unless Comcast were to also become a certificated video service provider.

Generally the definition of gross revenues on which the franchise fee is based is fairly comprehensive and I am pleased to see that it contains no references to generally accepted accounting principals (GAAP) as is often argued for by the cable industry. However, in the case of bundled services the video service provider is only required to pay a franchise fee to the extent it books revenue for the provision of video service. If the revenue is booked as data or telecommunications services no franchise fee would be required.

10. **Customer service** A video service provider would be required to comply with the FCC’s customer service standards but only those contained at Section 76.309(c) not other customer service provisions contained at Section 76.1600. Also neither the Commission nor any city would have authority to adopt local customer service standards. It is also unclear who has enforcement authority for the FCC customer service standards required under the Bill. The video service provider is not obligated to provide any reports to either the MPUC or any Commission or City and it is entirely possible that the only enforcement capability would be through an individual subscriber. It is also not clear whether the venue for such enforcement would be before the MPUC or state or federal court. There is no other administrative venue, such as the Commission or city council, that would have enforcement authority under the Bill.

It is also worth noting that if no competitor serves the Commission, Comcast would still be able to become a video service provider and thereby eliminate Commission enforcement of customer service standards and other local franchise obligations even in the absence of competition. This is exactly what happened throughout Iowa and in other states as no competitors applied for state franchises but the incumbent operators used the law to escape their existing local franchises.

11. **Emergency alert requirements** The Bill requires only compliance with federal EAS requirements. There is no reference to any state, county or local requirements for emergency alert provisioning.

12. **Resolution of disputes** The Bill includes language that requires disputes that are brought by a subscriber or a municipality to first go to “confidential non-binding mediation.” If that proceeding does not resolve the dispute, matters can then go to district court but only for “injunctive or declaratory relief.” In other words, the Bill appears to limit a video service provider’s damages. Thus even if a video service provider completely ignored the very minimal obligations in the Bill it would be almost impossible to enforce compliance. The MPUC has no authority and a subscriber or city/Commission could not obtain any damages for a breach/violation. Similar arbitration provisions pushed by large corporations around the country (in multiple industries) have been challenged and overturned in state and federal courts – this Bill would endorse the practice.

End of Memo