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Details:

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Commerce, Utilities, and Rail (SC-CUR)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Gigi Godwin (LRB) (November/2011)

State of Wisconsin

Department of Financial Institutions

Jim Doyle, **Governor** Lorrie Keating Heinemann, **Secretary**

April 2, 2007

To: Katie Boyce and Ron Hermes
Office of Governor Jim Doyle

From: Carrie Templeton, Executive Assistant

Re: AB 207/SB 107 modifications

DFI suggests making the following minor modifications to AB 207 and SB 107 to ensure those issued video service franchises by DFI are capable and qualified to offer the service to the public. Absent rulemaking authority, these changes are essential clarifications to the legislation.

These changes are consistent with current law in other industries or contain language taken from other states that issue statewide video service franchises.

Where possible, I've pasted the bill text in this document and highlighted our suggested changes/additions in yellow.

1. Definition of Video Service Franchise Area (page 14, lines 10-12)
(w) "Video franchise area" means the area or areas described in an application for a video service franchise under sub. (3) (d) 2., as approved by the department or the area or areas described in an application for a modification of a video service.

2. Application for Video Service Franchise to be submitted to DFI for approval (pages 16-17 of AB 207)
**Modifications are consistent with DFI application processes in other industries. Fee consistent with other industries/states
(d) *Application.* An applicant for a Video Service Franchise or a modified Video Service Franchise area shall submit an application to the department, in the form and manner prescribed by the department, that consists of all of the following:

1. The location and telephone number of the applicant's principal place of business, the names of the principal executive officers of the applicant, and the names of any persons authorized to represent the applicant before the department.
2. A description of the area or areas of the state in which the applicant intends to provide video service.
3. The date on which the applicant intends to begin providing video service in the video franchise area.
4. An affidavit signed by an officer or general partner of the applicant that affirms all of the following:
   a. That the applicant has filed with the FCC all forms required by the FCC in advance of offering video service.
   b. That the applicant agrees to comply with all state and federal laws and regulations.
5. A description of the proposed services to be provided.
6. A written opinion by an independent certified public accountant that the applicant has the financial and legal capacity to construct, maintain and operate the necessary installations, lines and equipment to provide the services proposed as of the date of application.
7. A written opinion by a qualified independent engineering firm that the applicant has the technical capacity to provide the proposed service to industry standards and in a safe and proper manner. The opinion shall be based on a comparison to either.
   a. An industry standard provided by the department in consultation with industry service providers.
   b). An equivalent standard based upon accepted industry practices or written criteria established by other states.
8. An application fee of $1,000, unless the application only modifies information described in (3)(d)1. If the

application only modifies information required in (3)(d)1, the fee shall be $100.

3. DFI Review of Applications for Video Service Franchise (page 18, lines 6-15)
(f) *Department duties.* 1. No later than 15 business days after the filing of an application, the department shall notify the applicant in writing as to whether the application is complete and, if the department has determined that the application is not complete, the department shall state the reasons for the determination.
2. No later than15 business days after the filling of an application that the department has determined is complete, the department shall issue a nonexclusive video service provider franchise to the applicant if the department is satisfied that the applicant has met all the requirements for a franchise.

4. Expiration and Revocation of Video Service Franchise (Page 18-19)
**Consistent with current law related to DFI authority to revoke licenses in other industries
(i) *Expiration and revocation of video service franchise.*
1. A video service franchise issued to a video service provider does not expire, unless the video service provider gives 30 days' advance notice to the department that the video service provider intends to terminate the video service franchise. If a video service provider gives such notice, the video service franchise shall expire on the termination date stated in the notice.
2. A video service franchise issued to a video service provider may be revoked by the department if the department determines that the video service provider is no longer legally, financially or technically qualified to provide video service or has failed to meet any requirement imposed upon it by this section.

5. Modifications to Video Service Franchise (Page 19, lines 3-10) – Delete (see #1 above)

6. Video Service Franchise Assessment – Insert on Page 19, line 3 (replace language from #5 above)
**Based on DFI current law assessment of fees to other industries
(j) Annual Assessment. A video service provider shall annually pay a fee to the department equal to .25 percent of the gross operating revenues of the video service provider during the preceding calendar year, to support required program services. The assessment shall be calculated and paid in the form and manner prescribed by the department and shall be due March 31 of each year.
(k) Recovery of Fees. The secretary of the department shall bring an action in any court of record to recover any fees that are due and owing under this section.

7. Transfer of Video Service Franchise (Page 29, lines 24-25 and Page 30, lines 1-5)
No later than 15 days after the transfer is completed, the person originally issued the video service franchise shall comply with the application requirements of sub. (3)(d) and shall provide notice to any municipality in which the person has provided video service.
Page 30, delete lines 3-5.

8. Discrimination: Access to Services (Page 26—27) Transfer enforcement authority of this section to DATCP.

9. Enforcement (Page 30, Lines 16-17) Delete and replace lines 16-17 with the following. **Consistent with DFI's enforcement authority across statutes
(13) (c) Notwithstanding any other provision of this section, and in addition to any remedy or penalty specifically set forth in this section:
1. The department of financial institutions shall enforce this section. Actions to enjoin violations of this section or any regulations thereunder may be commenced and prosecuted by the department in the name of the state in any court having equity jurisdiction. This remedy is not exclusive.
2. No action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of the action. No injunction may be issued under this section which would conflict with general or special orders of the department or any statute, rule or regulation of the United States or of this state.

10. Reinstatement of s. 100.209, Stats. with modifications to make applicable to video services (Page 33, Line 22) Delete and replace with:
100.209 of the statutes is amended to read:
"**100.209 Cable television and video service subscriber rights. (1)** DEFINITIONS.
In this section:
(a) "Cable operator" has the meaning given in s. 66.0420 (2) (d).
(b) "Cable service" has the meaning given in s. 66.0420 (2) (e).
(c) "Video service" has the meaning given in s. 66.0420 (2) (y).


FORWARD
E PLURIBUS UNUM

MEMORANDUM

April 3, 2007

TO: Ron Hermes
Governor's Office

FROM: Paul Ziegler
Department of Revenue

SUBJECT: Proposed Amendments to SB 107 and AB 207 relating to Cable/Video Services Providers

Under AB 207 and SB 107, the provision of video services by a telephone company may result in the exemption of currently taxable telephone company property as computer or digital broadcasting equipment. The material in *shaded italics* is intended to prevent these shifts.

1. The bill includes within the definition of video service any service provided via an open video system. The amendment limits the definition to include only video programming and cable service, including such services provided via an open video system, to avoid a potential narrowing of the state telephone tax by cross-reference in the bill. The amendment also explicitly excludes telecommunication services from the bill's definition of video service to clarify the separation of these services.

> **Section 7, SB 107 and AB 207.**
> **66.0420 (2) (y)** "Video service" means ~~any~~ video programming service, ~~or~~ cable service, ~~or service~~ *including video programming service or cable service* provided via an open video system that complies with 47 USC 573, that is provided through facilities located at least in part in public rights-of-way, without regard to delivery technology, including Internet protocol technology or any other technology. "Video service" does not include any of the following:
>
> 1. Video programming provided by a commercial mobile radio service provider, as defined in s. 196.01 (2g).
> 2. Video programming provided solely as part of and via a service that enables users to access content, information, electronic mail, or any other service offered over the public Internet.
> *3. Telecommunications services as defined under s. 76.80 (3) or s. 196.01 (9m).*

2. The amendment would preclude the expansion of the computer exemption to include equipment that is only partially used to provide video services but mostly used to provide telecommunications. If the property is used more than incidentally to provide telecommunications, it is taxable telecommunications equipment.

> **70.11 (39) Computers.** If the owner of the property fulfills the requirements under s. 70.35, mainframe computers, minicomputers, personal computers, networked personal computers, servers, terminals, monitors, disk drives, electronic peripheral equipment, tape drives, printers, basic operational programs, systems software, and prewritten software. The exemption under this subsection does not apply to custom software, fax machines, copiers, equipment with embedded computerized components, ~~or~~ telephone systems,

including equipment ~~that~~ *of which any portion* is used to provide telecommunications services, as defined in s. 76.80 (3) *or 196.01 (9m), in excess of incidental use, or property of a video service provider of which any portion is used to provide telecommunications services, as defined under s. 76.80 (3) or s. 196.01 (9m), in excess of incidental use.* For the purposes of s. 79.095, the exemption under this subsection does not apply to property that is otherwise exempt under this chapter.

3. The amendment would preclude the expansion of the digital broadcasting exemption to include equipment that is only partially used to provide video services but mostly used to provide telecommunications. Such property would have to be exclusively used for digital broadcasting to qualify for the exemption.

SECTION 22, AB 207 & SB 107.
70.111 (25) DIGITAL BROADCASTING EQUIPMENT. Digital broadcasting equipment owned and used *exclusively for digital broadcasting of radio signals, television signals or video programming, as defined under s. 66.0420 (2) (x)* by a radio station, television station, or ~~cable television system~~ video service network, as defined in s. ~~66.0419 (2) (d)~~ 66.0420 (2) (zb). *This exemption does not include equipment used for telecommunications services, as defined under s. 76.80 (3) or s. 196.01 (9m).*

4. This amendment conforms the telephone tax law to amendment #2 above.

76.81 Imposition. There is imposed a tax on the real property of, and the tangible personal property of, every telephone company, excluding property that is exempt from the property tax under s. 70.11 (39) *if that property is used exclusively for purposes other than the provision of telecommunications services* and (39m), motor vehicles that are exempt under s. 70.112 (5), property that is used less than 50% in the operation of a telephone company, as provided under s. 70.112 (4) (b), and treatment plant and pollution abatement equipment that is exempt under s. 70.11 (21) (a). Except as provided in s. 76.815, the rate for the tax imposed on each description of real property and on each item of tangible personal property is the net rate for the prior year for the tax under ch. 70 in the taxing jurisdictions where the description or item is located. The real and tangible personal property of a telephone company shall be assessed as provided under s. 70.112 (4) (b).

5. This amendment clarifies that property used to provide telecommunications is subject to the state's telecommunications tax, regardless of video services provided.

76.80 (4) "Telephone company" means any person that provides to another person telecommunications services, including the resale of services provided by another telephone company. *"Telephone company" includes a video service provider, as defined under s. 66.0420 (2) (zb), that provides telecommunication services.* "Telephone company" does not include a person who operates a private shared telecommunications system, as defined in s. 196.201 (1), and who is not otherwise a telephone company.

6. Delete Section 7 of AB 207 and SB 107, providing legislative findings, since it has no apparent substantive purpose and deleting would avoid potential disputes over whether the paragraph does have a substantive purpose.

SECTION 7. AB 207 & SB 107.
***66.0420 Video service. (1)** LEGISLATIVE FINDINGS. Delete entire paragraph*

(d) "Video service provider" has the meaning given in s. 66.0240 (2) (zg).
(2) RIGHTS. (a) A cable operator or video service provider shall repair cable or video service within 72 hours after a subscriber reports a service interruption or requests the repair if the service interruption is not the result of a natural disaster.
(b) Upon notification by a subscriber of a service interruption, a cable operator or video service provider shall give the subscriber a credit for one day of cable or video service if cable or video service is interrupted for more than 4 hours in one day and the interruption is caused by the cable operator or video service provider.
(bm) Upon notification by a subscriber of a service interruption, a cable operator or video service provider shall give the subscriber a credit for each hour that cable service is interrupted if cable service is interrupted for more than 4 hours in one day and the interruption is not caused by the cable operator or video service provider.
(c) A cable operator or video service provider shall give a subscriber at least 30 days' advance written notice before deleting a program service from its cable or video service. A cable operator or video service provider is not required to give the notice under this paragraph if the cable operator or video service provider makes a channel change because of circumstances beyond the control of the cable operator or video service provider.
(d) A cable operator or video service provider shall give a subscriber at least 30 days' advance written notice before instituting a rate increase.
(e) 1. A cable operator or video service provider may not disconnect a subscriber's cable or video service, or a portion of that service, for failure to pay a bill until the unpaid bill is at least 45 days past due.
2. If a cable operator or video service provider intends to disconnect a subscriber's cable or video service, or a portion of that service, the cable operator or video service provider shall give the subscriber at least 10 days' advance written notice of the disconnection. A cable operator or video service provider is not required to give the notice under this subdivision if the disconnection is requested by the subscriber, is necessary to prevent theft of cable or video service or is necessary to reduce or prevent signal leakage, as described in 47 CFR 76.611.
(3) RULES. This section does not prohibit the department from promulgating a rule or from issuing an order consistent with its authority under this chapter that gives a subscriber greater rights than the rights under sub. (2).
(4) PENALTY; ENFORCEMENT. (a) A person who violates sub. (2) may be required to forfeit not more than $1,000 for each offense and not more than $10,000 for each occurrence. Failure to give a notice required under sub. (2) (c) or (d) to more than one subscriber shall be considered to be one offense.
(b) The department and the district attorneys of this state have concurrent authority to institute civil proceedings under this section.

11. Creation of Section of Video Service Franchising in DFI Bureau of Corporations, Division of Corporate and Consumer Services. DFI will require four additional staff to operate the section:

a. Two professionals
b. One accountant
c. One program assistant

12. Addition of 5 FTE to DATCP Division of Trade & Consumer Protection to handle, mediate, and investigate consumer complaints, and take enforcement action when appropriate regarding violations of s.100.209 and to investigate and take enforcement action when appropriate regarding any complaints regarding access.


FORWARD
E PLURIBUS UNUM

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE PHIL MONTGOMERY AND SENATOR JEFF PLALE

FROM: John Stolzenberg, Chief of Research Services

RE: Discrimination Provision in 2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Cable Television and Video Service Providers

DATE: April 3, 2007

This memorandum, prepared at your request, provides a comparison of the provisions on discrimination in 2007 Assembly Bill 207 and 2007 Senate Bill 107, relating to regulation of cable television and video service providers (hereafter, the "bills") with alternative provisions recommended by Janet Jenkins, Administrator, Division of Trade and Consumer Protection, Department of Agriculture, Trade, and Consumer Protection (DATCP). Ms. Jenkins presented her alternative at the joint hearing on the bills before your committees on March 27, 2007. The memorandum summarizes these provisions and then provides a brief comparison of the major features of these two approaches.

Discrimination Provisions in the Bills

The bills establish that no video service provider may deny access to video service to any group of potential residential customers in the provider's video franchise area because of the race or income of the residents in the local area in which the group resides.

The bills specify a defense to an alleged violation of the above prohibition based on income if the video service provider has met either of the following conditions:

- No later than three years after the date on which the provider began providing video service under its state franchise, at least 25% of households with access to the provider's video service are low-income households.

- No later than five years after the date on which the provider began providing video service under its state franchise, at least 30% of households with access to the provider's video service are low-income households.

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The bills define a "low-income household" to be any individual or group of individuals living together as one economic unit in a household whose aggregate annual income is not more than $35,000, as identified by the United States Census Bureau as of January 1, 2007.

These defenses are based upon the households within the video service provider's video franchise area that have access to the provider's video service. Thus, for example, if a provider has built out its video system three years after it began to provide video service under a state franchise such that it is providing access to its service to households located in an area that is 60% of its total video franchise area, then the defense in the first bullet point would be met if 25% of the households in that built out area are "low-income households."

A video service provider may apply to the Department of Financial Institutions (DFI) for an extension of the time limits specified in these two defenses. DFI must grant the extension if the provider demonstrates to the department's satisfaction that the provider has made "substantial and continuous efforts" to comply with the requirements and that the extension is necessary due to one or more of the specified factors. In addition, a video service provider may satisfy the discrimination requirement or the defenses through the use of a qualified alternative technology.

The bills also establish that, notwithstanding these discrimination provisions, a telecommunications video service provider of any size is not required to provide video service outside its residential local exchange service area, and a video service provider that is an incumbent cable operator is not required to provide video service outside the area in which the operator provided service at the time DFI issued a video service franchise to the operator.

The bills authorize a municipality, interim cable operator, or video service provider that is affected by a failure to comply with the new video franchising law, including the discrimination provisions created by the bills, to bring an action in circuit court. The court is directed to order compliance with the law, but the bills are silent regarding the recovery of damages. No party to a suit may recover its costs of prosecuting or defending the suit.

In addition, the Department of Justice may enforce the provisions of the new law. The bills do not specify penalties for violations of the new law, nor does ch. 66, Stats., in which the law in numbered. In the absence of any specified penalty, civil violations are punishable by a forfeiture of not more than $200. [s. 939.61 (1), Stats.]

DATCP Proposal

The DATCP's proposal on discrimination substitutes the following text for the provisions in the bill on discrimination described in the preceding section:

> Section 66.0420 **(8)** (a) A video service provider may not deny access to the service to any group of potential residential subscribers within the video franchise area because of the race or income of the residents. A violation of this subsection shall be considered an unfair trade practice under s. 100.20. In determining whether a cable service provider has violated this subsection with respect to a group of potential residential

subscribers in a video franchise area, the following factors must be considered:

1. The length of time since the provider was granted a franchise for this area. If less than a year has elapsed since the franchise for this area was granted, it is conclusively presumed that a violation has not occurred. This subsection does not apply to providers that currently provide video or cable television services.

2. The cost of providing service to the affected group due to distance from facilities, density, or other factors.

3. Technological impediments to providing service to the affected group.

4. Inability to obtain access to property required to provide service to the affected group.

As indicated by Ms. Jenkins, this proposal is based upon discrimination language in s. 66-357 N.C. Stats., as created by North Carolina Session Law 2006-151.

This proposal states that "a violation of this subsection shall be considered an unfair trade practice under s. 100.20." This cross-reference means that the following enforcement and penalty-related provisions in s. 100.20 will apply to violations of this proposal:

- DATCP may issue a "special order" against a video service provider violating these provisions enjoining the provider from engaging in the unfair trade practice or requiring the provider to employ a method of competition which is determined by DATCP to be fair. [s. 100.20 (3), Stats.]

- The Department of Justice (DOJ) may file a written complaint with DATCP alleging that the video service provider is employing an unfair trade practice. If DOJ files such a complaint, DATCP must proceed with a hearing and adjudication of the alleged violation. A representative of DOJ may appear in the DATCP proceedings, and DOJ is entitled to judicial review of DATCP's decisions and orders under ch. 227. [s. 100.20 (4), Stats.]

- Any person suffering pecuniary loss because of a violation of an order issued under s. 100.20 may sue for damages and shall recover twice the amount of the person's pecuniary loss together with costs, including a reasonable attorney's fee. [s. 100.20 (5), Stats.]

- DATCP may commence an action in circuit court to restrain by temporary or permanent injunction the violation of any order issued under s. 100.20. The court may in its discretion make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action. DATCP may use its authority for conducting hearings, securing evidence, paying witness fees, and requiring reports under ss. 93.14 and 93.15, Stats., to investigate violations of any order issued under s. 100.20. [s. 100.20 (6), Stats.]

Section 100.26 (3) and (6) specifies civil and criminal penalties for violating an order issued by DATCP under s. 100.20: a forfeiture of $100 to $10,000 for a violation, and a fine of $25 to $5,000, or imprisonment for not more than one year, or both, for intentional failing to obey such an order or a regulation made under s. 100.20.

Discussion

This section of the memorandum provides a brief comparison of a number of the features of the discrimination provisions in the bills and the DATCP proposal.

Basic prohibition. The basic prohibition on discrimination in the bills and the DATCP proposal are similar. The bills include the qualifier that the group of residents who may not be discriminated against are those "in the local area in which the group resides."

Standards. The bills provide quantitative standards on discrimination based on ***income*** in the form of defenses to an alleged violation of the prohibition on discrimination. The DATCP proposal provides qualitative standards that DATCP, and any court reviewing DATCP's decision, must consider in determining whether the video service provider has discriminated on the basis of ***race or income***.

Provider flexibility. The bills authorize a video service provider to apply to DFI for an extension of a time limit in the defenses to an alleged violation of the discrimination prohibition. The bills also authorize a video service provider to satisfy the discrimination requirements or defenses through the use of specified alternative technologies. The DATCP proposal does not authorize either the time extension or the use of alternative technologies to comply with its prohibition.

Limit on geographic scope. The bills establish that, notwithstanding the discrimination and access to service provisions in the bills, neither a telecommunications video service provider or an incumbent cable operator is required to provide video service beyond their existing service territories, as identified in the bills. The DATCP proposal does not contain similar limitations.

Enforcement. The bills' discrimination prohibition may be enforced by an action on behalf of the state by DOJ. In addition, a municipality, interim cable operator, or video service provider that is affected by a failure to comply with the prohibition may bring an action to enforce it, though they cannot recover their costs in these proceedings. Through the cross-reference to s. 100.20, the DATCP proposal calls for DATCP to enforce the discrimination prohibition in an administrative proceeding. In addition, DOJ may file a complaint with DATCP initiating the DATCP proceeding. DATCP's orders may be reviewed by a court under ch. 227, Stats. The DATCP proposal does not alter policies regarding recovery of legal costs under current law. In general, in a DATCP administrative proceeding under s. 100.20 there is no recovery or exchange of legal expenses.

Remedies and penalties. Under the bills, a court may order a video service provider to comply with the discrimination prohibition. In addition, violations of the discrimination prohibition are punishable by a forfeiture. Under DATCP's proposal, DATCP may issue an order seeking compliance with the discrimination prohibition. DOJ may initiate DATCP review of an alleged violation of the prohibition. DATCP orders may be reviewed under ch. 227. Section 100.20 provides a private cause of action for a violation of a DATCP order issued under this section and discretionary authority for a court to restore to any person any pecuniary loss suffered because of a violation of such a DATCP order.

Also, violations of a DATCP order issued under s. 100.20 are subject to a forfeiture and, if the violation is intentional, a fine, or imprisonment, or both.

If you have any questions on any of the information presented in this memorandum, please feel free to direct them to me at the Legislative Council staff offices.

JES:jal:ty


FORWARD
E PLURIBUS UNUM

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR JEFF PLALE AND REPRESENTATIVE PHIL MONTGOMERY

FROM: David L. Lovell, Senior Analyst

RE: Video Franchise Legislation; Options Relating to Public Rights-of-Way

DATE: April 3, 2007

This memorandum is in regard to provisions relating to public rights-of-way in 2005 Senate Bill 107 and 2005 Assembly Bill 207, your legislation regarding franchising of video service providers. The memorandum describes current law and these provisions of the bills; it then presents the concerns about these provisions raised by municipalities at the March 27, 2007, joint hearing of your committees, and several options for amendment of them.

CURRENT LAW

Cable Service Providers

Federal law provides that a cable franchise "shall be construed to authorize the construction of a cable system over public rights-of-way...." In exercising this authority, the law requires cable operators to: (1) protect the safety, functioning, and appearance of the property and the safety of the public; (2) bear the cost of the construction; and (3) compensate the land owner for any resulting damages. [47 USC s. 541 (a) (2).]

State law allows public utilities and various other entities (such as cable operators) to construct necessary facilities in, across, or beneath streets and highways. Section 66.0425, Stats., establishes the requirement that a person obtain a municipal permit for the privilege to engage in construction in public rights-of-way, and addresses compensation to the municipality, performance bonds, liability, and third parties' interests. Many of the requirements of this section do ***not*** apply to various types of telecommunications companies.

Telecommunications Providers

Two other statutes address the authority for public utilities and cooperatives that provide a utility service to occupy public rights-of-way. Under s. 182.017, Stats., such occupancy is subject to a number

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of statutes and to "reasonable regulations made by any city, village or town through which the transmission lines or system may pass...." Further, a municipality may determine, by contract, ordinance, or resolution and consistent with state law, the "terms and conditions ... upon which [a] public utility may be permitted to occupy the streets, highways or other public places within the municipality." Under s. 196.58 (1) (a), Stats., the Public Service Commission (PSC) is required to review complaints that such regulations are unreasonable, and has adopted rules setting limits on them. [s. 196.58 (4), Stats., and ch. PSC 130, Wis. Adm. Code]

THE BILLS

The bills provide that, notwithstanding s. 66.0425, municipalities may not impose any fee or requirement on a video service provider relating to the construction of a video service network. They also state that, as long as a video service provider pays the required video service provider fee, "the municipality may not require the video service provider to pay any compensation under s. 66.0425, or any permit fee, encroachment fee, degradation fee, or any other fee, for the occupation of or work within public rights-of-way." Note that, while the bills clearly indicate that this policy is notwithstanding s. 66.0425, they are silent regarding how these provisions relate to ss. 182.017 and 196.58.

In a separate provision, the bills state that "[a] video franchise issued by the [DFI] authorizes a video service provider to occupy the public rights-of-way and to construct, operate, maintain, and repair a video service network to provide video service in the video franchise area."

CONCERNS RAISED BY MUNICIPALITIES

The position of municipalities regarding the use of public rights-of-way is summed up in one of the points contained in a joint statement of the League of Wisconsin Municipalities, the Wisconsin Alliance of Cities, and the Wisconsin Association of PEG Channels:

3) Clarify Rights-of-Way Authority and Other Police Powers

- Change: Make clear that municipal authority over rights-of-way is preserved, including the right to collect street opening permit fees and require performance bonds and other management tools.

- Reason: AB 207/SB 107 would eliminate street opening permit fees and may prevent municipalities from requiring video providers to post bonds before excavating in the right-of-way. The proposed changes are necessary to protect local rights-of-way.

- Precedent: California, existing WI cable franchises, Milwaukee-AT&T Agreement

The representatives of several individual municipalities made similar comments in their testimony.

OPTIONS FOR AMENDMENT OF THE PUBLIC RIGHT-OF-WAY PROVISIONS

Following are several options for amending the public rights-of-way provisions of the bills. The list is suggestive, rather than exhaustive; no doubt, additional options could be identified.

Options That Fully Address the Municipalities' Request

Options 1. and 2., in combination, restore current law, which appears to be the essence of the municipalities' request. Options 3. and 4. go one step beyond this, reinforcing other state and federal laws.

1. Delete from s. 66.0420 (4), Stats., created by the bills, the provision that, notwithstanding s. 66.0425, Stats. (municipalities' authority to regulate excavation and construction in streets), no municipality may impose any fee or other requirement on a video service provider regarding the construction of its video service network. (Note: If you pursue this option, take care in drafting to not go beyond this intent by also deleting the prohibition on municipal requirements regarding build-out and discrimination.)

2. Delete s. 66.0420 (7) (g), Stats., created by the bills, which provides that, if a video service provider makes the required franchise fee payments to a municipality, the municipality may not require the video service provider to pay any compensation under s. 66.0425, Stats., or any permit fee, encroachment fee, degradation fee, or any other fee, for the occupation of or work in the public rights-of-way.

3. In addition to item 1. or 2., or both, add language to specify that the privilege to occupy the public rights-of-way is subject to ss. 66.0425 and 182.017.

4. In addition to item 1. or 2., or both, add language to more closely parallel federal cable law, which requires a cable operator, in exercising its privileges in public rights-of-way, to: (a) protect the safety, functioning, and appearance of the property and the safety of the public; (b) bear the cost of the construction; and (c) compensate the land owner for any resulting damages. [47 USC s. 541 (a) (2).]

Options That Constitute a Compromise

Options 5. to 8. restore individual elements of the powers municipalities have under current law.

5. Allow municipalities to require video service providers to obtain street opening permits prior to excavating in rights-of-way. The statute could restrict the terms of a permit to prevent excessive restrictions on construction, and could set regulatory deadlines to prevent delays.

6. Allow municipalities to require video service providers to post bonds prior to excavating in rights-of-way, to ensure proper restoration. The statute could limit the amount of bonds; current law caps bonds at $10,000.

7. Allow municipalities to require video service providers to pay specified, limited fees for excavating in rights-of-way. Such a fee could be a permit fee for the privilege of occupying

the right-of-way, a degradation fee to represent the degradation that results from excavation, even with proper restoration, or another specified fee. The amount could be limited to a specified dollar amount or determined by a formula designed to prevent excessive fees.

8. Provide that a video service provider is liable for damages to persons or property that result from its occupation of the public rights-of-way.

Options Regarding Applicability of Other Statutes

As noted above, while the bills clearly indicate that the policy regarding occupancy of the public rights-of-way is notwithstanding s. 66.0425, they are silent regarding how these provisions relate to ss. 182.017 and 196.58. It is not clear if this was intentional or a drafting oversight. However, there is a distinction between these statutes. Section 66.0425 applies to a wide range of entities that construct facilities in the public rights-of-way, clearly including video service providers but explicitly excluding various types of telecommunications companies. Section 182.017 also applies to a wide range of entities, but entities that by and large provide utility services or the equivalent, particularly telegraph and telecommunications services, and s. 196.58 applies only to public utilities.

Clearly, video programming is not a telegraph or telecommunications service and video service providers are not, as such, public utilities, so it would appear that these statutes would be of no significance to the bills. However, a number of telecommunications utilities are providing or planning to provide video service over facilities that can, and may be, used for telecommunications services, as well. In addition, some cable operators now offer telecommunications services over their cable networks, and are regulated as public utilities in providing those services. To the extent that a video service provider's network is used to provide telecommunications services, the company installing it presumably is a telecommunications utility subject to ss. 182.017 and 196.58. For this reason, it would appear advisable to clarify the relationship between the public rights-of-way provisions of the bills and ss. 182.017 and 196.58. Options 9. to 11. address this subject.

9. Explicitly apply one or both of these statutes to video service providers.

10. Explicitly exclude video service providers from the provisions of one or both of these statutes (within the statutes themselves or by the "notwithstanding" mechanism used in reference to s. 66.0425).

11. Remain silent, on the theory that the statutes do not apply to video service providers in the first place. You would chose this option if you reject the argument made in the paragraph preceding this list of options.

If you have any questions regarding the options presented in this memorandum, please contact me at the Legislative Council staff offices.

DLL:ty


FORWARD
E PLURIBUS UNUM

Venskus, Katy

From: Rep.Zepnick
Sent: Wednesday, April 04, 2007 7:27 PM
To: Rep.Staskunas; Rep.Steinbrink; Rep.Soletski
Cc: Wilson, A.J.
Subject: Video Franchisie amendments

Attachments: video franch assembly dem amendments.doc

Tony, John, and Jim:

Sorry for whatever miscommunication took place at today's meeting. We had space and logistics issues and took Rep. Staskunas up on his offer to use his room.

I had in my head that members of the committee were going to meet today prior to inviting other feedback.

In my four short years here, I have never seen a bill that surpasses the Committee and goes straight to Caucus for feedback, amendments, etc.

Which is exactly where my frustration led today; realizing that their side has the votes, I am trying not to overpromise on issues that I have only so much control over.

companion to SB107

Having said that, my preference is that all amendments to AB 207 be coordinated through Energy and Utility members first and foremost; and I would appreciate anyone working on amendments to communicate that with me directly, as a courtesy to the ranking minority member.

I have had and will continue to have an open door policy on other member's concerns, all folks need to do is call me up and let me know what their issues are.

Given the magnitude of this bill and its implications, whether good or bad, it is important that we work as a team and continue to move things forward -- whether in committee or in Caucus or on the floor.

Attached is a summary of the concerns we discussed in today's meeting. There were a few overlap items which basically had the same language or overall intention.

I broke the issues into three categories: Consumer Protection, Municipal Oversight and PEG Channel programming.

In the next few days, I will be meeting with the following offices to discuss what if any amendments can pass both committee and Floor and be signed by Governor Doyle:

- Assembly leader Jim Kreuser
- Senate Chair Jeff Plale
- Assembly Chair Phil Montgomery
- Ron Hermes, Governor's Office

Thank you for your input--please do not hesitate to contact me with any questions or concerns. As soon as I have an update on amendments, date/time of Exec. Session, and any other pertinent information, I will be following up with members directly.

My office number is 608-266-1707 and my wireless is 414-708-9479.

Rep. Josh Zepnick
9th Assembly District
219, N. State Capitol
608-266-1707

Memorandum

To: Assembly Democrats-Energy & Utility committee

From: Rep. Josh Zepnick

RE: Potential Democratic amendments to Video Franchising bill, AB207

Date: 4/4/07

Consumer Protection

1. Transfer state oversight from DFI to DATCP.
2. Amend the clause of the bill that allows for automatic approval of franchise agreements. Insert 30 day review.
3. Require franchise applicants to submit proof of "financial, legal, and technical qualification."
4. Establish a once every 10-year review and renewal process so that a franchise agreement may be terminated where the video service provider has willfully and repeatedly violated federal, state or local law or regulations.
5. Amend section related to "allow a transfer without the review or approval of DFI/DATCP".

Municipal Oversight

1. Require video service provider to pay "audit fees" if a municipality experiences "underpayment" – i.e. less than 5% of gross revenues as defined in the bill.
2. Expand definition of gross receipts to include advertising and other non-subscriber revenues.
3. Make clear that municipal authority over right-of-way is preserved, including the right to collect street opening permit fees and require performance bonds, indemnification and insurance coverage, and other "management tools."
4. Video service providers must comply with all local codes and laws regarding right-of-way occupancy.
5. Require existing cable operators to honor existing contracts with municipalities until competition enters the market.

Public Educational and Government (PEG) Access Channels

1. Require video providers to either pay municipalities 1% of gross receipts or match PEG financial commitments under the incumbent's franchise agreement, *whichever is greater.*
2. Require video service provider to carry PEG programming to the headend or the video hub at **its** expense and to interconnect with its competitor's network where necessary to make PEG programming available to ALL subscribers via a quality signal.


FORWARD
E PLURIBUS UNUM

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR JEFF PLALE AND REPRESENTATIVE PHIL MONTGOMERY

FROM: David L. Lovell, Senior Analyst

RE: Video Franchise Legislation in Four States; Comparison of Provisions Regarding Issuance of Franchises

DATE: April 5, 2007

This memorandum compares four states' video franchise legislation with regard to the process by which franchises are issued. The four states compared are Wisconsin, California, Missouri, and Texas. The Wisconsin legislation described is your legislation, 2007 Senate Bill 107 and Assembly Bill 207. The legislation from California, Missouri, and Texas is, in each case, recently enacted law, which is identified in the table by statutory citations. The memorandum was prepared at the request of your staff.

The comparison is contained in the attached table. While most of the table is self-explanatory, the categories captioned "Review and Approval" and "Administrative Oversight/Revocation" warrant comment. These categories are intended to reflect the degree to which the legislation allows the franchising authority to exercise discretion in approving, renewing, or revoking franchises based on the content of applications or the performance of franchise holders. They do not reflect the franchising authorities' roles in enforcing the respective laws. In the Wisconsin legislation, the franchising authority has no enforcement role, while the franchising authorities in each of the other states has at least some enforcement responsibility.

If you have questions regarding the attached table, please contact me at the Legislative Council staff offices.

DLL:wu

Attachment

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Video Franchise Legislation in Four States; Provisions Regarding Issuance of Franchises

	WISCONSIN	CALIFORNIA	MISSOURI	TEXAS
	2007 Assembly Bill 207 and 2007 Senate Bill 107	Division 2.5, California Public Utilities Code	Sections 67.2675 to 67.2714, Revised Statutes of Missouri	Chapter 66, Texas Utilities Code
Franchising Authority	Department of Financial Institutions (DFI)	Public Utilities Commission (PUC)	Public Service Commission (PSC)	Public Utilities Commission (PUC)
Application	A. Information identifying: 1. The applicant's place of business, officers, and authorized representatives 2. The applicant's video franchise area 3. The date the applicant will commence service B. Affidavit stating that the applicant: 1. Will comply with applicable state and federal laws 2. Has made or will make required filings to the FCC prior to offering service 3. Is technically, financially, and legally qualified to provide service	A. Information identifying: 1. The applicant's name, place of business, officers, and parent company (if any) 2. The applicant's service area 3. The date the applicant will commence service B. Adequate assurance that the applicant is technically, financially, and legally qualified to provide service C. Affidavit stating that the applicant: 1. Has made or will make required filings to the FCC prior to offering service 2. Will comply with applicable state and federal laws, including list of specified provisions of this statute	Affidavit identifying the applicant's service area, place of business, and officers and stating that the applicant: 1. Will comply with applicable state and federal laws, including referenced statutes regarding public rights-of-way 2. Has made or will make required filings to the FCC prior to offering service 3. Is technically, financially, and legally qualified to provide service	Affidavit identifying the applicant's service area, place of business, and officers and stating that the applicant: 1. Will comply with applicable state and federal laws 2. Will comply with local regulation of the use of public rights-of-way 3. Has made or will make required filings to the FCC prior to offering service

	WISCONSIN	CALIFORNIA	MISSOURI	TEXAS
		3. Will comply with municipal regulations regarding public rights-of-way, including permit and fee requirements 4. Will concurrently provide the application to every municipality where it will provide service		
Application Fee	None	Fee equal to cost of processing application	None	None
Review and Approval	DFI must determine if application is complete within 10 days of receipt DFI must issue franchise within 10 days of receipt of complete application Franchise issued by default if DFI does not issue franchise within 10 days of receipt of complete application No review of substance	PUC must determine if application is complete within 30 days of receipt PUC must issue franchise within 14 days of finding that application is complete Franchise issued by default if PUC does not issue franchise within 44 days of receipt of application No review of substance PUC may not issue a franchise if the franchise holder is in violation of court order related to video service regulations	PSC must issue franchise within 30 days of receipt of affidavit No review of substance	PUC must determine if application is complete within 15 days of receipt PUC must issue franchise within 17 days of receipt of complete application No review of substance

	WISCONSIN	CALIFORNIA	MISSOURI	TEXAS
Expansion of Service Area or Transfer of Franchise	Franchise holder may expand video franchise area or transfer franchise Must notify DFI and municipalities No review or approval	Franchise holder may expand service area or transfer franchise In case of transfer, must honor any existing collective bargaining agreements No review or approval	Franchise holder may expand service area or transfer franchise Must notify PSC and municipalities No review or approval	Franchise holder may expand service area or transfer franchise Must notify PUC and municipalities No review or approval
Term of Franchise	Does not expire; franchise holder may terminate franchise	10 years; franchise holder may terminate franchise	Does not expire; franchise holder may terminate franchise	Does not expire; franchise holder may terminate franchise
Administrative Oversight; Revocation	None	PUC may not renew a franchise if the franchise holder is in violation of court order related to video service regulations	PSC may revoke franchise "[i]n the case of repeated, willful, and material violations" of service standards in law	None
Other Provisions	DFI prohibited from adopting rules	PUC may require a holding company to obtain a single state franchise on behalf of all of its subsidiaries		


FORWARD
E PLURIBUS UNUM

Venskus, Katy

From: Lovell, David
Sent: Friday, April 06, 2007 11:51 AM
To: Brady, Kevin; Browne, Michael; Groves, Monica; Kanninen, Dan; Tuschen, Terry; Rosser, Lewis; Engel, Andrew; Kramer, Zac; Pertl, Jeffrey; McGuire, Paula; Venskus, Katy; Cox, Gerald; Wadd, Jay; Genrich, Eric
Cc: Konopacki, Larry; Stolzenberg, John
Subject: FW: Error in briefing on SB 107

To Senate Democratic staff:

At the briefing yesterday on SB 107, I made a significant error in describing the provisions regarding PEG channels. As I recall, Eric Engel corrected me, but I want to be sure that you all have the correct and complete explanation.

Under the bill, a community that does not currently have any PEG channels will be guaranteed 2 PEG channels if its population is under 50,000 or 3 PEG channels if its population is 50,000 or greater. This applies in a community where there is no current cable service ***and*** in a community where there is cable service but the municipal franchise does not include any provision for PEG channels.

A community that currently has PEG channels keeps that number of PEG channels, whatever the number is.

SO, as the bill is currently written:

If you have no PEG channel, you get 2 or 3 PEG channels, depending on your population.

If you have 1, 2, or 3 PEG channels, you get 1, 2, or 3 PEG channels, regardless of your population.

If you have more than 3 PEG channels, you keep them all.

I erroneously stated that a community would get the ***lesser*** of 2 or 3 channels, depending on population, or the current number of channels. This is the way the bill treats franchise fees -- the lesser of 5% or the percentage you are currently receiving -- but PEG channels are treated differently. The correct explanation is that the community keeps its existing number of PEG channels.

I also erroneously stated that a community where there is cable service but the municipal franchise does not include any provision for PEG channels would be left at 0 PEG channels. The correct explanation is that such a community is treated the same as a community with no cable service -- i.e., it gets 2 or 3 PEG channels, depending on population.

To complete the explanation, there is one nuance I did not mention yesterday. Under the bill, if a video service provider distributes its programming to more than one municipality through a single "headend or video hub office," the municipalities' populations are added together to determine the number of PEG channels, and the municipalities will be allowed that number of PEG channels ***collectively***. This exception applies only to municipalities that do not currently have any PEG channels; it does not change the provision allowing communities to keep the number of PEG channels they currently have.

I hope this clarifies these provisions, and I apologize for any confusion over this.

David

p.s. Thanks to Paula for helping me compile this distribution list. If you notice that I have omitted anyone, please forward it to that person. Thanks.

David L. Lovell, Senior Analyst
Wisconsin Legislative Council Staff
608/266-1537

Venskus, Katy

From: Lovell, David
Sent: Wednesday, April 04, 2007 9:33 AM
To: Venskus, Katy; Raschka, Adam
Cc: Stolzenberg, John
Subject: Public rights-of-way

Katy, Adam,

After my memo on rights-of-way was finished and delivered, Claire Silverman, attorney for the League of Wisconsin Municiopalities, returned a call I had left earlier (not a whole lot earlier, in her defense) about ***other*** statutes that address the use of public rights-of-way. She pointed out s. 62.14, regarding cities' boards of public works. Sub. (6) of that section addresses such boards' powers and duties. It is similar in nature to the other statutes I describe in the memo. Here is the text:

> **62.14 Board of public works.**
>
> **(6) Duties and powers.**
>
> **(a)** *In general.* It shall be the duty of the board, under the direction of the council, to superintend all public works and keep the streets, alleys, sewers and public works and places in repair.
>
> **(b)** *Unusual use of streets.* No building shall be moved through the streets without a written permit therefor granted by the board of public works, except in cities where the council shall, by ordinance authorize some other officer or officers to issue a permit therefor; said board shall determine the time and manner of using the streets for laying or changing water or gas pipes, or placing and maintaining electric light, telegraph and telephone poles therein; provided, that its decision in this regard may be reviewed by the council.
>
> **(c)** *Restoring streets.* In case any corporation or individual shall neglect to repair or restore to its former condition any street, alley or sidewalk excavated, altered or taken up, within the time and in the manner directed by the board, said board shall cause the same to be done at the expense of said corporation or individual. The expense thereof, when chargeable to a lot owner, shall be certified to the city clerk by the board, and if not paid shall be carried into the tax roll as a special tax against the lot.

We should keep this statute in mind as we consider how to address public rights-of-way. Let me know if you would like me to revise the memo to reflect it.

David

David L. Lovell, Senior Analyst
Wisconsin Legislative Council Staff
608/266-1537

Venskus, Katy

From: Lovell, David
Sent: Tuesday, April 03, 2007 11:41 AM
To: Venskus, Katy; Raschka, Adam
Cc: Stolzenberg, John; Kunkel, Mark
Subject: Large telco video service providers

Adam & Katy,

Before leaving for vacation today, John asked me to send this message to you and to research one more point. Here's his message:

Adam and Katy,

I talked briefly to Lorenzo Cruz regarding CenturyTel's concerns over their potential inclusion in the build out/access to service requirements in AB 207 [page 27, lines 4 to 17]. Their concerns are based upon their reading of the text of the bill:

- These requirements apply to a "large telecommunications video service provider."
- A large telecommunications video service provider is a type of telecommunications video service provider that has at least 500,000 residential access lines in Wisconsin, and a telecommunications video service provider is a type of video service provider.
- The definition of "video service provider" on page 15, lines 5 to 7 is:

> "Video service provider" means a person, including an incumbent cable operator, who is issued a video service franchise or an affiliate, successor, or assign of such a person.

- CenturyTel reads the reference to an "affiliate" in the definition of "video service provider" as potentially including in the access line count the number of residential access lines from all of its affiliate utilities in Wisconsin (presumably all of these utilities either are, or will be, providing video service to meet the definition of telecommunications video provider – I did not verify with Lorenzo whether this is the case for CenturyTel).
- If all of CenturyTel's residential access lines are added together, then in the near future it will likely exceed 500,000 access lines.

CenturyTel's solution is to change the definition of "large telecommunications video service provider" to require such as provider to have had on January 1, 2007 500,000 basic local exchange access lines in this state.

If one agrees with CenturyTel's reading of these definitions, then the ambiguity created by the inclusion of "affiliate" in the definition of "video service provider" raises questions on the meaning of other provisions in the bill.

For example, application of CenturyTel's reading would apply the discrimination prohibition in the bill to the collective area of video franchise area of the video service provider plus the video franchise areas of the provider's affiliates who are other video service providers.

One remedy for this broader problem, that would also address CenturyTel's problem with the build out requirement, is to delete "affiliate" from the definition of "video service provider." However, I suspect that this would have effects that I am not aware of on the applicability of other provisions in the bill.

Please advise David and me if you would like any other amendment prepared to address any problems or ambiguities created by the inclusion of "affiliate" in the definition of "video service provider."

John

As an additional matter, John noted and I confirmed with Mike Varda (PSC attorney) another potential issue.

The telco price regulation statute (s. 196.196) creates the "large" category as a telco with more than 500,000 access lines. Everyone knows that this includes only AT&T; both TDS and CenturyTel are approaching this number, but since they are holding companies of smaller telcos, none of which reaches this threashhold, they are not likely to become "large."

The Bills also create a "large" category, the defined term, "large teleommunications video service provider," which is a telco video service provider that has more than 500,000 *basic local exchange* access lines. This is not the same thing. "Access lines," as used in s. 196.196, includes residential and business lines; basic local exchange access lines, as used in the bills, excludes business lines and, according to Mike, also excludes residential lines used to deliver a bundled service, i.e., any lines used for local residential telephone service bundled with long-distance, Internet, video, or anynother service.

Given this, I cannot say whether the term used in the bill includes AT&T or not. I doubt it is what the requesters wanted, in any case.

Let me know how you want to proceed and whether we should contact, e.g., Scott VanderSanden to ask about this.

David

David L. Lovell, Senior Analyst
Wisconsin Legislative Council Staff
608/266-1537


FORWARD
E PLURIBUS UNUM

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR JEFF PLALE

FROM: David L. Lovell, Senior Analyst

RE: Typical Components of a Permit Application Process

DATE: April 10, 2007

SB107?

This memorandum, prepared at the request of your staff, presents an outline of typical elements of a process for a regulated entity to apply to a state agency for a permit, license, or other approval and for the agency's review and action on the application. The extent of required procedures and the detail of the statutes vary greatly, depending on the approval in question. The following outline presents only the major components of a typical process.

I. Application
   a. Require application for approval
   b. Specify contents of application

II. Review and Approval by Agency
   a. Determination of completeness
   b. Review
      i. May specify criteria for substantive review
   c. Approval or denial
      i. May require approval if application is complete
      ii. May require approval if agency makes specified findings
      iii. May allow agency discretion whether to approve or deny, based on substantive review
      iv. May allow approval with modifications or conditions, based on substantive review
   d. May include hearing

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e. May include timeline or deadlines for agency actions

f. May include specific appeal process

i. Specify standards of review upon appeal

ii. (All administrative decisions are reviewable under Ch. 227, Stats.)

III. Public Notice

a. To affected parties, e.g., municipalities

b. Regarding

i. Receipt of application

ii. Hearing or public comment opportunity

iii. Decision

IV. Reporting Requirements

a. For enforcement purposes

b. For policy purposes (e.g., to know how complete service availability is)

V. Renewal

a. May be automatic in absence of complaints or violations

b. May be a repeat of original application process

VI. Revocation

a. Specify basis for revocation

i. Violation of specified rules, pattern of non-compliance, etc.

b. Specify process for revocation

i. May be upon complaint or on agency's own motion

ii. Include opportunities for hearing and appeal

VII. Rules

a. Application form

b. Details of application and review process

c. Additional review criteria

d. May limit rule-making authority to listed topics

If you have questions regarding this outline, please contact me at the Legislative Council staff offices.

DLL:ty


FORWARD
E PLURIBUS UNUM

Venskus, Katy

From: Lovell, David
Sent: Thursday, April 12, 2007 10:02 AM
To: Venskus, Katy
Cc: Stolzenberg, John; Kunkel, Mark
Subject: Drafting instructions

SB 107?

Katy,

John and I delivered your instructions for draft amendments to Mark K. yesterday. In the course of discussing the amendments with Mark, a couple questions came up, which require your response:

1. ***Question:*** should the bill allow the PSC to assess a video service provider for the cost of reviewing the video service provider's complaint under 182.017 that a municipality has imposed unreasonable requirements on its use of the municipality's rights-of-way?

Explanation: Of the three statutes that address the use of public rights-of-way (66.0425, 182.017, and 196.58), we are using 182.017. We are adding to it a provision to allow a video service provider to complain to the PSC that a municipal requirement regarding its use of the right-of-way is unreasonable. 196.58 includes such a provision, and we expect that the PSC will apply the concepts in its rules under 196.58 to review complaints under the new provisions of 182.017. In addition, 196.04 includes similar provisions regarding the need for utilities ***and cable operators*** to cross privately-owned rights-of-way (e.g., railroads' or other utilities' rights-of-way).

In general, the PSC's budget is derived from assessments on the entities it regulates, under s. 196.85. It makes general assessments against utilities in each category of utility and, to the extent practicable, makes specific assessments against individual entities to recover the cost of proceedings specific to that entity. It can (and I assume does) make specific assessments to recover the cost of proceedings to review complaints by utilities under 196.58 and to review complaints by utilities and cable operators under 196.04.

The bill amends both 196.04 and 196.85 to refer to "video service providers" instead of "cable operators."

It would appear to be consistent with current law and the bill to give the PSC authority to assess video service providers for the cost of reviewing complaints under the new provision of 182.017. If you agree, Mark will draft this as part of the public rights-of-way amendment.

2. ***Question:*** (much simpler) Should the amendment that expands applicability of the video privacy statute (134.43) to video service providers (which is being drafted confidentially for you alone) also apply that statute to satellite service providers (or "multichannel video program distributors," to use the term in the draft which includes cable, telco, & satellite)?

Comment: If you decide to go forward with this amendment (with or without satellite), you might want to roll it into the consumer protection amendment. This would not disguise it, but would cast it as consumer protection -- which seems to me a legitimate characterization of it.

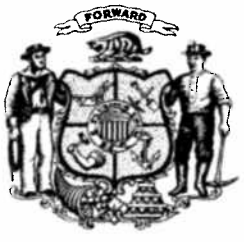
Please respond as soon as you can, so that we can get back to Mark.

Thanks --

David

David L. Lovell, Senior Analyst
Wisconsin Legislative Council Staff
608/266-1537


WISCONSIN STATE LEGISLATURE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WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR JEFF PLALE AND REPRESENTATIVE PHIL MONTGOMERY

FROM: Larry Konopacki, Staff Attorney LAK

SB 107?

RE: Federal Preemption of State Consumer Protection Regulations Applied to Satellite Providers

DATE: April 12, 2007

This memorandum assesses whether a state is preempted from applying consumer protection requirements to direct broadcast satellite (DBS) video providers.[1]

Congress has granted authority to the Federal Communications Commission (FCC) to regulate DBS services. It is arguable that this authority does not include consumer protection issues, leaving the state free to regulate these matters.

Alternatively, Congress's grant of power to the FCC could be interpreted to authorize the FCC to create rules to regulate consumer protection with respect to this type of service. Even if this is the proper read of FCC authority, it does not appear that Congress also intended to completely preempt state regulation of DBS service. Therefore, state regulation of consumer protection matters would only be preempted to the extent that the state regulatory scheme conflicts with FCC consumer protection rules. At this time, it does not appear that the FCC has created rules generally regulating consumer protection with respect to DBS service. Therefore, the state should be free to implement consumer protection regulations for DBS service.

In summary, it appears that the state has the authority, at this time, to implement consumer protection standards for DBS providers along with other types of video services. More detail of how this conclusion was reached is provided below. It is important to note that the division of regulatory authority between the state and the federal government in telecommunications regulation is an extremely complex area of the law. A recent 7th Circuit Court of Appeals decision stated that Congress's goal of fostering competition in this industry under the Telecommunications Act of 1996 (1996 Act) has been

[1] One of the primary rules interpreted in this memorandum is 47 C.F.R. 1.4000, which regulates "direct broadcast satellite service" which includes "direct-to-home satellite service." As used in this memorandum, the term "DBS" also includes both of these terms.

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successful, but this success "has not come without furrowing more than a few brows as lawyers and judges puzzle over the Act's unusual – and unequal – blending of federal and state authority." [*Indiana Bell v. IURC*, 359 F.3d 493, 494 (7th Cir. 2004).] Because of the complicated nature of this jurisdictional divide, it is difficult to identify every argument that could be made on either side, or to predict with any certainty whether a court would agree with the conclusions reached in this memorandum.

FEDERAL PREEMPTION STANDARD

State law is generally preempted by federal law in the following three circumstances: (1) Congress has explicitly stated its intention to preempt state law; (2) a state law regulates conduct in a field that Congress intended the federal government to occupy exclusively; or (3) state law conflicts with federal law. [*English v. GE Co.*, 496 U.S. 72, 78-79 (1990).] The following section will assess each of these three types of preemption with respect to the statute providing the FCC its jurisdiction over DBS service.

FCC'S STATUTORY AUTHORITY

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This express preemption of local authority, and its absence from 303 (v) which was created by the same act of Congress, suggests that Congress did not intend 303 (v) to preempt state regulation related to DBS service.

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Section 303 (v) could also be read more narrowly. The words "provision" and "distribution or broadcasting" could be read to limit the scope of this exclusive jurisdiction only to technological and physical matters such as frequencies of transmissions, signal strength, hardware requirements, or other aspects of the actual provision of the service, and not underlying business and public protection concerns such as consumer protection and the collection of taxes or fees for services provided.

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In summary, it appears that a court would not construe 303 (v) to explicitly preempt state consumer protection regulation of DBS service, regardless of whether the FCC's grant of authority under 303 (v) would be construed broadly or narrowly.

Exclusive Occupation of the Field

The second type of preemption applies when a state law regulates conduct in a field that Congress intended the federal government to occupy exclusively. Section 303 (v) does not appear to be a mandate from Congress directing the FCC to exclusively occupy the field of regulation of DBS service. Congress included the following direction in the 1996 Act:

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If 303 (v) had been intended to *fully preempt* states from regulating DBS service, it would not have been necessary for Congress to direct the FCC to promulgate regulations barring states and others from creating restrictions impairing the reception of DBS service.

The FCC seems to agree. It has created rules under this section which generally prevent restrictions under state or local laws, private covenants, contracts, or other private agreements that impair the installation, maintenance, or use of a DBS antenna. [47 C.F.R. 1.4000 (a).][3] However, even these rules are not exclusive. They do not prohibit all state and local regulations related to DBS service, only those in this defined category. In addition, the FCC has included exceptions allowing "local restrictions" necessary for safety or historical preservation.

In a case in the Federal District Court for the District of Kansas, the state was asserting authority to apply its consumer protection standards to a DBS provider. The court found that complete federal preemption of DBS regulation is impossible on its face because of the recognition of continued state authority, and therefore a lack of complete preemption, in these FCC rules. [*Kansas v. HCC*, 35 F. Supp. 2d 783, 788 (D. Kan. 1998).] The only question in this case was whether there was complete preemption necessary to invoke federal jurisdiction. Note that the party arguing in favor of complete preemption in this case apparently did not brief this issue beyond simply asserting preemption, so this does not shed much light on how a court would respond if these arguments were actually developed.

The FCC also noted the following in the federal register during the promulgation process for these rules: "*Not all antenna restrictions are preempted.* 3. Two petitions for reconsideration argued that the Commission improperly failed to preempt all restrictions on viewers' ability to install, maintain, or use (a DBS antenna or other covered antennae). In this Order, the Commission reaffirms the conclusion in the Report and Order that Congress intended that the Commission exercise its discretion when determining which restrictions should be preempted. . . ." [63 FR 67422, Dec. 7, 1998 (emphasis in original).]

In short, the second part of the preemption test is probably not satisfied because Congress does not appear to have intended the FCC to exclusively occupy this field of regulation, a premise that finds support in the FCC's own rules and commentary.

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State law is also preempted to the extent it actually conflicts with federal law. This type of preemption would apply where "it is impossible for a private party to comply with both state and federal

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There appear to be few instances in which Congress has prescribed consumer protection standards on DBS providers. Some federal requirements do exist that are at least marginally related to consumer protection. For instance, federal law does require that no more than 10 ½ minutes of commercial programming be played per hour of children's programming on weekends. [47 C.F.R. 25.701 (e).] A state law could not conflict with this or other federal requirements. However, because few federal regulations seem to exist that related to consumer protection for DBS services, there is not much opportunity for a state consumer protection scheme to cause a conflict.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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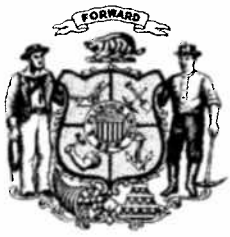
FORWARD

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR JEFF PLALE AND REPRESENTATIVE PHIL MONTGOMERY

FROM: Larry Konopacki, Staff Attorney

RE: Federal Preemption of State Consumer Protection Regulations Applied to Satellite Providers

DATE: April 12, 2007

$107?

This memorandum assesses whether a state is preempted from applying consumer protection requirements to direct broadcast satellite (DBS) video providers.[1]

Congress has granted authority to the Federal Communications Commission (FCC) to regulate DBS services. It is arguable that this authority does not include consumer protection issues, leaving the state free to regulate these matters.

Alternatively, Congress's grant of power to the FCC could be interpreted to authorize the FCC to create rules to regulate consumer protection with respect to this type of service. Even if this is the proper read of FCC authority, it does not appear that Congress also intended to completely preempt state regulation of DBS service. Therefore, state regulation of consumer protection matters would only be preempted to the extent that the state regulatory scheme conflicts with FCC consumer protection rules. At this time, it does not appear that the FCC has created rules generally regulating consumer protection with respect to DBS service. Therefore, the state should be free to implement consumer protection regulations for DBS service.

In summary, it appears that the state has the authority, at this time, to implement consumer protection standards for DBS providers along with other types of video services. More detail of how this conclusion was reached is provided below. It is important to note that the division of regulatory authority between the state and the federal government in telecommunications regulation is an extremely complex area of the law. A recent 7th Circuit Court of Appeals decision stated that Congress's goal of fostering competition in this industry under the Telecommunications Act of 1996 (1996 Act) has been

[1] One of the primary rules interpreted in this memorandum is 47 C.F.R. 1.4000, which regulates "direct broadcast satellite service" which includes "direct-to-home satellite service." As used in this memorandum, the term "DBS" also includes both of these terms.

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successful, but this success "has not come without furrowing more than a few brows as lawyers and judges puzzle over the Act's unusual – and unequal – blending of federal and state authority." [*Indiana Bell v. IURC*, 359 F.3d 493, 494 (7th Cir. 2004).] Because of the complicated nature of this jurisdictional divide, it is difficult to identify every argument that could be made on either side, or to predict with any certainty whether a court would agree with the conclusions reached in this memorandum.

FEDERAL PREEMPTION STANDARD

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