



S.B. 67

123rd General Assembly
(As Introduced)

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BILL SUMMARY

- Establishes a state policy relating to regulation and competition in the provision of cable service.
- Imposes restrictions on the formation and funding of cable operators owned or operated by a municipal corporation or township or its affiliate.
- Designates the Public Utilities Commission (PUCO) as the franchising authority of governmental cable operators.
- Provides for the treatment of governmental cable operators as business entities and not as governmental entities, for taxation and other purposes.

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CONTENT AND OPERATION

Existing law; overview of the bill

In Ohio, no state agency regulates cable service, either public or private, although the Public Utilities Commission (PUCO) regulates the amount, terms, and conditions of rates payable for pole attachments and conduit use (sec. 4905.71). Cable regulation is effected in Ohio by municipal corporations acting as franchising authorities within their jurisdictions pursuant to home rule power (police power, authority to exercise all powers of local self-government) conferred by the Ohio Constitution (Article XVIII, Sections 3 and 7). Additionally, townships may act as franchising authorities within their jurisdictions under specified circumstances established by statute (secs. 505.90 to 505.92).

This exercise of municipal and township authority is limited by federal cable law (47 U.S.C.A. 521, et seq.) and associated administrative rules. The federal law covers such matters as the use of cable channels and cable ownership restrictions, subscriber privacy, consumer protection, and franchising and regulation of cable service. That law also prohibits a cable operator from providing cable service without a franchise (47 U.S.C.A. 541(b)(1)). "Cable operator" is defined to include a governmental entity (47 U.S.C.A. 522(5) and (15) and sec. 1771.01(B); also see **COMMENT**).

Under federal law and the bill, a "franchising authority" is a governmental entity authorized to grant a franchise under federal, state, or local law (47 U.S.C.A. 522(10) and sec. 1771.01(C)). A "franchise" is an initial authorization or authorization renewal issued by a franchising authority that allows the construction or operation of a cable system, whether that authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise (47 U.S.C.A. 522(9) and sec. 1771.01(C)). Federal law states that it does not prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority (47 U.S.C.A. 541(f)(1)). Further, it does not require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor (47 U.S.C.A. 541(f)(2)). "Multichannel video programming distributor" is defined as a person such as a cable operator, multichannel multipoint distribution service, direct broadcast satellite service, or television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming (47 U.S.C.A. 522(13)).

Generally, federal cable law permits franchise provisions and state and local laws that are consistent with federal law (47 U.S.C.A. 556(c)). Further, federal law does not affect state or local authority regarding matters of public health,

safety, and welfare, or state jurisdiction regarding cable services, to the extent consistent with federal cable law (47 U.S.C.A. 556(a) and (b)). It also does not alter or restrict application of any federal or state antitrust law (note to 47 U.S.C.A. 521). But federal law prohibits the regulation of a cable system as a common carrier or utility by reason of providing cable service (47 U.S.C.A. 541(c)).

The bill enacts new Revised Code Chapter 1771. governing the provision of cable service, amends various statutes in existing tax law, and establishes a state policy relating to cable service competition. The bill additionally prescribes a regulatory framework for "governmental cable operators." This regulatory framework has three major aspects, reflected in this bill analysis: (1) restrictions on the formation and funding of governmental cable operators, (2) designation of the PUCO as the franchising authority of governmental cable operators, and (3) treatment of governmental cable operators under law as business entities and not as governmental entities.

State policy

(sec. 1771.02)

The bill declares that it is the public policy of Ohio to do all of the following:

(1) Ensure fair competition in the provision of cable service in Ohio, consistent with the procompetitive policies of the federal Telecommunications Act of 1996, for the purposes of (a) providing the widest possible diversity of entertainment, information, and news sources to the general public, (b) advancing the unfettered exercise of rights under the First Amendment to the United States Constitution to free speech and the free flow of information, (c) enhancing the development and widespread use of technological advances in the provision of cable service, and (d) encouraging improved customer service at competitive rates;

(2) Ensure that all cable service is provided within a comprehensive and nondiscriminatory federal, state, and local tax and regulatory scheme;

(3) Allow the general public full and timely information, and the opportunity to participate in decisions, respecting the provision and funding of cable services by a municipal corporation or township or its affiliate. (See **COMMENT** for the definition of "cable service.")

Restrictions on the formation and funding of governmental cable operators

General limitations on the provision of cable service

(secs. 1771.01(A), (B), and (D) and 1771.03)

The bill states that the provision of cable service over a cable system is not an essential governmental function under Ohio law or the laws of any Ohio municipal corporation or township. Further, the provision of cable service by a municipal corporation or township or its affiliate is not a valid exercise of the police power unless that service is provided in accordance with the bill.

The bill prohibits a municipal corporation or township or its affiliate from providing cable service over a cable system, whether bundled or unbundled with other services, except as provided under the bill. It provides for the regulation of governmental cable operators. Under the bill, a "governmental cable operator" is a cable operator owned or operated by a municipal corporation or township or by its affiliate. (See **COMMENT** for definitions of "cable operator" and "cable system.") The bill expressly states that it does not confer authority on a municipal corporation or township to own or operate a governmental cable operator.

"Affiliate" is defined under the bill, pursuant to terminology in federal cable law, to mean an individual, partnership, association, joint stock company, trust, corporation, or governmental entity who owns or controls, is owned or controlled by, or is under common ownership or control with, such a "person." "Affiliate" expressly includes a public utility owned or operated by a municipal corporation or township, but excludes a governmental cable operator.

Incorporation of a governmental cable operator

(sec. 1771.04)

The bill has the effect of requiring a governmental cable operator to be incorporated under Ohio law as a for-profit or nonprofit corporation. It prohibits a governmental cable operator from providing, within the jurisdictional boundaries of a municipal corporation or township, cable service over a cable system unless the governmental cable operator is incorporated as a for-profit or nonprofit corporation organized under existing law (Chapter 1701. or 1702.) and the municipal corporation or township or its affiliate is the sole shareholder or the sole member of the governmental cable operator.

Conditions on the formation of a governmental cable operator

(secs. 1771.01(E) and (G) and 1771.05)



The bill establishes a number of conditions on the formation of a governmental cable operator, including requirements for legislative action and a feasibility study, and restrictions on the use of public moneys and of revenues of affiliates.

Specifically, the bill prohibits a governmental cable operator from being formed by a municipal corporation or township or its affiliate except upon legislative action expressly authorizing that formation in compliance with the bill. Further, it prohibits public moneys or property of the municipal corporation or township or its affiliate from being used in the formation of a governmental cable operator except pursuant to an appropriation, in that same or related legislative action, from the unrestricted fund balance of the municipal corporation or township or its affiliate for the exclusive purpose of making a loan to, or contribution to the capital of, the governmental cable operator. "Public moneys" is defined as all moneys in the treasury of a municipal corporation or township or its affiliate or moneys coming lawfully into the possession or custody of such entity's treasurer.

The bill defines "legislative action," in the case of a municipal corporation, as the enactment of an ordinance by the legislative authority of the municipal corporation and, in the case of a township, the adoption of a resolution by the board of township trustees. The bill prohibits a legislative action from being taken without the legislative authority of that municipal corporation or township first finding all of the following:

- (1) The provision of cable service by the governmental cable operator will promote the competitive provision of improved cable service to citizens of the municipality or township;
- (2) The appropriation of public moneys for the purpose of having cable service provided by the governmental cable operator will be of greater general benefit to the community than other authorized uses of those moneys;
- (3) The governmental cable operator will be self-sustaining after receipt of the appropriated moneys.

The legislative action must be preceded by the completion of a public hearing concerning the findings of a feasibility study authorized and completed under the bill (see "*Specifications and requirements for a feasibility study,*" below). The hearing must be held by the legislative authority not more than 60 days after the filing of the feasibility study in accordance with the bill.

The legislative authority must publish notice of the hearing in accordance with the bill (see "**Public notices, inspection, and copying**," below). The notice must state the time and place of the hearing and contain a summary of the conclusions of the feasibility study, including the estimated amount of public moneys to be loaned or contributed by the municipal corporation or township or its affiliate to the operator. The notice also must contain a statement that the study is available for public inspection and copying in accordance with the bill and a statement of the location and office hours of the relevant office.

These restrictions on the formation of a governmental cable operator do not apply to a governmental cable operator operating prior to the bill's effective date.

Specifications and requirements for a feasibility study

(sec. 1771.06)

The bill prohibits a municipal corporation or township or its affiliate from funding a feasibility study for the purpose of forming a governmental cable operator except upon legislative action expressly authorizing the study and appropriating from the unrestricted fund balance of the municipal corporation, township, or affiliate public moneys sufficient to pay all costs of conducting the study and preparing and presenting a report on the study conclusions. No such legislative action may be taken without the legislative authority first finding that there is a substantial likelihood that the standards specified in (1) and (2) of "**Conditions on the formation of a governmental cable operator**," immediately above, will be met.

The bill requires that legislative action to authorize and fund a feasibility study must be preceded by a public hearing on the question of the legislative action. The legislative authority must publish notice of the hearing in accordance with the bill (see "**Public notices, inspection, and copying**," below). The notice must state the time and place of the hearing and contain the text of the proposed ordinance or resolution and a summary of it, including the amount of the proposed appropriation.

The feasibility study must address all of the following:

(1) The public purposes to be served by the provision of cable service to all or some of the residents of the municipal corporation or township by a governmental cable operator;

(2) The nature and likelihood of improvements and detriments to the provision of cable service to such residents that are expected to result, directly or

as the result of enhanced competition, from provision of cable service by a governmental cable operator;

(3) The projected costs of establishing, equipping, and operating a cable system and providing cable service to the residents of the municipal corporation or township by a governmental cable operator;

(4) The amounts, sources, and terms of required financing, including the amounts, timing, and terms of any loans or capital contributions to the governmental cable operator by the municipal corporation or township or its affiliate;

(5) The projected operating results of the governmental cable operator for each of its first five years of operation, or until it is projected to be financially self-sustaining, whichever is later; the projections must be supported by a marketing study;

(6) The managerial, technical, financial, and legal capabilities of the governmental cable operator to provide competitive cable service;

(7) The governmental cable operator's compliance with applicable federal, state, and local laws.

The study also must include a conclusion regarding whether a governmental cable operator formed by a municipal corporation or township or its affiliate would provide cable service that is competitive in technology, programming, rates, and customer service and would be financially self-sustaining. Upon completion of the study, it must be filed and available for public inspection and copying as provided under the bill.

Restrictions on ongoing assistance to a governmental cable operator

(secs. 1771.07 and 1771.08)

The bill places restrictions on the use of public moneys for, and the provision of other assistance to, a governmental cable operator on an ongoing basis. Specifically, it prohibits the provision of public moneys of the municipal corporation or township or its affiliate for loan or contribution to the capital of a governmental cable operator after its formation, except upon (a) the application of the governmental cable operator as described below, (b) subsequent legislative action authorizing an appropriation for that purpose from the unrestricted fund balance of the municipal corporation, township, or affiliate, and (c) a finding prior to that legislative action that the continued provision of cable service by the governmental cable operator will achieve all of the initial three objectives

specified in "Conditions on the formation of a governmental cable operator," above.

The legislative action must be preceded by a public hearing on the question of the legislative action. The legislative authority must publish notice of the hearing in accordance with the bill (see "Public notices, inspection, and copying," below). The notice must state the time and place of the hearing and contain a statement of the amount of the proposed appropriation, a statement that the application is available for public inspection and copying in accordance with the bill, and a statement of the location and office hours of the relevant office.

The application by the governmental cable operator for additional public funding must include all of the following:

- (1) Specification of the amount of additional funding requested;
- (2) Specification in reasonable detail of the purposes and costs to which that additional funding will be applied;
- (3) Comparative, audited financial statements for the governmental cable operator, including balance sheets and statements of results of operations and cash flow, for its two most recently completed fiscal years;
- (4) A projection of the operating results of the governmental cable operator, assuming such additional funding is loaned or contributed, for each of its following three years of operation, or until it is projected to be financially self-sustaining, whichever is later, which projections must be supported by a marketing study;
- (5) If any part of the additional funding is to be made by loan, specification of the applicable interest rate and terms of repayment.

The application must be filed with and available for public inspection and copying as provided under the bill at least 30 days prior to the public hearing. The legislative authority must publish notice of the time and place of the public hearing in accordance with the bill, together with a statement of the amount of additional public funds to be loaned or contributed by the municipal corporation or township or its affiliate to the governmental cable operator, a statement that the application is available for public inspection and copying in accordance with the bill, and a statement of the location and office hours of the relevant office.

The bill further prohibits a municipal corporation or township or its affiliate from making loans and contributions to the capital of a governmental cable operator as authorized under the bill except (a) in cash or (b) in the form of

property having a fair market value that, in the aggregate, does not exceed the unrestricted fund balance of the municipal corporation, township, or affiliate at the time of the loan or contribution. No such loan or contribution may be financed, in whole or in part, with debt or any obligation of the municipal corporation, township, or affiliate, whether the obligation is payable from general tax revenues or secured by the full faith and credit of the municipal corporation, township, or affiliate or otherwise. No municipal corporation or township or its affiliate may guarantee any obligation of the governmental cable operator, or pledge property or revenues as security for any obligation of the governmental cable operator, whether public property or otherwise, or general tax revenues or otherwise.

Additionally, no municipal corporation or township or its affiliate may make a loan to, provide services to, or permit the use of property it owns or operates by, a governmental cable operator except pursuant to a written agreement that (a) provides for repayment of the loan, for payment for those services, or for use at the fair market rate, and (b) establishes such other terms and conditions as would exist in an arms-length transaction for the making and repayment of such a loan, the provision of such services, or the use of such property by an unaffiliated third party. Further, no municipal corporation or township or its affiliate, directly or indirectly, by any device or method, may charge or receive a different amount from a governmental cable operator than it charges or receives from any other person for a like and contemporaneous right, interest, privilege, use, or service under substantially the same circumstances and conditions.

No municipal corporation or township or its affiliate, directly or indirectly, by any device or method, may use any sovereign authority it has under Ohio law for the benefit of a governmental cable operator in preference to any other person similarly situated.

The bill's restrictions on loans and contributions do not apply to a loan, contribution, guarantee, pledge, provision of services, or use of property authorized and in effect or rendered prior to the bill's effective date.

Public notices, inspection, and copying

(sec. 1771.09)

The bill sets forth certain details with respect to public notices and public inspection and copying. It provides that any required notice must be published in a newspaper of general circulation within the jurisdictional boundaries of the municipal corporation or township at least twice prior to the hearing date. The first publication must occur not less than 30 days, and the second must occur not more than seven days, prior to the hearing date. The publication must be made in

the body type of the newspaper under headlines in 18-point type. The chief legal officer of the political subdivision must review the notice prior to forwarding it for publication, to ensure that the notice is legally accurate and sufficient. No newspaper may be paid a higher price for such publication than its maximum bona fide commercial rate.

The bill further provides that any document required by the bill to be available for public inspection and copying must be filed with the office of the clerk of the municipal corporation or township. If no such office exists, the document must be filed in such other office as the applicable legislative action must specify. The document must be available in accordance with Ohio's existing public records law (sec. 149.43).

Existing cable operations of local governments

(Section 3)

The bill requires a political subdivision or its affiliate that is a cable operator on the bill's effective date to comply with the bill's incorporation provisions (see "**Incorporation of a governmental cable operator**," above), and to apply under the bill's provisions for a franchise from the PUCO (see "**PUCO as franchising authority for governmental cable operators**," below). These actions must be taken no later than six months after the bill's effective date.

Further, the bill provides that, notwithstanding the requirement to receive a franchise before operating a cable service, a governmental cable operator providing cable service over a cable system within Ohio on the bill's effective date may continue to provide that service until such time as the PUCO issues an order under the bill granting or denying the application or, if appealed, until a final order is issued pursuant to a judgment of the court as authorized under the bill.

PUCO as franchising authority for governmental cable operators

(secs. 1771.01(F) and 1771.10)

The bill prohibits a municipal corporation or township from being the franchising authority for a governmental cable operator of which the municipal corporation or township or its affiliate is the sole shareholder or member.

The bill further declares that the PUCO is the sole franchising authority for such a governmental cable operator. It grants the PUCO the power and jurisdiction to supervise and regulate governmental cable operators pursuant to the bill and consistent with the federal Telecommunications Act of 1996.

Under the bill, a governmental cable operator is prohibited from providing cable service, over a cable system in Ohio, exclusively to subscribers within the jurisdictional boundaries of the municipal corporation or township that is the sole shareholder or member of the operator or the municipal corporation or township the affiliate of which is the sole shareholder or member, without first obtaining a franchise from the PUCO. The application for the franchise must be in the form the PUCO must prescribe.

In determining whether to grant or deny a franchise to a governmental cable operator, the PUCO must give due consideration to all of the following factors:

- (1) The technical, managerial, and financial capabilities of the governmental cable operator to provide cable service over a cable system;
- (2) The quality of cable service to be offered by the governmental cable operator;
- (3) The technical and performance quality of the equipment to be used;
- (4) The proposed rates to subscribers;
- (5) Any other factors that the PUCO determines pertinent.

In an order granting a franchise, the PUCO must set the terms of the franchise. The terms must be consistent with the state policy specified in the bill (see "*State policy*," above). In setting terms consistent with that policy, the PUCO must consider all relevant factors or objectives, including, but not limited to, all of the following:

- (1) The terms and conditions of franchises issued to other cable operators providing cable service over cable systems constructed and operated within the jurisdictional boundaries of the municipal corporation or township;
- (2) Maintenance of just and reasonable rates, rentals, and charges;
- (3) Encouragement of innovation and technological advances;
- (4) Promotion of diversity and options;
- (5) Recognition of market forces;
- (6) Protection of consumers;
- (7) Promotion of the public welfare through public welfare-enhancing provisions;

(8) Recognition of efficient business practices.

In addition to those requirements, the terms of the franchise must include all of the following:

(1) A franchise fee determined as a percentage of the gross revenues of the governmental cable operator from the provision of cable services within the jurisdictional boundaries of the municipal corporation or township;

(2) Customer service requirements and consumer protection provisions;

(3) Obligations with respect to or in lieu of the provision of public, educational, or governmental access facilities and the provision of reduced-cost services to public, educational, or governmental entities commensurate with the interests of the community and the state policy specified in the bill, and obligations with respect to or in lieu of the provision of access to cable service to all households in the franchise area.

"Public, educational, or governmental access facilities" is defined for purposes of the bill as (a) channel capacity designated for public, educational, or governmental use, and (b) facilities and equipment for the use of such channel capacity (47 U.S.C.A. 522(16)).

Franchise fees must be deposited into the state treasury to the credit of the General Revenue Fund (GRF). Any such amounts paid into the GRF, but not expended by the PUCO for the purposes of carrying out its franchising duties, must be credited ratably by the PUCO, after first deducting any deficits accumulated from prior years, to each municipal corporation or township having within its jurisdictional boundaries a governmental cable operator with a franchise granted pursuant to the bill. The bill prohibits the municipal corporation or township or its affiliate from using moneys so received for a loan or capital contribution to a governmental cable operator, except in accordance with the bill's provisions (see "**Restrictions on ongoing assistance to a governmental cable operator**," above).

The PUCO must adopt rules to carry out its franchising power. The rules must include procedures for public hearings on franchise applications and on the terms of franchises granted by the PUCO, for addressing subscriber and community complaints regarding a franchisee, and for periodic reporting, audit, and inspection requirements for franchisees.

The bill states that nothing in it authorizes regulation, as a common carrier or utility, of a cable system providing cable service to the extent that regulation is

prohibited by federal law governing the provision of cable service (47 U.S.C.A. 541(c)).

Taxation of governmental cable operators and general status under Ohio law

(secs. 324.01, 718.01, 1771.11, 5701.08, 5709.08, 5709.10, 5709.11, 5709.12, 5709.121, 5733.01, 5739.01, and 5739.02)

The bill declares that a governmental cable operator is deemed to be engaged in a business activity for taxation and other purposes under Ohio law. Further, a governmental cable operator is not deemed under Ohio law to be a political subdivision for any purpose whatsoever.

The bill expressly authorizes the taxation of governmental cable operators under various tax statutes to which nongovernmental cable operators currently are subject, as follows.

Existing municipal income tax law (Chapter 718.) generally prohibits a municipal corporation from exempting, from a tax on income, compensation for personal services of individuals over 18 years of age or the net profit from a business or profession. The bill specifies that such net profit includes the net profit of a cable operator or a governmental cable operator as defined under the bill.

The bill also changes the definition of "business" as that term is used in existing state tax law (Title 57) and in the utilities service tax law (Chapter 324.). Under existing law, "business" includes all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations. The bill extends this term to cable operators or governmental cable operators, as defined under the bill.

The bill also changes the definition of "used in business" within the meaning of personal property used in business, for purposes of state tax law. In addition to other property currently identified as used in business, it adds personal property used by a cable operator or governmental cable operator to provide cable service over a cable system, as defined under the bill.

For the purpose of Ohio law governing the taxation of real and personal property, the bill changes the general tax exemptions granted for (a) public property used exclusively for a public purpose (sec. 5709.08), (b) certain types of public property (such as public grounds) of a municipal corporation or township used exclusively for public purposes or erected by taxation for such purposes (sec. 5709.10), (c) works, machinery, pipelines, and fixtures belonging to a municipal

corporation and used exclusively for conveying water, heat, or light (sec. 5709.11), and (d) certain real and tangible personal property of the state, or a county, township, or municipal corporation, used for charitable purposes (secs. 5709.12 and 5709.121). The bill states that these exemptions do not authorize an exemption for any real or personal property owned, operated, or used by a cable operator or a governmental cable operator as defined under the bill, or an exemption for any personal property used in business as redefined by the bill for purposes of state tax law.

The bill provides that the corporation franchise tax law (Chapter 5733.) also applies to each corporation that is a cable operator or governmental cable operator as defined under the bill.

Regarding the state sales and use tax (Chapter 5739.), the bill preserves the existing sales tax exemption granted to the transmission of interactive video programming by a cable television system as defined in township law, and includes in the exemption such transmission by a cable operator or governmental cable operator as defined under the bill. But the bill specifies that the general sales tax exemption granted for sales to the state or its political subdivisions does not exempt sales to governmental cable operators as defined under the bill.

COMMENT

The bill refers to federal definitions for a number of its terms.

"Cable operator" means any person or group of persons (a) who provides cable service over a cable system and directly through one or more affiliates owns a significant interest in such cable system, or (b) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system (47 U.S.C.A. 522(5)).

"Person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity (47 U.S.C.A. 522(15)).

"Cable service" means (a) the one-way transmission to subscribers of video programming or other programming service, and (b) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service (47 U.S.C.A. 522(6)).

"Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service that includes video programming and is provided to multiple subscribers within a community, but excludes (a) a facility that serves

only to retransmit the television signals of one or more television broadcast stations, (b) a facility that serves subscribers without using any public right-of-way, (c) a facility of a common carrier which is subject, in whole or in part, to federal common carrier law, except that such facility is a cable system (other than for purposes of the prohibition against regulating a cable system as a common carrier or utility) to the extent the facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services, (d) an open video system that complies with limitations under federal cable law regarding systems of local exchange carriers, or (e) any facilities of an electric utility used solely for operating its electric utility system (47 U.S.C.A. 522(7)).

HISTORY

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