



Sub. S.B. 67*

123rd General Assembly
(As Reported by S. Ways and Means)

**Sens. Hottinger, Finan, Wachtmann, Brady, DiDonato, Prentiss, Schafrath,
White, Oelslager**

BILL SUMMARY

- Establishes a state policy relating to competition between public and private providers of cable service.
- Provides that the bill does not affect existing law regarding a political subdivision's authority to own, lease, or operate a cable system, or grant a franchise to provide cable service.
- Imposes restrictions on political subdivisions that are public cable service providers or contract with a public cable service provider.
- Requires a public cable service provider to prepare and publish an annual report on its cable system and services.
- Provides that disputes under the bill may be submitted to arbitration.

TABLE OF CONTENTS

Existing law; overview of the bill.....	2
State policy	3
The effect of the bill on existing law	4
Restrictions on political subdivisions	4
General prohibitions.....	4
Limitation on providing cable service outside subdivision limits	5
Withholding requests about existing franchises	6

** This analysis was prepared before the report of the Senate Ways and Means Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

Limitations on expending public money for a cable system	6
Special fund requirement.....	8
Annual cable system report.....	8
Permissive arbitration.....	9
Grounds for a civil action	10

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 (R.C. 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 in federal law to include a governmental entity (47 U.S.C.A. 522(5) and (15); 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 R.C. sec. 1332.01(B)). 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 R.C. sec. 1332.01(B)). Federal law states that it does not prohibit a local or municipal authority that also is, 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 1332. governing the provision of cable service by a political subdivision of this state, and establishes a state policy relating to cable service competition.

State policy

(secs. 1332.01(C) and (I) and 1332.02)

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

(1) Ensure fair competition in the provision in Ohio of cable service over a cable system, 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 over a cable system, and (d) encouraging improved customer service at competitive rates;

(2) Ensure that all cable service over a cable system is provided within a comprehensive and nondiscriminatory federal, state, and local scheme. (See **COMMENT** for the definition of "cable service" and "cable system.")

The bill defines "cable service provider" as any person or group of persons that is engaged in the provision of cable service over a cable system and directly or indirectly owns a significant interest in the cable system, or that through any arrangement otherwise controls or is responsible for the management and

operation of the cable system. "Person" includes any individual, corporation, partnership, limited liability company, association, trust, or political subdivision.

The effect of the bill on existing law

(sec. 1332.03)

The bill states that nothing in it is a determination by the General Assembly that the provision of cable service over a cable system by a municipal corporation does or does not constitute a public utility under Article XVIII, §4 of the Ohio Constitution, which grants a municipality the right to own or lease any public utility to provide service to the municipality's inhabitants. Further, the bill states that it does not confer authority on a political subdivision of Ohio to own, lease, or operate a cable system or to provide cable service over a cable system; rather, that authority, if any, is as otherwise may be conferred by law.

The bill also states that, except as it expressly provides, it does not restrict the authority of a political subdivision, otherwise conferred by law, to grant a franchise to provide cable service.

Restrictions on political subdivisions

General prohibitions

(secs. 1332.01, 1332.04(A) and (B), and 1332.07)

The bill prohibits a political subdivision from providing cable service over a cable system, whether bundled with other services or unbundled, except in accordance with the bill. A political subdivision that is a public cable service provider or contracts with a public cable service provider (another political subdivision) for cable service is prohibited from doing any of the following:

(1) Preferring or advantaging any public cable service provider, or discriminating against any private cable service provider (any cable service provider other than a public one) in any material matter affecting the provision, within the jurisdiction of the political subdivision, of cable service over a cable system;

(2) Failing to pay all applicable fees, including, but not limited to, franchise fees, permit fees, pole attachment fees, or the equivalent of any such fees;

(3) Failing to apply any "private cable service regulation" without discrimination to a public cable service provider within the jurisdiction of the political subdivision. A "private cable service regulation" is any regulation, rule,

requirement, or restriction of or by a political subdivision of this state that applies, by resolution, ordinance, rule, regulation, franchising agreement, or otherwise, to the terms and conditions of service, conditions of access to public property, permits for pole attachments, or any other matter concerning or affecting the provision of cable service over a cable system by a private cable service provider.

The bill provides that nothing in (1) to (3), above, requires the application of a private cable service regulation to a public cable service provider if that application would be without legal or practical consequence, such as the application of a private cable service regulation requiring provision of an insurance bond, which would amount to requiring the political subdivision to insure its performance to itself.

A violation by a political subdivision of (1) to (3), above, whether as a franchising authority, public cable service provider, or otherwise, relieves any other cable service provider in the jurisdiction of the political subdivision from any obligation to comply with or perform any regulation, rule, requirement, or restriction that is the subject of the violation, and entitles any such other cable service provider to equivalent treatment, right, or benefit.

Limitation on providing cable service outside subdivision limits

(secs. 1332.01 and 1332.04(C))

Under the bill, a political subdivision that is a public cable service provider is prohibited from having "extraterritorial public cable service recipients" in excess of 50% of the number of public cable service recipients that reside within the geographical limits of the political subdivision. These recipients include any household or business that is outside the geographical boundaries of the political subdivision and that receives cable service or benefits from video programming service, transmission service, distribution service, repair service, billing service, or customer service that is provided by, originates from, or is controlled by a public cable service provider of the political subdivision. But this restriction does not prohibit public cable service providers from jointly owning and operating head-end equipment. Each such public cable service provider must pay that proportion of the full costs of owning and operating such head-end equipment, including the costs of construction, acquisition, installation, improvement, enhancement, modification, financing, maintenance, repair, and operation, equal to the total population of the political subdivision that is the public cable service provider divided by the total population of all political subdivisions that are public cable service providers jointly owning and operating the head-end equipment, determined annually or with such frequency as the public cable service providers otherwise agree.

Withholding requests about existing franchises

(sec. 1332.04(D))

Under the bill, no political subdivision that is a franchising authority may unreasonably withhold a request by a cable service provider to transfer, modify, or renew, in accordance with the terms of the franchise and in accordance with the federal Telecommunications Act of 1996, Cable Communications Policy Act of 1984 (47 U.S.C.A. 545), or Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C.A. 546), its existing franchise to provide cable service over a cable system.

Limitations on expending public money for a cable system

(sec. 1332.05)

In addition to satisfying any other applicable notice and hearing requirements, the bill requires that the legislative authority of a political subdivision provide notice of its consideration of an ordinance or resolution that would authorize the expenditure of "public money" for a cable system. "Public money" means any of the following:

(1) Any money received, collected by, or due any officer, employee, or duly authorized representative or agent of a public office under color of office (actually, purportedly, or allegedly done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority);

(2) Any money collected by any person on behalf of a public office or as a purported representative or agent of the public office;

(3) Any money received by any person, whether directly or indirectly, from the United States, Ohio, a county, municipal corporation, township, or any other public office for the purpose of performing or assisting with a governmental function or program authorized by or the responsibility of those entities.

Notice also must be given if the ordinance or resolution authorizes the provision of cable service over a cable system, including an ordinance or resolution that would authorize any of the following:

(1) A feasibility study, marketing study, or any cost-benefit analysis concerning the establishment, acquisition, construction, improvement, financing, leasing, management, or operation of a cable system or the provision of cable service over such a system;

(2) The acquisition, construction, installation, improvement, financing, lease, or agreement for management or operation of facilities capable of providing cable service over a cable system;

(3) An agreement or arrangement for the use of a cable system or for the provision of cable service over a cable system;

(4) Approval of the terms of a franchise agreement for the political subdivision as a public cable service provider, if any such agreement exists, or with any other public cable service provider to provide cable service over a cable system.

Any ordinance or resolution enacted by the legislative authority authorizing the formation of a public cable service provider by the political subdivision must include a comprehensible statement of the general plan for financing the acquisition, construction, installation, improvement, or lease of the cable system. No ordinance or resolution may be deemed an emergency ordinance or resolution, or a measure necessary for the immediate preservation of the public peace, health, or safety in the political subdivision. The ordinance or resolution cannot take effect sooner than 30 days after its date of enactment. If, within 30 days after the date of enactment, a petition signed by 10% of the electors of the political subdivision (based upon the total number of votes cast at the political subdivision's last preceding general election) is filed with the appropriate office demanding a referendum on the ordinance or resolution, the ordinance or resolution cannot take effect until submitted to the electors and approved by a majority of those voting on it.

These requirements apply only with respect to the first time an ordinance or resolution described above is considered or enacted by a legislative authority. A legislative authority need not comply with these requirements for any ordinance or resolution that pertains to the same cable system and that is considered or enacted, respectively, subsequent to an ordinance or resolution that was enacted and that complied with the requirements.

Notice of consideration of an ordinance or resolution that would authorize the expenditure of public money for a cable system must be given at least 45 days prior to enactment, and must be given to all persons that have filed a pending application with the political subdivision to provide within its jurisdiction cable service over a cable system, or are providing cable service over a cable system pursuant to a franchise granted by the political subdivision. The notice is required to be in writing, delivered to the address designated by the person as the address for receipt of notices or, if no such designation has been made, to the operating address of that person as registered with the political subdivision. The notice must

be delivered by certified mail, registered mail, overnight delivery, or a similar method of receipted delivery.

Special fund requirement

(sec. 1332.06(A))

The bill requires a political subdivision of Ohio that is a public cable service provider to maintain a special fund for its cable system and the provision of cable service over that cable system. The political subdivision is generally subject, with respect to that special fund, to the same laws regarding establishing, paying, appropriating, and transferring funds, the use of funds under contracts, and liability for wrongful payments, that presently apply to local government tax receipts.

Annual cable system report

(sec. 1332.06(B))

A political subdivision that is a public cable service provider under the bill must prepare and publish, on or before June 1 each year for the prior calendar year, an annual report on its cable system and cable service over that system. The report has to be substantially in accordance with "full cost accounting," which requires accounting in accordance with Governmental Accounting Standards Board (GASB) accounting principles and standards, accounting for all direct and indirect costs, including capital costs, that are incurred in the ownership, management, or operation of a cable system or provision of cable service over a cable system. "Direct costs" means all costs, whether capital costs, operating costs, or otherwise, that would be eliminated if the service or function to which they relate were discontinued. "Indirect costs" means all costs, whether capital costs, operating costs, or otherwise, that are not direct costs. Indirect costs that support multiple services or functions must be allocated among those services and functions in proportion to the relative burden each service or function places on the cost category and by any reasonable method consistent with GASB standards.

The report also must include disclosure of the amount, source, and cost of working capital utilized for the political subdivision's cable system and the provision of cable service over such system, and estimates of the amount of any franchise, regulatory, or pole attachment fee, or occupation or property tax, or any other fee or tax that would be applicable to the cable system and the provision of cable service over it, but for any exemption by reason of its status as a political subdivision. The bill provides that nothing in it requires any elected official of the political subdivision to maintain a log or other record of the time the official

spends on the business of the public cable service provider in the course of official duties.

Permissive arbitration

(sec. 1332.08)

Disputes under the bill first may be submitted to arbitration before a civil action is filed. Prior to initiating a civil action under the bill (see "**Grounds for a civil action**," below), a person authorized to bring such an action may provide written notice of proposed arbitration to all persons that would be party to the civil action, describing with reasonable specificity the issues that would be the subject of the civil action. The issues will be submitted to arbitration only if each person receiving the notice gives its written consent not later than seven days after receiving the notice.

Arbitration must be conducted and decided by a panel of three arbitrators in accordance with procedures established by the American Arbitration Association. The persons that would be the complainants in a civil action must select one of the arbitrators, the persons that would be the respondents in the civil action must select another, and the two arbitrators so selected jointly select the third arbitrator. If the two arbitrators selected are unable to agree on a third arbitrator within seven days after the latest date either of the two arbitrators was selected, they are removed, and the parties to the proposed arbitration must each select one substitute arbitrator in the same manner, and the two substitute arbitrators so selected jointly select the third arbitrator. If the substitute arbitrators are unable to agree on a third arbitrator within seven days after the latest date either such substitute arbitrator was selected, they are removed, and the issues will not be submitted to arbitration.

Not more than 120 days after the panel of arbitrators is selected, the panel is required to issue a written opinion setting forth findings and decisions respecting the issues submitted to arbitration. The findings and decisions of the majority of the arbitrators on the panel are deemed the findings and decisions of the panel. The findings and decisions are not binding but are admissible into evidence in any civil action brought under the bill respecting the issues submitted to arbitration. The arbitrators do not have continuing jurisdiction after the written opinion is issued.

Issues submitted to arbitration in this manner may be resolved at any time by binding settlement agreement among the parties to the arbitration.

Grounds for a civil action

(secs. 1332.09 and 1332.10)

A political subdivision subject to the bill's general prohibitions, the limitation on providing cable service outside subdivision limits, or the limitations on expending public money for a cable system, discussed above, may bring a civil action for declaratory relief in the court of common pleas in the county in which the political subdivision is located or in any county of this state in which the political subdivision is a public cable service provider.

A person that is or is likely to be adversely affected by a political subdivision's violation of those prohibitions and limitations may bring a civil action for declaratory or injunctive relief in such a court of common pleas. A person that is or is likely to be adversely affected includes a person that provides, or has filed a pending application to provide, within the jurisdiction of the political subdivision, cable service over a cable system, and includes any other political subdivision in which such allegedly noncomplying political subdivision is, or has filed a pending application to become, a public cable service provider.

If an arbitration opinion contains a finding of a violation by a political subdivision and the political subdivision fails to rectify the violation promptly, and any person adversely affected by the violation substantially prevails in a subsequent civil action against the political subdivision regarding the violation not promptly rectified, the political subdivision is liable to the person for the person's costs and reasonable attorney's fees incurred in connection with the civil action.

If an arbitration opinion does not contain a finding of a violation by a political subdivision and the political subdivision substantially prevails in a subsequent civil action brought against it respecting the alleged violation, the complainants in the civil action are liable to the political subdivision for its costs and reasonable attorney's fees incurred in connection with the civil action.

The court must exercise its equitable discretion in determining the appropriate amount of attorney's fees to be awarded. In exercising that discretion, the court must consider at least all of the following: the degree to which the party partially prevailed, the reasonableness of the party's action, the reasonableness of the arbitrator's decision, the effort or lack of effort of the parties to reach a settlement, and the parties' good faith or lack thereof.

The bill provides that any right of action, remedy, or penalty under its arbitration or civil action provisions is in addition to any right of action, remedy, or penalty otherwise available under law.

COMMENT

Federal law defines a "cable operator" as 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)).

The bill refers to federal definitions for some of its terms:

"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

ACTION	DATE	JOURNAL ENTRY
Introduced	02-16-99	p. 128
Reported, S. Ways and Means S0067-RS.123/nlr	---	---