



**Sub. S.B. 117**

127th General Assembly

(As Reported by H. Public Utilities)

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Mason, Fedor, Harris, Coughlin, Wilson, Sawyer**

**Reps. Hottinger, S. Williams, Bacon, J. Hagan**

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**BILL SUMMARY**

- Provides for a state franchising system for video service that is to be provided over wires or cables pursuant to a "Video Service Authorization" (VSA) under which the Director of Commerce is the franchising authority; the state system generally supersedes current local franchising authority.
- Allows existing municipal and township franchises and competitive video service agreements to continue until their scheduled expiration; prohibits the renewal or extension of those franchises or agreements; and allows a person to apply for a VSA when its current franchise or agreement expires, after another person provides or sells video service in the area in which the applicant's video service network extended under that franchise or agreement, after it receives required notice that a VSP will begin to provide or sell service in that area, or after the FCC determines that the person is subject to effective competition in that area.
- States the bill's intention to provide a comprehensive legislative enactment operating uniformly throughout Ohio, setting forth police regulations, and prescribing a rule of conduct upon citizens generally, and specifies a number of legislative findings concerning video service.
- Specifies that a VSA confers on a person the authority, subject to the bill, to (1) provide video service in the video service area specified in its application, (2) construct and operate a video service network in, along, across, or on public rights-of-way, and (3) when necessary to provide the service, appropriate private property.

- States that the Public Utilities Commission has no authority over a video service provider (VSP) in its offering of video service, over a cable operator in its offering of cable or video service, or over any person in its offering of video service pursuant to a competitive video service agreement, and states that the Director of Commerce has no authority to regulate video service rates, terms, or conditions of service.
- Grants the Director the authority to investigate and issue related subpoenas for any alleged violation of or failure by a VSP to comply with certain statutory provisions and allows the Director to apply to a court of common pleas for an injunction or an order requiring compliance, to impose civil penalties, and to revoke a VSA.
- Requires a VSP to provide ten days' advance, written notice to a municipal corporation or township and to persons providing video service in the area, before providing or selling video service to one or more subscribers in that area or any additional such area it adds under an amended VSA.
- Permits a VSP to terminate video service to its video service area, but only after providing 90 days' advance, written notice to the Director, affected subscribers, and the respective municipal corporations or townships in which the service will be terminated.
- Prohibits a VSP from denying "access to video service" to any group of potential residential subscribers in its video service area because of the race or income of the residents in the local area in which the group resides, and allows the VSP to make a related affirmative defense if it can demonstrate that certain access percentage requirements are met based on the income levels of the households.
- Unless the Director grants a waiver or extension, if a VSP with more than one million telephone access lines in Ohio begins providing video service in an area, generally requires it to provide access to at least 25% of the households in the area within two years and 50% of the households in the area within five years, and requires it to file an annual compliance report with the Director.
- Provides that not later than six months after the effective date of its VSA, a VSP must carry emergency interrupt service announcements transmitted by local television broadcasters and must transmit national,

state, and local emergency interrupt service announcements as required by federal law.

- On the provision of video service by a VSP, generally prohibits a political subdivision from requesting anything of value from a VSP, imposing any fee, license, or gross receipt tax, or imposing any franchise or other requirement.
- Specifies the conditions under which a municipal corporation or township included in a video service area may require the VSP to provide one or more channels for public, educational, and governmental programming (PEG channels).
- Establishes the number of required PEG channels for a municipal corporation or township that has programmed PEG channels as of January 1, 2007, and for those that do not have such channels as of that date.
- Permits a VSP not to pay its pro rata share for PEG facility support if the municipal corporation or township fails to provide it notice of the amount due.
- Authorizes charging for PEG channel transmission capacity except under specified circumstances relating to recent PEG obligations and allows a separate line item on subscribers bills to collect the forgone revenue.
- Requires a VSP to pay a quarterly fee to each municipal corporation and township in which it offers video service, based on a percentage of the VSP's gross revenue.
- Requires that gross revenue be computed in accordance with generally accepted accounting principles and specifies what is included in and excluded from gross revenue.
- Specifies the percentage to be applied to gross revenue depending on whether or not there are incumbent cable operators, but caps the percentage at 5%.
- Permits a VSP not to pay a VSP fee if the municipal corporation or township fails to provide it written notice of the appropriate percentage



within ten days of receiving requisite notice that VSP will commence providing or selling video service in that area.

- Permits a VSP that pays a VSP fee to include the fee in the regular bill of each of its video service subscribers.
- Authorizes a municipal corporation or township to conduct a yearly audit to verify the accuracy of a VSP's calculation of the fees; prohibits payment of contingency compensation for such audits; requires a VSP to pay, with interest, any amounts found to be underpaid in an audit, within 30 days after notice; and allows an action regarding audit results to be brought not later than two years following the end of the quarter to which the disputed amount relates.
- Permits a VSP to credit, offset, or deduct any VSP fee it pays a municipal corporation against any public way fee the municipality may require for occupation or use of a public way in the same manner a cable operator may offset a franchise fee.
- Repeals the township cable law, thus removing township authority to enter into cable service contracts for its unincorporated area.

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## TABLE OF CONTENTS

Overview and background.....	5
Legislative findings .....	7
Authority to provide video service.....	8
Required authorization.....	8
Video parity.....	10
VSA's .....	10
Video service area .....	10
VSA application process.....	11
Regulatory/enforcement authority.....	13
Duties of a VSP .....	14
Commencing service.....	14
Customer service .....	15
VSA transfer .....	15
Termination/abandonment of video service.....	16
Nondiscrimination.....	16
Teleco service commitment .....	17
VSP emergency service announcements .....	18

Local authority regarding VSPs.....	18
PEG channels .....	19
Channel authorization.....	19
Number of PEG channels .....	19
Institutional networks .....	21
PEG facility support.....	21
PEG transport.....	23
VSP fees; local audits .....	23
Gross revenue .....	23
Percentage of gross revenue payable .....	25
Fee included in bill.....	25
Audits.....	25
Public right-of-way law .....	26
Township cable law.....	27

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## CONTENT AND OPERATION

### Overview and background

The bill provides for a state franchising system for video service, that is, video programming<sup>1</sup> over wires or cables located at least in part in public rights-of-way, regardless of the technology used to deliver that programming, including internet protocol or any other technology. Currently, municipal corporations and townships have that authority, pursuant to federal cable law that empowers governmental "franchising authorities" and state law (the Ohio Constitution and Revised Code) that empowers municipal corporations and townships to authorize service within their jurisdictions.

Under the bill, local franchising authority is preserved but only until a current franchise or competitive video service agreement granted under such authority expires or terminates according to termination/expiration terms and conditions of that franchise or agreement or until such an incumbent provider of video service applies for a state franchise under conditions specified in the bill, as further explained in "Incumbent opt-in," below. The bill prohibits the renewal or extension of a current franchise or agreement. The bill includes legislative findings describing it as a comprehensive legislative enactment operating uniformly throughout Ohio, setting forth police regulations, and prescribing a rule

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<sup>1</sup> Under the bill, "video programming" is programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in federal cable law (R.C. 1332.21(I)).

of conduct upon citizens generally. It expressly states that it is not intended to be inconsistent with federal cable law (R.C. 1332.34).

"Video service" under the bill expressly includes cable service, with the exception of service from certain cable systems serving townships before October 1, 1979.<sup>2</sup> "Video service" further excludes video programming provided by a wireless (commercial mobile service) provider or provided solely as part of and via a service that enables users to access content, information, electronic mail, or other services offered over the public internet. Implicitly the bill also excludes satellite service, because that service does not use wires or cables for transmission. (R.C. 1332.21(J).)

Federal cable law (47 U.S.C. 521 to 615b) speaks in terms of "cable operators" and "cable systems" (as appropriate to the industry at the time of its enactment) and also to video programming services provided by telephone companies (47 U.S.C. 571 to 573.) Currently, video service is available in various parts of Ohio through "traditional" cable companies, as well as through a telephone company that, pursuant to "competitive video service agreements,"<sup>3</sup> recently began to provide video service via its telecommunications facilities. Video service is not a "public utility" service under Ohio public utility law (R.C. 4905.02, not in the bill); and, further, federal cable law prohibits regulation of a cable system as a common carrier or utility by reason of providing any cable service (47 U.S.C. 541(c)).

Following is a description of the bill's provisions regarding legislative findings, the authority required to provide video service after the bill's effective date, the new state system of video service authorization, the obligations of any such new state franchisees, and the authority of local governments relative to the franchisees.

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<sup>2</sup> The excepted cable systems are those that were exempted from the township cable law (R.C. 505.90 to 505.92) when it was enacted. Specifically, that law (repealed by the bill) did not apply to any cable system that provided service in an unincorporated area of a township before its October 1, 1979 effective date provided no township cable franchise was later issued to the company under that law.

<sup>3</sup> These agreements have the effect of franchises in that they constitute permission to provide service within a jurisdiction. The bill defines "competitive video service agreement" as any agreement, memorandum of understanding, or other document that provides or has the effect of providing, whether or not as a franchise, authorization by a municipal corporation or township for the provision of video service within its boundaries by a person using telecommunications facilities to provide that service (R.C. 1332.21(D)).

## Legislative findings

(R.C. 1332.22)

The General Assembly makes the following findings for the purposes of the bill:

(1) Video service brings significant daily benefits to Ohio by providing news, education, and entertainment.

(2) Ohio's economy will be enhanced by investment in new communications and video programming infrastructure, including fiber optic and internet protocol technologies.

(3) Enhancing the existing broadband infrastructure and increasing consumer access to robust and reliable broadband products and services are also important, statewide concerns.

(4) To date, there has been only minimal competitive entry by telephone companies into Ohio's facilities-based video programming market, in part, because local franchise requirements may present barriers to entry.

(5) Increased competition in the provision of video service will provide new and more video programming choices for consumers, and new providers have stated their desire to supply that service.

(6) The time-to-market interval is critical for new entrants seeking to compete with incumbents.

(7) Local franchise and other requirements may present inordinate delays for new entrants.

(8) Ohio can and should provide a uniform regulatory framework by which persons can rapidly and expeditiously provide video service to residents regardless of their jurisdictional locations, which framework will promote rapid competitive entry into the video service market and encourage additional, significant infrastructure investment.

(9) Maintaining an existing franchise in cases where new entrants obtain VSAs is not appropriate unless the incumbent chooses to maintain that franchise.

(10) The continued development of Ohio's video service market and promotion of infrastructure investment are matters of statewide concern and are properly subject to exercises of Ohio's police power.

(11) By analogy to *Am. Financial Services Assn. et al. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, citing *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, syllabus,<sup>4</sup> the bill is intended as a comprehensive legislative enactment operating uniformly throughout Ohio, setting forth police regulations, and prescribing a rule of conduct upon citizens generally.

**Authority to provide video service**

**Required authorization**

(R.C. 1332.21(H) and 1332.23(A) and (B))

The bill prohibits any person<sup>5</sup> from providing video service in Ohio on or after the bill's effective date except pursuant to a "video service authorization" (VSA) issued under the bill.

The bill states that nothing in the bill equates authority to construct and operate telecommunications facilities in public rights-of-way to authority to provide access to video service.

Under the bill, a person providing video service on the bill's effective date pursuant to the terms and conditions of an expired franchise or competitive video service agreement, or providing video service on that date other than under a franchise or competitive video service agreement in effect on the bill's effective date (see '**Incumbent opt-in**,' below), has 90 days beginning on that date to file an application for a VSA.

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<sup>4</sup> *American Financial* concerned Sub. H.B. 386 of the 124th General Assembly and the issue of that act's preemption of municipal predatory lending regulation pursuant to constitutional home rule authority. The syllabus in *Canton* states:

To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.

<sup>5</sup> "Person," for the bill's purposes, includes an individual, corporation, business trust, estate, trust, partnership, and association (R.C. 1.59, not in the bill).

**Incumbent opt-in.** The bill authorizes a person that offers service under a franchise or competitive video service agreement in effect on the bill's effective date to apply for a VSA to provide video service within an area served by its video service network under that franchise or agreement under any of the following circumstances: (1) before the expiration or termination of the person's franchise or competitive video service agreement for that area in accordance with its terms and conditions, (2) after any other person provides or sells video service in that area, (3) after receiving notice of a video service provider's intent to commence service in the area pursuant to the bill (see "**Commencing service,**" below), or (4) after a determination by the Federal Communications Commission (FCC) under federal cable law that the person is subject in that area to effective competition as defined in that law.<sup>6</sup>

The bill states that, upon the VSA's effective date, the franchise or competitive video service agreement terminates, and no provision of that franchise or agreement is enforceable.

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<sup>6</sup> Under federal law (47 C.F.R. 76.905(b)), "effective competition" means that:

(A) Fewer than 30% of the households in the franchise area subscribe to the cable service of a cable system;

(B) The franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50% of the households in the franchise area, and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15% of the households in the franchise area;

(C) A multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50% of the households in that franchise area; or

(D) A local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

### Video parity

(R.C. 1332.23(C))

Continuing law (R.C. 1332.01 to 1332.10, not in the bill) imposes certain requirements on political subdivisions that provide cable service over a cable system where there are private sector competitors for that service. The bill extends those continuing requirements to video service, by stating that video service constitutes cable service over a cable system for the purposes of that law. The bill does not require such political subdivisions to obtain a VSA or otherwise affect their cable/video service.

### VSAs

(R.C. 1332.21(L) and (M) and 1332.24(A))

The bill specifies that a VSA confers on a person the authority, subject to the bill's various limitations, to (1) provide video service in its video service area (see "Video service area," below), (2) construct and operate a "video service network"<sup>7</sup> in, along, across, or on public rights-of-way for the provision of video service, and (3) when necessary to provide that service, appropriate private property (in the manner of a telegraph company under continuing state telecommunications law (R.C. 4931.04)). A VSA or VSA renewal has a term of ten years. The Director of Commerce issues or renews VSAs. The bill states that, for the purposes of federal cable law, a VSA constitutes a franchise under that law, and the Director is the sole franchising authority under that law for VSAs in Ohio.

Under the bill, a "video service provider" (VSP) is a person that has been granted a VSA under the bill.

### Video service area

(R.C. 1332.21(A), (B), and (K) and 1332.25(B))

A VSP's "video service area" is the area the person specifies in its VSA application filed with the Director of Commerce, subject to the following:

- (1) Video service areas of VSPs may overlap.<sup>8</sup>

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<sup>7</sup> Meaning, the wires or cable and associated facilities or components used to deliver video service and including a cable system (R.C. 1332.21(L)).

<sup>8</sup> Federal cable law prohibits exclusive franchises (granting one franchise to the exclusion of all others) (47 U.S.C. 541(a)(1)).

(2) A specified video service area must be coextensive with municipal, township unincorporated area, or county boundaries except as provided in (3) and (4) below.

(3) The specified video service area of a person using telecommunications facilities to provide video service on the bill's effective date or of any other person later so using telecommunications facilities must be the geographic area in which the person offers basic local exchange service.<sup>9</sup>

(4) The specified video service area of an applicant cable operator that offers service under a franchise in effect on the bill's effective date initially shall be, at minimum, the franchise area established under that franchise.

The bill contains an additional provision stating that nothing in the bill requires a VSP to provide "access to video service"<sup>10</sup> within its entire video service area. (Federal cable law requires a franchising authority to allow a franchisee a reasonable period of time to become capable of providing service to all households in its franchise area (47 U.S.C. 541(a)(4)(A)).)

### **VSA application process**

(R.C. 1332.25(A), (C), (D), (E), and (F))

A VSA application can require only the following: (1) specification of the location of the applicant's principal place of business and the names of the applicant's principal executive officers, (2) specification of the geographic and political boundaries of the applicant's proposed video service area, (3) a general

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<sup>9</sup> Continuing law (R.C. 4927.01(A)) and the bill (R.C. 1332.21(B)) define "basic local exchange service" as both (1) end user access to and usage of telephone company-provided services that enable a customer, over the primary line serving the customer's premises, to originate or receive voice communications within a local service area, and that consist of local dial tone service, touch tone dialing service, access to and usage of 9-1-1 services, where available, access to operator services and directory assistance, provision of a telephone directory and a listing in that directory, per call, caller identification blocking services, access to telecommunications relay service, and access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies, and (2) carrier access to and usage of telephone company-provided facilities that enable end user customers originating or receiving voice grade, data, or image communications, over a local exchange telephone company network operated within a local service area, to access interexchange or other networks.

<sup>10</sup> "Access to video service" is the capability of a VSP to provide video service at a household address irrespective of whether a subscriber has ordered the service or whether the service is actually provided at that address (R.C. 1332.21(A)).

description of the type or types of technologies the applicant will use to deliver the video programming, which may include wireline, wireless, or any other alternative technology, (4) an attestation that the applicant has filed or will timely file with the FCC all forms required by that agency in advance of offering video service in Ohio, (5) an attestation that the applicant will comply with applicable federal, state, and local laws, (6) an attestation that the applicant is legally, financially, and technically qualified to provide video service, and (7) a description of the applicant's customer complaint handling process, including policies on addressing customer service issues, billing adjustments, and communication with government officials regarding customer complaints, and a local or toll-free telephone number at which a customer can contact the applicant.

The bill authorizes an applicant to identify any information in its application as trade secret information, and if, upon its written request to the Director, the Director reasonably affirms all or part of that information as trade secret information, the information so affirmed will not constitute a public record for the purpose of the Public Records Law (R.C. 149.43 et al.).

The Director must issue a VSA upon the submission of a completed application. It also requires a VSP to immediately file an application to amend its VSA to reflect any change in the information required under (1) to (3) above. An amendment to change video service area boundaries also must include (3)'s information on any new delivery technologies.

An applicant must pay a nonrefundable \$2,000 fee for each VSA application and a nonrefundable \$100 fee for each application to amend. The application fee revenue must be credited to a new Video Service Authorization Fund in the state treasury, to be used by Commerce. The bill prohibits a VSP identifying or making reference to the application fee on any subscriber bill or in conjunction with charging any fee to the subscriber.

The bill grants the Director 30 days to determine the completeness of an application or the completeness of required supplemental information. As applicable, the Director within that 30 days must notify an applicant of an incompleteness determination, state the bases for that determination, and inform the applicant that it may resubmit a corrected application.

The Director must issue a VSA, VSA renewal, or amended VSA within 15 days after his or her determination that the filed application is complete. If the Director does not notify the applicant regarding the application's completeness within the specified 30 days or issue the requested VSA within the specified 15 days, the application is deemed complete under the bill, and the VSA or amended VSA deemed issued on the 45th day after the application's filing date.

### **Regulatory/enforcement authority**

(R.C. 1332.24(B), (C), and (D))

The bill expressly states that the Public Utilities Commission has no authority over a VSP in its offering of video service, over a cable operator in its offering of cable or video service, or over any person in its offering of video service pursuant to a competitive service agreement.

The bill grants the Director of Commerce authority to investigate, upon a complaint or on the Director's initiative, any alleged violation of or failure by a VSP to comply with the following provisions of the bill: the requirements to operate with proper authorization, file required authorization amendments, assist municipalities and townships in addressing consumer complaints, meet customer service standards, and provide certain notices and emergency announcements; the prohibition of the bill against subscriber group race and income discrimination; the requirements regarding PEG channels; and the service commitment applicable to telecommunications facilities-based VSPs. However, the bill states that the Director has no authority to regulate video service, including, but not limited to, the rates, terms, or conditions of that service.

In conducting an investigation, the Director, by subpoena, may compel witnesses to testify in relation to any matter over which the Director has jurisdiction and may require the production of any book, record, or other document pertaining to that matter. If a person fails to file any statement or report, obey any subpoena, give testimony, produce any book, record, or other document as required by a subpoena, or permit photocopying of any book, record, or other document subpoenaed, a court of common pleas, upon application made to it by the Director, must compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify.

If the Director finds that a person has engaged in any such violation or failure to comply and the person has failed to cure the violation or failure after reasonable, written notice and reasonable time to cure, the Director may apply to any court of common pleas for an order enjoining the activity or requiring compliance. The action must be commenced within three years after the date the alleged violation or failure occurred or was reasonably discovered. Upon the Director's showing that the person has engaged in a violation or failure to comply, the court must grant an injunction, restraining order, or other appropriate relief.

The bill also authorizes the Director to enter into a written assurance of voluntary compliance with a person and to impose civil penalties pursuant to an

adjudication under the Administrative Procedure Act, including a civil penalty for any failure to comply with an assurance of voluntary compliance.

Under the bill, the Director sets the amount of the penalty, but it cannot exceed \$1,000 for each day of violation or noncompliance or a total of \$10,000, counting all subscriber impacts as a single violation or act of noncompliance. In determining whether a civil penalty is appropriate, the Director must consider all of the following factors: (1) the seriousness of the noncompliance, (2) the good faith efforts of the person to comply, (3) the person's history of noncompliance, (4) the financial resources of the person, and (5) any other matter that justice requires.

Civil penalties must be deposited to the credit of the Video Service Enforcement Fund in the state treasury, which the bill creates, to be used by Commerce in carrying out its enforcement duties under the bill.

Additionally pursuant to an adjudication under the Administrative Procedure Act, the Director may revoke, in whole or in part, the VSA of any person that has repeatedly and knowingly violated or failed to comply with the above-described prohibitions and requirements and that has failed to cure the violations or noncompliances after reasonable written notice and reasonable time to cure. Under the bill, a person acts knowingly, regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature; and a person has knowledge of circumstances when the person is aware that such circumstances probably exist.

The bill requires a court to conduct a de novo review in any appeal from an adjudication described above.

### **Duties of a VSP**

The bill establishes the following duties for a VSP, all of which are enforceable by the Director of Commerce as described above.

#### **Commencing service**

(R.C. 1332.27(A))

The bill requires a VSP to provide ten days' advance, written notice to the respective municipal corporation or township before providing or selling video service to one or more subscribers in that area or providing service to any additional such area it adds under an amended VSA and additionally provide such notice to every person providing video service in all or part of the area.

### Customer service

(R.C. 1332.26(C) and (D))

The bill requires a VSP, when requested to do so, to assist a municipal corporation or township in addressing video service subscriber complaints, in a manner consistent with the complaint handling process set forth in its VSA application.

Additionally, a VSP must meet all of the following customer service standards: it must (1) restore video service within 72 hours after a subscriber reports a service interruption or other problem if the cause was not a natural disaster, (2) give the subscriber a credit in the amount of the cost of each such day's video service as would be billed to the subscriber, upon a report by a subscriber of a service interruption and if the interruption is caused by the VSP and lasts for more than four hours in a given day, (3) give the subscriber, for each hour of service interruption, a credit in the amount of the cost of per hour video service as would be billed to the subscriber, upon a report by a subscriber of a service interruption and if the interruption is *not* caused by the VSP and lasts for more than 24 consecutive hours, (4) give a subscriber at least 30 days' advance, written notice before removing a channel from the VSP's video service, except if the circumstances requiring removal are beyond its control, (5) give a subscriber at least ten days' advance, written notice of a disconnection of all or part of the subscriber's video service, unless the disconnection has been requested by the subscriber, is necessary to prevent theft of video service, or is necessary to reduce or prevent signal leakage, (6) not disconnect all or part of a subscriber's video service for failure of the subscriber to pay its video service bill, until the bill is at least 45 days past due, and (7) give a subscriber at least 30 days' advance, written notice before instituting an increase in video service rates.

Further, the bill affirms the continuing authority granted to a consumer under the Consumer Sales Practices Act (R.C. 1345.01 to 1345.13).

### VSA transfer

(R.C. 1332.27(B))

A VSP can transfer its VSA to a successor. Within ten days after completing the transfer, the VSP must provide written notice to the respective municipal corporation or township. The transfer is not valid until the date that the successor files a complete affidavit with the Director containing the information required in a VSA application (see "VSA application process," above). The bill expressly states that the Director has no authority to act upon the notice or the completed affidavit.

### Termination/abandonment of video service

(R.C. 1332.27(C))

A VSP can terminate video service to its video service area, but only after providing 90 days' advance, written notice to the Director, affected subscribers, and the municipal corporations or townships in which the service will be terminated. Under the bill, the Director has no authority to act upon the notice.

However, under the bill, a VSP that provided video service under a franchise on the bill's effective date cannot abandon the video service it provided within the franchise area to subscribers served on that effective date, at least until the franchise would have expired if not terminated under the incumbent opt-in provisions of the bill.

### Nondiscrimination

(R.C. 1332.21(E) and (F) and 1332.28)

In order to prohibit discriminatory practices against a group of potential residential subscribers, a VSP cannot deny access to video service to any group of potential residential subscribers in its video service area because of the race or income of the residents in the local area<sup>11</sup> in which the group resides. The bill specifies that the VSP can make an affirmative defense to the income discrimination prohibition as well as to the race discrimination prohibition, if the VSP can demonstrate either of the following:

(1) Three years after the date it began providing video service in its video service area, at least 25% of households with access to the VSP's video service are low-income households.

(2) Five years after the date it began providing video service in its video service area and thereafter, at least 30% of the households with access to the VSP's video service are low-income households.<sup>12</sup>

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<sup>11</sup> "Local area" is a federal law term undefined by the bill. Federal law requires a franchising authority to assure that access to cable service is not denied to any potential subscriber group because of the income of the residents of the local area in which the group resides (47 U.S.C. 541(a)(3)).

<sup>12</sup> The bill does not expressly preclude a VSP from using these affirmative defenses in a race dispute. However, the bill's definition of "low-income household" speaks only of income, and not race.

"Low-income households" are those residential households that are located within the VSP's video service area and have average annual household income of less than \$35,000 based on U.S. Census Bureau estimates on January 1, 2007. A "household" means, consistent with U.S. Census Bureau regulations, a house, an apartment, a mobile home, a group of rooms, or a single room that is intended for occupancy as separate living quarters. "Separate living quarters" are those in which the occupants live and eat separately from any other persons in the building and that have direct access from the outside of the building or through a common hall.

**Teleco service commitment**

(R.C. 1332.29)

The bill requires a VSP that both uses telecommunications facilities to provide video service and has more than one million telephone access lines in Ohio to provide access to video service to at least (1) 25% of the households in its video service area within two years after the date it began providing video service in that area, and (2) 50% of the households in its video service area within five years after the date it began providing video service in that area. However, the VSP need not meet the 50% requirement until two years after at least 30% of the households with access to its video service under its VSA subscribe to the service for six consecutive months.

A VSP can comply with those requirements by using any alternative technology, except satellite technology, that offers service, functionality, and content demonstrably similar to the service, functionality, and content the VSP otherwise provides through its video service network.

The VSP must file an annual report with the Director of Commerce describing its compliance with these requirements or, as applicable, its progress toward that compliance. The VSP also can apply to the Director for a waiver of compliance or for an extension of time to comply. The Director can grant the waiver or extension only if the Director determines that the VSP has made substantial and continual effort to comply and that one or more of the following caused the VSP's inability to comply:

(1) The VSP cannot obtain access to public and private rights-of-way under reasonable terms and conditions.

(2) Developments or buildings are not subject to competition because of existing, exclusive service arrangements.

(3) Developments or buildings are inaccessible using reasonable technical solutions under commercially reasonable terms and conditions.

(4) A natural disaster prevents compliance.

(5) There are other factors beyond the VSP's control.

If an extension of time is granted, the Director must establish a new compliance deadline. If a waiver is granted, the Director must specify the requirement or requirements waived.

**VSP emergency service announcements**

(R.C. 1332.31)

Not later than six months after the effective date of its VSA, a VSP must carry emergency interrupt service announcements transmitted by local television broadcasters and must transmit national, state, and local emergency interrupt service announcements as required by federal law (47 C.F.R. 11.11 et seq.) or as otherwise required by the FCC.

**Local authority regarding VSPs**

(R.C. 1332.26(A) and (B))

The bill prohibits a political subdivision from requiring a VSP to obtain from it any authority to provide video service within its boundaries.

With certain allowable exceptions (see "**PEG channels**" and "**VSP fees; local audits**," below), the bill also prohibits a political subdivision from (1) requesting anything of value from a VSP for providing video service, (2) imposing any fee, license, or gross receipt tax on the provision of video service by a VSP,<sup>13</sup> or (3) imposing any franchise or other requirement on the provision of video service by a VSP, including, but not limited to, any provision regulating rates charged by a VSP or establishing any local build-out requirement or requirement to deploy any facility or equipment.

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<sup>13</sup> Right-of-way fees required by a municipal corporation are considered fees associated with the use of public ways, not with the *provision of video service* and, thus, are not prohibited by the bill.

## **PEG channels**

### **Channel authorization**

(R.C. 1332.21(G) and 1332.30(D) and (G))

A "PEG channel" is a channel, for public, educational, and governmental programming, made available by a VSP or cable operator for noncommercial use. The bill specifies the conditions under which a municipal corporation or township included in a video service area may require the VSP to provide PEG channels. (Currently, there are franchising authorities in Ohio to which PEG channels have been made available pursuant to authority under federal law (47 U.S.C. 531).

Under the bill, the VSP bears only the responsibility for the transmission to subscribers of the PEG channel programming once it is delivered to the VSP in the appropriate format. A video service provider must accept PEG channel content and programming that, at the least, meets the transmission standards of the National Television Standards Committee<sup>14</sup> in effect on the bill's effective date. The operation of a PEG channel and the production of any programming that appears on the channel is the sole responsibility of the municipal corporation or township. Except as described below, it cannot require a VSP to provide any funds, services, programming, facilities, or equipment related to public, educational, or governmental use of channel capacity.

### **Number of PEG channels**

(R.C. 1332.30(A), (B), and (E))

The bill provides two schemes for the provision of PEG channels relating to whether there are or are not PEG channels currently. The first scheme concerns municipal corporations or townships that have PEG channels programmed on January 1, 2007.

**Existing channels.** If a municipal corporation or township has three or more PEG channels programmed on that date, the person providing those channels pursuant to a franchise, competitive video service agreement, ordinance, or resolution or otherwise must continue to provide those PEG channels, three of which must be on the person's basic service tier, with the additional PEG channels on the basic service tier or on any service tier viewed by more than 50% of the subscribers in the video service area. Any such additional channel may be reclaimed if it is not substantially utilized. Under the bill, a PEG channel is "not

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<sup>14</sup> The Committee is a standardization body that has prescribed a set of standard protocol for TV transmission and reception. The current protocol is analog TV.

substantially utilized" when fewer than 40 hours of noncharacter-generated content are programmed on that channel each week and less than 60% of the programming is nonrepeat and locally produced.

Additionally, if the municipal corporation or township has one or two PEG channels programmed on January 1, 2007, the person providing those channels pursuant to a franchise, competitive video service agreement, ordinance, or resolution or otherwise must continue to provide the channel or channels, with one PEG channel on the person's basic service tier and, as applicable, the second PEG channel on the person's basic service tier or on any service tier viewed by more than 50% of the subscribers in the video service area.

**New channels.** The bill authorizes a municipal corporation or township by written notice to require a new person providing video service in the municipal corporation or township on or after the bill's effective date to provide the same number of PEG channels under the same service tier conditions and subject to the same channel reclamation as those required of an incumbent person and described in "**Existing channels,**" above. If there is more than one such incumbent, the person must provide the same number required of the incumbent with the most recent obligation. The notice must state the appropriate number of PEG channels and the service tiers required. Following receipt of the notice, the person must provide the PEG channels not later than 120 days after the municipal corporation or township is able to deliver the PEG channel content.

The bill specifies that it does not preclude a provider and a municipal corporation or township from entering into other arrangements for PEG channels, including agreements increasing or decreasing the number of channels required under the first scheme.

The second scheme for the provision of PEG channels concerns municipal corporations or townships that have no PEG channels programmed on January 1, 2007. This PEG channel requirement can be imposed only by written notice to the VSP after it initially provides access to service in the area. Following that notice, the VSP must provide the PEG channels 120 days after the municipal corporation or township is able to deliver the PEG channel content. The VSP can use any service tier viewed by more than 50% of its subscribers in the video service area to provide the required PEG channels.

Generally under this scheme, the number of required PEG channels cannot exceed three if the respective municipal corporation or township has a population of at least 50,000, or two if the population is less than 50,000. If there is more than one VSP providing PEG channels in the municipal corporation or township, the number of channels must be the same for all the VSPs.

However, if a VSP distributes video programming to more than one municipal corporation or township through a single headend or video hub office and the aggregate population of the municipal corporations or townships is at least 50,000, none of those municipal corporations or townships can require the VSP to provide, in the aggregate, channel capacity for more than three PEG channels. If the aggregate population is less than 50,000, none of those municipal corporations or townships can require the VSP to provide, in the aggregate, channel capacity for more than two PEG channels.

Under this second scheme, a VSP can reclaim and program a PEG channel that it determines is not "substantially utilized." At such time as the municipal corporation or township that caused the establishment of the PEG channel can later certify that the channel will be substantially utilized, the VSP, within 120 days after the date the VSP receives that certification, must restore the reclaimed channel as a PEG channel. However, the VSP is not obligated to carry that channel on any specified tier of service.

### **Institutional networks**

(R.C. 1332.30(C))

The bill prohibits a municipal corporation or township from requiring a VSP to provide any institutional network on its video service network. However, a company that (pursuant to a franchise, competitive video service agreement, ordinance, or resolution or otherwise) provided any institutional network on January 1, 2007, must continue to provide the institutional network until the obligation would have expired if the obligation had not terminated under the bill's incumbent opt-in provisions, or, if earlier and or applicable, until January 1, 2012, or an earlier date specified in an ordinance or resolution in effect on the bill's effective date. The provider must give the municipality or township at least 120 days advance written notice of such a termination. If the obligation included terms regarding the infrastructure of the institutional network upon the expiration of the obligation, the video service provider must honor those terms. Additionally, the bill provides that the VSP and municipal corporation or township may enter into other arrangements for institutional networks.

### **PEG facility support**

(R.C. 1332.30(E))

A municipal corporation or township is prohibited under the bill from requiring a VSP to provide any funds, services, programming, facilities, or equipment related to PEG channels.

However, the bill provides that the obligation of any person under a franchise, competitive video service agreement, ordinance, or resolution in effect on the bill's effective date to provide monetary or other support to a municipal corporation or township for PEG channel facilities continues until the obligation would have expired if not terminated pursuant to the bill's incumbent opt-in provisions or, if earlier and as applicable, January 1, 2012, or such earlier date as may be specified in an ordinance or resolution in effect on the bill's effective date.

Additionally, each other person providing access to video service within the municipal corporation or the unincorporated area of a township after the bill's effective date has the same obligation to support PEG channel facilities during the same time period as the incumbent as described above, but, if there is more than one such incumbent, each other person shall have the same obligation as the incumbent with the most recent obligation. Regarding the form of facility support, the bill provides that if the incumbent support is in the form of a percentage of gross revenues or a per subscriber fee, the VSP must provide that same level of support in that same form. If the incumbent support is in the form of a lump sum payment without an offset to its video service provider fee, the VSP is responsible for a pro rata share of that payment. If the incumbent provides in-kind support, the VSP must pay the municipal corporation or township a pro rata share of the fair market value of that support.

The VSP's pro rata share must be based on its proportion of video service subscribers with service addresses in the municipal corporation or unincorporated area of the township. For the purpose of determining the pro rata shares, all VSPs and the incumbent must report quarterly to the municipal corporation or township the total number of subscribers served within the municipal corporation or the unincorporated area of the township. This information must be treated as confidential by the municipal corporation or township and used only to derive the pro rata shares.

The bill authorizes the VSP to identify and collect the amount of any PEG facility support fees or payment and the cost of any content conversion, if applicable, as a separate line item on the bills of its subscribers having service addresses within the municipal corporation or unincorporated area of the township. It requires the VSP to remit its pro rata share to the municipal corporation or township quarterly, not sooner than 45 nor later than 60 days after the end of the preceding calendar quarter. However, the person need not pay its pro rata share unless the municipal corporation or township provided notice to the person of the amount due. The municipal corporation or township shall use the payments only as authorized under federal law.

### **PEG transport**

(R.C. 1332.30(F))

The bill requires a person to provide to a municipal corporation or township transmission capacity for any PEG channels the person provides. It allows the person to use the most economically and technologically efficient means of providing that capacity. The person can charge the municipal corporation or township for that transmission capacity, except as follows.

A person that provided PEG channels to the municipal corporation or township on January 1, 2007, or any person serving that municipal corporation or township after the bill's effective date must provide the transmission capacity at no charge until the earlier of January 1, 2012, or the date its obligation to provide PEG channels would have expired if not terminated under the bill's incumbent opt-in provisions, or, if earlier and applicable, until such earlier date as may be specified in an ordinance or resolution in effect on the bill's effective date. The person can identify and collect the amount of its costs to provide the transmission capacity as a separate line item on the bills of its subscribers having service addresses in the municipal corporation or unincorporated area of the township.

However, if, during that "no charge" period, the municipal corporation or township requests that a PEG channel origination point existing as of January 1, 2007, be relocated, the person can charge the municipal corporation or township for the costs of constructing that part of a transmission line, connecting the person's headend or video hub office to the relocated point, that extends 200 feet beyond the headend or video hub, but not for the costs associated with the transmission of the PEG programming. Also, the person can charge for the construction costs associated with additional origination points, but not for the costs associated with the transmission of the PEG programming.

### **VSP fees; local audits**

(R.C. 1332.32 and 1332.33)

The bill requires a VSP to pay a quarterly VSP fee to each municipal corporation and each township in which it offers video service. Payment must be made not sooner than 45 nor later than 60 days after the calendar quarter ends. To calculate the fee the VSP must determine its gross revenue for the quarter and multiply the result by the applicable percentage specified in the bill.

### **Gross revenue**

The bill requires that gross revenue be computed in accordance with generally accepted accounting principles. It specifies that gross revenue consists



of all of the following revenue for the calendar quarter that is collected by the VSP for video service from all its subscribers with service addresses within any portion of the municipal corporation or, respectively, the unincorporated area of the township: (1) recurring monthly charges for video service, (2) event-based charges for video service, including, but not limited to, pay-per-view and video-on-demand charges, (3) charges for rental of set top boxes and other video service equipment, (4) service charges related to the provision of video service, including, but not limited to, activation, installation, and repair, and (5) administrative charges related to the provision of video service, including, but not limited to, service order and service termination charges.

The bill expressly states that gross revenue excludes: (1) any taxes, fees, or assessments collected by the VSP from video service subscribers for pass-through to any federal, state, or local government agency, including the VSP fee authorized by the bill, the PEG support fee authorized by the bill, and the FCC user fee, (2) uncollectible charges (however, uncollectible charges, all or part of which are written off as bad debt but subsequently collected, less the expenses of their collection, must be included in gross revenue in the quarter collected), (3) late payment charges, (4) maintenance charges, (5) charges for services other than video service that are reasonably identifiable on books or records the VSP keeps in the regular course of business or by other reasonable means and are aggregated or bundled with amounts billed to video service subscribers, including, but not limited to, any revenue received by a VSP or an affiliate for telecommunications service, information service, or the provision of directory or internet advertising, including yellow pages, white pages, banner advertising, and electronic publishing, (6) reimbursement by programmers of marketing costs actually incurred by the VSP, (7) advertising revenue (except as described below), and (8) any revenue not expressly enumerated in the bill as making up gross revenue.

For exclusion (7) above, the bill allows advertising revenue to be included in gross revenue if a municipal corporation enacts an ordinance or a board of township trustees adopts a resolution that uniformly applies to all VSPs and that provides for its inclusion. "Advertising revenue" is defined as the net revenue received by the VSP for advertising on its subscription-based video service within a municipal corporation or the unincorporated area of a township. If the revenue is derived under a regional or national compensation contract or arrangement between the VSP and one or more advertisers or advertising representatives, the amount of revenue derived for the applicable locality must be determined by multiplying the total net revenue received by the VSP under the contract or arrangement by the percentage resulting from dividing the number of subscribers in the municipal corporation or unincorporated area of a township by the total number of regional or national subscribers that potentially receive the advertising under the contract or arrangement. The bill requires the municipal corporation or

township to promptly notify affected VSPs of the ordinance or resolution, which cannot take effect until the first day of the first calendar quarter that begins more than 30 days after the notice.

### **Percentage of gross revenue payable**

The percentage amount to be applied to gross revenue for the purpose of determining the quarterly VSP fee depends in part on whether video service is provided in the municipal corporation or township by a person operating under a continuing franchise as authorized under the bill (see '**Continuing under existing authority**,' above).

Specifically, if in the calendar quarter a franchise fee is payable by a cable operator under a continuing franchise, the percentage of gross revenue payable in that calendar quarter by a VSP must be the same percentage of gross revenue payable in that calendar quarter pursuant to that franchise, not to exceed 5%. If there is more than one such franchise of a cable operator in that quarter, the lowest such percentage must be used.

Otherwise, the percentage must be zero or such higher percentage, not to exceed 5%, as is specified in an ordinance or resolution that the municipal corporation or township may enact or adopt under the bill.

The municipal corporation or township must provide written notice to the VSP of the appropriate percentage within ten days after it receives the VSP's commencement of service notice that is required under the bill. A VSP need not pay the fee unless the municipal corporation or township provided the notice.

### **Fee included in bill**

A VSP that pays a VSP fee can identify and collect that fee as a separate line item on the regular bill of each of its video service subscribers that has a service address within any portion of the municipal corporation or, respectively, within the unincorporated area of the township.

### **Audits**

The bill authorizes a municipal corporation or township, at its sole expense and not more often than once per calendar year, to conduct an audit for the purpose of verifying the accuracy of a VSP's calculation of the VSP fees it paid to the municipal corporation or township in the audit period. The VSP must make the records pertaining to its gross revenue available for inspection at the location where such records are kept in the normal course of business. The VSP need not retain those records for longer than three years after the year for which the fee was payable, unless the municipal corporation or township has commenced a civil

action under the bill. A VSP must pay any amounts found to have been underpaid in an audit within 30 days after notice, including interest on the underpayments as provided in the Ohio Uniform Commercial Code (specifically R.C. 1343.03, unchanged by the bill).

The bill prohibits a municipal corporation or township from employing, appointing, or retaining any person to conduct an audit regarding the fee calculation for compensation that is dependent in any manner upon the dollar amount of the audit findings. It also prohibits any person from soliciting or accepting compensation that is dependent in any manner upon the outcome of the audit, including compensation dependent on the audit findings or the recovery of fees or other payment by the municipal corporation, township, or VSP. These prohibitions expressly do not prohibit or limit the hiring of legal counsel on a contingency fee basis to enforce the findings of an audit.

An action by a municipal corporation or township or by the VSP to dispute the amount of VSP fee due based on the audit results must be brought in a court of competent jurisdiction not later than two years following the end of the quarter to which the disputed amount relates. Under the bill, a municipal corporation or township is deemed to accept as full payment any payment of a VSP fee that it does not challenge by bringing such an action.

### **Public right-of-way law**

(R.C. 1332.23(C))

The bill contains a provision that relates to municipal authority to oversee the use of its public ways.<sup>15</sup>

The specific provision states, in effect, that a video service provider fee paid to a municipal corporation is a franchise fee, and that a VSA constitutes a franchise, for the purposes of two provisions of municipal public way law. By that statement, the bill extends to VSPs both of the following, continuing law provisions:

(1) The requirement that a municipal corporation allow a cable operator a credit, offset, or deduction against any public way fee it pays to the municipality

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<sup>15</sup> "Public way" means the surface of, and the space within, through, on, across, above, or below, any public street, public road, public highway, public freeway, public lane, public path, public alley, public court, public sidewalk, public boulevard, public parkway, public drive, and any other land dedicated or otherwise designated for a compatible public use, which is owned or controlled by a municipal corporation. "Public way" excludes a private easement. (R.C. 4939.01(E), unchanged by the bill.)

for occupation or use of a public way. (The amount of the credit, offset, or deduction is the amount of the franchise fee and or the retail value of any free service or other nonmonetary compensation, as applicable.) (R.C. 4939.05(B)(4), not in the bill.)

(2) A confirmation of municipal authority to charge a franchise fee in accordance with federal cable law or allow a credit, offset, or deduction of the franchise fee against payment of a construction permit fee. (R.C. 4939.08(D).)

**Township cable law**

(R.C. 153.64 and 505.90 to 505.92 (repealed))

The bill repeals the township cable law as of the bill's effective date, thus removing township authority to enter into cable service contracts for its unincorporated area. The bill's amendment of R.C. 153.64 is technical, to remove a cross-reference to one of the repealed sections.

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**HISTORY**

ACTION	DATE
Introduced	03-15-07
Reported, S. Energy & Public Utilities	05-09-07
Passed Senate (29-4)	05-09-07
Reported, H. Public Utilities	06-13-07

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