

ORDINANCE NO. 48-2007

Offered by All of Council

AN ORDINANCE DETERMINING THE VIDEO SERVICE PROVIDER FEE TO BE PAID BY A VIDEO SERVICE PROVIDER OFFERING VIDEO SERVICE IN THE VILLAGE PURSUANT TO A VIDEO SERVICE AUTHORIZATION; AUTHORIZING THE MAYOR TO GIVE NOTICE TO THE VIDEO SERVICE PROVIDER OF THE VIDEO SERVICE PROVIDER FEE; AND DECLARING AN EMERGENCY.

WHEREAS, the General Assembly enacted Sections 1332.21 through 1332.34 of the Ohio Revised Code, effective September 24, 2007, to provide a statewide “uniform regulatory framework” for the provision of cable television and/or other video service, which will substantially reduce the Village of Richfield’s traditional franchising authority to regulate cable and/or video service offered in the Village using facilities located in the Village’s public rights-of-way; and

WHEREAS, the Village of Richfield has a cable television franchise agreement with Time Warner which expires by its own terms on or about April 14, 2010 and pursuant to which Time Warner pays franchise fees in the amount of three percent (3%) of gross revenues which are defined by the franchise to include advertising revenues; and

WHEREAS, pursuant to R.C. Section 1332.23, any new video service provider intending to provide video service to subscribers in the Village must apply for and obtain a video service authorization from the Director of the Ohio Department of Commerce; and

WHEREAS, R.C. Section 1332.23 also permits a cable operator with an effective franchise agreement to terminate its franchise with the Village, at its option, by applying for a state-issued video service authorization when a competitive video service provider either gives notice that it will begin providing service to subscribers in the Village or actually begins providing service to subscribers in the Village, or if the FCC determines that the cable operator is subject to “effective competition” in the Village pursuant to 47 CFR 76.907; and

WHEREAS, under R.C. Section 1332.32, a video service provider that is providing service to subscribers in the Village pursuant to a state-issued video service authorization must pay the Village a video service provider fee (“VSP Fee”) based on a percentage of the provider’s “gross revenues” derived from providing video service in the Village, not to exceed five percent (5%) of such revenues; and

WHEREAS, R.C. Section 1332.32 requires that the percentage of gross revenues on which VSP Fees are paid must be the same as the percentage of gross revenues that a cable operator pays pursuant to a franchise agreement that is in effect, or, if there is no effective franchise agreement under which franchise fees are payable for a given calendar quarter, the VSP Fee shall be zero percent (0%) of gross revenues, unless the Village determines by

Ordinance that the VSP Fee will be a percentage of gross revenues not to exceed five percent (5%) of gross revenues; and

WHEREAS, R.C. Section 1332.32(C)(2) further requires the Village to provide all video service providers offering service in the Village with notice of the VSP Fee requirements within ten (10) days of receiving notice from the video service provider that it will begin offering service in the Village, or the video service provider is not required to pay the VSP Fee to the Village; and

WHEREAS, R.C. Section 1332.32(B)(2)(g) provides that the VSP Fee is paid on a base of gross revenues consisting of revenues received from subscribers only, unless the Village specifically determines, by Ordinance uniformly applicable to all video service providers, that advertising revenues also be included in the base of gross revenues on which the VSP Fee is paid; and

WHEREAS, R.C. Section 1332.32(B)(2)(g) requires the Village to promptly notify affected video service providers of the Ordinance determining to include advertising revenues in the base of gross revenues on which the VSP Fee is paid, but provides that the requirement to include advertising revenues in the base of gross revenues does not take effect until the first day of the first calendar quarter that begins more than thirty (30) days after giving such notice; and

WHEREAS, in order to minimize the negative financial impact on the Village it is the intent of this Council to charge the maximum Video Service Provider Fee with the most expansive definition of Gross Revenues allowed by law; and

WHEREAS, in order to provide timely notice to a video service provider of the VSP Fee, it is necessary for this Council to determine now that the percentage of gross revenues on which the VSP Fee will be paid is five percent (5%) and that advertising revenues shall be included in the base of gross revenues on which the VSP Fee is paid, and to authorize the Mayor to provide notice of the VSP Fee to a video service provider within ten (10) days of the Village receiving notice that a video service provider will begin providing service in the Village.

NOW, THEREFORE, BE IT ORDAINED by the Council of the Village of Richfield, Summit County, State of Ohio:

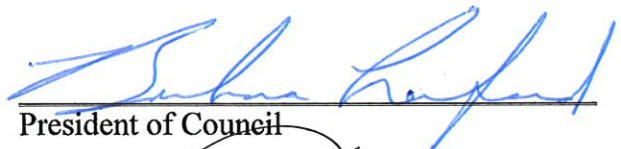
SECTION 1. That in accordance with the requirements of R.C. 1332.32, all video service providers providing video service in the Village pursuant to a video service authorization obtained from the Director of the Ohio Department of Commerce shall pay Video Service Provider Fees ("VSP Fees") in the amount of three percent (3%) of gross revenues received from providing video service in the Village, which gross revenue base shall include advertising revenues. The VSP Fee shall be paid quarterly, not sooner than forty-five (45) days nor later than sixty (60) days after the end of each calendar quarter.

SECTION 2. That, no later than ten (10) days from receipt of notice from a video service provider that it will begin providing video service in the Village pursuant to a state-issued video service authorization, the Mayor is authorized and directed to provide such video service provider with notice of the VSP Fee as determined by this Council above, which notice shall be given by certified mail.


SECTION 3. That it is found and determined that all formal actions of the Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of the Council and any of its committees that resulted in such formal action were in meetings open to the public in compliance with all legal requirements.

SECTION 4. This Ordinance is hereby determined to be an emergency measure necessary for the preservation of the public peace, health, safety and welfare in order to ensure that the Village continues to receive appropriate fees from persons providing video and/or cable service in the Village using the Village's rights-of-way; wherefore, provided this Ordinance receives the affirmative vote of two-thirds of the members of Council elected or appointed, it shall take effect immediately upon its passage and execution by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

PASSED: 9/18/07



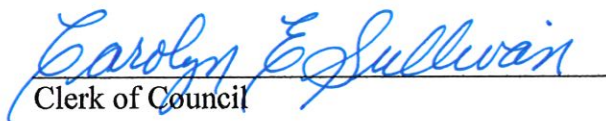
President of Council



Mayor

Dated: 9/18/07

ATTEST:



Clerk of Council

CLIENT MEMORANDUM

-- PRIVILEGED & CONFIDENTIAL --

To: Michael K. Lyons, Mayor
Roberta Beshara, Councilperson and Chair of Cable Committee

From: R. Todd Hunt
William R. Hanna

Direct Telephone: (216) 928-2935
(216) 928-2940

cc: Charles T. Riehl, Director of Law

Date: September 12, 2007

RE: Village of Richfield – Effect of Ohio Senate Bill ("S.B. 117") on Existing Franchise with Time Warner.

You have requested an analysis of the effects that S.B. 117 will have on the Village of Richfield and its franchise agreement with Time Warner. Particular issues of concern are Time Warner's ability to terminate the franchise, its obligation to pay franchise fees, and the status of the Institutional Network connecting the public buildings in the Village. The franchise with Time Warner expires pursuant to its own terms on April 14, 2010.

We have reviewed S.B. 117 and analyzed its effect on the Village's franchise with Time Warner. In addition, we have included other important information regarding S.B. 117 as it relates to the Village. Finally, we have recommended several follow-up actions for the Village to consider in light of the changed cable/video franchising law.

S.B. 117 Effective Date and Applicability

S.B. 117 becomes effective **September 24, 2007**. The provisions of S.B. 117 apply only to a video service that is provided over a "wire-based" video delivery system. It does not apply to satellite or wireless video service.

Authority to Provide New Video Service Under S.B. 117

Video Service Authorization. Any *new* video service provider with a "wire-based" system (such as AT&T) must obtain a "video service authorization" from the Ohio Director of Commerce before providing service in the Village.

- Assuming the application is correctly filed, a video service authorization is granted within 45 days of the filing of the application. There is no negotiation of terms and no authority to deny a complete application.

- The application for video service authorization requires *very* little information from the provider and the Director of Commerce is only authorized to determine if the application is complete.
- The term of the authorization is 10 years, as are any renewals.

Notice of Service. A new video service provider must give the Village at least 10 days advance notice before offering service in the Village. As a practical matter, because a new operator will have to construct, or reconstruct, facilities in the Village's rights-of-way in order to provide video service, the Village should actually have considerably more than 10 days' notice that a new provider will be offering service. **Note that S.B. 117 does not take away the Village's authority to manage its public rights-of-way under R.C. Chapter 4939.** (See "Recommendations" below.)

Video Service Provider Fee. Under a video service authorization issued under S.B. 117, the Village will receive a video service provider fee ("VSP Fee") rather than "franchise fees," on a base of gross revenues that includes only subscriber revenues, **unless** the Village specifically determines, in an Ordinance applicable to all video service providers, that advertising revenues are to be included in the base of gross revenues on which the VSP Fee is paid.

- **Village Action Required to Receive VSP Fees.** (See "Recommendations" below). In the event that an operator begins providing service under a state-issued video service authorization, the Village must pass an Ordinance applicable to all video service providers determining the following in order to receive the VSP Fee:
 - Percentage of Gross Revenues. The Village must determine, by Ordinance applicable to all video service providers, the percent of gross revenues (up to 5%) that the provider is to pay as the VSP Fee. If Time Warner continues to provide video service *pursuant to its franchise*, the percentage of gross revenues must be the same as it is under the current franchise – three percent (3%) and any new entrant will be at 3%. If Time Warner terminates its franchise early (see Time Warner's Options below) and the Village does not make a timely determination by Ordinance and give timely notice, S.B. 117 provides that the percentage will be zero.
 - Advertising Revenues. The Village may choose to include advertising revenues in the VSP fee base of gross revenues (similar to the franchise with Time Warner), by Ordinance applicable to all providers with a state-issued video service authorization. Although S.B. 117 requires the Village to "promptly notify affected video service providers", the inclusion of advertising revenues in the gross revenue base of the VSP Fee "[does] not take effect until the first day of the first calendar quarter that begins more than thirty days after the notice."
- **Notice of Video Service Provider Fee.** The Village must notify any new provider of the VSP Fee payment requirement within 10 days of receiving the video service provider's notice of intent to offer service, or the provider is not required to pay fees. (See "Recommendations" below.)

Service Area. A new provider **cannot** be required to provide service throughout the entire Village under S.B. 117.

Public, Educational and Governmental (“PEG”) Channel and Support Requirements.

- PEG Channels. A new video service provider is required to provide the same number of PEG channels under the same carriage requirements as the incumbent. The Village must give the new provider written notice of the PEG channel requirements, which the provider must then provide no later than 120 days after the Village is able to deliver the PEG content to the provider.
- PEG Support. A new video service provider is required to provide the same support for PEG Channel facilities as the incumbent operator (see Effect of Time Warner Franchise, PEG Support below). Where the incumbent provides “in-kind” support – such as a public access studio – the new video service provider must pay the Village a pro rata share of the fair market value of that support. The pro rata share is based on the video service provider’s proportion of video service subscribers in the Village. Under these circumstances, all providers must report their total number of subscribers to the Village on a quarterly basis and the Village must determine the pro rata share. **The Village must then notify the provider of its pro rata share of PEG support or the provider is not obligated to pay the Village.**

Time Warner’s Options under S.B. 117

Under S.B. 117 Time Warner may choose to:

- (1) continue under its existing franchise with the Village until its expiration by its own terms (on or about April 14, 2010); or
- (2) terminate its franchise with the Village and apply for a video service authorization from the state if any of the following circumstances exist:
 - A new video service provider, such as AT&T, begins providing or selling video service in the Village;
 - A new video service provider gives the required 10-day notice that it intends to provide or sell services in the Village; or
 - Time Warner obtains from the Federal Communications Commission (FCC) a ruling that the Village is subject to “effective competition”. Under FCC regulations, “effective competition” can be shown by evidence of a satellite provider that is capable of providing service to 50% of the franchise area and has a greater than 15% penetration in the area.
 - “Effective competition” is generally an easy standard to meet and we assume that Time Warner would be able to meet it if it applies to the FCC for a ruling. If Time Warner does apply for a ruling, it is difficult to predict how long it would take the FCC to rule, but we anticipate that it would take at least 90 days. Time Warner could apply immediately to the FCC for a ruling without waiting for S.B. 117 to become effective.
 - **Time Warner has indicated to us that it is evaluating all of its Ohio franchises and compiling the necessary information to “opt-out” of its franchises wherever possible after S.B. 117 takes effect.**

If any of the above events occurs, then Time Warner can apply for a video service authorization from the State Director of Commerce pursuant to the process outlined above. When the video service authorization is granted, the franchise is terminated and its terms are unenforceable.

Service Area. Even if Time Warner terminates its franchise with the Village, S.B. 117 requires it to provide service to the entire franchise area until the franchise would have expired by its own terms.

Effect of Time Warner's Termination of Franchise

Franchise Fees/Video Service Provider Fee

- Under its current franchise with Time Warner, the Village receives an annual franchise fee payment of 3% of Time Warner's gross revenues received in connection with its provision of cable service in Richfield. The franchise agreement defines gross revenues broadly to include subscriber, advertising and home shopping revenues. Time Warner must continue to pay franchise fees until it terminates the franchise or the franchise expires by its own terms.
- Under a state-issued video service authorization Time Warner will pay a VSP Fee on a base of gross revenues that includes only subscriber revenues, **unless** the Village specifically determines, in an Ordinance applicable to all video service providers, that gross revenues are to include advertising revenues. The Village will, however, lose franchise fees on home shopping revenues and late fees, which may not be included in the base of gross revenues under S.B. 117.
 - **Village Action Required to Receive VSP Fee.**
 - As with a new video service provider, the Village must determine by Ordinance (1) the percentage of gross revenues (up to 5%) for the VSP Fee (2) whether advertising revenues are to be included in the base of gross revenues.
 - **Notice of Video Service Provider Fee.** **The Village must notify Time Warner of the VSP Fee payment requirement within 10 days of receiving Time Warner's notice that it intends to offer service in the Village pursuant to a video service provider authorization.** (See Recommendations below.)

PEG Channels

- The Village of Richfield currently has reserved the right in the franchise to have 3 PEG channels. The Village currently has only one channel locally programmed by the Revere School District – Channel 22. A public access channel – Channel 21 – is administered by Time Warner and shared by many other communities' residents who wish to have their programs aired. The Village has not programmed a government channel, although it is reserved on Time Warner's channel lineup as Channel 23 for such use, but is currently being used by Time Warner.
- Under S.B. 117:
 - The Educational Channel (Ch. 22) will be grandfathered indefinitely/permanently
 - The Educational Channel (Ch. 22) must be carried on the lowest service tier, as it is now

- Channel 22 may not be reclaimed by the operator (even if a channel fails to meet the “substantial utilization” standards under S.B. 117)
- The Village may require Time Warner to provide the governmental access channel, but it will likely have to be on the second tier of service. If the Village desires to use a governmental access channel, it should be requested of Time Warner soon and be actually used by the Village to put the Village in the best legal position going forward.
- Any new providers must provide the same number of PEG channels under the same carriage requirements.
- PEG Facility Support. Time Warner’s franchise requires it to provide a public access studio within 30 minutes driving time of the Village and three remote origination point facilities for access channels. Under S.B. 117 video service authorization, the incumbent operator obligations are grandfathered until April 14, 2010. S.B. 117 requires that any new service providers have a pro rata share of the same unfulfilled obligation to support PEG facilities.
- Connectivity from PEG Origination Points to Time Warner’s Headend. The Village’s franchise with Time Warner requires it to provide a remote origination point facility at the Village Hall, Revere High School and the Richfield Public Library, including all necessary signal distribution equipment for receiving and transmitting live and tape-delayed signals. If Time Warner terminates its franchise early, S.B. 117 requires it to continue to provide signal connectivity until its franchise would have otherwise expired (April 14, 2010). After that point in time, the providers may seek to charge the Village an unknown cost or fee to carry the PEG signals to the headend.

Institutional Network

- The Village has an “Institutional Network” of 2 to 4 dedicated optical fibers originally provided by Cablevision under the current franchise which can provide noncommercial, noncompetitive video, audio and data communication transmissions between public buildings in the Village and in Richfield, Bath and Copley Townships for the benefit of these four political subdivisions, as well as the Revere Local School District, the Copley-Fairlawn School District, and the public libraries. The hub site of the Network is Revere High School. Time Warner is required to maintain the fiber for the Network.
- Under S.B. 117, Time Warner is obligated to continue to maintain the Institutional Network through the term of its franchise with the Village – April 14, 2010 – even if it obtains a video service authorization from the State. It is our opinion that if ownership of the Network becomes an issue, the Village should assert that it owns the Network and will assume the maintenance thereof on April 14, 2010, or make contractual arrangements with Time Warner to do so. S.B. 117 specifically provides that the video service provider and the municipality may enter into other arrangements for the Network. Presumably, Time Warner will want to enter into a service agreement for the Network for a fee.

Other effects of Time Warner's early termination of franchise would include:

- Loss of Certain Services:¹
 - no obligation to provide free basic and expanded basic cable service to Village buildings (including police and fire stations), public and private schools and library buildings
 - no obligation to provide a local emergency override system available to Village officials.
- Loss of Enforcement Provisions:
 - no performance bond
 - insurance provisions
 - no indemnity
 - no liquidated damages
 - no ability to regulate rates under FCC regulations
 - substantially limited audit provisions
 - no authority to enforce customer service standards
 - no testing provisions
 - no line extension policy.

Recommendations

(1) Video Service Provider Fee

S.B. 117 requires the Village to pass an ordinance and to notify any service provider with a state-issued video service authorization (either AT&T or Time Warner) of the percentage of gross revenues on which to pay the video service provider fee within 10 days of receiving notice that the provider will begin providing service. If the Village fails to do so, *it forfeits the right to receive fees*. This is an extremely short period of time in which to expect Council action in response to a specific notice, with a drastic consequence for failure to timely act.

Accordingly, we recommend that the Village pass an ordinance *prior* to a new service provider's notice of planned service and/or Time Warner's termination of its franchise. **At your request we have prepared an Ordinance, applicable to all state authorized video service providers in the Village, that does the following:**

- establishes the percent of gross revenues on which all video service providers in the Village will pay video service fees pursuant to S.B. 117. (The blank for the percent will need to be filled in by Council.) Currently, the Village receives 3% of gross revenues from Time Warner. The Village may establish any amount between 0% and 5%; and
- establishes that advertising revenues are to be included in the gross revenues on which video service providers will pay the fee; and
- authorizes the Mayor to serve the appropriate notice on the provider by a form of delivery with proof of receipt, within 10 days of receiving the video service provider's notice of service.

¹ Time Warner's position on the continued provision of these services is unknown. Although S.B. 117 prohibits local governments (or the state) from requiring these services, it does not prohibit a video service provider from voluntarily providing them.

By passing the Ordinance in advance, notice can be delivered immediately within the 10-day deadline to a provider when the Village receives notice that it intends to provide service pursuant to a state-issued video service authorization. Again, because S.B. 117 does not become effective until September 24, 2007, the Village need not pass an Ordinance immediately, but may want to consider doing so sometime soon.

(2) Public Right-Of-Way Management & Control

S.B. 117 also has little or no notice and enforcement provisions to protect the Village, its residents and its public rights-of-way in connection with a video service provider's occupancy of and construction in the right-of-way – such as notice of provider work or placement of facilities in the right-of-way, construction bonds, indemnification and insurance provisions. The Village should consider whether its current construction permit and other requirements and regulations are sufficient protection, or whether it needs additional protection such as a more comprehensive right-of-way ordinance pursuant to its home rule authority and its authority under Ohio Rev. Code Chapter 4939. This may be particularly helpful if a telephone company desires to provide video service in the manner currently being provided by AT&T in several communities in Ohio using large-sized equipment cabinets in tree lawns.