



TOWN BOARD SPECIAL MEETING
April 8, 2019 - 6:00 PM
1st Floor Conference Room, 301 Walnut Street, Windsor, CO 80550

AGENDA

A. CALL TO ORDER

1. Roll Call
2. Review of Agenda by the Board and Addition of Items of New Business to the Agenda for Consideration

B. BOARD DISCUSSION

1. Cable Franchise Agreement Discussion
No action required - - informational and negotiation

C. COMMUNICATIONS

1. Communications from Town Manager
 - a. Future Meetings Agenda

D. EXECUTIVE SESSION

1. An executive session pursuant to Colorado Revised Statutes § 24-6-402 (4)(e)(I) for the purpose of determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators with respect to franchise agreement renegotiation. (Shane Hale, Town Manager; Brandon Dittman, Esq., Special Counsel)

E. ADJOURN

The Town of Windsor will make reasonable accommodations for access to Town services, programs, and activities and will make special communication arrangements for persons with disabilities. Please call (970) 674-2400 by noon on the Thursday prior to the meeting to make arrangements.



MEMORANDUM

Date: April 8, 2019
To: Mayor and Town Board
Via: Shane Hale, Town Manager
From: Shane Hale, Town Manager
Re: Cable Franchise Agreement
Item #: B.1.

Background / Discussion:

The Town's cable television franchise agreement will expire in 2020. As part of the 2019 Budget, you authorized funding for special counsel services. You recently appointed Kissinger and Fellman as our special counsel for these negotiations. Brandon Dittman has been assigned by his firm for this purpose.

Financial Impact:

None - - funds budgeted in 2019.

Relationship to Strategic Plan:

Infrastructure

Recommendation:

No recommendation - - informational

ATTACHMENTS:

- ▢ Confidential Dittman memorandum

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ATTORNEY – CLIENT PRIVILEGED M E M O R A N D U M

TO: Mayor Kristie Melendez and Members of the Town Board
Town of Windsor, Colorado

FROM: Brandon Dittman, Esq.

cc: Ian McCargar, Town Attorney
Shane Hale, Town Manager

DATE: April 2, 2019

RE: Cable Franchise Agreement Renewal with Comcast

Town Staff and I recently began the process of initiating negotiations with Comcast for a franchise renewal agreement. While negotiations have not formally begun, our Firm employs the strategy of beginning with a model franchise agreement we drafted based upon Comcast's relatively new franchise agreements with Denver and Aurora (which we negotiated). We will then make modifications in that document to address local needs. During the negotiation process we also recommend that the Town of Windsor update its cable customer service standards with Comcast. While the franchise and the customer service standards are technically two separate documents with no requirements to be addressed at the same time, we have found it prudent to update these documents at the same time. In preparation for the renewal process, this memo will describe the overall franchise renewal process, the needs assessment process, the legal framework in which the franchise renewal process will operate, and specific legal issues that are implicated in franchise renewal negotiations.

I. EXECUTIVE SUMMARY

Cable operators have a Federal statutory presumption of an entitlement to franchise renewal. However, an incumbent cable operator must agree to a franchise that meets the cable-related needs of the community, taking into account the costs of meeting those needs. The Town's franchise authority allows it to negotiate for certain franchise benefits like franchise fees, access channels, audit obligations, insurance requirements, violation procedures and others, although Federal law puts limits on how far the Town may go in some of these areas. The limits of this authority are also described in this memo. The Town also has legal authority to adopt and enforce customer service standards, which are often addressed concurrently with franchise negotiations,

but are technically a separate matter, and any amendments to the Town's standards will be adopted separately from the new franchise.

Key issues in the upcoming negotiations will include addressing the impacts of new technology on the cable system and in particular, Public, Educational and Government Access ("PEG") channels, and making programming on those channels available in high definition and on-demand.

The Town and Comcast will negotiate informally in the hopes of agreeing to a franchise that can be presented to the Board for approval. This process is legislative as opposed to quasi-judicial. If the Town and Comcast are not able to informally reach agreement on a new franchise, Federal law provides for a structured, formal procedure, and quasi-judicial Board action which could either lead to a new agreement, or to litigation if the Board rejects Comcast's best offer. This statutory "formal" process would also involve significant expense and it will be our intent to avoid that process if at all possible.

II. FRANCHISE RENEWAL PROCESS

A. A Brief Description of Cable Franchising.

A cable franchise is a contract between the cable operator and the local government that the cable operator serves. To provide cable services to subscribers, cable companies must locate facilities within public rights of way, either on utility poles or underground. In consideration for a cable operator's right to utilize the Town's rights of way the Town requires the cable operator to enter into a franchise agreement. Federal law governs what issues can be addressed in that contract.

Franchise agreements cover a wide range of topics including: categories of programming that must be offered to subscribers; compensation paid to the Town by the cable company (the *franchise fee*); requirements for provision of public, educational and government access channels (commonly referred to as *PEG channels*) and financial support for capital expenditures related to PEG channels; requirements of compliance with conditions under which work in the rights of way can be conducted; recognition of the Town's authority to adopt and enforce cable customer service standards; the variety of cable services provided; compliance with federal technical standards; insurance and indemnification; procedures for addressing franchise transfers; procedures for remedying franchise violations; and franchise termination. By law, franchise agreements are non-exclusive, but to date, local government have seen very little competition in this area.

B. Federal Entitlement of Franchise Renewal.

Under federal law, Comcast is *entitled* to a franchise renewal if it has materially complied with the terms of its current franchise, and it offers and has the legal, technical, and financial ability to comply with a new franchise agreement that meets the future cable-related needs of the Town. Since Comcast clearly has the capability to comply with almost any franchise condition, the foundational question becomes whether Comcast will agree to a franchise document that will meet the Town's future cable-related needs.

Federal law provides for two types of franchise renewals. The first, and more common, is an informal renewal process. In an informal process, the parties meet and negotiate a mutually acceptable franchise. The informal process is less structured, usually less confrontational, and less costly.

If the Town and Comcast are unable to informally negotiate an acceptable franchise, under the federal Cable Act, either party may pursue a formal franchise renewal. To commence a formal franchise renewal proceeding, a cable operator may make a written demand for formal proceedings, or the Town may notify Comcast that it is commencing the formal process. Within a very structured and statutorily directed time period, the Town will finalize a determination of its future cable-related needs and submit that information to Comcast. Comcast then submits a proposed franchise. The Town, within four months of the submission date, must make a preliminary assessment of whether it will accept or deny Comcast's offered franchise. If the Town does not accept the proposed franchise, the end result, in all likelihood, is federal court litigation. It is not uncommon however, that even when the parties are proceeding through a "formal" renewal process, they will continue to negotiate informally, and the threat of litigation at the end of the process often leads to an eventual "informal" resolution. As noted above, because the formal renewal process is quasi-judicial, and because we do not know at this point whether we will end up in the formal process, it is Staff's recommendation that Council members should refrain from discussing the terms of the franchise and the status of negotiations outside of your Board meetings.

C. Understanding Cable Services, and Federal and State Limitations on Town Authority.

Most often, people think of cable services as video programming. As will be discussed below, the Town cannot require Comcast to provide specific channels, but may require it to provide certain broad categories of programming. As channel capacity expands, there is more room on the cable system to provide additional programming choices. The Town has authority to require a cable system with sufficient capacity to address the community's diverse programming interests.

Federal law authorizes the Town to require one or more public, educational or governmental ("PEG") access channels. These are three distinct categories. The Town operates a government access channel. Operating a channel includes acquiring the capital equipment, developing programming, and staffing. As you probably know, government access channels include programming such as community message boards, Town planning and zoning meetings, Town Board meetings, and other programming providing information about local issues. This channel may also be used in conjunction with other governmental entities.

Educational access channels are generally used by public schools and higher education for broadcasting school board meetings, athletic activities, performing arts, programming created by students, and/or other scholastic/educational type events.

The general public may also operate a public access channel. When in use, a public access channel should remain separate from the government and educational access channels. Content programmed on government and educational access is controlled by the governmental entity, and

can be limited to government and education-related issues. Public access is open to anyone, and the content of the programming is subject to First Amendment protections.

Federal law classifies telephony and internet as “telecommunications services.” To the extent there is regulation of these services, the governmental entity with regulatory authority is either the Colorado Public Utilities Commission or the Federal Communications Commission. These services are not governed by a local cable television franchise. The Colorado General Assembly passed legislation in 1996 that specifically preempts local government from requiring a franchise or otherwise regulating telecommunications service providers. While Comcast provides telecommunications services, the franchise agreement only addresses its cable services.

There are also specific *limitations* imposed by federal law. The Town may require an upgrade of the cable system to provide a level and quality of cable services and can require that the cable operator meet the technical standards that have been promulgated by the FCC, but cannot require specific transmission technologies (e.g., fiber to the home). The Town may not use the franchise to negotiate terms regulating communications services that are not considered cable services under Federal law, such as telephone or internet services, nor can the Town charge franchise fees on non-cable service revenues. The Town may not require Comcast to offer particular channels (e.g., ESPN or CNN), but may require Comcast to offer particular programming categories (e.g., sports channels or news channels). Federal law *does* allow the Town to adopt customer service standards that may be more stringent than the federal standards, without Comcast’s consent. Because the Town has more authority with respect to customer service standards, these standards should be referenced in the franchise agreement but adopted separate from the adoption of the franchise agreement.

The Town may require financial consideration, which is usually called a franchise fee. Franchise fees are considered to be rent for the use of the public rights of way. Most cities and towns impose a franchise fee of 5% of the gross revenues received by the cable operator from the operation of cable system and provision of cable services in the community. While some cities and towns use these revenues for a variety of cable-related support, most franchise fees end up as general fund revenue – again, based upon the understanding that this is a rental fee for the use of public property. In addition, Federal law allows local governments to require additional consideration for PEG channels (over and above the franchise fee), but limits the use of these PEG funds for capital (and not for operational) expenses. It is common in Colorado for Comcast to pay fifty cents per subscriber per month to local franchising authorities as a PEG fee. Cable operators are allowed to pass through to subscribers the costs incurred in complying with the franchise agreement and with the Town’s customer service standards. In addition, federal law allows cable operators to pass through any government imposed fees or taxes to their subscribers. Therefore, the fees that the Town may choose to impose will show up on customer bills.

D. Assessing Community Needs to Support Negotiations.

Some cities and towns undertake a comprehensive community needs assessment, which often include a combination of surveys, focus groups, public meetings, web feedback and other methods, to obtain data about PEG usage, citizens’ viewership of PEG channels, programming choices offered, customer service, technical issues, and other issues related to the cable system. In

some communities, this kind of process (which can be costly) is very important at the outset of negotiations. However, over the past few years, Comcast has concluded new franchise agreements with Denver and Aurora, and has agreed to take a “model” version of those agreements and replicate it in other Colorado jurisdictions, making edits where appropriate to address unique community needs and interests. The Denver and Aurora negotiations took just over two years to complete, and resulted in agreements that were generally very good for the cities. We believe it is appropriate to use as a foundation for these upcoming franchise negotiations.

As a result, we do not believe it is necessary to make the additional investment for a more comprehensive needs assessment at this time, since we are comfortable with many of the model agreement’s terms. That being said, if we are unable to reach agreement informally with Comcast, the Town retains the ability to do a more comprehensive needs assessment at a later date, in order to develop more information to support the Town’s positions in negotiations. Should we have difficulty reaching agreement with Comcast on key issues through informal negotiations, staff would expect to meet with the Town Board in executive session to advise on the status of negotiations, seek Board direction on negotiation priorities, and advise on the potential legal implications of pursuing various negotiating strategies.

As noted above, an example of one area where the Town does have some legal authority is addressing new technologies and PEG channels. As you are probably aware, many cable programs can now be viewed on-demand. Comcast has been hesitant to provide on-demand programming for PEG channels. In the 2013 Aurora franchise, Comcast agreed to provide some support for enhancing on-demand programming that is streamed over the internet (and therefore available to anyone with a broadband connection – not just Comcast subscribers). It would *not* agree to provide on-demand PEG programming on its cable system. If Aurora would have tried to force Comcast to make PEG programming available on-demand on the cable system, a court would have looked at how much demand there truly was in the City from subscribers to watch PEG programming on-demand, what the cost would be to make it available in that community, and the relationship of that cost to the number of subscribers and the general economics of that particular cable system. Aurora actually preferred the benefit of being able to enhance its on-demand web-based programming, as opposed to having its government channel in the cable television on-demand line up. Other Colorado jurisdictions have received this benefit from Comcast in their new franchises over the past three years.

In addition, many cable channels can currently be viewed in both standard definition (SD) and high definition (HD). Those cable channels that are not currently available in HD will likely be made available in HD format during the term of the next franchise. For a period of time all cities and towns will have some citizens that continue to watch video programming in SD, while others will (or already have) chosen to watch most of their programming in HD. Most cities and towns believe that it is important to make access channels available to subscribers in both SD and HD. Generally, Comcast prefers not to give additional bandwidth to local governments to allow for access channels to be seen in both SD and HD, since Comcast is not paid for that bandwidth. However, based upon the model agreement that grew out of the Aurora and Denver franchises, there will be an opportunity to obtain an HD channel for the Town’s access channel.

III. CUSTOMER SERVICE STANDARDS

The Town's authority to adopt customer service standards is a police power, and these standards can be adopted and enforced without Comcast's consent. However, Comcast has the legal authority to pass through to subscribers the costs of complying with local regulations. While customer service standards may be adopted without discussion with the cable operator, it has been our practice to discuss and negotiate the standards with Comcast, in the hopes of reaching a consensus. We recommend that all of our Colorado clients adopt the model customer service standards developed by the Colorado Communication and Utility Alliance ("CCUA")¹. The CCUA model customer service standards have been continuously updated to reflect the changing nature of Comcast's operations, are a negotiated compromise with Comcast, and have served most of the Cities and Towns in Colorado well. We believe that CCUA model customer service standards will also be a good fit for Windsor.

IV. NEXT STEPS

The current franchise will expire in 2020. While it is unlikely that negotiations will extend beyond the expiration date, the current franchise will extend month to month upon expiration. Following the executive session on April 8, 2019 I will begin drafting a proposed franchise which will serve as starting point for negotiations. Comcast's Senior Director of Regulatory and Government Affairs, Jon Lehman, will be negotiating on behalf of Comcast. Assuming a smooth negotiation occurs, Staff will schedule the franchise renewal for first reading once we have negotiated a franchise renewal that Town staff supports. If you have any questions please feel free to reach out to Town Staff or myself.

¹ The CCUA is a consortium of Colorado local governments who collaboratively work on telecommunications and utility issues. The CCUA has over 57 members.



MEMORANDUM

Date: April 8, 2019
To: Mayor and Town Board
Via: Shane Hale, Town Manager
From: Shane Hale, Town Manager
Re: Future Meetings Agenda
Item #: 1.a.

ATTACHMENTS:

- ▢ Future Meetings Agenda



FUTURE TOWN BOARD MEETINGS

April 15, 2019 5:30 p.m.	Town Board Work Session Meet the Board – New Hire Employees 7 th Street Traffic Update 2018 International Building Codes, Contractor Licensing & Residential Guidelines – Joint meeting with Planning Commission
April 22, 2019 6:00 p.m.	Town Board Work Session Smoking in the Parks
April 22, 2019 7:00 p.m.	Town Board Regular Meeting
April 29, 2019	Fifth Monday – No Meeting
May 6, 2019 6:00 p.m.	Town Board Work Session Bright Futures Presentation/Discussion Transportation Master Plan Kick-Off – Joint meeting with Planning Commission and Parks, Recreation and Culture Advisory Board
May 13, 2019 5:30 p.m.	Board/Manager/Attorney Monthly Meeting Parks, Recreation and Culture Strategic Plan
May 13, 2019	Town Board Regular Meeting Kern Board
May 20, 2019 6:00 p.m.	Town Board Work Session Projected Residential Buildout Based on Existing Land Use
May 27, 2019	Meeting Cancelled, Town Hall Closed – Memorial Day
June 3, 2019 6:00 p.m.	Town Board Work Session Windsor Water Strategy
June 10, 2019 5:30 p.m.	Board/Manager/Attorney Monthly Meeting
June 10, 2019 7:00 p.m.	Town Board Regular Meeting
June 17, 2019 6:00 p.m.	Town Board Work Session
June 24, 2019 6:00 p.m.	Town Board Work Session
June 24, 2019	Town Board Regular Meeting

7:00 p.m.

Additional Events

April 11, 2019	1 st Quarter Regional Elected Officials Meeting 5:30-9:00, Wellington Fire Department
April 20, 2019	Coffee with the Mayor, Senor Jalapeño, Windsor, CO
April 26, 2019	Bellvue Water Treatment Plant Tour, Bellvue, CO
April 30, 2019	Advisory Board Appreciation Dinner, Windsor CO
May 18, 2019	Coffee with the Mayor, Community Recreation Center, Windsor, CO
June 18-21, 2019	Colorado Municipal League Annual Conference, Breckenridge, CO

Future Work Session Topics

- Investment Strategy Discussion
- Land Use Code Update meeting with Planning Commission (next code section in series) – Planning
- Economic development/retail needs at 60,000 population
- Fehr & Peers Preliminary Transportation Master Plan Information for CIP Budget Discussion (July/August)
- Trails and Open Space update
- Broadband Discussion



MEMORANDUM

Date: April 8, 2019
To: Mayor and Town Board
Via: Shane Hale, Town Manager
From: Ian D. McCargar, Town Attorney
Re: Executive Session
Item #: D.1.