

Cable Franchise Fees – Do you know where you stand?

Jonathan Bryant, Esq. of Taft Stettinius & Hollister, LLP has prepared a basic **Frequently Asked Questions (FAQ)** information piece for IACT members regarding **Statewide Cable Franchising** that was enacted a few years ago. A partial list of the FAQ ran in the July 2010 edition of Actionlines; a full list appears below.

Q: What is a franchise?

A: A franchise is an agreement that allows a cable company to install infrastructure, such as transmission lines, in public rights-of-way to transmit video services to subscribers. *See* IND. CODE § 8-1-34-4.

Q: Why did my municipality grant a franchise?

A: Different units had different objectives. Some municipalities were concerned solely with maintaining public rights-of-way. Other municipalities enforced customer service standards.

Q: What is “statewide franchising?”

A: Indiana’s cable franchising system changed dramatically in 2006. Previously, franchises were granted by cities and towns. Because these franchises were effective only in the corporate boundaries of the cities or towns issuing the franchises, the same cable company frequently had many franchises and the terms of the franchises varied widely from place to place. In 2006, the General Assembly adopted a statewide franchising system. Now, instead of a separate franchise issued by each city or town, a cable company needs only a single franchise issued by the Indiana Utility Regulatory Commission. *See* IND. CODE § 8-1-34-16.

Q: What happened to the existing franchise agreement between my municipality and the cable company?

A: Cable companies were given the option to continue to operate under their existing agreements until they expire, or to terminate their existing agreements and apply for a statewide franchise. If a cable company in your municipality elected to terminate its existing agreement, it was required to notify your municipality between July 1 and November 1, 2006. *See* IND. CODE § 8-1-34-21.

Q: How does statewide franchising affect my city or town?

A: Public rights-of-way are extremely valuable. Without access to public rights-of-way, cable companies would be forced to negotiate agreements with private landowners to install transmission lines and other infrastructure needed to deliver video services to their customers. On the other hand, allowing private companies to use public rights-of-way can increase costs to the municipality. For example, a road improvement project may require relocation of cable transmission lines. Also, allowing access to a cable company may reduce space available for other assets and uses. In recognition of these considerations, cable companies have traditionally paid to municipalities a fee in exchange for the right to use the public right-of-ways, known as franchise fees.

Q: How are franchise fees calculated?

A: Although language varies from franchise to franchise, in general, fees are a percentage of the operator's gross revenues earned from providing cable services. "Gross revenues" is a term that was usually defined in the franchise. Under statewide franchising, state statute describes the process to determine franchise fees. *See* IND. CODE §§ 8-1-34-23 and 24.

Q: My municipality receives franchise fee revenue. Did statewide franchising impact franchise fees we receive?

A: Yes. Before you can determine the impact, you will need to know some background information. First, how many franchise agreements were in effect on June 30, 2006, the day the new statutes went into effect? Second, what did those franchise agreements require for franchise fees, including the definition of gross revenues and the percentage applied to that definition? Third, did the cable company terminate the local franchise agreement between July 1 and November 1, 2006? Finally, has your municipality adopted any ordinances regarding franchise fees since July 1, 2006, including adopting a franchise fee percentage upon expiration of a local franchise agreement?

Q: Why does it matter how many franchise agreements were in effect on June 30, 2006?

A: In many municipalities, only one operator provided cable services, so there would have been only one franchise agreement. However, in several Indiana cities, two or more operators provided cable services, and each of them had a franchise agreement with the city. The statewide franchising system attempts to retain some local control by deferring to the system developed by the municipality.

Q: How does the statewide system retain local control?

A: Consider franchise fees. As discussed, franchise fees are calculated based on the operator's gross revenues, a term usually defined in the franchise agreement. Under the statewide franchising system, if there was one and only one franchise in your municipality on June 30, 2006, then "gross revenues" retains the meaning it had under the existing agreement and means the same for all cable companies providing service in your municipality. *See* IND. CODE § 8-1-34-23(b)(1).

But if there was more than one franchise in your municipality on June 30, 2006, the definition of "gross revenues" may vary. If your municipality had two franchise agreements, one with Cable Company A and another with Cable Company B, then Cable Company A continues to pay franchise fees based on the definition of gross revenues in the Cable Company A franchise agreement and Cable Company B continues to pay franchise fees based on the definition of gross revenues in the Cable Company B franchise agreement. This is true even if the definition of "gross revenues" is not the same in the two agreements. For example, the franchise agreement with Cable Company A may have limited the definition of "gross revenues" to revenue received from only basic or life-line cable subscriptions. These subscriptions are generally limited to local channels. Under this definition, revenues received from customer subscriptions to more expensive packages would not be included. Meanwhile, the franchise agreement with Cable Company B may have included the more expensive packages within the definition of "gross revenues." Under the statewide franchising system, Cable Company A continues to calculate gross revenues using the more limited definition of "gross revenues" and Cable Company B continues to calculate gross revenues using the broader definition. *See* IND. CODE § 8-1-34-23(b)(2).

When a new provider, Cable Company C, enters the market in your municipality, the new provider is required to use the definition of "gross revenues" that is more favorable to the municipality. Using the same details, Cable Company C would be required to use the broader definition of "gross revenues" contained in the franchise agreement with Cable Company B. *See* IND. CODE § 8-1-34-23(b)(3).

If there were no local franchise agreements in place on June 30, 2006, then "gross revenues" is determined according to the terms of the statute. *See* IND. CODE § 8-1-34-23(c) and (d).

Q: Does the percentage applied to gross revenues vary in the same way?

A: Yes. Under federal law, the maximum percentage is 5%. If there were no local franchise agreements in place on June 30, 2006, then the franchise fee is 5% of gross revenues. *See* IND. CODE § 8-1-34-24(a)(2)(A). If there was only one local franchise agreement in place on June 30, 2006, then the percentage specified under that agreement continues. *See* IND. CODE § 8-1-34-24(a)(2)(B). If there was more than one local franchise agreement in place on June 30, 2006, then the municipality determines the percentage applied presumably by ordinance. *See* IND. CODE § 8-1-34-24(a)(2)(D).

Q: My municipality wants to change the percentage applied to gross revenues. Is it allowed to do so?

A: Under the statute, municipalities may change the percentage applied, but the percentage may never exceed 5%. If the municipality had multiple local franchise agreement in effect on June 30, 2006 with different percentages it may want to consider establishing a uniform fee. *See* IND. CODE § 8-1-34-24(a). The franchise fee is generally a direct pass-through to the customer and noted on the customer's bill. *See*, IND. CODE § 8-1-34-24(d).

Q: One of the providers in my municipality elected to continue under its existing franchise. Does that change the analysis?

A: Yes. A cable company that elects to continue under its existing franchise agreement with a municipality continues to pay the franchise fee imposed under that agreement until it expires. *See* IND. CODE § 8-1-34-24(e).

Q: I am concerned that a provider in my municipality is not complying with its franchise fee requirements. What is my recourse?

A: Disputes over franchise fees are not uncommon. The statute provides municipalities with the right to inspect the operator's books and records. If the municipality and the operator cannot resolve their disagreement, either of them may file a petition with the Indiana Utility Regulatory Commission to determine the amount due to the municipality. *See* IND. CODE § 8-1-34-24(c).

Q: I still have questions. Who can I contact?

A: If these FAQs do not answer your questions, please contact Jodie Woods at Indiana Association of Cities and Towns by phone (317/237-6200) or email (jwoods@citiesandtowns.org) or see the Indiana Utility Regulatory Commission's Video Services Division webpage (<http://www.in.gov/iurc/2336.htm>).

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