

**NYS Department of Public Service**  
**ISSUES IN CABLE FRANCHISING**

**FRANCHISING COMPETING PROVIDERS**

**The Process**

In 2005, the Public Service Commission adopted rule changes that address competitive franchising situations. Under new Part 894, an applicant for a competing franchise is required to **file an application with the municipality in a format and with the information specified by section 894.5**. *The applicant must also indicate whether it will provide service on the same terms and conditions as those contained in the incumbent provider's franchise and may submit a proposed franchise document that is consistent with that stated commitment.* The **municipality is required to exercise due diligence** in evaluating the application and negotiating a franchise document that serves the interests of the municipality and its residents. A properly noticed and conducted **public hearing** (*see new Sec. 894.7*) must be held. If the municipality accepts the applicant's offer to comply with the same terms and conditions as the incumbent, the hearing shall be held and the franchise may be awarded within 30 days of the municipality's receipt of the application. Otherwise the hearing generally must be held within 60 days of receipt of an application and the franchise must be awarded or denied within six months of the hearing date. A municipality may not unreasonably refuse to award an additional competitive franchise. (*Please refer to Sec. 894.5 through 894.8 of the Commission's Rules and Sec. 621 of the Federal Cable Act.*)

**Special Considerations to Keep in Mind**

1. As with renewals, this is **not a competitive bidding process**. Competing providers are dealt with on a one-to-one basis and, assuming they each meet the reasonable requirements of the municipality and applicable federal and state standards, **each can reasonably expect to receive a franchise to operate**.
2. Under Sec. 895.3, **no municipality may award or renew a franchise which contains economic or regulatory burdens which *when taken as a whole* are greater or lesser than those burdens placed upon another cable television franchisee operating in the same franchise area**. In this regard, municipalities should take special care to ensure that the agreement with a new provider will not put at risk commitments previously negotiated with an incumbent.
3. Under Sec. 895.1 (f), **if the municipality requires PEG access support in excess of the PSC-mandated minimums, the channel designation requirements must be the same for both providers and the provisions for facilities, equipment and support must be *competitively neutral* when compared with those requirements in the other provider's franchise**.
4. Competition may present some **new situations** requiring attention. Two such areas may involve **PEG access funding and logistical arrangements**, as well as **customer service considerations** engendered by the opportunity to transition between competing services.
5. Municipalities also may need to prepare for some initially **unanticipated effects of competition**. These may include the advent of more complex marketing approaches and pricing plans with **the potential for increased consumer confusion and complaints**, as well as more unpredictable service rates resulting in **less reliable anticipation of franchise fee revenues** for municipal budgeting purposes.

**What's Required in a Franchise Document?** [*cf. PSC regulations Sec. 895.1 (a) through (s) and Sec. 895.4 (b)*]

1. **"Recitations"** attesting to the fact that (a) "franchisee's **technical ability, financial condition and character** were considered and approved in a **full public proceeding affording due process**"; (b) "franchisee's **plans for constructing and operating...were considered and found adequate and feasible in a full public proceeding affording due process**"; (c) franchise **complies with PSC's franchise standards**; (d) franchise is **non-exclusive**.
2. A **description of the system** "as constructed and as will be expanded or enhanced during the term of the renewal." Minimum channel capacity must be specified.
3. A provision stating that the franchisee will construct and maintain its cable system using materials of **"good and durable quality"** and all work involved will be performed **"in a safe, thorough and reliable manner"**. (*Section 896*)
4. An **anti-redlining** provision.
5. Provisions specifying public, educational and government (**PEG**) **access support requirements**.
6. A provision stating that **rates and charges** are subject to regulation in accordance with federal law.

7. A provision specifying the **term of the franchise**. (Not more than 15 years.)
8. A provision **prohibiting abandonment** “in any portion of the franchise area” without written consent of the franchising municipality.
9. A full **indemnity and insurance** specification.
10. A provision requiring **prompt repair or replacement of any damaged or destroyed municipal property** with restoration to serviceable condition.
11. A commitment to **Equal Employment Opportunity standards**.
12. A provision reserving for the municipality the right to adopt “additional regulations that it shall find necessary in the exercise of its **police power**” provided such regulations are reasonable, not materially conflict with the franchise and consistent with federal and state laws and rules.
13. “**Right to inspect**” [with] reasonable notice and during normal business hours...**pertinent books, records, maps, plans, financial statements and other like materials of the franchisee.**”
14. Designation of the **municipal official or office responsible for “the continuing administration of the franchise”**.
15. **Franchise fee**. It must be “precise” as to the “amount or method of calculation”, with an express commitment to competitive neutrality with regard to the franchise fee provision in any other cable television franchise granted by the municipality. This provision also must state "whether any facilities or support for PEG access" are part of the franchise fee. (*See also the Department’s publication entitled “Issues in Cable Franchising: The Franchise Fee”.*)
16. A **severability clause** which may also specify any material provisions.
17. A provision stating that the franchise is **subject to approval of the PSC**.
18. A provision stating that an **application for PSC certification and any required FCC applications must be filed by franchisee within 60 days of the municipal grant**.
19. A provision stating whether municipal approval is required to **transfer** the franchise.
20. A provision permitting system-wide reporting for matters other than the franchise fee and consumer complaints.

**What's Negotiable?** [*cf. PSC Regulations 895.2, 895.4, 895.5 and Federal Cable Act, Parts III and IV.*]

1. “**Equipment and facilities**” (including institutional networks and system extensions, but not mandated technology.)
2. **Franchise fee**. (May be specified by the franchising authority without negotiations and made a condition of renewal. *See also the Department’s publication entitled “Issues in Cable Franchising: The Franchise Fee”.*)
3. **Public, educational and government (PEG) access** facilities, support and management. (Municipality may designate a management entity other than the franchisee at any time.)
4. **Service to schools and public buildings**.
5. **Right-of-way management and safety**.
6. **Consumer protection**. (May also be regulated by local law in a manner not inconsistent with rights granted in the franchise.)
7. **Accountability standards and procedures**.
8. **Term**. (May not exceed fifteen years.)

**What's Out of Bounds?** [*cf. Federal Cable Act, Parts III and IV.*]

These subject areas have been preempted from local franchising authority consideration by Federal law and, therefore, cannot be addressed in nor enforced by a franchise document.

1. **Requirements for “video programming”** (other than for “broad categories”) and “**other information services**”.
2. **Rates**. (Separate methodology mandated; see Sec. 623 of the Federal Cable Act.)
3. **Specifics of technologies employed**.
4. Matters not pertaining to “cable service” (such as **telephone service and internet service**).

**Is There Help Available?**

**Yes—and it’s free of charge.** The Department provides consulting services to municipalities to assist them in all their dealings with cable television service providers. Contact us at 518-474-2213 or by writing to the Cable Municipal Assistance Section, NYS Department of Public Service, Office of Telecommunications, 3 Empire State Plaza, Albany, NY 12223.