



CITY OF
PORTLAND, OREGON
OFFICE OF CITY ATTORNEY

Linda Meng, City Attorney
1221 S.W. 4th Avenue, Suite 430
Portland, Oregon 97204
Telephone: (503) 823-4047
Fax No.: (503) 823-3089

August 20, 2007

INTEROFFICE MEMORANDUM

TO: David C. Olson, Director
Office of Cable Communications and Franchise Management

FROM: Ben Walters 
Senior Deputy City Attorney

SUBJECT: Qwest Broadband Services – Proposed Cable Franchise
“Defense of Franchise” Indemnification

After staff concluded negotiations with Qwest Broadband Services on a franchise to provide cable services within the City of Portland, on July 30, 2007, the Mt. Hood Cable Regulatory Commission held a hearing seeking public comments on the proposed franchise. At the hearing's conclusion, the Commission directed that the record remain open for submission of additional comments. On August 13, 2007, Comcast Cable submitted a letter to the Commission containing supplemental comments on the proposed Qwest Broadband Services. Comcast's letter raised several concerns, including questioning aspects of the indemnification provision in the proposed franchise.

Section 15.1 of the proposed franchise contains four distinct indemnification provisions. Subsection A addresses general indemnification. Subsection B addresses indemnification for failures to timely relocate facilities. Subsection C addresses indemnification for hazardous substances. Subsection D relates to defense of the franchise.

Comcast's letter asks why the franchise would require Qwest Broadband to indemnify the City for litigation costs relating to defense of the contract. Section 15.1(D). Comcast argues that this provision gives the impression that the City would be delegating legislative authority by allowing Qwest to control litigation. In posing this argument, Comcast asserts Subsection A would give Qwest control over “defense of franchise” litigation. However, the general indemnification requirement in Subsection A isn't implicated in the “defense of franchise” Subsection D.

Subsection D does not allow the City to tender defense of litigation challenging the franchise to Qwest. Rather, it would contractually bind Qwest to paying the City's litigation costs as well as any awarded damages. Subsection D would not impose substantive limitations upon the City's ability to render its own defense, to plan litigation strategy, or to seek its desired outcomes.



In contrast, Subsection A contractually assigns responsibility to Qwest for claims “arising from any casualty or accident to Person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Qwest, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Cable System with all necessary Facilities in a safe condition.” The City may tender defense of such claims to Qwest. This provision generally pertains to actions lying in tort. Logically, Qwest should defend tort claims arising from Qwest’s actions. Qwest should be responsible for the defense where tort liability arises from Qwest having acted (or having failed to act).

Comcast correctly notes that federal law generally protects cities against “green mail” relating to cable franchises. 47 U.S.C §555. However, even litigation limited to injunctive or declaratory relief can still be expensive, time consuming and otherwise drain municipal resources. Subsection D would protect the City’s financial interests by contractually assigning the litigation costs to Qwest. Qwest has applied to the City to use the public right-of-way to provide cable services. If successful in a competitive market, Qwest may enjoy financial rewards. If the franchise is declared invalid, Qwest would be affected in terms of its authority to undertake construction of its facilities, to enter into the market, and to offer competitive services. Portland believes that it is appropriate that the potential financial risks associated with litigation flow through to the potential beneficiary. Qwest has agreed to assume this potential risk.

This is not the first time Portland has sought to avoid this type of risk through indemnification. The “defense of franchise” provision was modeled after cable franchise language previously approved by the Portland City Council in a temporary, revocable permit issued to RCN Telecom Services, Inc. on July 18, 2001, in Ordinance No. 175792.¹

Comcast complains that the “defense of franchise” provision “would render the level playing field provision in [Comcast’s] existing franchises meaningless.” Letter from Sanford Inouye to Chair Norm Thomas, p. 1 (August 13, 2007).² The basis for this conclusion is unclear.

¹ The language was contained in Section P.1(c) of the temporary revocable permit. The ordinance may be viewed at http://efiles.ci.portland.or.us/webdrawer/search/rec?sm_anyword=175792&count (accessed August 16, 2007). There is no record of the City receiving any objections to this language from the incumbent cable operator at that time.

² While Comcast’s letter refers this provision in multiple existing franchises, only one MHCRC-administered franchise contains what may be described as a “level playing field” or “most favored nations” provision. Originally included in the TCI franchise renewal in 1993, this provision now is contained in Section 22.9 of the West Portland cable franchise:

Comparability of other cable franchises. (A) If, after the effective date of this Franchise, the City enters into or authorizes a

David C. Olson
August 20, 2007
Page 3

The legal merits of claims that may be brought by Comcast would not be affected by the “defense of franchise” provision.

Please let me know if you have any further questions regarding this matter.

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c. Julie Omelchuck, Cable Office

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franchise, permit, license or other agreement of any kind with any Person other than Grantee to enter the Streets for the construction and operation of a Cable System providing Cable Services to Residential Subscribers within any part of Grantee’s Franchise Area in which Grantee is actually providing Cable Services, the material provisions of such agreement shall be reasonably comparable to those contained in this Franchise, insofar as this does not conflict with applicable law. However, nothing in (this subsection) shall limit or prevent the City from issuing any franchise, permit, license or other agreement of any kind for all of Grantee’s Franchise Area or any portion thereof, that provides for greater requirements or for a higher level of Cable Services to Subscribers, than that required of Grantee under this Franchise.

This provision was negotiated during a period when the cable franchises in the MHCRC areas were under separate ownership (TCI owned the West Portland cable franchise; Time Warner owned the east Portland and east Multnomah franchises). Subsequently, the cable franchises in MHCRC areas came under common ownership, first by AT&T Broadband (1999), and later by Comcast (2002). This language is not included in the East Portland or East County cable franchises. There is now good reason to question the continuing validity of this provision, based upon recent developments at the federal level. Federal Communications Commission, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984* 46-48, 72 FR 13189-01, 13198, 2007 WL 835168 (Wednesday, March 21, 2007) (announcing federal preemption of “local laws, regulations, and requirements” regarding level-playing-field provisions).