



## **SB 1087 QUESTIONS AND ANSWERS**

### **CABLE PROVIDERS MAY ELECT TO TERMINATE LOCAL FRANCHISES AND SEEK A STATE-ISSUED CERTIFICATE OF FRANCHISE AUTHORITY (SICFA)**

#### **Why a state-issued cable franchise?**

For many years, cable companies were the sole provider of wire-based video programming to city residents. Until 2005, a cable company that wanted to serve customers within a Texas city did so by obtaining a local franchise agreement from that city. Federal law requires a local authority (e.g., a state or local government) to issue a franchise agreement, and Texas law provides for compensation for the use of a city's rights-of-way.

Because of ever-growing technological capabilities, telecommunications companies now also have the ability to provide video programming. Those companies wanted the local franchise system reformed so that they would not have to obtain hundreds of franchises to implement their new technology.

Cities wanted to ensure that all technologies and services that use the public rights-of-way would pay a fair and equitable fee for use of the public's land. In addition, cities wanted to ensure that they retained police power authority over their rights-of-way and were still able to provide public, educational, and governmental (PEG) programming to their citizens.

In 2005, the legislature passed Senate Bill 5, which created a new Chapter 66 of the Texas Utilities Code.

#### **What are the basics of Chapter 66 of the Texas Utilities Code?**

Chapter 66 has several provisions, some of which are complex. Essentially, the law:

1. creates a state-issued cable and video franchise to be administered by the Public Utility Commission (PUC).
2. requires an entity seeking to provide cable or video service in Texas to file an application with the PUC for the state-issued certificate of franchise authority, and requires the PUC to issue a certificate of franchise within 17 business days of the receipt of an application, provided that – among other things – the applicant: (a) agrees to comply with all federal laws and regulations; (b) agrees to comply with all city regulations regarding the use of the public rights-of-way, including the police powers of the city; and (c) provides a description of the service area footprint to be served.

3. provides that a SICFA shall contain a grant of authority to use a city's rights-of-way, subject to the police powers of a city.
4. requires the holder of the SICFA to make a quarterly franchise payment to each city in which it provides service and that the payment be equal to 5% of gross revenues, as that term is defined in the law, earned by the franchise holder in that city.
5. provides that the holder of the SICFA shall pay each city an amount equal to 1% of the provider's gross revenue or, at the city's election, the per-subscriber line fee that was paid under previous franchise agreements in lieu of in-kind services and operational grants.
6. requires the holder of the SICFA to provide a city, upon request, with a certain number of PEG channels to be operated by the city for noncommercial programming, with certain limitations and restrictions.

Many entities have applied for, and received, a SICFA. However, some cable companies continue to operate in some cities under existing, "grandfathered" local franchise agreements.

### **What is the status of all the "grandfathered" local cable franchises?**

Until the passage of SB 1087 in 2011, Chapter 66 provided that the cable provider with the most subscribers in a city providing cable or video service pursuant to a local franchise agreement with a city could not seek a SICFA for that community until the expiration of the existing franchise agreement. In other words, the law "grandfathered" existing local cable franchises until they expired. SB 1087 changed that.

### **What is the effect of Senate Bill 1087?**

Senate Bill 1087 made changes to, among several other things, the "grandfathering" provision in Chapter 66. With regard to "grandfathering", the bill provides that:

1. beginning September 1, 2011, a cable service provider or video service provider in a city with a population of less than 215,000 may elect to terminate not less than all unexpired franchises and seek a SICFA for those areas by providing written notice to the Public Utility Commission and each of those cities before January 1, 2012.
2. a cable service provider or video service provider in a city with a population of at least 215,000 may terminate a local franchise in that city only in very limited circumstances and pursuant to certain requirements.

Some cities have already received "informal" letters from their cable provider of the provider's intent to terminate the city's local franchise. The bill requires a formal written notice before January 1, 2012, so those cities will likely see another notice soon. Other cities have not yet received any notice, but also may receive one soon.

### **What will the effect of the transition be on my city?**

The vast majority of cities will see little change from current procedures. Once a cable provider seeks and obtains a SICFA in a city with a population of less than 215,000, the local franchise is terminated and Chapter 66 will:

1. allow the holder of the SICFA to use a city's rights-of-way, subject to the police powers of a city.
2. require the holder of a SICFA to make a quarterly franchise payment to each city in which it provides service that is equal to 5% of gross revenues, as that term is defined in the law, earned by the franchise holder in that city.
3. require the holder of a SICFA to pay each city a PEG fee an amount equal to 1% of the provider's gross revenue or, at the city's election, the per-subscriber line fee that was paid under previous franchise agreements.

The law also requires the holder of a SICFA to provide a city, upon request, with a certain number of PEG channels to be operated by the city for noncommercial programming, with certain limitations and restrictions. This provision requires only that the provider give channel capacity to a city; it is the city's responsibility to operate the channel and provide a minimum level of programming. A city that has or wishes to have a PEG channel or channels should consult with local legal counsel regarding specifics, which may be complex.

Cities with a population of at least 215,000 are subject to detailed local franchise termination provisions, and should consult with local legal counsel regarding specifics.

### **Does Senate Bill 1087 make any other important changes?**

Yes. Senate Bill 1087 makes various changes relating to a city's accounting of its PEG fees. Under Chapter 66, the PEG fee is paid quarterly in the same manner as the 5% franchise fee. Senate Bill 1087 requires, effective September 1, 2011:

1. the holder of a SICFA to specifically identify the amount of the PEG fee when it is paid.
2. a city to: (a) establish a separate account for the PEG fee revenue; and (b) maintain "a record of each deposit to and disbursement from [the PEG fee] the separate account, including a record of the payee and purpose of each disbursement."

Note that a city must have only one account, not necessarily a separate account for each provider in the city. It is advisable that a city keep the PEG fee account entirely separate from its general fund to comply with the law, which states that the city "may not comingle" PEG fees "with any other money."

### **What if my city has no PEG channels and doesn't anticipate having any in the near future?**

Under Chapter 66, a PEG fee may be spent only as permitted by federal law, which provides that expenditures must be for capital costs for PEG facilities, otherwise it counts as part of the franchise fee, which is limited to 5% by federal law. In other words, a city may not spend PEG fee revenue on PEG channel operational or other, non-capital costs without a similar reduction in its franchise fee by an equal amount. This means that, for some cities, they may not have enough PEG fee revenue now – or in the foreseeable future – to operate a PEG channel. Other cities may not desire to operate a PEG channel. For cities in either situation, there are a number of options:

1. A city may simply spend the revenue in a lawful manner or it may accumulate the PEG fee revenue in anticipation of spending it on allowable expenditures.
2. Alternatively, several cities have “opted out” of the PEG fee. Those companies and cities have taken the position that the law allows an election between receiving the PEG fee of either an amount equal to one percent of the provider’s gross revenue or a per-subscriber line fee under the previous local franchise. If a city had no per-subscriber fee under its previous local franchise, that amount is zero. If you choose this alternative, you can simply request that the video service provider not collect and remit the PEG fee.
3. You can also request that the video service provider reflect the reduction in PEG fees on the quarterly statement provided with your franchise fee payment. For example, the video service provider’s statement would reflect a franchise fee of 5% and a PEG fee of 1%. The provider would provide a 1% credit against the PEG fee on your statement which leaves a city with the required 5% franchise fee total.

Each city should consult with local legal counsel regarding the options above.

#### **Who can we contact with questions?**

City officials should contact Scott Houston, general counsel of the Texas Municipal League at 512-231-7400 or [shouston@tml.org](mailto:shouston@tml.org).

Cable providers should contact Todd Baxter, vice president for government affairs and general counsel at 512-474-2082 or [tbaxter@txcable.com](mailto:tbaxter@txcable.com).