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# F I S C A L   I M P A C T   R E P O R T

**SPONSOR** HHGAC **ORIGINAL DATE** 03/12/09 **LAST UPDATED** **HB** 675/HHGACS

**SHORT TITLE** Community Access To Media & Information Act **SB**

**ANALYST** Haug

## APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Non-Rec | Fund Affected |
|---|---|---|---|
| FY09 | FY10 | | |
| | NFI | Recurring | General Fund |

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB 522

**SOURCES OF INFORMATION**
LFC Files

Responses Received for Original Bill From
Attorney General (AGO)
Public Education Department (PED)

Responses Received for HHGAC Substitute From
Public Education Department (PED)

## SUMMARY

Synopsis of Bill

House Bill 675 enacts the “Community Access to Media and Information Act” which imposes requirements on a local franchise authority (a city, town, county etc.) with regard to franchise agreements entered into with a corporation for the provision of communications, information and digital services to consumers. Those service providers could include cable television companies, telephone companies, Internet Service Providers etc.

The bill requires a service provider, prior to entering into a franchise agreement, to conduct an assessment of the communication and information needs of the community, at its own expense. The costs of conducting the assessment are reimbursable from the franchise fees payable to the political subdivision. The results must be published as a matter of public record, and the political subdivision (usually the local franchise authority) must hold a hearing within ninety days of completion of the needs assessment.

Compensation receivable to the political subdivision, both from current and future franchise agreements, must be allocated by the political subdivision for the benefit of its public, educational and government access operations.

The bill provides that an assignment of a franchise agreement is not valid unless the assignee assumes all of the obligations of the assignor and the political subdivision has approved the assignment.

The bill imposes certain minimum requirements for the contents of franchise agreements relating to public, educational, and governmental access, including requirements that no less than two and one-half percent of the annual gross revenues, or one-half of the francise fees, of the local service provider be “allocated and reserved” by the political subdivision and used for general operations of the direct governmental or contracted public access provider. The bill also provides that that an additional one percent of gross revenues above franchise fees of the service provider be set aside for the provision of facilities and equipment, to be collected by the political subdivision “allocated and reserved” by the political subdivision and used to fund public, educational and government access facilities and equipment needs in accordance with federal regulations. Those funds must be distributed by the political subdivision among the access providers equitably in accordance with the demands upon their respective resources which is newly defined in the substitute bill.

The bill defines “"access management organization" to mean an entity contracted to provide the services of public, educational and governmental access. The bill provides that if the service provider also operates as the access management organization, the service provider shall establish clear administrative procedures to make equipment and channel time available to the community and shall state, on screen, that the public is watching an access channel. These requirements shall be specifically described in the franchise agreement and subject to regulation and approval by the local franchise authority. If a nonprofit organization operates as the access management organization, those obligations must be included in the contract between the political subdivision and the nonprofit organization.

The bill also mandates that cable services carry public, educational, and government access where they carry commercial channels.

The bill also requires that a communications and information service provider be capable of broadcasting emergency alerts in their systems.

The bill also provides that a cable system shall be deemed abandoned if a renewed franchise agreement has not been completed by the termination date of the existing franchise agreement unless a mutually agreed upon extension between the political subdivision and the service provider for continuation of negotiations has been reached

The bill requires diversity in programming and prohibits discrimination based upon race, religion, ethnicity, gender, age or sexual orientation.

The bill requires that the political subdivision and the service provider each file a report, within 90 days of a contract year, year with the Public Regulation Commission certifying compliance with this provision of the new Act.

The bill would allow any access management organization or subscriber to the services included in the new Act to bring an action in district court to enforce compliance with the Act.

**FISCAL IMPLICATIONS**

House Bill 675 has no apparent fiscal implications.

**SIGNIFICANT ISSUES**

The AGO stated in analysis of the original bill, edited for changes introduced by the HHGAC substitute:

> This bill imposes requirements on "local franchise authorities" (usually cities, towns, and counties) and "communications, information, and digital services" providers when those entities are negotiating franchise agreements for the provision of those services. It appears to dictate the terms of those agreements, even though the state is not a party and negotiations are conducted between the local franchise authority and the service provider.
>
> Current state law does not regulate those agreements, or provide for "state-wide" franchise agreements. Federal law does not require that local franchise authorities mandate the provision of public, educational, or governmental access when negotiating those agreements. This bill would remove that discretion from the local franchise authorities.
>
> Although the title of the bill refers to "Cable Television Franchise Agreements", the phrase "cable television" is not used in the body of the bill. The bill's broad definition of "service provider" could also include internet, satellite, radio, telephone, and other wireless or wired broadcast and information providers. However, the bill does impose public access requirements on "cable service" in Section 5. Some of the bill's requirements may not be practical regarding channel and bandwidth provision for public, educational, and governmental use and may be difficult to implement by other mediums, such as telephone, radio, Internet access, etc, which are included in the bill's broad definition of "service provider". Given the title and the new Act's requirements, this analysis assumes that the intent of the bill is to primarily regulate franchises for cable television.
>
> The bill raises the issue of whether the state may usurp the discretion granted to local franchise authorities by federal law to negotiate the terms of a franchise for the provision of cable television to consumers and whether the state may enact a state law dictating terms and conditions in those franchise agreements. (See 47 U.S.C. Sections 521 to 561 describing the franchise process for cable communications providers and local franchise authorities.) This state does not have a "state-wide" franchise system in place. If it did, state law could presumably regulate state-wide franchise agreements, subject to federal law and Federal Communications Commission rulings. The bill only addresses local franchise agreements.
>
> The Public Regulation Commission does not regulate cable television in New Mexico. See NMSA 63-9A-3M. This bill would impose a requirement on local franchise authorities and service providers to submit an annual report with that Commission certifying compliance with the terms of the new Act, but requires the Commission to

serve only as “a repository and custodian” of compliance certifications.

If the state can impose its authority on local franchise authorities, as opposed to establishing state-wide franchises regulated by a state agency, the provisions in this bill will be reviewed to determine whether they are “reasonable”, and whether the denial of a franchise agreement by a local franchise authority because a service provider refuses to agree to the terms required by this bill could be deemed an “unreasonable refusal to award a franchise” under federal law and applicable Federal Communications Commission rulings.

The Federal Communications Commission has adopted an order providing guidance and setting restrictions on the process and requirements that local franchising authorities can employ when considering franchise applications from potential new cable service providers and incumbent cable providers. The FCC addressed the issue of local franchise authorities imposing unreasonable conditions during franchise negotiations. The order discussed a “needs assessment” imposed on Verizon, along with the extraction of unreasonable payments for public, educational, and government access. The FCC order prohibited unreasonable demands regarding public, educational, and governmental access as an “unreasonable refusal to award a franchise. See *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, adopted December 20, 2006 and released March 5, 2007 (FCC Cable Franchising Report and Order), Sections 108,109, and 110.

That Order was upheld by the Sixth Circuit Court of Appeals in *Alliance for Community Media v. Federal Communications Commission;* (No. 05-311, 2008).

This bill will have to be reviewed in light of the FCC’s order and the decision of the Sixth Circuit Court of Appeals.

The bill also defines "access management organization" as an entity contracted to provide the services of public, educational and governmental access and requires the political subdivision (local franchise authority) to “allocate and reserve ” two and one half percent of “gross revenues or one-half of the franchise fees” of the service provider, collected by that political subdivision, for an “access management organization” for “general operations”. That amount must be included in the franchise fee under federal law, and therefore will result in a reduction of revenues available to the local franchising authority.

The bill also requires that the service provider pay an *additional* “one percent of gross revenues above franchise fees” to be “set aside” by the political subdivision, used by the access management organization for the provision of facilities and equipment. These provisions may violate 47 U.S.C. Section 542 which regulates franchise fees that may be charged to cable communications (television) operators. In the case of any franchise granted *after* October 30, 1984, the definition of “franchise fee” excludes *capital costs which are required by the franchise to be incurred by the cable operator* for public, educational, or governmental access facilities. 47 U.S.C. 542(g)(2)(C). The Federal Communications Order differentiated between “costs incurred in or associated with the construction of PEG access facilities,” which qualify as capital costs and therefore fall

into the franchisee fee exclusion, and "payments in support of the use of PEG access facilities," which do not qualify as capital costs and so are subject to the statutory cap on franchise fees. Salaries and training in support of the use of PEG access facilities fall into the latter category, for example, and so are counted toward the five percent limit. In any event, this bill dictates the amount of the franchise fee which must be paid by the service provider to the local franchising authority, effectively removing that issue from franchise agreement negotiations.

In addition, federal law, cited above, contemplates payments from a cable operator directly to a local franchise authority. Federal law does not appear to allow a state to require that a local franchise authority collect additional fees from a cable communications provider, based upon gross revenue of that provider, and then pass them through to a private contractor. The funds received by a political subdivision from the service provider would assume the character of "public funds", and under this bill would not be based upon actual costs incurred by the local franchising authority in order to provide negotiated public, educational, and governmental access. This bill imposes minimum payment provisions in contracts between a political subdivision and a private organization and may also conflict with the Procurement Code (NMSA Section 13-1-28 et seq) which generally requires a competitive proposal process for such contracts.

Section 7 of the bill deems a "cable system" to be "abandoned" if a franchise terminates, and a new franchise has not been negotiated, unless an extension has been agreed to between the political subdivision and the service provider. If implemented, this could be construed as an unlawful "taking" by government of private property in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

## RELATIONSHIP

House Bill 675 relates to Senate Bill 522 which addresses the same topic and is identical to the original version of HB 675.

GH/svb