

Memo

To: City Council
From: Michael L. Jones, City Solicitor
Date: October 22, 2009
Re: Addition to Legislative Agenda of October 26, 2009

Please add the attached ordinance to the Legislative Agenda of the October 26, 2009 meeting for consideration. A letter from Todd Hunt of Walter and Haverfield has also been provided explaining the need for passage of this ordinance as an emergency measure.

• Celebrating 75 years •

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October 21, 2009

VIA FACSIMILE # (740) 353-1036
and ORIGINAL BY U.S. MAIL

City of Portsmouth
c/o Michael L Jones, Director of Law
728 Second Street, Room 22
Portsmouth, OH 45662

Re: Video Service Provider Fee Ordinance

Dear Mr. Jones and City Officials:

You have requested that our firm prepare a video service provider fee ordinance as required by Ohio Revised Code § 1332.32(C)(1)(b) in order for the City to continue to receive what were formerly known as franchise fees from a cable operator, now known as a "video service provider fees" or "VSP Fees", after the expiration of the current franchise agreement between the City and Time Warner NY Cable LLC ("Time Warner"). Enclosed is a draft of such an ordinance for City Council's consideration for adoption at its October 26, 2009 meeting.

As background information, on September 24, 2007, Amended Sub. Senate Bill 117 was passed by the Ohio legislature that, in essence, took away local government franchising authority over cable television operators and created a state-wide authorization scheme for what are now known as "video service providers". This Senate Bill was codified into the Ohio Revised Code at Sections 1332.21 through 1332.34. It is a fairly long and complicated statutory procedure for the authorization and regulation of the provision of video services in local communities, including municipal corporations such as the City of Portsmouth, and provides that the Ohio Department of Commerce issue the authorizations and regulate the service.

The statute grandfathered existing franchise agreements between cable operators and local municipalities. However, upon the expiration of a franchise agreement between a cable operator and a local community, the cable operator must obtain a video service authorization ("VSA") from the Ohio Department of Commerce to continue to provide video service in the community. It is anticipated that Time Warner, the current cable television franchisee in Portsmouth will, upon the expiration of its franchise with the City on or about November 1, 2009, or shortly after, obtain a VSA from the State of Ohio.

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The only action that will be required by the City of Portsmouth with respect to Time Warner's VSA or for any other video service provider that receives a VSA from the State, in order to maintain the payment of franchise fees/VSP Fees by the provider, is for City Council to pass an ordinance to require VSP Fees.

Be advised the statutory definition of "gross revenues" upon which the percentage of VSP fees is based, is narrower than the definition of "gross revenues" that is contained in the current franchise agreement between the City and Time Warner and upon which the City's current franchise fees is based. Therefore, there may be a small decrease in the amount of fees paid by Time Warner under the state-issued VSA. The City currently receives 5% of Time Warner's gross revenues in Portsmouth and the enclosed ordinance continues that rate of 5%. 5% is the maximum amount that can be charged to the video service provider under the state statute.

Additionally, the statute specifies that if the City wishes to receive a percentage of the video service provider's revenue from advertising, that desire has to be separately specified in the City ordinance. Since advertising revenue is part of the definition of "gross revenues" in the current franchise agreement, I have included 5% of advertising revenues to also be received by the City in the enclosed ordinance. Consequently, the City will receive the maximum in VSP fees that it is entitled to receive and will be in almost as good a position with respect to the amount of fees as it is under its current franchise agreement.

As is the situation under the current franchise and federal law, the new state statute permits a video service provider to identify and collect the VSP Fee as a separate line item on the regular bill of each of its subscribers within the municipality. Although I have not reviewed any of Time Warner's bills in Portsmouth, I assume that it has always included the franchise fee as a line item on a subscriber bill just as it has in every other community in Ohio. Therefore, there should be no difference on the new billings under a VSA and, as stated above, the amount may actually be slightly less under the new state regimen.

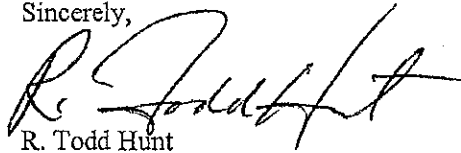
Our advice is that the City Council should adopt the VSP Fee ordinance as soon as possible as an emergency measure so that it will be in effect if and when Time Warner receives its VSA from the Ohio Department of Commerce. The new state statute requires Time Warner to notify the City of the issuance of its VSA and that notice then triggers a 10-day period within which the City must in turn notify Time Warner, or any other video service provider, of the requirements for the payment of VSP Fees. So as not to have the Council under a very short deadline within which to adopt the VSP ordinance within that 10-day period, it is certainly proper and advisable to put the ordinance in place now so that it will be much more convenient for Council and for the Mayor to provide the notice to Time Warner or any other video service provider within that 10-day window when it arises.

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Although lengthier than I had contemplated, I trust that the explanations in this letter are adequate for your understanding of the need to pass the enclosed VSP ordinance. As always, if you have any questions or concerns, please do not hesitate to contact me. Thank you again for the opportunity to serve the City of Portsmouth.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Todd Hunt". The signature is stylized with a large, sweeping initial "R" and a long, horizontal stroke extending to the right.

R. Todd Hunt

RTH/bak
Enclosure

ORDINANCE

Year – 2009 Number _____

An ordinance determining the Video Service Provider Fee to be paid by a Video Service Provider offering video service in the City pursuant to a Video Service Authorization from the Ohio Department of Commerce; authorizing the Mayor to give notice to the Video Service Provider of the Video Service Provider Fee; and declaring an emergency.

Whereas, the Ohio General Assembly enacted Sections 1332.21 through 1332.34 of the Ohio Revised Code ("ORC"), effective September 24, 2007, to provide a statewide "uniform regulatory framework" for the provision of cable television and/or other video service, which substantially reduces the City's traditional franchising authority to regulate cable and/or video service offered in the City using facilities located in the City's public rights-of-way; and

Whereas, the City has a cable television franchise agreement with Time Warner NY Cable LLC ("Time Warner") which expires by its own terms on or about November 1, 2009, and pursuant to which Time Warner pays franchise fees in the amount of five percent (5%) of gross revenues which are defined by the franchise to include, *inter alia*, advertising revenues; and

Whereas, pursuant to ORC Section 1332.23, any cable operator desiring to continue to provide video service after the expiration of its current cable television franchise agreement and any new video service provider intending to provide video service to subscribers in the City must now apply for and obtain a video service authorization ("VSA") from the Director of the Ohio Department of Commerce; and

Whereas, under ORC Section 1332.32, a video service provider that is providing service to subscribers in the City pursuant to a state-issued VSA must pay the City a video service provider fee ("VSP Fee") based on a percentage of the provider's "gross revenues" derived from providing video service in the City, not to exceed five percent (5%) of such revenues, if the City determines by ordinance that there shall be a VSP Fee; and

Whereas, ORC 1332.32(C)(2) further requires the City to provide all video service providers offering service in the City with notice of the VSP Fee requirements within ten (10) days of receiving notice from the video service provider that it will begin offering service in the City under a State-issued video service authorization, or the video service provider is not required to pay the VSP Fee to the City; and

Whereas, ORC Section 1332.32(B)(2)(g) provides that the VSP Fee is paid on a base of gross revenues consisting of revenues received from subscribers only, unless the City specifically determines, by Ordinance uniformly applicable to all video service providers, that advertising revenues also be included in the base of gross revenues on which the VSP Fee is paid; and

Whereas, in order to minimize the negative financial impact on the City it is the intent of this Council that the Video Service Provider Fee shall be as equivalent as possible to the current franchise fees required by the City's franchise with Time Warner; and

Whereas, in order to provide timely notice to a video service provider of the VSP Fee, it is necessary for this Council to determine now that the percentage of gross revenues on which the VSP Fee will be paid is five percent (5%) and that advertising revenues shall be included in the base of gross revenues on which the VSP Fee is paid, and to authorize the Mayor to provide notice of the VSP Fee to a video service provider within ten (10) days of the City receiving notice that a video service provider will begin providing service in the City. Now, therefore,

BE IT ORDAINED by the Council of the City of Portsmouth, Ohio, that:

SECTION I. In accordance with the requirements of ORC 1332.32, all video service providers providing video service in the City pursuant to a video service authorization obtained from the Director of the Ohio Department of Commerce shall pay video service provider fees ("VSP Fees") in the amount of five percent (5%) of gross revenues received from providing video service in the City, which gross revenue base shall include advertising revenues. The VSP Fee shall be paid quarterly, not sooner than forty-five (45) days nor later than sixty (60) days after the end of each calendar quarter.

SECTION II. No later than ten (10) days from receipt of notice from a video service provider that it will begin providing video service in the City pursuant to a state-issued video service authorization, the Mayor is authorized and directed to provide such video service provider with notice of the VSP Fee as determined by this Ordinance.

SECTION III. It is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and any of its committees or subcommittees that resulted in such formal action, were in meetings open to the public in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

SECTION IV. This Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety and general welfare of the residents of the City, in that it is necessary for this Ordinance to take immediate effect so that the City continues to receive appropriate fees from entities providing video and/or cable service in the City using the City's rights-of-way as set forth in this Ordinance, for which reasons and other reasons manifest to this Council, this Ordinance is hereby declared to be an emergency measure and shall take effect and be in force immediately after its passage.

Passed this _____ day of _____, 2009

Attest:

City Clerk

President of Council