

# Memo

**To:** City Council

**From:** David W. Kuhn, City Solicitor

**CC:** Mayor; Auditor; Superintendents, Portsmouth City Schools and East High School operating under the name of Sciotoville Community Schools

**Date:** April 6, 2007

**Re:** OHIO SENATE BILL 117: Effect on CATV franchises

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Attached are copies of an email message, with attachments, received yesterday from Walter & Haverfield, the City's cable television consultant.

The subject matter involves the negative effect that Ohio Senate Bill 117 will have on local governments and school districts, if enacted in its present form. Please review the attached information and consider adopting a resolution opposing S.B. 117.

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**David Kuhn**

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From: "Kathy Hodkinson" <dkuhn@pmcourt.org>  
To: "David W. Kuhn" <dkuhn@frognet.net>  
Sent: Thursday, April 05, 2007 11:07 AM  
Attach: Client\_Briefing\_Cable\_Telecom\_Mid-March\_2007.pdf; Sample Resolution - S.B. 117.doc  
Subject: Fw: Statewide Coalition Formed To Fight SB 117

----- Original Message -----

From: News from Walter & Haverfield  
Sent: Thursday, April 05, 2007 10:55 AM  
Subject: Statewide Coalition Formed To Fight SB 117

*Celebrating 75 years.*  
**Walter &  
Haverfield** LLP  
attorneys at law

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**URGENT ACTION ALERT:**  
**IMMEDIATE RESPONSE REQUESTED**

**Ohio Legislature Considers New State-Wide Cable/Video Franchise Bill  
Divesting Local Governments Of Franchising Authority**

April 4, 2007

Dear Clients and Friends,

Ohio Senate Bill 117, which was introduced on March 15, 2007, will divest Ohio local governments of their cable/video franchising authority and will cost Ohio municipalities and townships millions of dollars in revenue and telecommunications support. The purpose of this letter is to inform you of the grave danger that S.B. 117 poses to municipal Home Rule authority, the fiscal health of Ohio's cities, villages and townships, and local community growth and to ask for your help in stopping the Bill.

Effectively opposing this unconstitutional proposal will take an enormous effort by local governments, school districts, and public interest organizations throughout the State of Ohio. Local governments must act now if they are to preserve their cable franchise authority and prevent further erosion of Home Rule authority. Therefore, we request **your immediate participation** in the opposition to S.B. 117 through local legislative action, voicing your **objection** to the State Legislature, and providing a contribution toward the necessary funding of the efforts of **Local Voice Ohio**, a non-profit, state-wide coalition working to stop the Bill.

**Threat Analysis:**

A full summary of S.B. 117 is presented in the enclosed Client Briefing. As you will see, the Bill:

4/5/2007

- ▶ Slashes franchise fees paid to communities by cable television operators by reducing the revenue base upon which they are calculated.
- ▶ Allows cable operators to abandon their current cable franchises.
- ▶ Significantly reduces local control of the Public Right Of Way (PROW).
- ▶ Bans Institutional Networks provided by cable companies for schools and local governments.
- ▶ Severely limits Public, Educational & Governmental (PEG) Access Channels.
- ▶ Eliminates Funding for PEG Access.

There is no doubt that S.B. 117 is an unmitigated financial disaster for Ohio municipalities and townships and it is bad for Ohio's schools. In addition, it's bad for cable subscribers. The only parties who will benefit from S.B. 117 are large and highly profitable cable and telecommunications companies.

**Action Requested:**

- 1) Become knowledgeable about the effects that S.B. 117 will have on your community by reviewing the enclosed Client Briefing.
- 2) Lobby your local government to pass legislation that formally objects to S.B. 117. A sample Resolution is enclosed.
- 3) Make a contribution to **Local Voice Ohio's** efforts to do the following on behalf of local Ohio governments: (1) perform legislative analysis; (2) grow a diverse and vibrant local government coalition; (3) prepare model resolutions and letters to state legislators; (4) prepare "talking points" for use in connection with face-to-face meetings with legislators; (5) lobby to oppose and/or change the current proposed Bill; (6) work to identify and prepare pro-local government witnesses for Senate hearings; and (7) develop legal strategy concerning S.B. 117.

As discussed in the attached Client Briefing, S.B. 117 would reduce franchise fees in many communities by as much as 10-20%. Based upon our estimate of the work involved in the above-described activities, we suggest a contribution to Local Voice Ohio in the amount of 3% of your community's annual franchise fee revenue. Alternatively, we suggest the following minimum levels of support:

Villages & Townships (population < 1,000).....	\$500
Villages & Townships (population 1,000 - 4,999).....	\$1,000
Cities & Townships (population 5,000 - 9,999).....	\$1,250
Cities & Townships (population 10,000 - 14,999).....	\$1,500
Communities with populations of 15,000 or greater.....	10¢ per resident

**Timing:**

Time is of the essence in gearing up to try to counter the huge cable & telephone lobbying efforts. The Sponsor's introduction hearing has already been held and additional critical hearings will

take place this month (April). In order for Local Voice Ohio (LVO) to effectively mount opposition, funding will be needed by April 13, 2007. Please mail the detachable portion below with your contribution, and make checks payable to: Local Voice Ohio, Inc. You may receive other requests for support from other organizations assisting Local Voice Ohio and/or from LVO directly, or you may already have received such correspondence. If so, we apologize for any inconvenience but urge you to support LVO.

**Questions/Further Information:**

With 75 years of public law experience and having represented hundreds of Ohio municipalities and townships in telecommunications and cable television franchising matters, Walter & Haverfield LLP is uniquely positioned to assist Local Voice Ohio (LVO) in this vital effort on behalf of Ohio's local governments, school districts, and public interest groups. Please contact Bill Hanna [(216) 928-2940;whanna@walterhav.com] or Todd Hunt [(216) 928-2935; rthunt@walterhav.com] with any questions, or log on to [www.localvoiceohio.com](http://www.localvoiceohio.com).

Sincerely,

WALTER & HAVERFIELD LLP, on behalf of  
Local Voice Ohio, Inc.

✂ Please detach at perforation and include with contribution

Send to:

Local Voice  
Ohio, Inc.  
(WH)  
3886 N. High  
St.  
Columbus,  
Ohio 43214

Amount: \$ \_\_\_\_\_

Name of Contributor:

Address:  
\_\_\_\_\_  
\_\_\_\_\_

Make Checks Payable  
to:

Local Voice  
Ohio, Inc.

Contact Person:

Phone No. \_\_\_\_\_

If you would like to be added to the Local Voice email list to receive up to date news on S.B. 117, please provide your email address:

\* Tax I.D. Number for Local Voice Ohio, Inc. is 20-8725993.

# Client Briefing

Urgent Legal News • March 19, 2007

## On Cable & Telecommunications Law

OHIO LEGISLATURE CONSIDERS NEW STATE-WIDE CABLE/VIDEO FRANCHISE BILL  
DIVESTING LOCAL GOVERNMENT OF FRANCHISING AUTHORITY

### INTRODUCTION

If enacted as written, Ohio Senate Bill 117 (S.B. 117), introduced on March 15, 2007, will have a tremendous negative impact on every municipality, township, and school district in Ohio. S.B. 117 takes away the right of Ohio's municipalities and townships to require cable franchise agreements from cable operators and/or telephone companies. But this Bill would not only prohibit local governments from negotiating new agreements or extending existing ones; in fact, it would permit operators to abandon their existing franchise agreements at any time after the legislation becomes effective.

In addition to the abolition of local franchise agreements, the Bill will result in the loss of millions of dollars of franchise fee revenues each year. Although S.B. 117 provides for a franchise-like fee based upon the gross revenues of a Video Service Provider (VSP), the definition of "gross revenues" is much narrower than in most franchise agreements. This narrowing of the "gross revenue" definition will most likely result in the immediate loss of as much as 15-20% of the franchise fees received by Ohio's municipalities. For many communities, this will be a loss of tens of thousands of dollars annually; for larger cities, the loss will be hundreds of thousands of dollars each year.

Moreover, the Bill prohibits municipalities from requiring that VSPs provide an institutional network (I-Net). The I-Nets and dark fiber networks that many Ohio municipalities and school districts depend upon today for their telecommu-

nications needs, provided under existing cable franchise agreements, would be outlawed. S.B. 117 would even prohibit free cable service to public buildings! In addition, amendments to R.C. Chapter 4939 would further erode local authority to manage the public right-of-way (ROW).

With respect to Public, Educational and Governmental Access channels (PEG channels), while S.B. 117, on paper, will permit some PEG access channels, the number would be drastically reduced, and nearly all PEG channels would be shared (as opposed to being available for the exclusive use of an individual municipality, township or school district). And the Bill would allow operators to reclaim any PEG channels that do not meet an arbitrary standard of "substantially utilized" which is defined in such a way that every PEG channel in Ohio is at risk of going dark. Finally, S.B. 117 bans *all* specific PEG financial support.

### SUMMARY OF S.B. 117

Following is a more detailed overview of the core provisions of S.B. 117:

1. "Video Service Provider" means:

Cable operator; telephone company providing video service; or anyone else providing video service and using at least a portion of the public ROW (not satellite providers)

2. Incumbent Opt-Out [1332.23]

Incumbent cable operators or video service providers may abandon their current franchise or Video Competition Agreement

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...and Extraordinary Service.

(i.e., may "opt-out") at anytime after passage. If an incumbent chooses not to opt-out, the PEG access provisions in the existing franchise are preempted anyway. No existing cable franchise agreement may be extended, and no new local franchise agreements may be negotiated. S.B. 117 truly means the end of local franchises in Ohio. (Note, however, that the U.S. Constitution states that "No state shall... pass any... law impairing the obligation of contracts." The Ohio Constitution (Article II, Sec. 28), in turn, states that "The general assembly shall have no power to pass... laws impairing the obligation of contracts...".

### 3. Video Service Authorization [1332.24 -25]

Franchises ("Video Service Authorizations") with a 10 year term will be granted by the Ohio Director of Commerce, not by local communities. The application to the Director of Commerce will require only very basic information: company contact information; the geographic boundaries of Video Service Area; the technology to be used; and attestations regarding compliance with FCC regulations and applicable law. The Director will be authorized only to determine whether an application is complete and, in general, will be required to grant authorization within 30 days of the filing of a complete application. Neither the Director of Commerce nor the PUCO has any regulatory authority over provision of video services, and only minor enforcement powers.

### 4. Franchise Fee (now "Video Service Provider Fee") [1332.33]

A quarterly Video Service Provider Fee will be paid based upon a percentage of Gross Revenues and passed through to subscribers (like franchise fee currently). However, the "Gross Revenues" definition is much narrower than many cable franchise agreements and includes only Subscriber Revenues — no advertising, home shopping, launch incentive fees or other non-subscriber revenues will be included in gross revenues. Also excluded are subscriber late fees and franchise fees (so no "fee on fee"). These revisions to the revenue base upon which franchise fees are calculated will result in the loss of approximately 15-20% percent of a community's franchise fees each year (depending upon the current franchise's definition of gross revenues).

### 5. Franchise Fee Audit [1332.34]

The authority of local governments to ensure that cable or video operators are properly paying franchise fees will be greatly diminished. S.B. 117 would restrict audits of VSP Fees to only once per year, at the sole expense of the municipality or township (i.e., no reimbursement of costs no matter the amount of underpayment discovered by audit). An action to dispute the amounts paid must be brought in state court within 2 years of underpayment. Finally, S.B. 117 provides that municipalities and townships may not hire anyone whose compensation is dependent in any way on the outcome of the audit (i.e., no contingent fee arrangements).

### 6. Video Service Area ("VSA") [1332.25]

For a cable operator with a franchise in place on the effective date of legislation, the VSA is the franchise area. For a telephone company the VSA is anywhere it offers basic local exchange service throughout Ohio. Otherwise, the Video Service Areas are co-extensive with the boundaries of political subdivisions, and may overlap (as between providers).

### 7. Public, Educational and Governmental ("PEG") Access [1332.30]

Under S.B. 117, a community may request PEG Channels, but the number of channels will be greatly restricted in relation to current law. The total number of PEG channels available to a municipality, township or Video Service Provider head-end may not exceed: 3 channels for aggregated population greater than or equal to 50,000; 2 channels for aggregated population less than 50,000, or the number of PEG channels provided pursuant to a franchise. VSPs need only provide channels within 120 days of a community's request, and only if the community demonstrates the ability to transmit PEG programming content to the VSP in a format compatible with whatever video technology that VSP may be using.

One of the most draconian provisions of the Bill is that it would allow a VSP to take back any PEG channel that is not "substantially utilized", defined as 12 hours per day non-character generated programming, 80% or less of which is non-repeat programming. This comes to 9.6 hours per day of new, non character-generated, non-repeated programming. Very few if any PEG channels in Ohio meet this standard and thus for all intents and purposes, every (or nearly every) PEG channel in the State of Ohio will be at risk of being taken away by Video Service Providers.

S.B. 117 provides that no additional funds, equipment, facilities or other support may be required for PEG purposes other than the VSP/Franchise Fee. And finally, the Bill would permit a VSP to carry PEG Channels on any tier viewed by more than 50% of subscribers in area, whereas under current law a community may require that PEG channels be carried on the basic service tier where it is viewable by *all* subscribers.

### 8. Services for Public Benefit

Under S.B. 117, no Institutional Networks (I-Nets) may be required of a VSP by local governments. [Proposed R.C. 1332.30(B)]. In addition to being prohibited from requiring I-Nets pursuant to a new franchise agreement, schools and cities will lose the free use of the I-Nets upon which they have become highly dependent. The Bill makes no provision for grandfathering or transitioning such current obligations. Demonstrating just how little the VSPs want to pay for the use of local ROW (which use enables them to earn millions and millions of dollars), S.B. 117 even provides that no free cable service to public buildings may be required by lo-

cal governments. Specifically, proposed R.C. 1332.26(A) provides "No political subdivision shall require a video service provider to obtain from it any authority to provide video service within its boundaries." And 1332.26(B) provides "[N]o political subdivision shall request anything of value from a video service provider for providing video service....".

#### 9. Customer Service/Consumer Protection Issues

Local authority to protect residents by enacting and enforcing customer service standards applicable to cable operators would be eviscerated by S.B. 117. The Bill would require VSP to implement an "informal process" for billing inquiries, service and subscriber complaints. [1332.31] But a municipality or township would be permitted to require compliance only with FCC customer service regulations (and thus would be prohibited from enforcing more stringent standards, as under current law). And if there are two or more wireline providers, or "effective competition" in a community, no customer service standards may be enforced at all. [1332.26(C)]. (And neither the Director of Commerce nor the PUCO would have any authority in this regard either).

#### 10. Emergency Alert [1332.32]

Essentially, Video Service Providers would be required only to comply with the Federal Emergency Alert System requirements. Despite the time-honored tradition of local override and the growing role of local authorities as first responders in times of crisis, no local direct override may be required under S.B. 117.

#### 11. Buildout and Redlining [1332.28-.29]

Telephone companies with more than one million access lines in Ohio will be required to provide access to video service to at least 25% of the households in the Video Service Area within 2 years after first providing video service in that VSA. In addition, any such company will be required to provide access to its video service to at least 50% of the households in the Video Service Area within 5 years after first providing video service in that VSA or after two years have passed from the first time that 30% of households in the area with access to the service subscribe to it for 6 consecutive months.

A VSP is prohibited from denying access based on race or income but has an affirmative defense to a charge that this prohibition has been violated if it can demonstrate either (1) that 25% of the households with access to its service are low income households within three years after service first provided in the video service area; or (2) 30% of the households within the VSA with access to the service are low income, 5 years after service first provided.

There are many exceptions and escape hatches to these build-out and anti-redlining obligations. The Director of Commerce has very limited enforcement authority and would be required to bring a lawsuit within three years if a violation is suspected and not cured within a reasonable time after notice.

#### 12. Local Rights-of-Way Management [Revisions to R.C. Chapter 4939]

Under S.B. 117, for public utilities, cable operators and other Video Service Providers, a municipality's consent for use of the ROW is deemed granted 31 days after filing of completed application (i.e., only notice, not consent, required) unless earlier granted — consent cannot be denied. Under current law, 60 days is permitted to grant or deny application. A municipality would be prohibited from denying or delaying consent for use of the ROW even based on financial, technical or managerial criteria necessary to protect the public health, safety and welfare, where the requestor is a public utility, cable operator or VSP. Finally, VSPs and cable operators are entitled to offset any VSP Fees paid against any ROW fee.

#### CONCLUSION

S.B. 117 poses a grave threat to municipal Home Rule authority, municipal fiscal health, and local community growth. Walter & Haverfield LLP is currently assisting in building a state-wide coalition to oppose S.B. 117, on behalf of our municipal and other local government clients.

For more information regarding the contents or effects of S.B. 117 or to find out what you can do to help prevent the passage of the Bill, please contact one of our Cable & Telecommunications Group lawyers:

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The information in this newsletter is a summary of often complex legal issues and may not cover all the 'fine points' related to a specific situation or court jurisdiction. Accordingly, it is not intended to be legal advice, which should always be obtained in consultation with an attorney.

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Walter &  
Haverfield <sup>th</sup> LLP  
attorneys at law

## [ Sample Resolution ]

Please feel free to modify Resolution for your Community

*\* For an electronic version of this Sample Resolution  
please email Heather Vlasuk at hvlasuk@walterhav.com*

RESOLUTION NO.

OFFERED BY:

### A RESOLUTION OPPOSING OHIO SENATE BILL 117 AND SUPPORTING THE LOCAL CABLE FRANCHISING PROCESS; AND DECLARING AN EMERGENCY

WHEREAS, Senate Bill ("SB") 117 was introduced in the Ohio Senate on March 15, 2007 and whereas on March 27, 2007, the Senate held the Sponsor's introduction hearing and is expected to commence further hearings in April 2007; and

WHEREAS, in its present form, SB 117 would eliminate local franchise authority over cable and other video service providers that must use the [City's/Village's] rights-of-way to provide service and would replace that authority with only the most minimal oversight and enforcement powers by the Ohio Director of Commerce; and

WHEREAS, SB 117 would permit cable operators to unilaterally abrogate and abandon existing cable/video contracts with municipalities even if no new competitive video service is offered in those communities and would outlaw the extension of any current franchise agreement; and

WHEREAS, SB 117 would significantly reduce the franchise fees paid to the [City/Village] by cable operators and/or other video service providers in exchange for using the [City's/Village's] rights-of-way, and would severely impair the [City's/Village's] ability to audit cable and competitive video service providers' franchise fee payments; and

WHEREAS, SB 117 would substantially reduce, if not completely eliminate, the [City's/Village's] ability to have dedicated Public, Educational and Governmental (PEG) access channels and would eliminate entirely all specific PEG funding as well as other services, such as free cable service to [City/Village] buildings and public schools; and

WHEREAS, SB 117 would prohibit the [City/Village] from requiring a cable/video service provider to build-out its system so as to provide universal service to all [City/Village] residents, as has been traditionally required of cable television operators so as to ensure that all residents receive similar access to services; and

WHEREAS, SB 117 would prohibit the [City/Village] from requiring that any cable/video service provider supply an Institutional Network for the provision of voice, video and data communications between and among [City/Village] buildings, public and private school buildings, and library buildings in the [City/Village] ; and

WHEREAS, SB 117 would prohibit the [City/Village] from enforcing reasonable cable customer service standards determined by the community, as permitted by current Federal law; and

WHEREAS, this further encroachment on local authority to monitor and regulate video/cable service providers using the [City's/Village's] rights-of-way to provide video/cable service to the [City's/Village's] residents is not in the [City's/Village's] best interest and is strongly opposed by this Council; and

WHEREAS, this Council specifically objects to any diminishment of the revenue it receives from video/cable providers which use the [City's/Village's] rights-of-way as a part of their business activities; any erosion of the [City's/Village's] ability to require universal service for all residents and businesses within the [City/Village]; any erosion of the [City's/Village's] right to require traditional community enhancements such as dedicated public, educational and governmental (PEG) access facilities and Institutional Network (I-Net) capacity from video/cable providers using the [City's/Village's] rights-of-way; any erosion of the [City's/Village's] ability to ensure adequate customer service provided by video/cable operations; and any provision which diminishes the [City's/Village's] authority to manage its public rights-of-way or otherwise infringes upon its Home Rule authority under the Ohio Constitution.

NOW, THEREFORE, BE IT RESOLVED by the Council of \_\_\_\_\_,  
\_\_\_\_\_ County, State of Ohio, that:

Section 1. It is hereby declared that this Council is opposed to Ohio S.B. 117, presently before the Energy and Public Utilities Committee of the Ohio Senate, and urges the Ohio Legislature to oppose and defeat S.B. 117 and any other legislation which would further erode local government control and authority over the use of its rights-of-way in video/cable service providers utilizing its rights-of-way.

Section 2. The Clerk of Council is hereby directed to serve a certified copy of this Resolution upon Governor Ted Strickland; and upon State Senator [State Senator for the District; See <http://www.senate.state.oh.us/senators/index.html>]; and upon the members of the Ohio Senate's Energy and Public Utilities Committee.

Section 3. This Resolution is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety and welfare. [Emergency provision if applicable]

PASSED: \_\_\_\_\_

ATTEST:

I certify that the foregoing Resolution was duly passed by the Council of said Municipality on \_\_\_\_\_, 2007.

April \_\_, 2007

Governor Ted Strickland  
Riffe Center, 30<sup>th</sup> Floor  
77 South High Street  
Columbus, Ohio 43215-6108

[Your District's Senator]  
(See <http://www.senate.state.oh.us/senators/index.html>  
to locate your Senator)

**RE: \_\_\_\_\_ (Community Name) \_\_\_\_\_ Has Formally Objected To S.B. 117  
Through Passage of Resolution No. \_\_\_\_\_.**

Dear Governor Strickland and Senator \_\_\_\_\_:

\_\_\_\_\_ (Community Name) \_\_\_\_\_ is strongly opposed to Ohio S.B. 117, now pending before the Energy and Public Utilities Committee, because it will divest local governments of their cable/video franchising authority and institute a state-wide franchising scheme. S.B.117 is a grave danger to \_\_\_\_\_ (Community Name)'s \_\_\_\_\_ Home Rule authority, fiscal health, and local community growth.

**Therefore, \_\_\_\_\_ (Community Name) \_\_\_\_\_ has passed Resolution No. \_\_\_\_\_ formally objecting to the passage of S.B. 117 and supporting the local franchising process.**  
Please find enclosed a copy of Resolution No. \_\_\_\_\_.

Sincerely,

\_\_\_\_\_ on behalf of  
\_\_\_\_\_

*cc: Members of the Ohio Senate's Energy and Public Utilities Committee:*

Senator Robert Schuler  
Statehouse  
Room #221, Second Floor  
Columbus, Ohio 43215

Senator Steve Buehrer  
Senate Building  
Room #125, First Floor  
Columbus, Ohio 43215

Senator Ray Miller  
Senate Building  
Room #223, Second Floor  
Columbus, Ohio 43215

Senator Jeff Jacobson  
Senate Building  
Room #138, First Floor  
Columbus, Ohio 43215

Senator Tom Niehaus  
Senate Building  
Room #038, Ground Floor  
Columbus, Ohio 43215

Senator Robert F. Spada  
Senate Building  
Room #129, First Floor  
Columbus, Ohio 43215

Senator Lance T. Mason  
Senate Building  
Room # 226, Second Floor  
Columbus, Ohio 43215

Senator Jason H. Wilson  
Senate Building  
Room #052, Ground Floor  
Columbus, Ohio 43215

Senator Kevin Coughlin  
Senate Building  
Room #137, First Floor  
Columbus, Ohio 43215