

Legal Report to the City of Seattle, Washington

From: Brian T. Grogan, Moss & Barnett

Date: November 3, 2011

**Re: The Proposed Transfer of the Cable System and Franchise
from Broadstripe to WaveDivision I, LLC**

1. Background

On or about October 1, 2007, the City of Seattle, Washington (“City”) passed and adopted Ordinance 122514, granting to Millennium Digital Media Systems, L.L.C. d/b/a Broadstripe, LLC (“Broadstripe”) a cable television franchise agreement permitting Broadstripe to construct, maintain, and operate a cable television system in certain cable franchise districts in the City (“Franchise”). Section 14 of the Franchise and Subsection 21.60.520 of the Seattle Municipal Code provide that neither a cable franchise nor a cable system operated thereunder may be transferred to another person without the approval of the City. The transactions contemplated by the Purchase Agreement constitute a “Transfer” as that term is defined in the Franchise.

On August 16, 2011, Broadstripe (and its affiliates) and WaveDivision I, LLC, a Washington limited liability company (“Wave-I”) entered into a Purchase and Sale Agreement (“Purchase Agreement”) whereby Broadstripe agreed, among other things, to sell and convey all of its assets and cable system facilities within the City that Broadstripe owns and operates pursuant to the Franchise (the “Cable System”) to Wave-I (“Assignment”). Wave-I’s sole member and manager is WaveDivision Holdings, LLC, a Delaware limited liability company (“Wave Holdings”) and Wave Holdings is the sole member and manager of seven (7) other active limited liability companies that own and operate cable, data and phone networks in the United States.

On or about August 26, 2011, Broadstripe and Wave-I submitted to the City FCC Form 394 - Application for Franchise Authority Consent to Assignment or Transfer of Control of Cable Television Franchise (the “Application”) – seeking the City’s consent to the Assignment.

2. Description of the Transaction

Under the Purchase Agreement Broadstripe and its affiliates have agreed to sell to Wave-I the Cable System and Franchise in the City among other assets. The Purchase Agreement provides for the payment of the purchase price in cash at closing subject to an escrow account that is customary and standard in transactions of this type.¹ There are standard pre-conditions that must be met by both parties prior to closing of the transaction such as necessary government approvals, including the consent of the City. Unique to this transaction is the required approval of the Bankruptcy Court and the possible appeal of sale of the assets by creditors and interested parties.²

3. Federal Law

The Cable Communications Policy Act of 1984, as amended by the Cable Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996 (“Cable Act”), provides at Section 617 (47 U.S.C. § 537):

Sales of Cable Systems. A franchising authority shall, if the franchise requires franchising authority approval of a sale or transfer, have 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority. If the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time.

The Cable Act also provides at Section 613(d) (47 U.S.C. § 533(d)) as follows:

(d) Regulation of ownership by States or franchising authorities. Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person’s ownership or control of any other media of mass communications or other media interests. Nothing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person (1) because of such person’s ownership or control of any other cable system in such jurisdiction, or (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.

Further, the Federal Communications Commission (“FCC”) has promulgated regulations governing the sale of cable systems. Section 76.502 of the FCC’s regulations (47 C.F.R. § 76.502) provides:

¹ See Purchase Agreement at Section 3.1. p. 28.

² Id. at Section 7.16 p. 73.

Time Limits Applicable to Franchise Authority Consideration of Transfer Applications.

- (a) *A franchise authority shall have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information required by the terms of the franchise agreement or applicable state or local law to act upon an application to sell, assign, or otherwise transfer controlling ownership of a cable system.*
- (b) *A franchise authority that questions the accuracy of the information provided under paragraph (a) must notify the cable operator within 30 days of the filing of such information, or such information shall be deemed accepted, unless the cable operator has failed to provide any additional information reasonably requested by the franchise authority within 10 days of such request.*
- (c) *If the franchise authority fails to act upon such transfer request within 120 days, such request shall be deemed granted unless the franchise authority and the requesting party otherwise agree to an extension of time.*

4. Legal Standard of Review

The legal qualification standard relates primarily to the analysis of whether the transferee, Wave-I, has the appropriate authorization to complete the Assignment and is authorized to operate and control the Cable System and Franchise serving the City. The applicable standard of review is that the City's consent shall not be unreasonably withheld.

5. Legal Review

The proposed Assignee, Wave-I, is a Washington limited liability company and proposes to conduct business under the trade name Wave Broadband. Wave-I's sole member and manager is WaveDivision Holdings, LLC, a Delaware limited liability company ("Wave Holdings"). Wave Holdings is also the sole member and manager of seven (7) other active limited liability companies that own and operate cable, data and phone networks. See attached organizational structure chart provided by Wave-I as part of FCC Form 394.

Wave-I was issued a Certificate of Formation by the Secretary of State of the State of Washington on November 4, 2002 and remains in good standing as of the date of this report. WaveDivision was formed on November 6, 2002 and remains in good standing as of the date of this report according to the State of Delaware.

Based on the November 2, 2011 report prepared by Mr. Garth Ashpaugh, "Review Of Transfer Of Cable Television Franchise From Broadstripe To WaveDivision I, LLC," we recommend that the City's consent to the proposed transfer be conditioned on the provision of a guaranty from Wave Holdings. This guaranty should require Wave Holdings to irrevocably and unconditionally guaranty the full and faithful performance by Wave-I of all of the terms, covenants, conditions and agreements contained in the Franchise.

6. Other Considerations

Another significant consideration in jurisdictions where more than one cable operator is authorized to provide cable television service, is whether the transfer will result in the potential for a reduction in competition as a result of any sale or transfer of control. In particular, Section 613(d) (47 U.S.C. § 533(d)) of the Cable Act permits a franchising authority such as the City to prohibit the change of control of the Cable System if the City determines that the acquisition of the Cable System may eliminate or reduce competition in the delivery of cable service in such jurisdiction. Generally, this provision is of concern when one of the two franchised cable operators seeks to acquire the competing system thereby reducing competition which may have an adverse impact on subscriber rates, programming and services. Given that Comcast is the City's only other franchised cable operator and Wave-I is not in any way owned or controlled by Comcast, there is no immediate concern with reduced competition resulting from the proposed Assignment.

7. Recommendation

Based upon our review of the proposed Assignment described in the Application, we see no basis for the City to deny the Assignment based on a lack of legal qualifications of Wave-I. We recommend that the City condition its approval of the Assignment on an acceptable guaranty from WaveDivision. The City should further condition approval of the Assignment on Wave-I's commitment to comply with all terms of the Franchise and assume any liability of Broadstripe under the Franchise as more fully described in the attached Consent Agreement.

~ END OF REPORT ~

ORGANIZATION CHART FOR WAVEDIVISION HOLDINGS, LLC

