

**Minutes of the Meeting of the Legal Committee of Council
Held in the Council Chambers of the Municipal Building
On Monday, May 17, 2021, at 6:30 P.M**

Brian Fischer, Committee Member, stated that he would act as Chairman of this meeting as the Chairman of the Legal Committee, Ward 2 Councilman Dennis McBride, was out of town.

Committee Members: Present:

Present: Ward 1 Councilman Bob Butkowski; Councilman-at-Large Brian Fischer

Absent: Chairman, Ward 2 Councilman Dennis McBride

Others in Attendance:

Councilwoman-at-Large Tammy Holtzmeier; Mayor Bryan Jensen; Ward 3 Councilman Tony Moore; Ward 4 Councilman Scott Radcliffe; Councilman-at-Large Craig Witherspoon; City Engineer Ryan Cummins; Planning/Economic Development Coordinator Pam Fechter; Law Director John Gasior; Finance Director Bill Logan; Safety Director Duane Streater; Service Director Mike Farmer; Clerk of Council Barbara Brooks; Dylan Reynolds, Chronicle; Kevin Martin, Morning Journal; City of Avon IT Technician Aaron Jenkins; Resident Pat Jankowski; Attorney William Hanna of Walter-Haverfield

Discussion of Video Service Providers

Mr. Gasior stated that he told Council last week that he was going to try to bring Mr. Hanna out here. Mr. Hanna is with the Walter-Haverfield law firm in Cleveland and has devoted probably the last 15 -20 years of his career to trying to understand the cable industry and the small cells and all the other things that go into our right-of-way for communications purposes. Residents came to a couple of our Council meetings in January and February and asked questions about what our current situation is with Spectrum, whether we could bring in additional competition, if there was some incentive that the City could create to do that, and even if we did, would other providers be willing to come? These are difficult questions because they are technical in nature and so what Mr. Gasior wanted to do was to have Mr. Hanna give you a general overview of the industry. It was his firm that negotiated the video service provider agreement for the City back in 2008 and we still operate under that. Mr. Logan has the numbers of what that video service provider agreement actually means in terms of revenue to the City on a yearly basis, so he can give you that. Mr. Gasior then introduced Mr. Hanna to everyone.

Mr. Hanna, Attorney at Walter-Haverfield, LLP, 1301 East 9th Street, Cleveland, stated the he had an opportunity to review the minutes from the Council meetings where there were residents talking about their experiences with the high-speed internet offerings, expressing some interest in whether there are additional options for them or the City, and some general discussion of whether the City has a role to play in incenting competition within the City or whether the City is somehow keeping out competition. One way to frame that issue is to look back at some of the events that Mr. Gasior mentioned in 2007/2008. Prior to 2007, under the Federal Cable Act, the City was the local franchise authority which would negotiate the terms and conditions that would apply to a video service provider or cable provider wanting to utilize the City's right-of-way and provide cable services to City residents. That gave local franchise authorities the opportunity to negotiate for franchise fees as they were then called from 0% to 5% to require public, educational, and governmental access channels and support for that type of programming and equipment, etc. and to even require universal build-out in provision of service throughout the entire community, which as communities grew and as these services were deployed for the first time was an important power to be able to require that universal service.

Mr. Hanna said that, in 2007, in Ohio, the cable industry, principally the Ohio Cable Television Association, which was Time Warner at that time and AT&T, backed legislation in Columbus known as SB117, which was eventually adopted and became effective in September of that year and took local franchise authority away from cities, villages, and townships and gave it to the State of Ohio Commerce Dept. There was a schedule built in there for the conversion of pre-existing franchise agreements to video service authorization governed by the Ohio Dept. of Commerce and the ability of local communities to require any particular bells and whistles or free cable service or institutional networks was all taken out, either immediately or sunsetted through about 2012.

Mr. Gasior stated that when Adelphia Cable came in back in the 90s, they provided the City with video equipment and the City turned it over to the schools. There were a lot of giveaways at the time but when this Senate Bill 117 came about, the cable industry pulled back and decided they did not have to do that anymore and were just going to involve themselves with the 5% fee if we negotiated that, or we would pass legislation. We did pass the legislation in Ordinance No. 111-08. Mr. Gasior said that he just wanted to give a background because there was a time when we could get all of those freebies from the cable companies and those days are long gone.

Mr. Hanna said he would agree with that. He does not remember all the details from the last agreements here but those items did have real value to local communities and to the school systems and to other institutions that could utilize them. The free cable service had a value, the Public Educational Governmental Access had a value, and the argument of the industry at the time was principally that those extras cost them so much money that they could not really expand and drive down prices and compete the way that they wanted to do. They were successful in their efforts to have that legislation adopted by the legislature and the principal argument was that by making these changes, the landscape in Ohio would become much more competitive and the State would ensure that there were not contracts with providers that would cost them so much money that they could not really provide good service or do it in an economical way. As Mr. Gasior mentioned, the video service provider fee is still available; it is the equivalent of what was the franchise fee. The method to obtain that was to pass legislation to specify what percentage of gross revenues you would charge for the use of the public right-of-way and to indicate whether you would include advertising revenues in that revenue base or not include those revenues. Mr. Gasior added that, at that point, we did pass the 5% which he thought was the maximum and we included the video and the advertising, so Council did the best we could possibly do at the time, and we are still under that agreement.

Mr. Hanna said, and one of the keys to that and the reason that is important, is that if a new provider begins to do business within the City, they are subject to the same video service provider fee in the Ordinance. You cannot charge one provider 5% and give someone else a couple years of 0% or 1% in order to try to incentivize them to enter the City and provide services here. And so that agreement is still in effect and would apply to anyone providing those services within the City. It does not apply to high-speed internet services, though, because those are not within the scope of the video service definition under the Ohio Revised Code. And what he noted in the Council minutes that he read was that the current discussion was principally related to high-speed internet and of course that has become a lot more important to all of us since COVID. It really has become a central part of a lot of people's lives and they are paying a lot more attention to it than they did previously. His read of the comments in some of those meetings was that there was some concern that the City was limiting competition. It is his belief that: the City could not do that under law, and that the City certainly is not doing that. In fact, his information is that the City has done just about everything that it can to try to make it clear that it is open for business with new high-speed internet or information service providers and what has happened is that the

providers who have looked at the City have made a determination about how much it will cost them to build out their infrastructure to be able to provide the services and then they run that vs. the calculations about how many customers they can expect to acquire and what revenues will result from those customers and make a determination about whether that business proposition is one that they want to pursue. And to date, they have not made that determination in Avon.

Mr. Gasior said, following up on that, he does not think that there is anything that the City can do. There was some discussion in those meetings about granting easements and some other inducements to try to bring a company like WOW into the City and he does not think that there is anything that the City can really do that would make a significant enough economic impact on the company to bring the company in if they do not see it being a profitable endeavor. Avon is spread out with a lot of underground cable going to a lot of our subdivisions; there are not a lot of poles and that adds to the cost of installing the infrastructures. Mr. Gasior said he thought that the Mayor would do anything to try and get competition in here and bring in another carrier but if they do not want to come there is not much we can do to get them here. Mayor Jensen added that he thought that all of Council would like to see competition and there is not one person on this Committee that would not welcome competition and encourage it.

Mr. Hanna stated, to Mr. Gasior's point, some of the things that make Avon such an attractive community, such as the low density of residences and the underground utilities, are exactly those things that can make installing infrastructure more expensive. It does not mean that it cannot happen but it is going to be put into that equation and providers will make their decisions about what the business opportunities look like.

Mr. Gasior questioned, when you look over the last 20 years and all of the changes that have happened in technology, is there something on the horizon technologically speaking, that could cause some companies to want to wait and not invest in a great deal of 2021 infrastructure because 2025 may be a whole new technology?

Mr. Hanna stated that he did see the comments about tax abatements and easements in the minutes of those meetings and again, he thought that the City can think broadly about how to try to accomplish competition but he was not sure that tax abatements would be legal under the Fair Competition and Cable and Video Service Providers chapter of the ORC. And the easements question he thought does not really apply because the principal real estate that is used to provide these services is public right-of-way and they have the right to obtain any local permission which cannot have conditions placed upon it. That is the way they reach customers in the City. As to Mr. Gasior's question about new technology, 5G is kind of the big question mark that is hovering out there. The speeds and the capacity that true 5G promises are really very substantial, and the timetable on when 5G will be available, keeps changing. There is no definitive answer as far as he knows, as to when that will occur. It is possible that providers are delaying putting in infrastructure until that happens.

Mr. Radcliffe noted that there have to be other communities that have done things to incentivize providers to come in, and he asked Mr. Hanna what he has seen or what his experience has shown of something to help bring some competition here?

Mr. Hanna said that one of the things that used to be available, although it is not now, was the universal service requirement that you could impose on a new provider so that at least from a single provider you could ensure that the services they provided were available throughout your community. Without that, they could cherry pick and so certain of your neighborhoods would have great service and others would

not. You no longer have the authority to require those agreements and so that is not really the issue anymore. He thought that in terms of incenting people, having an opportunity to talk with the providers about the nature of the community and where the opportunities might be cannot hurt but ultimately they are still going to look at what is their cost of entry, and Mr. Hanna did not think that you can directly affect that in a competitive way without being challenged by either a taxpayer or by another provider. There are some communities that have gone down the path of providing some services themselves as a municipal undertaking but that is a very complicated procedure and it can be a very costly procedure.

Mr. Radcliffe stated that the agreement that we have in place applies to everybody. Mr. Logan said that our video service provider is with Spectrum Charter Communications and we get a check from them once a year for 5% of what they bill here in the City. This last year it was \$286,000 and has been pretty consistent for the last 4 or 5 years at that amount. That is about \$5-1/2 to \$6 million dollars that they are billing throughout the City. He asked Mr. Hanna to confirm that that is only for video service, cable service, and does not include what they are billing all the residents and businesses for internet connectivity. Mr. Hanna responded, yes, and that has been a subject of discussion over the years and as more people move to streaming services and cutting the cable cord, the video revenues have not grown as quickly as they did previously and the related fees then have not grown as quickly either.

Mr. Butkowski stated that he streams through Spectrum but there is a cable charge on his bill even though he is streaming the cable so he is paying part of that 5% to the City off from that cable. But as we continue to see more and more streaming (Discovery just joined forces with Time Warner and on CNBC they are talking about how this is going to be driving the cable business so it is going to be bundled much differently), we might not even be going through Spectrum; we might be getting it directly through Discovery or whatever the company is going to be moving forward. He asked if the State was looking at that; are we still going to get some fees off from the internet or is that just going to go away? Mr. Hanna responded that, other than any pole attachment or that type of revenue, the revenues that the City gets from the internet are minimal. They are principally from the cable. There have been discussions over the years about trying to modify the ability of local governments to include internet services within the cable service revenue base for video service provider fees or franchise fees and in the early 2000s that got some traction and there were some cities that were seeing huge increases in their franchise fee payments because they had this new revenue source. But that was struck down by the FCC and the courts.

Mr. Butkowski asked if cable was considered a utility and Mr. Hanna said that for some purposes, it is. Mr. Butkowski said, for gas and electric, different companies can provide services on the same infrastructure. Why is it that the cable providers do not have that same onus that the other utilities have? Mr. Hanna answered, because for those purposes it is not considered a public utility. It is considered more of a purely private business operation. That is why he said that in some ways it is treated like a public utility but in many respects it is not, and that is one of the ways in which it is not considered to be a public utility. Mr. Butkowski asked if they were looking at that at the State level and Mr. Hanna said that he was not aware that there is any active discussion of that at the moment. Part of that is, theoretically, if somebody put in enough fiber when they built out a community, yes, it would be possible to lease or enter into an agreement with another provider to use some of that fiber to provide services but they are not required to do that.

Mr. Butkowski stated that he knows there are other communities in Northeast Ohio that have put in that infrastructure and manage it and it came at an extreme cost. He thought for Hudson it was over \$8 million and Mr. Hanna said it was \$10 million overall. Mr. Butkowski asked Mr. Hanna what he had seen in regard to those communities that have decided to install infrastructure on their own and what some of

the roadblocks or issues were that they have run into by taking that on themselves. Mr. Hanna said that he does not have a clear answer that those communities have seen that it does work or does not work. These situations are still very new. He believed that Hudson came first and Fairlawn a bit later. He does not know for certain whether Hudson has expanded into the video realm but they did, he believed, expand from business only internet to business plus residential and he thought that is what they are doing in Fairlawn as well. He said he could do some research if the City wanted that done to find out what the experience of those cities has been and what the effects have been on the market place. One of the hurdles here is cost because cities have the same installation costs as a private entity would and you are dealing with tax money and that makes it that much more difficult to pull off. In addition, typically you see an aggressive effort by the incumbent providers to minimize the number of people who switch from one service to the City service. Over 30 years ago, the City of Wadsworth put in a system that eventually did provide cable service. The city struggled with that for most of that time and they may have actually turned that over to a private operator at this point.

Mr. Fischer asked what a company has to do if they want to come in for just internet because a lot of people now do not care about cable, everything is going to be wireless, is what he is thinking. Mr. Hanna said, with respect to the small cells, which is probably the most likely near term new internet provider entry point, you would go to your small cell right-of-way regulations which allow you to require a permit and to require applications for antennas and for new pole installations. There are a number of tools that the City has at its disposal, all governed by the Ohio Revised Code, that say that you can protect the City's right-of-way, recover your costs of processing those applications and make sure that they are not damaging the City or the public's health, safety, and welfare. There is not the ability to levy on those services a revenue-based charge and so you would not have the ability to back off on that to make it more attractive. He thought the provider would make the same sort of calculations that any other new entrant would make regarding the costs of putting in those antennas and new poles vs. what they expect in terms of customers.

Mr. Fischer stated that the question they all get on a regular basis is that the City is keeping people from coming in. In Mr. Hanna's professional opinion, what is keeping other companies from coming in? The cost of the outbuild or is it the City? Mr. Hanna responded that it is a cost benefit analysis that does not really involve the City. Mr. Fischer said, and with technology taking off so fast, what does Mr. Hanna think the internet or cable provider system will be in 5 years? Mr. Hanna said he is not an engineer but he thought there are a lot of technological advantages to wireline services in terms of speed and reliability and so he thought that operators will continue to use those for as long as they possibly can to the greatest extent that they possibly can but you are going to see more limited deployment of new wireline facilities and see instead wireless facilities. At this point in time it looks like they will be small cell facilities and the technology involved in those antennas is changing so that it should be more possible to have multiple providers using the same antennas in the future. It has not really been very possible up to this point in time which gets back to sort of the utility-like question: can people share these antennas and at what point in time can the City say, we are not going to allow somebody to put up a new antenna because they can use one that is already in the right-of-way. That is not a clear possibility at the moment but he thinks that is going to come.

Mr. Moore said, but if you get into people sharing an antenna, there are going to be safety concerns on drawing speeds on peak times vs off-peak times, and hacking into other people's service. Mr. Hanna said that those are all legitimate questions and that has been one of the reasons that that has not really been deployed to date. It has been difficult to ensure that two providers could use the same antenna and have high speed, highly secure wireless communications without interfering with each other and having a

negative impact on speed and security, etc. He understands that there are a lot of improvements being made in that regard but those are legitimate issues. From the perspective of the legal profession, at least representing local governments, we sort of look to the industry to sort that out and expect that they would not deploy those before they were comfortable that they could do so.

Mrs. Holtzmeier stated that she feels that from the residents' perspective, they see two options: a couple more subsidiary options depending on how you get service and they would like some other choices. She understands Mr. Hanna's explanation and supports that it is a free market and we want other providers to want to invest in our customer base. Is there any problem with having the Administration take a meeting with these folks for more discussion and see if we can come to an agreement? Mr. Hanna said he does not know what the City's efforts have been in the past or communications with them on that point, but from the legal end there is no reason not to have meetings like that to have those conversations. Mrs. Holtzmeier said that, having been a customer of all three of these companies we are talking about, there is no magic bullet here; everyone has pros and cons to what they offer, including price and speed. So when residents are inquiring about a choice, personally she does not know if a choice will provide any relief but we are society that likes to have choices so to bring one may be good to appease our residents. Mr. Hanna said, and there have been a number of studies by the FCC over the years that show that in communities it is less common that there is no competition at all now in part because of the rise of satellite dish video.

Mrs. Holtzmeier asked Mr. Logan if that \$286,000 franchise fee that was fairly stable, went into a specific fund or in the General Fund? Mr. Logan said, it went in the General Fund, and he added that it does not apply to satellite or wireless video service, so as more wireless entities come into the City, small cell towers or whatever, this has no effect on them. As for the internet coming in, he supposed that they can come in by going through the right application process and doing a small cell tower or piggy-backing on somebody else's receivers that are up on one of our large cell towers, but the video service provider fee that we are collecting only from Charter Communications aka Spectrum would not apply to any of them.

Mr. Hanna noted, and for a number of years the cable industry has made the argument that satellite dish video providers should be subject to some sort of different 5% charge because those were their competitors and there was an unfair competitive advantage. The difference, though, that the courts ultimately came back to is the cable operators are using the public right-of-way and satellite dish folks are really not and so there is no legitimate basis to charge them a fee just to benefit another industry.

Mr. Gasior said that he would conclude the meeting by thanking Mr. Hanna for coming and answering questions. If anything else occurs to a Council member in the near future, he asked that they send him the question and he will get it to Mr. Hanna to try and have it answered. He then asked Mr. Hanna that if there were any new developments in the industry that he thought would be of interest to our community based on this discussion, to please call him and let him know and maybe we can have him out here again.

Everyone thanked Mr. Hanna for coming this evening.

Transcribed by Gail Hayden, Assistant Clerk of Council