

24-2009

September 29, 2009

ORDINANCE ENACTING PROVISIONS FOR COMPETITIVE VIDEO SERVICE AUTHORIZATIONS, ESTABLISHING FEES, DEFINING CERTAIN TERMS AND AUTHORIZING THE MAYOR OR HER DESIGNEE TO PROVIDE CERTAIN NOTICE TO THE VIDEO SERVICE PROVIDERS OFFERING VIDEO SERVICE IN WOODLAWN PURSUANT TO STATE AUTHORIZATION AND DECLARING AN EMERGENCY.

WHEREAS, The Ohio General Assembly enacted O.R.C. §§1332.21 through 1332.34, and such enactment provides for a “uniform regulatory framework” on a statewide basis for the provision of cable television and/or other video service; and

WHEREAS, O.R.C. §§1332.21 through 1332.34 became effective on September 24, 2007; and

WHEREAS, O.R.C. §§1332.21 through 1332.34 will substantially reduce Woodlawn’s traditional franchising authority under the Cable Communications Policy Act of 1984 as amended by the Telecommunications Act of 1996 (47 U.S.C. 521 et seq.) to regulate cable and/or video service offered in Woodlawn using facilities and equipment located in Woodlawn’s public rights-of-way; and

WHEREAS, Woodlawn had a cable television franchise agreement with Time Warner which expired by its own terms on or about August 15, 2009 and pursuant to which Time Warner paid franchise fees in the amount of five percent (5%) of gross revenues which were defined by the franchise agreement to include, inter alia, advertising revenues; and

WHEREAS, Pursuant to O.R.C. §1332.23, any new video service provider intending to provide video service to subscribers in Woodlawn must apply for and obtain a video service authorization (“VSA”) from the Director of the Ohio Department of Commerce; and

WHEREAS, Upon being granted a VSA by the Director of the Ohio Department of Commerce, the applicant shall be considered a competitive video service provider (“VSP”); and

WHEREAS, O.R.C. §1332.23 also permits a cable operator with an effective franchise agreement to terminate its franchise with Woodlawn, at its option, by applying for a VSA when a competitive VSP either gives notice that it will begin providing service to subscribers in Woodlawn or actually begins providing service to subscribers in Woodlawn, or if the FCC determines that the cable operator is subject to “effective competition” in Woodlawn pursuant to 47 CFR 76.907; and

WHEREAS, Under O.R.C. §1332.32, a VSP that is providing service to subscribers in Woodlawn pursuant to a VSA must pay Woodlawn a video service provider fee (“VSP Fee”) based on a percentage of the VSP’s “gross revenues” derived from providing video service in Woodlawn, not to exceed five percent (5%) of such revenues; and

WHEREAS, O.R.C. §1332.32 requires that in any calendar quarter the percentage of gross revenues on which VSP Fees are paid must be the same as the percentage of gross revenues that the cable operator pays pursuant to a franchise agreement that is in effect (or alternatively if multiple franchises are in effect in a jurisdiction, the lowest such percentage paid a cable operator pursuant to a franchise agreement that is in effect shall be paid),

or if there is no effective franchise agreement under which franchise fees are payable, the VSP Fee shall be zero percent (0%) of gross revenues, unless Woodlawn determines by Resolution that the VSP Fee will be a higher percentage of gross revenues, not to exceed five percent (5%) of gross revenues; and

WHEREAS,

O.R.C. §1332.32(C)(2) further requires that Woodlawn provide all VSPs offering service in Woodlawn with notice of the VSP Fee requirements within ten (10) days of receiving notice from the VSP that it will begin offering service in Woodlawn, or the VSP is not required to pay the VSP Fee to Woodlawn; and

WHEREAS,

O.R.C. §1332.32(B)(2)(g) provides that the VSP Fee is paid on a base gross revenue received from subscribers having service addresses within the jurisdiction that consists of revenues as are defined in O.R.C. §1332.32(B)(1)(a-e) but specifically excludes revenues as defined in O.R.C. §1332.32(B)(2)(a-h), unless Woodlawn determines, by resolution uniformly applicable to all VSPs, that advertising revenues as defined by O.R.C. §1332.32(B)(2)(g) are also be included in the base of gross revenues on which the VSP Fee is paid; and

WHEREAS,

O.R.C. §1332.32(B)(2)(g) requires Woodlawn to promptly notify affected VSPs of the Resolution determining to include advertising revenues in the base of gross revenues on which the VSP Fee is paid, but provides that the requirement to include advertising revenues in the base of gross revenues does not take effect until the first day of the first calendar quarter that begins more than thirty (30) days after giving such notice; and

WHEREAS,

In order to provide timely notice to a VSP of the VSP Fee, it is necessary for this Council to determine now that the percentage of gross revenues that shall be paid as a VSP Fee is five percent (5%) and that advertising revenues in accordance with O.R.C. §1332.32(B)(2)(g) shall be included in the base of gross revenues on which the VSP Fee is paid, to authorize the Woodlawn Mayor or his or her designee to provide notice of the VSP Fee to a VSP within ten (10) days of Woodlawn receiving notice that the VSP will begin providing service in Woodlawn; and

WHEREAS,

O.R.C. §1332.30(A)(2) requires that Woodlawn provide written notice to a VSP that it shall be required within one-hundred and twenty (120) days of receipt of that notice to provide the same number of public, educational and government access (“PEG”) channels under the same service tier conditions and subject to the same channel reclamation conditions as may be proscribed by O.R.C. §1332.30(A)(1)(a-b) for the current incumbent cable provider of video or cable service with the most obligation in Woodlawn; and

WHEREAS,

O.R.C. §1332.30(A)(1)(a) requires that if more than three (3) PEG channels are required to be provided to Woodlawn by an incumbent cable provider or VSP, then any such additional channel may be reclaimed by the incumbent cable provider or VSP if it is programmed with fewer than forty (40) hours of non-character generated content per week and less than sixty percent (60%) of the programming is non-repeat and locally produced, all referred to as “not substantially utilized”; and

WHEREAS,

Because O.R.C. §1332.30(A)(1)(a) fails to provide guidance as to what “non-repeat and locally produced” shall mean, Woodlawn believes it necessary to define “non-repeat and locally produced” as the first three (3) playbacks of programming produced or provided by any local resident, Woodlawn or its affiliates, or any local public or private agency that provides services to residents of Hamilton County, or any transmission of a meeting or proceeding of any local, state, or federal governmental entity; and

WHEREAS, It is the desire of Woodlawn that all payments of VSP Fees collected from VSP be made directly to Woodlawn, quarterly, no later than sixty (60) days after the end of a calendar quarter; and

WHEREAS, The PEG programming origination point for Woodlawn is currently located at ICRC, 2492 Commodity Circle, Cincinnati, Ohio 45241 unless and until Woodlawn shall designate otherwise; and

WHEREAS, O.R.C. §§1332.21 through 1332.34 contain numerous requirements that a VSP provide certain specific notifications to Woodlawn, but otherwise fail to adequately proscribe the specific manner in which such notice should be provided and Woodlawn believes that such notice would properly be provided in writing to the Woodlawn Mayor by either certified mail, express mail or personal delivery, all evidenced by a return receipt; and

WHEREAS, In order to enable Woodlawn to treat incumbent cable providers and VSPs appropriately and adequately and properly address all the requirements and conditions of O.R.C. §§1332.21 through 1332.34 as enacted by the Ohio General Assembly, Woodlawn believes it is necessary to ordain as follows.

NOW THEREFORE, BE IT ORDAINED by the Council of the Village of Woodlawn, Hamilton County, Ohio, majority of all concurring:

SECTION I **DEFINITIONS.** That the following definitions apply to the terms used herein:

“Incumbent Cable Provider” means any person who on the effective date of this Resolution is the holder of a cable franchise agreement with Woodlawn as granted pursuant to requirements of 47 U.S.C. 541.

“PEG” means the activities or actions performed for the benefit of public, educational and government video programming by Woodlawn.

“Video Service” means the service defined in O.R.C. §1332.21(1).

“Video Service Authorization” or “VSA” means the authorization granted to a video service provider in accordance with the requirements of O.R.C. §§ 1332.21 to 1332.34 et seq.

“Video Service Provider Fee” or “VSP Fee” means the fee paid by a VSP in accordance with the requirements of O.R.C. §1332.32.

“Video Service Provider” or “VSP” means a person, firm, or corporation granted a video service authorization under O.R.C. §§1332.21 to 1332.34 et seq.

SECTION II **VSP FEE.** In accordance with the requirements of O.R.C. §1332.32, all VSPs providing video service in Woodlawn pursuant to a VSA obtained from the Director of the Ohio Department of Commerce shall pay a VSP Fee in the amount of five percent (5%) of gross revenues received from providing Video Service in Woodlawn, which gross revenue base shall include advertising revenues. The VSP Fee shall be paid quarterly, not later than sixty (60) days after the end of each calendar quarter.

SECTION III **VSP FEE NOTICE PROVISION.** Upon receipt of notice from a VSP that it will begin providing Video Service in Woodlawn pursuant to a state-issued video service authorization, the Woodlawn Mayor or his or her designee is authorized and directed to provide such VSP with notice of the VSP Fee as

SECTION IV determined by this Resolution which notice shall be delivered in a manner that provides for proof of timely delivery.

SECTION V **VSP ACCESS PROVISION.** Upon receipt of notice from a VSP that it will begin providing Video Service in Woodlawn pursuant to a VSA, the Woodlawn Mayor or his or her designee is authorized and directed to provide such VSP with notice that the VSP shall be required to provide the same number of PEG channels in Woodlawn under the same service tier conditions and subject to the same channel reclamation conditions as may be proscribed by O.R.C. §1332.30 (A)(1)(a-b) for the Incumbent Cable Provider with the most recent obligation in Woodlawn, which notice shall be delivered in a manner that provides for proof of timely delivery and shall state the appropriate number of PEG channels and service tiers required to be provided by the VSP within Woodlawn within one-hundred and twenty (120) days after delivery of such notice.

SECTION VI **ACCESS PROGRAMMING REQUIREMENTS.** In accordance with the requirements of O.R.C. §1332.30(A)(1)(a) when more than three (3) PEG access channels are provided to Woodlawn by an Incumbent Cable Provider or VSP, such additional channel shall be programmed by Woodlawn with at least forty (40) hours of non-character generated content per week with at least sixty percent (60%) of the programming being non-repeat and locally produced. For the purposes of this Section “non-repeat and locally produced” shall mean, the first three (3) playbacks of programming produced or provided by any local resident, Woodlawn or its affiliates, or any local public or private agency that provides services to residents of Hamilton County, or any transmission of a meeting or proceeding of any local, state, or federal governmental entity.

SECTION VII **FEE PAYMENT REQUIREMENTS.** Any VSP Fee or Community Service Fee payments required to be paid to Woodlawn by a VSP shall be made quarterly and be remitted directly to Woodlawn via appropriate negotiable instrument made payable to The Village of Woodlawn, 10141 Woodlawn Boulevard, Woodlawn, Ohio 45215, not later than sixty (60) days after the end of each calendar quarter.

SECTION VIII **PEG ORIGINATION POINT.** The PEG programming origination point of Woodlawn for the delivery of VSP access services shall be located at ICRC, 2492 Commodity Circle, Cincinnati, Ohio 45241.

SECTION IX **NOTICE REQUIREMENT.** Any notice of Woodlawn that is required of a VSP in accordance with O.R.C. §§1332.21 through 1332.34 shall be provided in written form to the Woodlawn Mayor either by certified mail, express mail or upon personal delivery, all evidenced by a return receipt.

SECTION X **APPLICATION TO INCUMBENT CABLE PROVIDERS.** The additional requirements applicable to VSPs enacted in this Resolution shall not apply to Incumbent Cable Providers. The relationship between Woodlawn and such providers shall continue to be governed by the franchise agreement between the parties until its expiration or until the Incumbent Cable Provider is granted a VSA in accordance with O.R.C. §§1332.21 through 1332.34 et seq.

SECTION XI

This ordinance is hereby declared to be an emergency measure necessary to preserve the health, safety and general welfare of the Village. The reason for said emergency is to ensure that Woodlawn continues to timely receive appropriate fees from persons providing video and/or cable service in Woodlawn using Woodlawn's rights-of-way. Therefore, this Ordinance shall take effect immediately.

Vice Mayor Willie Norton

Attest: _____

Date: **September 29, 2009**

Clerk of Council, Barbara L. Battle

CERTIFICATE

I, Barbara L. Battle, Clerk of Council of the Village of Woodlawn, Ohio, hereby certify that the foregoing is a true and correct copy of an ordinance adopted by the Council of the Village of Woodlawn, Ohio, on the 15th day of July, 2009.

Barbara Battle, Clerk of Council

Approved as to form:

Matthew W. Fellerhoff, Law Director