

Verbatim of November 6, 2017 Board Minutes

2017-0805 Franchise Agreement with Comcast – Discussion

DISCUSSION AREA ONLY OF MINUTES (see page 2)

(1:10:25 on Audio)

Not Verbatim

Summary Only on Item

Village Manager La Margo reported that the Comcast Franchise Agreement expired in 2003. The Village staff worked on a model franchise agreement with the Metropolitan Mayors group, Klein Thorpe and Jenkins and other municipalities and attorneys.

Comcast and the Village agree on every article with the exception of the undergrounding of utilities (Section 3.3). However, the current language in section 3.3 of the model franchise agreement does not work in communities that are high growth and who prefer undergrounding utilities.

Comcast maintained that they should not have to underground without compensation. That compensation is not a right for Comcast. The only company who was undergrounding and was reimbursed (because they are defined as a Utility in the State of Illinois) is ComEd. All others (Comcast, AT&T and others) are not afforded those same guarantees.

This all came about when we were embarking on the LaGrange Road project and beginning to plan for the 143rd and 159th widening projects. The Village knew that they might look at asking ComEd to go underground in certain areas. The Village didn't get any push-back from the other companies at that time, just Comcast. When ComEd removes the poles, it only makes sense that the others to do so as well. There are efficiencies to doing this work altogether and that is exactly what they did on LaGrange Road.

The issue is that Comcast wants to be treated as a utility, but they are not. Although, Comcast did pay for the undergrounding on LaGrange Road, Comcast wants to be paid its costs of undergrounding its wires when ComEd is paid to underground its wires. The Village does not owe Comcast any money in that situation. If the Village has to pay for Comcast to go underground, then the Village would have to pay AT&T to go underground too, as AT&T and Comcast are competitors.

The Village has been consistent in its position since 2010, Comcast has appealed to have the Village accept its language. The Village has provided Comcast with alternative language over the years, but Comcast has refused to change its position.

If the Village is willing to change its position and accept the language from Comcast we can move this matter forward. Comcast's proposed language would require the Village to pay for Comcast to underground its wires when the Village pays any user of the right of way to do so, such as ComEd, when the Village has no legal obligation to do so. As stated above, the impact of this language is that if the Village pays ComEd to go underground, then the Village will be required under the Comcast franchise agreement to go underground, which will trigger the Cable and Video Competition Law requirement for the Village to have to pay AT&T to go underground as well. This could cost the Village hundreds of thousands if not

millions of dollars in expenses.

Although the franchise agreement has expired, Comcast is required to pay the Village the franchise fee under Federal law (47 U.S.C. § 542), State law (65 ILCS 5/11-42-11.05) and its “expired” Franchise Agreement. The expired Franchise Agreement remains in effect, to the extent its terms do not conflict with more current Federal law and State law.

The Village does not have any legal obligation to pay Comcast to underground, unless the Village is voluntarily paying other utilities to go underground. Utilities operate under a different set of rules than Comcast, and one of the benefits of being a utility is that at times a municipality must pay their undergrounding fees.

This opens up a policy discussion about what is fair, and that consideration is beyond the realm of legal requirements and is one to be made by the Village Board.

Discussion took place on this subject. (refer to audio file)

VERBATIM BEGINS HERE – The discussion that took place:
(1:12:21 on Audio)

PEKAU – And the reason I asked for him to look at this – and him and I talked about it – and the one thing that is not here is the, there was a master or a, what do they call it Joe

LA MARGO – A Model Franchise Agreement

PEKAU – (Spoke over Joe) A Model Agreement that was actually worked on by Klein, Thorpe and Jenkins our Attorneys. That included reimbursing them for this. And as I read it I realized, and I totally understand, Manager La Margo’s position that we don’t have to reimburse them. But I also looked at it and said wait a minute, they put the cable up and now we’re asking them to move it and underground it, as even if it is part of a transportation project and to me it seems like a right vs wrong issue. They are paying significant franchise fees and it does seem like something that, well we can say no – maybe it’s not that, I don’t believe it’s the right thing to do to say no. If it was the first time they were putting it up, they would have to do it themselves, but since it’s already up and we’re asking them to move it, that was, and so I thought it was important that we have that discussion at a Board level to determine, do we agree, or what do we think? Should we continue to operate the way we have without a franchise agreement? Or should we move towards that Model Franchise Agreement where we do reimburse them when we’re actually asking them to move something that they have already put in.

I’d just would like to get the Boards thoughts.

RUZICH – Mr. Chairman

PEKAU – Trustee Ruzich

RUZICH – So, do you want to talk?

LA MARGO – I’m sorry, just one more point too. If we do allow, if we do pay for Comcast,

we'd have to pay for everybody including AT&T and any other non utility groups. So if we pay for one we are going to have to pay for all of them. Which just for LaGrange Road was about \$1.2 Million? About \$1.2 Million Dollars it would have cost the Village to underground those, just for the Comcast lines – ComEd, ComEd lines!

PEKAU – ComEd lines we did reimburse. (Talking over La Margo) We did reimburse ComEd, Comcast was far less than that and they're not asking for that in arrears, their just asking going forward, I believe.

LA MARGO – Right right – But we would have to pay for AT&T and any others

PEKAU – mm-hmm

RUZICH – Mr. Chairman, so I'm clear, there, because I read the agreement, Joe sent it to me before, or actually you did Mr. Mayor and I read it. So 3.3 seems to be the sticking point.

LA MARGO – Yes

RUZICH – Have we gone back to them recently and asked and asked them to remove that? Is it worth trying again? Because my understanding is there is no downside to us operating without this franchise agreement. Is that correct Ken, legally?

LA MARGO – That's correct.

ATTORNEY KEN FRIKER – That's corr, well, yes. The franchise understate will state in Federal Law they must pay the Village for the use of the right-of-way. So the Village receives a 5% franchise tax, which is roughly \$800,000 dollars a year, which means that their revenue from the Village of Orland Park, Comcast revenue, is in the area between \$16 and \$20 Million Dollars a year, but they do have to pay that 5% fee, franchise fee, if they want to continue to use the Village right-of-way. Whether or not we have a franchises agreement in place.

RUZICH – Ok, so I guess my opinion is I don't see any upside. It's going to cost us money, and we don't have as much as we had before to go around. So that would be my opinion.

CALANDREILLO – Mr. Mayor

PEKAU – Trustee Gira

GIRA – Mr. Chairman, I recall when this came up years ago and Comcast was adamant as we were planning LaGrange Road improvements they wanted to be considered a utility because Nicor and ComEd are the two utilities that the State of Illinois recognize in most communities, if not all recognize. So that when they were putting their service underground we had to pay for it. That's how it is, that's a universal, they provide service to every home, business, office in town. Comcast doesn't necessarily do that. AT&T doesn't necessarily do that. So I don't know, they lobbied very seriously back then to be given the labeling of a utility and we didn't do it and I think detrimental to us to willing say sure, we'll go back and give you a million dollars and AT&T. In going forward we have road construction projects at

143rd Street coming, 159th Street in place, 151st and Ravinia.

I understand reimbursing them if say we were relocating a cable between Village Hall and the Civic Center, it's on our property and we have discretion in that. We have no idea how they lay out their systems, that's their business. I don't think we want to hurt ourselves and the Village and our Budget by voluntarily saying sure we'll do this. We can just continue with the existing contract.

PEKAU – Anybody else?

CALANDREILLO – Mr. Mayor

PEKAU – Trustee Calandriello

CALANDREILLO – I just what to echo Trustees Gira and Carols comments, you know. \$1.2 Million or whatever the number is I could use that on neighborhood roads that give a multi-billionaire companies, I'm not going to say it's a bail-out, but I'd rather use it on our own property. There's no harm in not giving this out, so I don't know why we would want to give out free money. So, thank you.

PEKAU – Trustee Dodge

DODGE – Mixed feelings. You know, we caused them to have a change and so I've kinda got mixed feeling about them having to bear costs without any kind of, I don't know - compensation I guess is the right word. On the other hand, I think what Trustee Gira points well made, which is, they are not recognized by the State of Illinois as a utility, well then ok we're kinda swimming against the tide, so I appreciate the sentiment about kinda right vs wrong. It's a lot of money, right, so there's other things coming, so, I mean I don't know if I'm comfortable going all the way to bright to say we're going to treat them like a utility because if the State doesn't and then we start writing checks we are looking pretty generous. If we're causing them to have a change in cost and there's other ways for us to work with them, I'm not opposed to something else. Just because it's, I'm mindful of the fact every time we do a road project and we've got to cross a pipeline, or we have to cross a utility, they just absolutely, I don't think there is a better phrase in economics other than, stick it to you pricing. So we've been absolutely given big bills by some of the folks are on the other side of this power equation virtue of State Law. So, to bring that to a crisp point, I don't know if I want to treat them like a utility and give all this money away or don't mind if we find some way to accommodate when they do incur these cost. That's where I'm at.

PEKAU – Any other comments?

PEKAU – (1:19:28) So, my final comment on this is a, there was a Model Agreement which did include those reimbursements and that was some other nearby municipalities have adopted that Model Agreement. And I totally understand that this would be a cost to us. I totally understand that argument, but like Trustee Dodge I'm a bit uncomfortable. Because just because we can do something, doesn't make it right and doesn't I mean we should.

So like Trustee Dodge, I'm willing to find a way, I don't want them to stick it to us and feel they have card blanch, but if there some way to work out something, where we're asking

them to move their investment that it doesn't, to me, it just doesn't seem that it's the right thing to do even though it's something that we can do.

LA MARGO – Mr. Mayor, just as a point of clarification, I apologize I didn't mention this before. One of the reasons why they needed to move is because we have ComEd moving and they share the poles with ComEd. If Comcast wanted to erect their own poles up, they would be able to do that but it would be much more expensive for them to do that then to underground.

PEKAU – Understood. Ok

GIRA – Good point.

PEKAU – In any case I came across this, it was brought to my attention, I thought it deserved a Board discussion because we haven't had an agreement since 2005, I believe, so it's twelve years operating without an agreement.

It looks like at the present time the Board feels like the status quo is appropriate. Is that correct?

DODGE – Well if we want, I mean, I guess, you know Joe do we have an option to sit down with Comcast and talk this through? - you're not going to get full card blanch like a utility maybe there is some other accommodation.

LA MARGO – We, every year we sit down with them. It's ironic, cause, I feel every year for the last two and half years that I've been dealing with this or three years that I have been dealing with this, it always seems to be the October - November time-frame that they come out and reach out to us. But we will absolutely reach out to them again and see if we can sit down with them and work out some sort of agreement with them.

DODGE – Let's get back to central principals here right, which is, if you drive certain roads in Orland you don't see a lot of wooden poles with a lot of wires hanging off it. There's a reason we have been investing in this over the years. And so, you know, there's a community good here, but, you know, as I said earlier context matters, well guess what, revenue isn't as good as it used to be - so let's not write a check to ComEd tomorrow. But if we keep looking for cooperation – or Comcast, excuse me, thanks Pat – if we start looking at these things, well then, ok there may be some other way to solve this problem. Don't treat them as a utility, but then totally let's not go the other way. I would be comfortable if Joe kept exploring it. I don't know if the rest of the Board thinks that.

GIRA – I think maybe we add to that conversation and say before you raise your rates, hike those rates on our residents, we'll be happy to sit down and talk to you about everything.

LA MARGO – I will note we do have a very good relationship with Comcast regardless of not having the franchise agreement. We have a very good working relationship with them. But we will continue to the conversation.

(1:22:47)
/nm
3/22/19