

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

CITY OF WESTFIELD, PETITIONER, V.)
INDIANA BELL TELEPHONE COMPANY)
INCORPORATED D/B/A AT&T INDIANA,)
BRIGHT HOUSE NETWORKS, LLC,)
COMCAST OF ILLINOIS/INDIANA/OHIO, LLC)
D/B/A COMCAST CABLE, AND E.COM)
TECHNOLOGIES, LLC D/B/A FIRSTMILE)
TECHNOLOGIES, RESPONDENTS.)

CAUSE NO. 43877

APPROVED: OCT 27 2010

BY THE COMMISSION:

Larry S. Landis, Commissioner
Beth Krogel Roads, Administrative Law Judge

On March 31, 2010, the City of Westfield ("Complainant" or "Westfield") filed its Complaint with the Indiana Utility Regulatory Commission ("Commission") against Indiana Bell Telephone Company Incorporated d/b/a AT&T Indiana ("AT&T"), Bright House Networks, LLC ("Bright House"), Comcast of Illinois/Indiana/Ohio, LLC d/b/a Comcast Cable ("Comcast"), and E.Com Technologies, LLC d/b/a FirstMile Technologies ("FirstMile") (collectively, "Respondents") in this matter.

Pursuant to notice and as provided for in 170 IAC 1-1.1-15, a Prehearing Conference in this Cause was held in Room 224 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana at 2:00 p.m. E.D.T. on May 3, 2010. Proofs of publication of the notice of the Prehearing Conference have been incorporated into the record and placed in the official files of the Commission. The Complainant, Respondents AT&T, Comcast, and FirstMile, and the Office of Utility Consumer Counselor ("Public") appeared and participated at the Prehearing Conference. No members of the general public appeared.

Based upon the applicable law and the evidence of record, the Commission now finds:

1. Notice and Jurisdiction. Due, legal and timely notice of the prehearing conference conducted herein was caused to be published by the Commission. Under Indiana Code 8-1-34 (the "Video Franchise Statute"), and specifically under Ind. Code § 8-1-34-16, the Commission is the sole video franchising authority in the State of Indiana. In addition, the Commission has authority under Ind. Code § 8-1-34-24(c) to determine the amount of gross revenue on which video franchise fees shall be paid to the local unit. Consequently, the Commission has jurisdiction over the Respondents and the subject matter of this Cause in the manner and to the extent provided by the laws of the State of Indiana.

2. **Parties' Characteristics.** As a municipality, Westfield is a unit as defined in Ind. Code § 8-1-34-12.¹ AT&T, Bright House, Comcast, and FirstMile are each holders of Certificates of Video Franchise Authority issued by the Commission, pursuant to Ind. Code § 8-1-34-17, for service territories including Westfield, and are video service providers.

3. **Background.** On March 31, 2010, Westfield filed a Complaint against the video service providers operating within Westfield for failure to accurately calculate and pay the video franchise fees owed to Westfield under the Video Franchise Statute. On April 23, 2010, Respondents AT&T and FirstMile filed answers to the Complaint. On April 30, 2010 Bright House filed a letter notifying the Commission of its intent not to participate in the proceeding. On May 3, 2010, a Prehearing Conference was held and a Prehearing Conference Order was issued on May 19, 2010, setting the procedural schedule.

On June 3, 2010, the Consolidated City of Indianapolis ("Indianapolis") filed a petition to intervene in this proceeding. On June 18, 2010, the Presiding Administrative Law Judge requested a showing as to Indianapolis' interest in this matter, which Indianapolis provided on July 30, 2010. The intervention by Indianapolis was granted on August 17, 2010.

On June 17, 2010, the Complainant filed a *Complainant/Petitioner's Motion for Suspension of Procedural Schedule and Request to Establish Briefing Schedule* ("Motion") in the above-captioned Cause. No party filed expressing opposition to the Motion. On July 6, 2010, the Presiding Administrative Law Judge granted the Motion with the following schedule: stipulation of facts filed no later than July 9, 2010; parties' initial briefs filed no later than July 30, 2010; and parties' reply briefs filed no later than August 30, 2010. In addition, the evidentiary hearing previously set for August 16, 2010 was vacated.

Westfield filed a Proposed Stipulation of Facts on July 9, 2010. Initial briefs were filed by Westfield, Comcast, AT&T and Indianapolis on July 30, 2010. Westfield filed a reply brief and AT&T, Comcast and Indianapolis filed a Joint Response Brief on August 30, 2010.

4. **Summary of Filings.** In its Complaint, Westfield alleged that the video service providers serving customers in Westfield were incorrectly calculating the amount of franchise fees owed to Westfield and were not paying the correct amounts. Westfield argued that it had followed the Video Franchise Statute in changing the percentage rate of the franchise fee from 3% to 5%. Westfield further alleged that it had the right to choose (1) to continue to use the definition of gross revenue as found in the franchise agreement in effect on June 30, 2006, or (2) to elect to use the definition of gross revenue as found in the Video Franchise Statute, Ind. Code § 8-1-34-5.

AT&T's Answer denied Westfield's characterization of Ind. Code § 8-1-34-23, stating that the section spoke for itself. AT&T stated that Ind. Code § 8-1-34-23(b)(1) provides that if a franchise agreement requiring the payment of a franchise fee based on a percentage of gross revenues was in effect on June 30, 2006, the "provider shall determine gross revenue as that term

¹ Ind. Code § 8-1-34-12 states: "As used in this chapter, 'unit' has the meaning set forth in IC 36-1-2-23." Ind. Code § 36-1-2-23 states that "Unit means county, municipality, or township."

is defined in the local franchise in effect on June 30, 2006.” FirstMile’s answer denied that the Commission should determine the amount of gross revenue on which a franchise fee should be based because said amount had already been properly determined pursuant to the terms of the Insight Communications franchise agreement.

With its notice of intent not to participate, Bright House included for the record a copy of a letter sent to Bright House by Westfield dated October 5, 2007, confirming the agreement between Westfield and Bright House to use the “gross revenues definition from Insight’s franchise agreement – the gross revenues definition in effect on June 30, 2006 – in accordance with IC 8-1-34-23, IC 8-1-34-24, and the town’s recently passed Ordinance 07-13.” (sic)

Pursuant to Westfield’s Proposed Stipulation of Facts, the following pertinent facts were stipulated by the parties:

- On or about July 14, 1997, Westfield granted a local video franchise (“Local Franchise”) to Insight Communications Company, L.P. and its successors (“Insight”). A copy of the Local Franchise was included as an attachment.
- The Local Franchise defined “gross subscriber revenue,” at Section 2, Paragraph 7, as including “all compensation paid by a subscriber for the sale of the Company’s monthly basic television services. This does not include revenue derived from paid TV program charges, leased channels, Pay-TV service, nor does it include any sales or excise tax.”
- The Local Franchise specified that Insight would pay Westfield a franchise fee of three percent (3%) of Insight’s monthly gross subscriber revenues derived from cable services provided in Westfield.
- The Local Franchise was in effect on June 30, 2006.
- The Local Franchise was terminated on December 6, 2006, upon the issuance by the Commission of a Certificate of Franchise Authority to Insight in IURC Cause No. 43174 VSP 01.
- On or about July 9, 2007, Westfield adopted Ordinance 07-13, which set the franchise fee at five percent (5%) to be paid quarterly, pursuant to Ind. Code § 8-1-34-24.
- On May 10, 2010, Westfield adopted Ordinance 09-07, which adopted the same definition for “gross revenues” as found in the Video Franchise Statute.

In its Initial Brief, Westfield argued that the purpose of the Video Franchise Statute was to ensure fair and equitable treatment of video providers within the same jurisdiction, including the standardization of the application of franchise fees and consistent definitions. Westfield also argued that it was not the intent of the Video Franchise Statute to restrict municipalities to contractual terms entered into well before the passage of the statute and that, to do so, would punish those municipalities by locking their fees to a formula that could not anticipate the current statutory landscape.

In their Initial Briefs, AT&T, Comcast and Indianapolis all argued that the statutory language of the Video Franchise Statute is clear and unambiguous and must be followed. They further argued that, while Section 24 of the Video Franchise Statute allows for units to change the franchise fee to a maximum of five percent (5%), there is no similar provision in Section 23

to allow units to adopt a different definition of “gross revenues.” Rather, if a unit had a local franchise agreement in effect on June 30, 2006, which defined the term “gross revenues,” then that definition had to be used by the video service providers in determining the amount of gross revenues to be paid to the unit.

In its Reply Brief, Westfield argued that it had the power under the Indiana Home Rule Act, found in Ind. Code 36-1-3, to change the rules and to adopt the definition of “gross revenues” found in the Video Franchise Statute. Westfield also argued in favor of the public policy of providing a reliable and predictable statewide framework, rather than locking units into pre-existing contract terms.

In their Joint Response Brief, AT&T, Comcast and Indianapolis requested the Commission to dismiss Westfield’s Complaint with prejudice. They further argued that Westfield’s unsupported policy argument should not trump unambiguous statutory language.

5. Commission Discussion and Findings. The Video Franchise Statute established the Commission as “the sole franchising authority for the provision of video service in Indiana.” Ind. Code § 8-1-34-16(a). The Video Franchise Statute also contains specific provisions regarding that authority. The specific provision found in Ind. Code § 8-1-34-24(c) is at issue in this proceeding and states as follows:

With each payment of a franchise fee to a unit under this section, the holder shall include a statement explaining the basis for the calculation of the franchise fee. A unit may review the books and records of: (1) the holder; or (2) an affiliate of the holder, if appropriate; to the extent necessary to ensure the holder’s compliance with section 23 [IC 8-1-34-23] of this chapter in calculating the gross revenue upon which the remitted franchise fee is based. Each party shall bear the party’s own costs of an examination under this subsection. If the holder and the unit cannot agree on the amount of gross revenue on which the franchise fee should be based, either party may petition the commission to determine the amount of gross revenue on which the franchise fee should be based. A determination of the commission under this subsection is final subject to the right of direct appeal by either party. Ind. Code § 8-1-34-24(c) (emphasis added).

The Westfield Complaint was filed under this section. Consequently, while the Commission has the authority to interpret its authorizing statutes, the main task of the Commission in this proceeding is to determine the amount of gross revenue.

Pursuant to the Stipulation of Facts, Westfield had one franchise agreement, the Local Franchise, in effect on June 30, 2006. As noted by the Respondents and the Intervenor Indianapolis, in that circumstance the Video Franchise Statute provides for calculation of the amount of gross revenue as follows:

This subsection applies to a holder or other provider providing video service in a unit in which a provider of video service is required on June 30, 2006, to pay a franchise fee based on a percentage of gross revenues. The holder's or provider's gross revenue shall be determined as follows:

(1) If only one (1) local franchise is in effect on June 30, 2006, the holder or provider shall determine gross revenue as the term is defined in the local franchise in effect on June 30, 2006. Ind. Code § 8-1-34-23(b) (emphasis added).

Pursuant to this section, the Commission finds that the Respondents, as video service providers operating in Westfield, must use the definition in the Local Franchise in order to determine the amount of gross revenues.

Westfield has made public policy arguments for being allowed to choose to use the definition of gross revenue provided in the Video Franchise Statute. Although the fair and equitable treatment of video service providers is certainly important, there does not appear to be any leeway or grant of discretion to the Commission in the statutory language to allow for changes to be made for public policy reasons. As stated by the Respondents, the Indiana General Assembly determines public policy and can certainly amend the statutory language to correct any perceived issues with the statute. Similarly, Westfield's argument that the legislature could not have intended to lock a municipality to contractual terms agreed to prior to the passage of the Video Franchise Statute is one best addressed by the legislature. When a statute is clear and unambiguous, the statute must be given its clear and plain meaning. *Citizens Action Coalition of IN, Inc., et al. v. PSI Energy, Inc., et al*, 894 N.E.2d 1055, 1063 (Ind. Ct. App. 2008).

Westfield also made Home Rule arguments, indicating that it has the power and authority under the Home Rule Act to choose the definition of gross revenue. However, even if the Commission accepted this argument, the language of Section 23 of the Video Franchise Statute clearly and unambiguously applies to the video service provider or the holder of a certificate of video franchise authority. An ordinance by Westfield does not change the requirement on the holder or provider to use the definition of gross revenue as found in the Local Franchise.

Under the Video Franchise Statute, upon petition under Ind. Code § 8-1-34-24(c), the Commission is to determine the amount of gross revenues. At this point in time, the Complainant and the Respondents have not provided any numbers or data as to the amount of gross revenues to which they feel the franchise fee percentage should be applied. Therefore, the Commission lacks sufficient information at this time to make the required determination on the amount of gross revenues for each of the Respondents for their operations in Westfield. In order to provide sufficient information to the Commission, each Respondent shall provide its calculation of the amount of gross revenues as defined in the Local Franchise; i.e. "all compensation paid by a subscriber for the sale of the Company's monthly basic television services," not including "revenue derived from paid TV program charges, leased channels, Pay-TV service," or "any sales or excise tax."

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. Pursuant to the Commission findings in this Order, the Respondents shall file with the Commission the Respondents' calculations of the amount of gross revenues and their statement for explaining the basis for the calculation of the franchise fee, for their operations within Westfield, no later than thirty (30) days from the date of approval of this Order.

2. Within thirty (30) days of the Respondents' filings, Westfield shall notify the Commission whether the amount of gross revenues is still in dispute. If the amount of gross revenues is still in dispute, Westfield shall confer with the Respondents and file a proposed procedural schedule for addressing the dispute.

3. This Order shall be effective on and after the date of its approval.

LANDIS, MAYS AND ZIEGNER CONCUR; ATTERHOLT ABSENT:

APPROVED: OCT 27 2010

**I hereby certify that the above is a true
and correct copy of the Order as approved.**



Brenda A. Howe, Secretary to the Commission