Understanding Township Franchises & Right-of-Way Consents

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While, for the most part, townships do not own public roads within their boundaries, they do have significant authority over highways, roads, streets and other rights-of-way located within their boundaries. For example, applicable state constitutional and statutory provisions require most utilities to obtain a township's permission to locate lines or other facilities within those rights-of-way. Generally, if a utility desires to serve any property within a township, that utility *must* obtain from the township a franchise to provide that service.

Some providers of utility services fail to obtain the necessary permits and franchises; others offer carefully drafted and largely one-sided proposed permit or franchise ordinances, resolutions and agreements for township consideration, while others are more forthright and solicitous. Questions often arise about what is legally provided for and what should be expected in such permits and franchises. This article provides answers to those questions.

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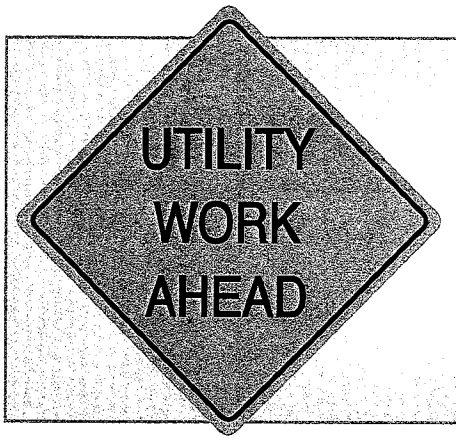
1. What is a Township Franchise?

A municipal franchise is a right or privilege granted by a governmental unit pursuant to constitutional and legislative authority to conduct or operate a public utility or other business within a certain geographical area. Such a right or privilege in effect constitutes a contract inferring certain rights and imposing related duties.[1] Put another way, a municipal franchise is a special privilege of a public nature conferred by a governmental unit upon a person or entity.[2]



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2. What are the Controlling Legal Requirements?

In relevant part, the 1963 Michigan Constitution provides:

"No person, partnership, association or corporation, public or private, operating a public utility shall have the right to use the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this Constitution, the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."

Article 7, § 29 of the 1963 Constitution makes it clear that if a utility, regardless of ownership, proposes to serve customers within a township, it must first obtain a franchise from the township. It also makes it clear that a utility may not place facilities within any right-of-way within a township without the township's consent. The constitutional provision is further augmented by Section 1 of Public Act 266 of 1909, as amended,[3] which grants to townships the right to impose terms and conditions on such consents or franchises.

The statute provides:

"The township board of any township may grant to any person, partnership, association or corporation the right to use the highways, streets, alleys and other public places of the township to set poles, string wires, lay pipes or conduits or to lay tracks for railways and to operate and maintain the same and the right to transact a local business in such township, subject to such reasonable regulations as said board shall prescribe from time to time."

Other state constitutional provisions limit franchises. Article 7, § 19 requires a franchise granted by a township to be revocable at the will of the township unless it is approved by a majority of the township's electors. Article 7, § 30 limits a franchise granted by a township to no longer than 30 years. PA 266 establishes the requirements for an election to grant an irrevocable permit.[4]

3. What is a Right-of-Way Permit?

A right-of-way permit is one mechanism a township can use to permit use of public rights-of-way within the township by a utility. Permission can also be granted by a contract or even by a resolution. The form of the township's consent can be varied.

Technically, a right-of-way permit issued by a township is narrower than a township-issued franchise. A right-of-way permit only grants the right to use streets, alleys and other public places of a township for the installation, maintenance, and use of items such as poles, wires, pipes and similar items. A franchise not only encompasses such privileges, but also grants to the utility or other business involved the right to transact business within the municipality. Since most utilities today pursue the grant of a municipal franchise and rarely seek only a simple right-of-way permit, the remainder of this article will concentrate on franchises.[5]

4. Why Does a Township Have the Right to Permit Use of Rights-of-Way that are Owned and Controlled by the County Road Commission?

The principle is one of allowing a municipality to control how streets and other rights-of-way within its border are used and to determine whether and how its residents receive utility services. In doing so, it can prevent needless duplication of services. Therefore, a township can prevent several different providers of the same utility service from serving the same areas of the township with each utility placing its own separate poles, wires, pipes or other facilities within rights-of-way.

Franchising authority also provides a mechanism for local governments to be compensated under certain circumstances when someone uses a publicly owned right-of-way for profit. The utility or telecommunications company is receiving a special benefit from a publicly owned asset, much in the same way that a person who affixes a radio tower on township-owned property would be expected to enter into a lease and pay for the privilege.

5. Can a Township Consent to the Use of County Roads Even If the County Road Commission Objects?

Yes, the township can so consent. However, since the township and the coun-

ty road commission have concurrent jurisdiction over this area, the road commission's permission is also needed when a utility or communications company needs to disturb the roadway through construction or excavation. So, for the use of county roads in these circumstances, both the township's and the road commission's permission is needed.

6. Who Must Obtain a Franchise or Consent?

Any utility or other person or entity wishing to use rights-of-way in a township to set poles, wires, pipes, conduits or other facilities must obtain a township's consent. Any utility desiring to serve customers within a township must obtain a franchise. This covers governmentally owned as well as privately owned utilities.

7. Would Consent to Use Rights-of-Way Ever Be Sought Without a Formal Franchise?

Yes. For example, a city may own a well field in a township and desire to pipe water from the well field to the city limits within rights-of-way without serving customers in the township. In that situation, the city would still need to obtain at least a right-of-way permit from the township since it would be utilizing a public right-of-way located within the township.

In another situation, we know of a circumstance where a utility authority needed to cross a portion of a nonmember township to serve customers in an adjoining member township. Would the township have to consent in that situation? It depends upon whether or not utility lines will cross or be located within public rights-of-way within the township. If the utility lines will not be located within a public right-of-way and will not serve customers within the township, the township's consent would normally not be required (unless there are zoning regulations or other local ordinance provisions which apply). However, if the proposed utility line or lines will cross or be located within a public road right-of-way, township consent will be required.

8. Can Conditions and Requirements Be Included in a Township Franchise?

Yes, reasonable conditions may be imposed. Common conditions and requirements include:

- a provision allowing other utilities to use the poles or conduits being placed in the rights-of-way;
- what part or parts of the township are to be served under the franchise;
- a requirement that lines be relocated at the utility's expense if required due to changes in township-owned utilities or changes in the right-of-way;
- an indemnification and hold-harmless clause which will protect the township from losses due to the location of the utility facilities within the rights-of-way;
- limitations on trimming trees within the rights-of-way;
- a requirement to submit plans and specifications to the township for review and approval prior to any construction;
- limitations on the times when traffic can be blocked or detoured when facilities are being installed or maintained, as well as traffic control requirements;
- restoration requirements for areas where work has occurred;
- requiring notification of the owners and occupants of any property affected by utility work;
- a designation of which specific rights-of-way may be used;
- a provision requiring the franchisee to accept the franchise by signing the consent;
- compliance with the township's zoning and other ordinances;
- an indication whether the franchise is exclusive or nonexclusive;
- a clause stating whether the franchise is revocable or irrevocable;
- the term of years (usually 0-30 years);
- a provision requiring the franchisee to pay the township's costs incurred in reviewing and approving the franchise.

9. How Does a Township Grant a Franchise?

A township can establish a franchise via contract, resolution or ordinance. Most often, an ordinance executed by the requesting utility is used. If an ordinance is used, the township should follow the same general procedures as for any general township ordinance.

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10. What Is the Difference Between a Revocable and an Irrevocable Franchise?

A revocable franchise can be terminated at the will of the township board involved. An irrevocable franchise stays in effect for its entire stated term, and requires township voter approval.

However, even revocable franchises will often limit the conditions under which revocation will occur, requiring notice to the utility and an opportunity to be heard before the township board acts on revocation. Irrevocable franchises are also usually deemed revocable for cause after notice and opportunity for a hearing.

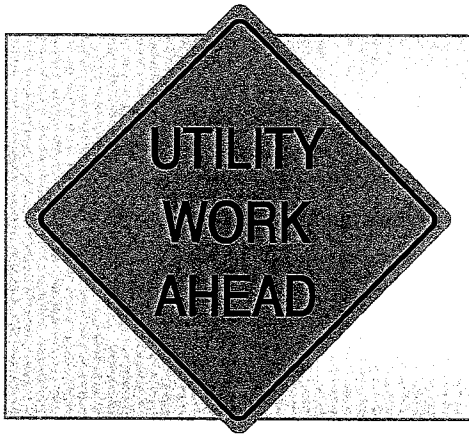
As a practical matter, franchises are seldom, if ever, revoked because township residents need the utility services. This is especially true for utility services regulated by the Michigan Public Service Commission (MPSC). However, where utility service is provided by another municipality such as an adjoining city, the township may revoke the franchise if an alternative service provider exists. Moreover, in these days of competition among various utility providers, townships may desire to consider revocation when a given utility provides less than satisfactory service.

There are also general legal constraints on the ability of a township to revoke even an expressly revocable franchise. Why? A franchise is generally held to constitute a contract between the municipality and the business that obtained the franchise. Even if a franchise is revoked or expires by its own terms, absent poor performance on the part of the utility or duplication of existing services, it is highly unlikely that the Michigan courts would require that essential utilities services cease.

11. Can a Township Grant More Than One Franchise for the Same Utility Service?

Yes. Theoretically, utility franchises can be exclusive or non-exclusive. An exclusive franchise would prevent other utilities from providing the same service within the franchise's service area.

However, exclusive franchises may be of questionable legality under various state and federal laws and regulations, including those governing antitrust activities. While in some circumstances there may be a reason for an exclusive franchise to avoid needless service duplication as well as the duplication of wires, pipes or other facilities, in the last few years there has been increased sharing of facilities with different utilities offering differing rates for services provided using the same lines, conduits, pipes and other facilities. So, there may not in many circumstances be a legitimate public purpose for granting an exclusive franchise.



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12. Can Townships Charge a Franchise Fee to Utilities?

Except as noted below, most public utilities refuse to pay franchise fees or a percentage of their revenue to the township involved. However, some have agreed to include a provision requiring such payments to the township to the extent such fees are paid by the utility to any other Michigan municipality. It is also fairly common for a utility to pay the township's reasonable attorney fees and costs in preparing and adopting the franchise document.

13. Are There Legal Limits on the Ability of a Township to Withhold Consent to a Franchise?

A township's authority regarding franchises is not absolute. Michigan courts have made it clear that a township cannot unreasonably withhold consent from a utility that desires to operate within a township and utilize its streets and public places.

14. Isn't There a New Michigan Statute that Could Affect Telecommunications Franchises?

Yes. The Metropolitan Extension Tele-

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communication Rights-of-Way Oversight (Metro) Act (PA 48 of 2002), went into effect November 1, 2002. In summary, the Metro Act requires that all telecommunications providers now apply for and obtain a permit (on a form approved by the MPSC) to operate within the rights-of-way. One significant benefit related to the Metro Act is that it requires all telecommunications providers (even incumbents) to pay an annual permit fee, which will be distributed to those communities that have affirmatively acted to "opt in" to the Metro Act process. The deadline to opt in is December 31, 2003. *(For more on the Metro Act, turn to the "Capitol Report" article on page 4.)*

15. Has Federal Legislation Altered the Authority of Townships Regarding Franchises?

Under the supremacy clause of the United States Constitution, federal law can "trump" state laws, including even state constitutional provisions. Federal statutes can severely limit the authority for the control of local franchises by municipalities in the areas of telecommunications and cable television.

For example, cable television companies seeking to install and operate cable lines and equipment in the public rights-of-way are required under federal law to obtain a franchise from the local government (the "franchising authority"). Federal legislation does impose some constraints upon what conditions municipalities can place upon cable television franchises.[6] However, unlike most franchises in Michigan, the franchising authority is entitled to receive a franchise fee for the use of rights-of-way within its jurisdiction up to 5 percent of the applicable gross revenues.

It is usually prudent for a township to consult with its legal counsel prior to entering into any type of franchise or right-of-way permit. This is particularly true with regard to any matter involving the Metro Act and any federal statute regarding cable television and telecommunications. The laws and procedures regarding franchises and right-of-way consents are becoming increasingly complex. ■

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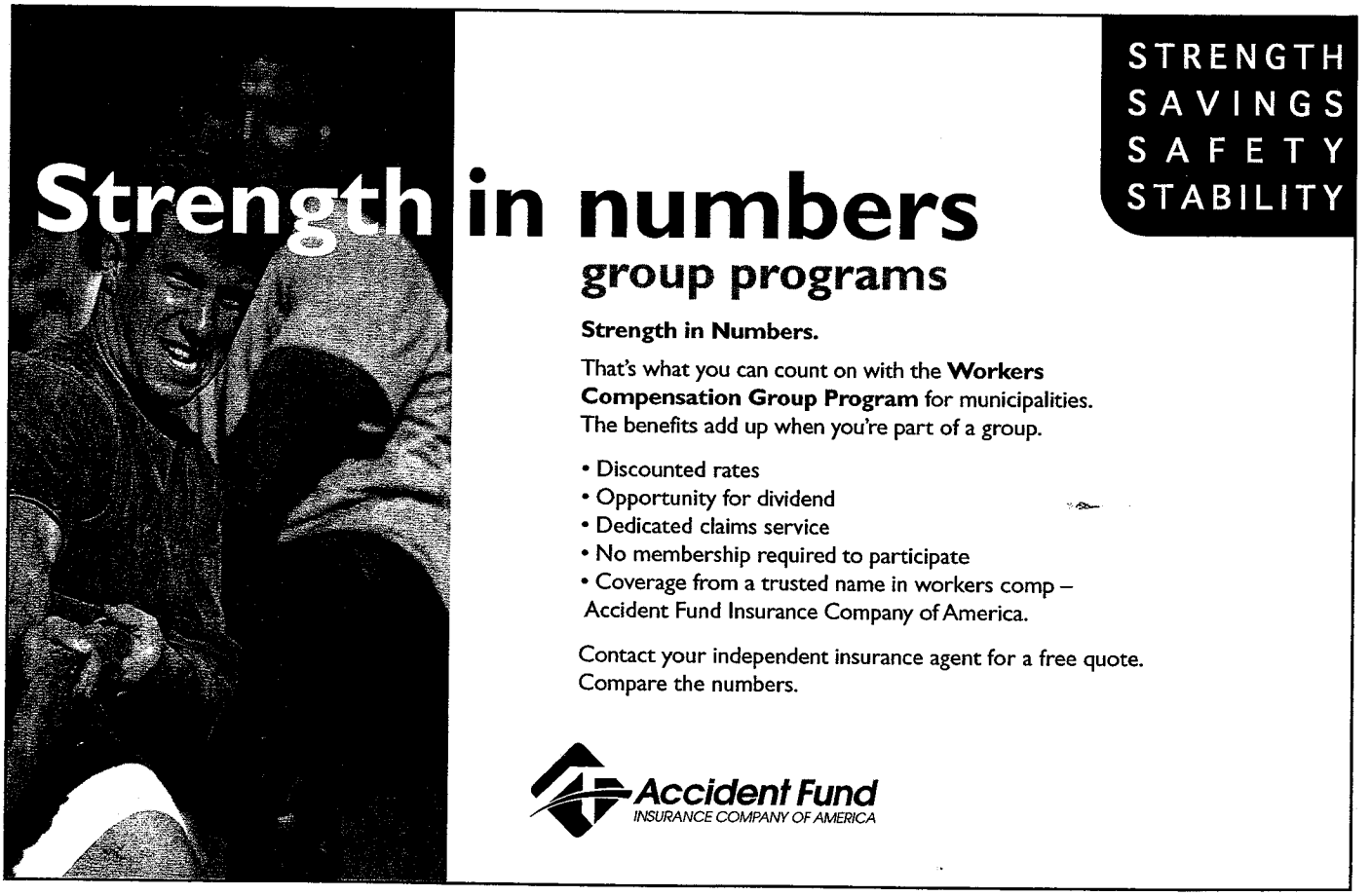
1 *Traverse City* vs *Consumers Power Co*, 340 Mich 85 (1954); *City of Detroit* vs *Public Utilities Commission*, 288 Mich 267 (1939); *Michigan Civil Jurisprudence* (Vol. 10 - 2002 revisions), page 194.

2 *Lansing Twp* vs *City of Lansing*, 356 Mich 338 (1959); *Michigan Civil Jurisprudence* (Vol. 10 - 2002 revisions), pages 194-195.

3 MCL 460.601.

4 Sections 2-3a: MCL 460.602-603a.

5 Of course, individual townships may still require a franchisee to apply for an administrative right-of-way permit after a franchise has been granted with regard to the opening of a particular street or right-of-way as a means of monitoring construction or installation work.

6 See the Cable Communications Policy Act of 1984 and Cable Television Consumer Protection and Competition Act of 1992.