

**HUBACHER & AMES, PLLC**  
ATTORNEYS

**MEMORANDUM**

TO: John Carlton  
FROM: Matt Ames  
DATE: May 18, 2011  
SUBJECT: Answers to Questions Regarding Proposed OpenBand Franchise

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REAL ESTATE  
TELECOMMUNICATIONS  
COUNSEL

You have asked me to respond to certain questions submitted by Supervisor Waters in connection with the Finance Committee's review of the proposed OpenBand franchise agreement. My answers follow.

***1. Questions regarding drop-related violations.***

a. Question: Is this safe?

Answer: In principle, any failure to ground a drop properly raises a potential safety concern. Grounding refers to attaching the cable plant to other facilities to ensure that excess electric current, such as from lightning or a power surge, is diverted in a safe manner. The technical inspection was conducted in accordance with the National Electrical Safety Code and the National Electrical Code, which are safety codes. Consequently, any non-compliance is potentially serious and should be corrected; nonetheless, some grounding violations are more serious than others. In this case, of the three violations found, two were loose connections that were immediately corrected at the time of the inspection. The third violation consisted of wiring that was in fact grounded, but not grounded in the fashion required by the code. As further explained below, the 3.4% non-compliance rate is actually low when compared to other systems. It is also important to note that the report prepared by Columbia Telecommunications Corporation ("CTC") states that CTC "found the existing cable plant to be in very good condition and that the plant is well-built and maintained relative to industry standards . . . ."

b. Question: *Do other providers have this problem?*

Answer: Yes. It is common to find grounding infractions in the inspection of cable systems. Staff has not conducted a recent inspection of the Comcast or Verizon systems, so we cannot compare

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OpenBand to those two systems. In 2004, however, CTC conducted an inspection of the Adelphia system, now owned by Comcast. CTC found that 19% of subscriber drops -- 8 out of 43 inspected -- were improperly grounded or not grounded at all. In addition, when asked about this issue, CTC stated:

“[OpenBand’s] non-compliance rate is extremely low in comparison to other systems we have inspected over the past year (i.e., 4% non-compliance in the Comcast system in Frederick County, Virginia; 19% in the Comcast system in Wilmington, Delaware; and 47.1% in the Comcast system in Alexandria, Virginia). In our view, the 3.4% non-compliance rate in Loudoun County can be regarded as an overall plus in the system rating evaluation score. Further, we believe that the non-compliant drops could be fixed systemwide within a week.”

c. Question: *Have uncovered drops been an ongoing problem with OpenBand?*

Answer: No. The only problems the CTC report identified concerning drops had to do with grounding. CTC did not find any drops that were unburied or uncovered. Indeed, the report notes that “all of the distribution plant and drops that OpenBand has constructed are underground, placed in a joint trench with the power company before the construction of new homes and neighborhoods throughout the community. Because of this, the depth of OpenBand’s service drops and plant is greater than what Comcast and Verizon would typically construct, especially for the individual subscriber drop cables. This is a good feature, because the plant is less susceptible to cuts from placement of shrubs, fences, or other utility work.”

2. *What are the consequences of denying the franchise agreement in regard to limiting service?*

The franchise only addresses the provision of cable service. Consequently, a denial of the franchise would, at least as a legal matter, have no effect on OpenBand’s ability to provide telephone or Internet service.

A denial of the franchise request would mean that OpenBand would no longer have the right to use the public rights-of-way to provide cable service. Were OpenBand to accept the denial, the consequence would be that OpenBand would either have to find another way to deliver cable service that does not rely on the placement of facilities in the rights-of-way, or would have to cease providing cable service.

OpenBand could also be required to remove its system from the public rights-of-way, unless permitted by the County to abandon those facilities in place. Removal of such facilities, however, could affect other services, at some locations. In Broadlands and most of Lansdowne, cable, telephone, and Internet services are all delivered using separate plant, so it appears that removal of cable plant would not affect the other classes of service. In Lansdowne Town Center and Leisure World, however, multiple services are delivered over one set of cables. Consequently, if the County were to insist on removal of plant serving those areas, other services might be affected.

**3. *Is there a provision which allows OpenBand to operate after the expiration of its previous agreement for up to 36 months?***

Yes. Section 5.9, "Continuity of Service Mandatory," addresses several aspects of the company's obligation to provide continuous service to subscribers. One purpose of the provision is to ensure that customers are not left without service before another provider is in place. Section 5.9.1 states:

At the County's request, the Grantee shall operate its Cable System for a temporary period (the "transition period"), following the revocation or termination of its Franchise or any transfer as necessary to maintain service to Subscribers, and shall cooperate with the County to assure an orderly transition from the Grantee to another grantee. The transition period shall be no longer than the reasonable period required to select another grantee and to build a replacement Cable System, if necessary, and shall not be longer than thirty six (36) months, unless extended by the County for good cause. During the transition period, the Grantee shall continue to be obligated to comply with the terms and conditions of the OVS Ordinance, this Franchise Agreement, and all Applicable Law.

**4. *Why would we grant such a long renewal period? What about a provisional 1 or 2-year contract? Why 12 years with backdating?***

By way of background, it is important to bear in mind that staff's goal has been to address the concerns raised by residents that could be addressed within the scope of the franchise agreement. While the County may choose to take some other action regarding concerns related to the exclusive easements or the terms of the contracts between OpenBand and the HOAs, those issues could not be effectively addressed in the franchise agreement. Accordingly, the focus of negotiations was on issues related to programming and customer service. It is also important to understand that the proposed franchise agreement is comparable to or more favorable to the County and residents than the existing Comcast and Verizon franchise agreements in practically every respect, and OpenBand has agreed to do things that Comcast and Verizon have refused to do and could not be legally required to do. For example, neither of the other agreements specifies the number of HD channels to be provided, requires a phase-out of any model of converter, or requires the company to install probe devices to try to identify problems related to picture quality. The enforcement provisions of the proposed agreement are also stronger and more comprehensive than those in the Verizon and Comcast franchises. Finally, the agreement provides for performance reviews every two years.

Staff had proposed a five-year term, which is the same as the term of the original agreement. OpenBand felt strongly that it was agreeing to terms that it was not legally required to accept, and consequently insisted on a 10-year term. The company's representatives were very firm in conveying their position on this, and staff concluded that, because the agreement was more favorable than the Verizon and Comcast agreements, and because the company had agreed to address in some fashion the other key concerns raised by the public, it was reasonable to accept the longer term.

There were two practical reasons for making the agreement retroactive to the termination date of the prior agreement. First, OpenBand did not intend to allow its agreement to lapse, and if the renewal procedure provided for in the original agreement had been followed, there would have been no gap, so it seemed reasonable to start the new franchise from that date. Second, under the proposed agreement, OpenBand is required to pay the larger PEG access capital fee now being paid by Verizon and Comcast, and making the date retroactive would obligate the company to pay the fee for that period. The value to the County is approximately \$88,000 from July 1, 2009, through April 30, 2011.

A provisional 1- or 2- year contract at this point would not seem to solve anything. As noted above, the premise of the negotiations has been to address the key problems raised by residents that can realistically be addressed in the franchise agreement. A provisional contract that does not address those problems is of no benefit to the residents. Indeed, several members of the Cable & OVS Commission stated that they supported the agreement precisely because they believed it preferable to approve the agreement to obtain the improvements it offers, rather than to delay further. To the extent that residents are dissatisfied for other reasons, a 1- or 2-year contract would not address their concerns.

**5. *Does the County have any authority over the granting of telecommunications easements? Would Lansdowne be free to grant additional easements to other providers regardless of County action?***

The County does not have any specific authority regarding the granting of such easements. The County could not, for example, order a property owner to grant new easements for a competitor's use, or order OpenBand to open its easements: to do so would raise a constitutional question under the Fifth Amendment to the U.S. Constitution, as well as state law.

We are examining the issue of whether the County could conceivably condemn one or more easements, using the power of eminent domain, subject to the limitations of state law and the requirement that it pay compensation for the value of the condemned easements. We will address this issue in more detail in a separate memorandum.

We have no reason to believe that the Lansdowne HOA cannot grant additional easements to cross property that it owns. Nevertheless, it is possible that the existing easements are laid out in such a way that it is impossible to build a new system without

physically crossing the existing easements. In that case, Lansdowne may not be able to solve the problem. Staff was informed at one point that the Southern Walk HOA believed that it could do so. As far as we know, Southern Walk has not pursued that option.

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I hope this discussion has been helpful. Please let me know if you have any questions.