

Town of Carroll

From: Bernie Waugh [bernie.waugh@gardner-fulton.com]
Sent: Monday, December 12, 2011 3:50 PM
To: twinmtn@roadrunner.com
Cc: Mark Catalano; Bonnie; Bill Dowling
Subject: RE: Agreement for Review

Dear Selectmen:

I have reviewed the proposed agreement between Town of Carroll and Carroll Information Group concerning the PEG access channel. I notice that it appears to be already signed. But I've reviewed this Agreement under the assumption that if I found flaws in the agreement, changes could be made if necessary. [By the way, even though we do legal work for the Town of Newport NH, we have no file on record indicating that we previously reviewed any agreement such as this on behalf of Newport.]

I have two major concerns, and a few others related to those. In neither case can I give you any final language, because I don't know what your intent is. Therefore this E-mail is only the first step. If you get back to me on these issues, then I can go ahead and draft specific wording changes:

1. First Major Issue - Franchise Fees: The Agreement, as currently worded, guarantees that all franchise fees received from Time Warner will be considered "dedicated" and will be turned over to CIGI to operate the PEG channel. The trouble with that is that there is no state statute allowing TV franchise fees to be considered "off-budget." Therefore the usual municipal budget law rules apply - which is that every amount received by a town must be subject to a budgetary appropriation (passed by town meeting as part of the budget) in order to be dedicated to some particular purpose. An exception to this is the revolving fund for purposes of "Providing cable access for public, educational, or governmental use" under RSA 31:95-h, I(e). **HOWEVER...**that statute is **not** automatic, and cannot be used unless it is first adopted by the Town Meeting. If it has not been adopted by town meeting, then the Agreement should be altered to reflect that, and any statement in the Agreement about turning over the franchise fees should be made conditional upon the Town Meeting potentially deciding otherwise. **Questions:** Has the Town Meeting adopted RSA 31:95-h, I(e)? Or, is it the Selectmen's intent to put it on the warrant to be adopted (for example in March)?

2. Related Issue - Other Funds: As currently worded, Section 17 says that funds received from other sources (other than the Town) are not subject to being reported to the Town. In my view the legality of this provision is questionable. The gist of this Agreement, as a whole, is that it is designating the CIGI as the agent of the Town for purposes of performing certain governmental functions (such as the broadcasting of governmental meetings, and the administration of a public forum in a manner consistent with First Amendment free speech principles). In my view a court, if asked, would hold that all of CIGI's financial books would be available to the public under the Right-to-Know law, even though it is a private 501(C)(3) [analogous to the way local advisory committees are subject to the law]. I would suggest that all of CIGI's budgetary information should be available as if it were a public record.

3. Second Major Issue - What Is and What Isn't Governmental Speech? There are several portions of the Agreement that say that public access to the PEG will not be discriminatory (e.g. Section 1(A), non-discriminatory basis; Section 1(E) - equal access; Section 2, open to all users regardless of viewpoint). My concern arises from some recent cases, including *Sutcliffe v. Epping School District*, 584 F.3d 314 (2009). That case involved a claim by a local group whose viewpoints were in opposition to the School Board. They requested that the Town's website contain a link to their own website. The Town refused, and the group sued on the basis of the First Amendment. The Federal Court of Appeals eventually upheld the Town's decision on the basis of the "Governmental Speech" doctrine - basically saying that the Town's website wasn't a public forum for free speech purposes.

The reason I'm raising that issue is that I think your "equal access" promise goes too far. I am assuming that there will **some** times (for example during the broadcast of Selectmen's meetings) when the Town will want to retain the priority of its **own** interests under the "Governmental Speech" doctrine. Otherwise, if some group wanted to broadcast, let's say, a Ku Klux Klan program at precisely the same time as the Selectmen's meeting, the "equal access" principle, standing alone, wouldn't give you any way to choose between those two. **Question:** How do the parties here intend to determine when it is that governmental speech and programming takes priority versus when it doesn't? Is this going to be a decision reached by CIGI all by itself? Will it be CIGI in consultation with Town officials? Again, I would like to draft some language

recognizing the priority of governmental speech (as opposed to the "public forum") aspect of the PEG. And my basic question is, how do you intend for those details to be decided?

4. Related Issue - Cable Franchise Agreement. I don't have a copy of your Cable Franchise Agreement with Time Warner, and if indeed I'm going to add some language to deal with Item #3 above, then I also want to insert any limitations on PEG use that may be contained in your franchise agreement. For example, I know in some communities the franchise agreement expressly prohibits use of the PEG by commercial entities. If that is the case here, then those limitations also ought to be put into this Agreement as a limit upon the otherwise broad reach of the "equal access" principle. In addition, some reference ought to be made to the FCC rules (e.g. the rules against using obscenity, etc.) **Question:** Could you please send me a copy of the Town's franchise agreement with Time-Warner, so that I could check for these issues.

Again, I'd be glad to finalize my recommended changes if you respond to the questions above. Don't hesitate to contact me for any reason.

Sincerely,
Bernie Waugh

From: Town of Carroll [mailto:twinmtn@roadrunner.com]
Sent: Wednesday, December 07, 2011 10:45 AM
To: Bernie Waugh
Cc: Mark Catalano; Bonnie; Bill Dowling
Subject: Agreement for Review

Good Morning, Bernie,

Attached please find an agreement signed by the Selectmen Monday night, but which they have requested you review. There is a letter from Linda Dowling attached. However, I understood from the Board that I was to ask you to review this on behalf of the Town.

Maryclare

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