

November 14, 1990

REPORT TO THE COMMITTEE ON PUBLIC SERVICES AND SAFETY
CABLE TELEVISION SERVICES

INTRODUCTION

Councilman Henderson requested on November 16, 1989 that this Committee obtain a report from the City Attorney on whether any existing City policy or ordinance forbids provision of cable television services to less than a full "service area." A report was prepared on December 8, 1989, and the matter was continued until November 21, 1990. This report is a recap and update on this issue. For the Committee's convenience, a copy of the October 23, 1989 Memorandum of Law which responds to additional questions on cable television matters is attached. (See Appendix A.)

THE STATUTORY SCHEME

San Diego is a "Charter City." As such, the City may regulate in areas that conflict with state law if the subject with which they deal is a "municipal affair." Thus, municipal regulation of cable television is possible to the extent that cable television is not of "state-wide concern." However, the California legislature has recently enacted laws which do, in fact, preempt some areas of cable television regulation.

A. State Statutes

Government Code sections 53066 et seq., effective January 1, 1990, and attached as Appendix B, established a "comprehensive" policy concerning cable television by amending certain sections of the California Government Code dealing with television franchises. Government Code section 53066 authorizes cities to grant franchises and prohibits the operation of any cable system without a franchise.

Government Code section 53066.3 permits a city to grant "an additional . . . franchise in an area where a franchise has already been granted to a cable television operator," but only

after a public hearing at which certain factors have been considered. Those considerations include (1) economic and technical capabilities; (2) aesthetic and economic impacts on the service area; (3) other general impacts and "societal interests"; (4) impacts on community served; (5) unreasonable disruption or inconvenience to existing users, or future uses; and (6) franchising authority's interest in universal cable service. The City is allowed to impose additional terms and conditions as

might be appropriate and must make a final determination regarding any additional franchise within six months of receipt of an application (barring unreasonable delay by the applicant).

This section addresses the issue of competitive franchises within the same geographic area of an existing cable operator as follows:

(d) Any additional franchise granted to provide cable television service in an area in which a franchise has already been granted and where an existing cable operator is providing service or certifies to the franchising authority that it is ready, willing, and able to provide service, shall require the franchisee to wire and serve the same geographical area within a reasonable time and in a sequence which does not discriminate against lower income or minority residents, and shall contain the same public, educational, and governmental access requirements that are set forth in the existing franchise. This subdivision does not apply where all existing cable operators certify to the franchising authority that they do not intend to provide service within a reasonable time to the area to be initially served by the additional franchise.

Emphasis added.

While the inclusion of subdivision (d) no doubt comes as a result of cable industry lobbying, it nevertheless reflects fundamental fairness. One of the main objectives of our cable franchises is to assure that San Diego becomes a geographically "wired city." Current franchisees are required to build out their systems to include the whole city at a minimum service level. It is not fair to grant a franchise to build and operate a competing system unless the new franchisee is subject to the same rules. To do otherwise is to allow the new operator to "cream-skim" or "cherry -pick" the most promising areas and services while requiring the existing operator to (1) serve marginal or unprofitable areas and (2) provide marginal or unprofitable services.

However, a recently enacted amendment to Government Code section 53066.3 (AB 2892-Moore) establishes a mechanism for new

franchisees to enter a portion of a geographical area. The portion of this section which is underlined is the new language of a recently enacted amendment to the original section to become effective January 1, 1991. This amendment provides new franchisees with an opportunity to enter a portion of the existing cable operators' geographical area when the existing franchisee fails to certify that they intend to provide service to the area at issue within a reasonable period of time.

B. City Charter

San Diego's City Charter provides the setting in which all franchises within the City are to be awarded:

SECTION 103. FRANCHISES.

The Council shall have power to grant to any person, firm or corporation, franchises, and all renewals, extensions and amendments thereof, for the use of any public property under the jurisdiction of the City. Such grants shall be made by ordinance adopted by vote of two-thirds (2/3) of the members of the Council and only after recommendations thereon have been made by the Manager and an opportunity for free and open competition and for public hearings have been given. No ordinance granting a franchise or a renewal, extension or amendment of an existing franchise shall be effective until thirty days after its passage, during which time it shall be subject to the referendum provisions of this Charter. No franchises shall be transferable except with the approval of the Council expressed by ordinance.

C. City Ordinances

The San Diego Municipal Code sets forth the performance requirements for cable operators to whom franchises are granted. Municipal Code sections 73.0101 (see Appendix C), enacted in 1970 and amended in 1981 and 1984, provide for qualitative regulation and a complaint procedure. Cable television companies are to keep a record of complaints and provide them, upon request, to the City Manager. The City Manager can make such request if a customer uses the procedure set forth for complaining to the Manager's office.

D. City Council Policy

Council Policy 700-28, dated April 6, 1972 (see Appendix D), set forth the City's policy for granting of cable television franchises to less-than-full-service-area franchisees. This Policy has been preempted by the state law.

More recently, the City Council passed a resolution endorsing federal legislation returning regulation of the cable television industry to local government.

E. Franchise Ordinances

The statutes and ordinances discussed above reflect the City's policies regarding cable television. The net result is that the City is primarily served by two cable companies, Cox Cable and Southwestern Cable.

Cox and Southwestern essentially each serve one-half of the city. They have been granted long-term franchises with renegotiation intervals and potential extension clauses.

CONCLUSION

In light of the recently adopted legislation, the City may grant cable franchises for parts of the City already served by

existing cable systems. It may not, however, allow a new franchisee to serve a smaller geographical area or provide lesser or less services than required of the operators of the existing systems, unless it is for an area which the existing franchisee indicates it does not intend to service within a reasonable period of time. It may impose terms and conditions additional to those in the existing franchise, including a larger franchise fee.

Respectfully submitted,
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City Attorney

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Attachments
RC-90-59