

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: March 6, 2013
TO: Council President Pro Tem Sherri Lightner
FROM: Jan I. Goldsmith, City Attorney
SUBJECT: Time Warner's Coverage of Padres Games

INTRODUCTION

At your request, our office has taken a preliminary review of Time Warner Cable's ("Time Warner") refusal to contract with Fox Sports San Diego to carry the network which will broadcast San Diego Padres games during this upcoming season. Nearly your entire district is served by Time Warner and you have received numerous complaints. Your office, reflecting the views of your constituents, has asked us to outline any options that might be available to assist in an inquiry.

As you know, Time Warner is a franchise cable operator in the City of San Diego. Two types of franchise agreements govern the delivery of cable television services: City-issued franchises and state-issued franchises. Time Warner's City-issued franchise (approved by the City Council as San Diego Ordinance O-15213) was originally entered into in 1980 with a company that was a predecessor in interest to Time Warner. In 2003, San Diego Ordinance O-19243 amended the agreement and extended the term of the Time Warner franchise to April 9, 2020. Under the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), either Time Warner or the City could convert Time Warner's franchise into a state franchise. *See*, Cal. Pub. Util. Code §§ 5840(o)(3), 5930(c).

1. A dispute between two private businesses

Time Warner has characterized its negotiations with Fox Sports as a dispute between two private businesses in which the City should steer clear. We agree with Time Warner's characterization, but we believe legitimate public policy issues are involved that justify the City at least making an inquiry as to Time Warner's motivation (see below).

The City has no authority under the franchise agreement to mandate carriage of Padres broadcasts and certainly could not do so by ordinance. The United States Supreme Court struck down Federal Communications Commission (FCC) rules which would have required cable operators to set aside channels for certain programmers. *See, FCC v. Midwest Video Corp.* (1979) 440 U.S. 689, 708-709.

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See also, 47 U.S.C. § 544(f)(1), which provides that: “[A]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.”

Nor may the City require that Time Warner provide its competitors who carry Padres games with access to Time Warner’s infrastructure (its cable wires). See, *National Cable & Telecommunications Assn. v. Brand X Internet Services*, (2005) 545 U.S. 967. Competitors which receive a valid state franchise may enter Time Warner’s San Diego market areas, but must construct or lease their own infrastructure.

The most effective way to encourage Time Warner to carry Padres broadcasts is for Time Warner customers to demand it. An organized effort by Time Warner customers could do wonders. Consumers have alternatives to Time Warner.

2. A line of inquiry

Time Warner is not entirely free of regulations or contractual requirements. In fact, every agreement, including Time Warner’s franchise agreement, includes an implied covenant of good faith and fair dealing. “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. . . . The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith.” *Carma Developers, Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372. In addition, there are federal and state regulations that establish public policies and impose obligations on a cable operator such as Time Warner.

Federal law discourages discrimination on the basis of affiliation. Thus, for example, if Time Warner’s motivation is to avoid contracting with Fox Sports San Diego because it is a competitor, yet Time Warner would contract under the same terms had the broadcast rights been held by a Time Warner affiliate, there might be a basis to conclude discrimination on the basis of affiliation. Although that, alone, is not a basis for finding a violation of federal law, it might bear on Time Warner’s good faith.

Section 616 of the Communications Act of 1934 (as amended, codified at 47 U.S.C. § 536), and the related rule which the Federal Communications Commission (“FCC”) enacted (47 C.F.R. § 76.1301(c)), establish a policy against discrimination on the basis of affiliation. The relevant inquiry is whether the distributor “acted upon” a motive to discriminate “in reaching a carriage decision.” The best example is a current case in which the FCC issued an Order which held that Comcast Cable Communications unfairly discriminated against the Tennis Channel by requiring subscribers to pay an additional fee for broadcasts while Comcast broadcast its own channels, Golf Channel and Versus, without additional charge. See, *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Order, MB Docket No. 1-204 (July 24, 2012). That Order is now on Petition for Review before the U.S. Court Appeals for the District of Columbia Circuit.

The purpose of raising Section 616 is not to accuse Time Warner of a violation. That is not the City’s role and we are not recommending legal action or even the threat of legal action. Moreover, a Section 616 violation involves additional factors beyond basic discrimination.

Rather, the purpose is to help focus the inquiry at your hearing on a legitimate issue. Specifically, given federal policy and Time Warner’s obligation to act in good faith, it seems reasonable to ask that Time Warner explain why it is willing to spend \$8 billion to broadcast Los Angeles Dodgers

baseball games, but is refusing to pay what every other carrier has paid in San Diego as the market rate to broadcast Padres games. Is it because Fox Sports has the rights and is not a Time Warner affiliated entity? If so, how can Time Warner justify that motivation in light of federal policies?

It appears to many in the sports world that Time Warner is acting inconsistently. While Time Warner refuses to do business with Fox Sports, Time Warner's \$8 billion deal in Los Angeles has been the talk of the sports world. John Durando of Sports Media reports that Time Warner's Los Angeles deal "means a lot more money" for other market programming. "Networks will have to pay higher rights fees for local team rights," he reports. Joe Flint of the Los Angeles Times reports that "few cable companies have been as instrumental in driving up sports costs as Time Warner Cable." Joe Flint, *Time Warner Cable's Split Personality with TV Sports*, Los Angeles Times, January 23, 2013.

As for San Diego, the Times reports:

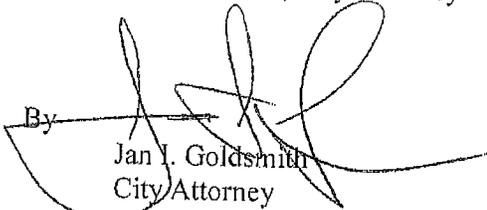
"While Time Warner Cable has taken some franchises away from Fox Sports in Los Angeles, in San Diego the strategy backfired. Fox held onto the rights to the Padres despite a big bid from Time Warner Cable. The end result: Fox raised the price of its sports channel there to cover the costs of its new deal, and Time Warner Cable refuses to carry the network." *Id.*

Sports industry consultant Marc Ganis has said that Time Warner does "seem to be talking out of both sides of their mouth. Time Warner Cable has at one moment railed against excessive rights fees being paid [San Diego] and then in the next moment pays an exorbitant rights fee [Los Angeles]." *Id.*

CONCLUSION

Although the dispute between Time Warner and Fox Sports is between two private companies, there is a public policy issue that is involved. Accordingly, it is reasonable to ask that Time Warner explain why it has committed to spend \$8 billion to bring Los Angeles Dodger games to fans, but refuses to pay market rate in San Diego. After receiving that explanation, the ultimate decision is up to Time Warner customers to decide what, if anything, to do.

JAN I. GOLDSMITH, City Attorney

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