

DATE: January 10, 1990

TO: Jack Sturak, Assistant Treasurer
FROM: City Attorney
SUBJECT: Business Taxes - Cable Television Franchises

This responds to your memorandum of December 11, 1989 which asked whether Cox Cable Television is exempt from payment of business taxes under the terms of its franchise agreement with the City. You provided us a copy of Ordinance No. 12543 (N.S.) adopted January 2, 1979 which granted Mission Cable Television, Cox's predecessor, a franchise to operate a cable television business. Business taxes had not been levied against this company or its predecessor for the past 27 years, as shown in the correspondence attached to your request.

Section 21(c) of the ordinance you forwarded states in pertinent part:

(C) Payments made to City by Grantee pursuant to this section for any calendar year shall be as a rental for use of the public right of way in lieu of any fee or tax prescribed by the City for the same period... ." emphasis added

You asked whether that language is sufficient to operate as an exemption of Cox Cable from the business tax provisions contained in San Diego Municipal Code sections 31.0101 et seq. We answer that it does, based on past practice and a fair reading of the franchise.

You are correct that there is no provision in law, either in the State Constitution, the Government Code or the Municipal Code, which would preclude the City from imposing a business tax upon a cable television company. The City business tax is a revenue raising measure and not regulatory (San Diego Municipal Code section 31.0101). It does not constitute authorization to conduct a business, but instead is a requirement that a tax or fee be paid for the conduct of business within a city.

Ordinance No. 12543 (N.S.) granted a franchise to engage in the business of operating a cable television system (see Sections 3 and 4d). Section 21(c), quoted above, states that payments are a rental for the use of a public right of way. Under the current or past practices of the City, no fee or tax is or has been prescribed by the City for rental for the use of a public right of way by any entity, other than as has been set forth in a franchise. Therefore, the term "tax" referred to in Section 21(c) must be viewed as referring to any other tax prescribed by the Municipal Code for other than rights of way, e.g., business

taxes.

Because of the long-standing practice of the City not to charge a business tax or issue a separate business license to cable television companies, the conduct of the parties appears to have recognized that the franchise granted by the City Council clearly was in lieu of all other fees and taxes. Whether this could have been more clearly articulated in the franchise agreement is not at issue; what is paramount is the understanding accorded to that language, as noted in Mr. McRann's letter of November 20, 1989, over the past 27 years with regard to Cox Cable and its predecessor, Mission Cable.

We therefore concur that you may treat the franchise as an exemption from the business tax provisions of the Municipal Code and discontinue any efforts to collect arrearages.

JOHN W. WITT, City Attorney

By

Rudolf Hradecky

Deputy City Attorney

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cc Curtis M. Fitzpatrick

Tony Salmon

Pat Wayne

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