

SACRAMENTO METROPOLITAN



Cable
 Television
 Commission

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ROBERT E. SMITH
 EXECUTIVE DIRECTOR

April 24, 1984

For Commission Meeting of:
May 3, 1984

To: Sacramento Metropolitan Cable Commission

From: Bob Smith Executive Director

Subject: ORDINANCE CHANGE MODIFYING PENALTIES FOR NONCOMPLIANCE WITH AN ACCELERATED CONSTRUCTION SCHEDULE

On March 28, 1984, the Commission received a letter from Cablevision identifying a conflict between the remedies prescribed in the Resolution and Section 5.50.410 of the Cable Television Ordinance relating to construction milestones and specific performance. This conflict would place Cablevision in material breach of the franchise if they do not adhere to their 48-month construction schedule even though the Ordinance envisions less stringent penalties for non-compliance with a longer 63-month construction period.

Under the Ordinance, the Cable Franchisee has 23 months from filing a Certificate of Acceptance to serve 20% of the dwelling units in the Imposed Service Area, 43 months to serve 50% of the dwelling units, and 63 months to serve all homes. It further states that if a Franchisee fails to meet these milestones, there are provisions for imposition of liquidated damages at \$1,000 per day, reduction of the franchise term, and also requirements wherein a Franchisee must request Commission approval for revision of the time schedule. The last paragraph of this Ordinance Section provides that a Franchisee may voluntarily propose an accelerated construction schedule. However, failure to meet such a shorter schedule results not in liquidated damages, but in termination of the Franchise.

The provision of the Resolution as negotiated with Cablevision specifically envisioned imposing liquidated damages after two consecutive quarterly failures to meet their shorter schedule, and then only after two years had passed from the filing of the Certificate of Acceptance.

The Ordinance must be changed to make its provisions consistent with the Resolution.

It is our intent that Cablevision construct the system within 48 months as stated in their Application. Should they fail to do so for reasons which are within their control and after 24 months have elapsed, the Commission could impose the liquidated damages. Should they continue behind schedule and fail to meet the more lenient milestones provided by the Ordinance, then proceedings to terminate the franchise would be commensed.

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This issue has been reviewed at length by Dave McMurtry, Commission Counsel, who recommends the changes reflected in the attached Ordinance Amendment. These changes provide that Cablevision must adhere to the 48 month time schedule including the census tract and mileage progression tables contained in the Ordinance Amendment. However, should they fail for two consecutive quarters after the two year "grace period" to comply with these progressions, the Commission may impose liquidated damages which hopefully would cause Cablevision to get back on schedule. The change does not alter the Resolution as originally negotiated but changes the Ordinance to eliminate a material breach of the contract and adds liquidated damages should they not meet the 48-month time schedule.

I, therefore, recommend that you adopt the attached Resolution recommending Ordinance changes as suggested by the Commission Counsel.



BOB SMITH, Executive Director
Sacramento Metropolitan Cable
Television Commission

RES:kl/ab

Attachment

84-014

ORDINANCE NO. SCC _____

AN ORDINANCE AMENDING CHAPTER 5.50 OF THE
SACRAMENTO CODE RELATING TO CABLE TELEVISION

The Board of Supervisors of the County of Sacramento, State of California, do ordain as follows:

SECTION 1. Section 5.50.410 contained in Sub-Chapter 4 of Chapter 5.50 of the Sacramento County Code is hereby amended to read as follows:

5.50.410 CONSTRUCTION SCHEDULE. The Cable Television System shall be constructed and installed in accordance with the construction standards set forth in Article 4-a, above, within the entirety of each Service Area and Basic Service and other services identified pursuant to the provisions of Section 5.50.504 in Article 4-c, shall be made available to all Dwelling Units within each Service Area within the times prescribed below, regardless of density, and the standards for line extensions set forth in Section 5.50.424, below, shall not be applicable to territories within Service Areas. Each Franchisee shall:

a. Commence construction of the Cable Television System in each Service Area by stringing or laying cable not later than nine (9) months following the date of filing of the certificate of acceptance of the franchise pursuant to the provisions of Section 5.50.220 in Sub-Chapter 3;

b. Make Basic Service and other services identified pursuant to the provisions of Section 5.50.504 in Article 4-c, below, available to at least twenty percent (20%) of all Dwelling Units within each Service Area not later than twenty-three (23) months following the date of filing of the certificate of acceptance of the franchise pursuant to the provisions of Section 5.50.220 in Sub-Chapter 3;

c. Make Basic Service and other services identified pursuant to the provisions of Section 5.50.504 in Article 4-c, below, available to at least fifty percent (50%) of all Dwelling Units

within each Service Area not later than forty-three (43) months following the date of filing of the certificate of acceptance of the franchise pursuant to the provisions of Section 5.50.220 in Sub-Chapter 3; and

d. Make Basic Service and other services identified pursuant to the provisions of Section 5.50.504 in Article 4-c, below, available to one hundred percent (100%) of all Dwelling Units within each Service Area not later than sixty-three (63) months following the date of filing of the certificate of acceptance of the franchise pursuant to the provisions of Section 5.50.220 in Sub-Chapter 3.

Except as otherwise provided by or pursuant to the Franchise Documents, any and all studio facilities, equipment, channels and other services, resources or benefits required of a Franchisee under any provision of the Franchise Documents shall be completed and made available, and the provision of any Community Use Programming which the Franchisee has proposed pursuant to the provisions of Sections 5.50.332 through 5.50.340 in Article 4-a, shall commence not later than thirty-seven (37) months following the date of filing of the certificate of acceptance of the franchise pursuant to the provisions of Section 5.50.220 in Sub-Chapter 3. When other times are prescribed by or pursuant to the Franchise Documents, such services, resources, benefits and programming shall be completed, made available or commenced, as the case may be, within the times required.

The foregoing shall not be construed to prevent an applicant from proposing additional, more stringent completion levels than those set forth above.

If the Franchisee has proposed more stringent construction completion levels than those set forth above and if said proposal has been incorporated in the Franchise Documents, the failure of the Franchisee to comply with such additional construction levels shall be subject to the provisions of Section 5.50.804 hereof. Provided, that the failure of the Franchisee to comply with such additional construction levels shall not constitute a breach of its obligations under the Franchise Documents unless and until:

a. Franchisee has experienced two (2) consecutive failures to comply with such additional construction levels; or,

b. Franchisee has breached any of the provisions of the first two paragraphs of this Section 5.50.410.

Further, provided, that within the first twenty-four (24) months after the filing of the certificate of acceptance of the franchise pursuant to the provisions of Section 5.50.220 in Subchapter 3, no failures of the Franchisees to comply with such additional construction levels shall constitute a breach of the Franchise Documents if:

a. Such failure will not prevent the Franchisee from being in substantial compliance with such additional construction levels by the end of twenty-four(24) months after the filing of said certificate of acceptance; and,

b. Franchisee has not breached any of the provisions of the first two paragraphs of this Section 5.50.410.

SECTION 2. Section 5.50.434 contained in Sub-Chapter 4 of Chapter 5.50 of the Sacramento County Code is hereby amended to read as follows:

5.50.434. EXCUSES FOR VIOLATIONS. Except as hereinafter provided, violation by a Franchisee of any of the provisions set forth in Sections 5.50.404 through 5.50.408, the first two paragraphs of Section 5.50.410, Sections 5.50.412 through 5.50.416, 5.50.422 through 5.50.430, above, or 5.50.466, below, caused by circumstances beyond the control of the Franchisee shall constitute good and sufficient excuse and justification for such violations precluding the Franchisee from being in breach of said Sections. The following are examples of acts or omissions by a Franchisee or circumstances which shall be deemed not to be beyond the control of the Franchisee and which shall not constitute excuses or justifications for violations:

a. The failure at any time by a Franchisee or its officers, agents or employees to exercise diligence in planning, organizing, arranging for or prosecuting the work of construction and installation, or in taking any other action necessary to permit or facilitate the work of construction and installation;

b. Unanticipated cost increases or insufficiency of capital with which to take actions necessary to comply or facilitate compliance with any of the provisions of Sections 5.50.404 through 5.50.408, the first two paragraphs of Section 5.50.410, Sections 5.50.412, through 5.50.416, 5.50.422 through

5.50.430, above, or 5.50.466, below;

c. Considerations relating to economy or cost efficiency, as respects acts or omissions by a Franchisee;

d. Delays occasioned by the failure of a Franchisee to diligently apply for and prosecute any request for a required certificate, approval or consent from the FCC;

e. Delays occasioned by seasonal changes in weather or climatic conditions, such as rain (exclusive of catastrophic conditions in the nature of "Acts of God"). (Rain delay shall not constitute an excuse or justification for violation except with respect to measurable precipitation occurring on more than fifty-nine (59) days during any period commencing July 1 and ending the next following June 30; and only if such is the proximate cause of the violation.);

f. Delays occasioned by the customary and usual time required to obtain approval to attach lines to poles owned by private or public utilities or in the attaching of cable to the poles; provided that if a Franchisee submits all plans and documentation required by private or public utility in connection with the approval to attach lines to poles, any time consumed by such approval process which is longer than one hundred fifty (150) calendar days following the submissions of all necessary plans and documentation shall be deemed to excuse the Franchisee from any violations which are proximately caused by such delay in excess of one hundred fifty (150) calendar days.

g. Delays occasioned by the customary and usual time required to process and secure approvals under zoning ordinances of the County and Cities for the location of components of the Cable Television System and other installations associated therewith, given the nature of the approval required and magnitude of the project; provided that if a Franchisee submits specific sites and

plans for all headends, towers and transmitters to the County and requests the County to perform a single environmental analysis upon all such facilities as the lead agency, any time consumed by such environmental analysis which is longer than one hundred twenty (120) calendar days during a period subsequent to the filing of the certificate of acceptance of the franchise pursuant to Section 5.50.220 in Sub-Chapter 3 shall be deemed to excuse the Franchisee from any violations which are proximately caused by such delay in excess of one hundred twenty (120) calendar days.

Notwithstanding the provisions of Subparagraph "a" through "f", inclusive, above, a Franchisee shall not be excused from any violation of the provisions of Sections 5.50.404 through 5.50.408, the first two paragraphs of Section 5.50.410, Sections 5.50.412 through 5.50.416, 5.50.422 through 5.50.430, above, or 5.50.446, below, except for causes which are beyond the control of the Franchisee, and except with respect to violations which have not been contributed to or aggravated by acts or omissions by the Franchisee.

Except as otherwise provided above, violations caused exclusively by acts or omissions by the County, the Cities, the Cable Television Commission or their officers, agents, or employees shall constitute an excuse and justification for failure of a Franchisee to comply with the provisions of Sections 5.50.404 through 5.50.416, 5.50.422 through 5.50.430, above, or 5.50.446, below, precluding a determination that the Franchisee is in breach. However, violations as a result of such exclusive causes shall not be deemed to excuse the Franchisee from other violations, shield the Franchisee from a determination that it is in breach for violations, or bar any relief for damages or otherwise as a result of such breach.

SECTION 3. Section 5.50.437 is hereby added to Sub-Chapter 4 of Chapter 5.50 of the Sacramento County Code to read as follows:

5.50.437 EXCUSES FOR VIOLATIONS OF FRANCHISEE'S MORE STRINGENT CONSTRUCTION LEVELS. Notwithstanding the provisions of Sections 5.50.434 or 5.50.436, no failure of the Franchisee to comply with more stringent construction completion levels proposed by it and incorporated in the Franchise Documents shall constitute a breach of its obligations under said Franchise Documents if such failure results from reasons (including, but limited to those disallowed or restricted by Section 5.50.434, above) not within the reasonable control of the Franchisee.

SECTION 4. This ordinance was introduced and the title thereof read at the regular meeting of the Board of Supervisors on _____ and on _____, _____.

This ordinance shall take effect and be in full force on and after thirty (30) days from the date of its passage hereof, and before the expiration of fifteen (15) days from the date of its passage it shall be published once with the names of the members of the Board of Supervisors voting for and against the same, said publication to be made in a newspaper of general circulation published in the County of Sacramento.

On a motion by Supervisor _____, seconded by Supervisor _____, the foregoing ordinance was passed and adopted by the Board of Supervisors of the County of Sacramento, State of California, at a regular meeting thereof, this _____ day of _____, 1984, by the following vote, to wit:

AYES: Supervisors,
NOES: Supervisors,
ABSENT: Supervisors,

Chairperson of the Board of
Supervisors
Sacramento County, California

(SEAL)

ATTEST: _____
Clerk of the Board of Supervisors