

B I L L R E F E R R A L

9/1988

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DATE: June 8, 1988

COMMITTEE ACTION: _____

TO: Brent Bleier

DATE: _____

FROM: KENNETH EMANUELS, LEGISLATIVE REPRESENTATIVE

REPLY NO LATER THAN: June 22, 1988

A.B. 3295 S.B. _____ Relating to Cable Television

STATUS:

Please review the attached measure to determine its effect upon the City of Sacramento and complete the following questions as appropriate. During your analysis of this measure, if questions arise, please feel free to contact Kenneth Emanuels at 442-0412. This questionnaire should be returned to the City Attorney's Office for presentation to the Council Committee on Law and Legislation. PLEASE LEAVE THE BILL ATTACHED TO THIS FORM.

If you think no Committee action on this bill should be taken, either because the bill is not of sufficient importance to the City or for any other reason, please mark here, do not fill out the rest of the form, and return this form to the City Attorney's Office. _____.

PLEASE TYPE YOUR RESPONSE

1. Briefly describe the provisions of the bill (attach additional sheets if necessary).

See attached letter.

2. Should this measure be: (Please circle desired position)

Supported

Opposed

Supported if Amended

Placed on Watch List

Other (explain)

3. Please explain your reasons for the above determination, including how this measure effects your Department and the fiscal impact of this measure to the City. Please make your comments in a format that can be used in a letter to State officials. (Continue on next page or attach additional sheets if necessary.)

BRENTON A BLEIER
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June 16, 1988

RECEIVED

JUN 20 1988

CITY ATTORNEY'S OFFICE

Kenneth Emanuels
Legislative Representative
City of Sacramento
City Attorney's Office
812 10th Street
Sacramento, CA 95814

Re: AB 3295

Dear Mr. Emanuels:

In response to your bill referral dated June 8, 1988, it is my opinion that this bill should be OPPOSED.

In essence, AB 3295 contains declarations by the Legislature that the grant of local authorizations for the use of public rights-of-way for cable television purposes may be properly conditioned upon considerations of (1) aesthetics of the use, (2) a weighing of the public's rights to receive information from a diversity of sources, and (3) traditional local government interests such as traffic disruption.

Additionally, AB 3295 would require local government entities to consider a series of factors when considering the issuance of a second franchise including:

- Public need for an additional franchise;
- Unreasonable adverse economic or aesthetic impact;
- Disruption or inconvenience to existing users and adverse impacts on future use;
- The applicant's technical and financial ability to perform;
- Impact upon "universal" cable service;
- "Other societal interests"; and
- Other relevant matters determined in the local governments sole discretion.

Additionally, AB 3295 incorporates a portion of what has come to be known as a "favored nations clause". This term, derived by

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the cable industry, describes franchise clauses which require that subsequent franchises be issued on terms at least as demanding as those issued to an initial franchisee. Sacramento's franchise contains such a clause, which was inserted at the request of the Franchisee and over the strongest objection of staff and legal counsel. Usually, such clauses, as in Sacramento, also call for reductions of public benefits in the event another franchise is issued on differing terms and conditions. AB 3295 does not contain this latter clause. Rather, it simply purports to prohibit subsequent franchises on terms more favorable than existing franchises.

Interestingly, the bill also purports to prohibit franchises on less favorable terms than existing franchises, although its final subsection purports to reserve sole discretion in local government to impose additional terms or conditions upon the granting of a franchise. In construing these two portions (proposed Section 53066.3(b) and (c)) together, one would conclude that local government would have the power to impose additional terms and conditions so long as those additional terms did not render the subsequent franchise less favorable than the former franchise, or were somehow established to be "warranted by the public interest".

As you may know, Sacramento's cable television franchising scheme has been under repeated and continuous attack for several years upon constitutional grounds. This bill purports to reflect many of the arguments which we have raised in defense of that process.

However, it is clear that the Legislature's findings and declarations in this regard can be of no assistance whatever to us against these constitutional arguments.

Moreover, such requirements could provide a serious impediment to the issuance of subsequent franchise authorizations. This, of course, would engender further litigation.

For example, Sacramento's local governments have adopted two alternative approaches to authorization for cable television purposes: (1) the competitive selection model of the Franchise Ordinance, and (2) the noncompetitive ministerial issuance of licenses pursuant to the Licensing Ordinance. The Licensing Ordinance was adopted, quite candidly, in an effort to forestall an adverse judgment of the Federal Court as against our Franchise Ordinance.

AB 3295 would directly conflict with the provisions of our current Licensing Ordinance and would require Sacramento's local governments to immediately seek to have the law determined to be

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unconstitutional by the Federal Court in order to preserve certain favorable judgments rendered for us in other cable cases based upon the existence of our Licensing Ordinance.

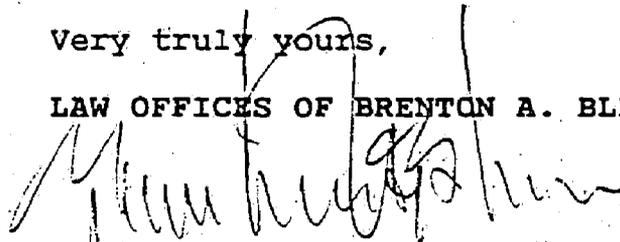
Inasmuch as AB 3295 requires these considerations only with respect to subsequent franchises, and not with respect to an initial franchise, it would appear that AB 3295 reflects legislative efforts of the cable industry to solidify the position of initial franchisees. In Sacramento's position, having now opened its market on a nondiscretionary basis through the Licensing Ordinance, such a bill would simply engender additional litigation against local government by the Initial Franchisee.

In summary, AB 3295 cannot assist Sacramento in its difficult cable television situation and can in fact engender further litigation if it were passed. The bill should be opposed.

Please feel free to contact me if you require additional information.

Very truly yours,

LAW OFFICES OF BRENTON A. BLEIER



BRENTON A. BLEIER

BAB/sk

cc: Robert E. Smith, Executive Director

AMENDED IN SENATE JUNE 22, 1988
AMENDED IN ASSEMBLY MAY 11, 1988
AMENDED IN ASSEMBLY APRIL 5, 1988

CALIFORNIA LEGISLATURE—1987-88 REGULAR SESSION

ASSEMBLY BILL

No. 3295

Introduced by Assembly Member Moore

February 12, 1988

An act to add Section 53066.3 to the Government Code, relating to cable television.

LEGISLATIVE COUNSEL'S DIGEST

AB 3295, as amended, Moore. Cable television.

Existing law authorizes the granting by a city, county, or city and county of a cable or community antenna television system.

This bill would state legislative findings and declarations, and would specify matters that would have to be considered at a public hearing and conditions that would have to be met before a cable television franchise could be granted which overlaps with an existing franchise.

Vote: majority. appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. (a) The Legislature declares that
2 because federal and state courts are examining the
3 permissible scope of regulation of cable television under
4 the First Amendment, it is in the public interest to
5 promulgate a comprehensive declaration of policy
6 involving governmental interests pertinent to the

1 regulation of a cable television franchise.

2 (b) The Legislature finds and declares the following:

3 (1) The First Amendment interests regarding the
4 provision and reception of cable television are varied and
5 numerous.

6 (2) Access to above ground facilities may be
7 conditioned upon the franchisee's ability to minimize any
8 unreasonable impact on the aesthetics of private and
9 public property in the area.

10 (3) Access to facilities such as utility poles and conduits
11 may be limited, so long as the limitation is not contrary
12 to the intent of Section 767.5 of the Public Utilities Code,
13 and may be regulated, to reflect the policies of the city,
14 county, or city and county regarding the public's rights to
15 receive information from a diversity of sources.

16 (4) Access to facilities such as easements,
17 rights-of-way, and streets may be limited to effectuate
18 certain local governmental interests, such as, but not
19 limited to, minimizing unreasonable disruption of
20 existing underground facilities and unreasonable
21 disruption of traffic.

22 (5) If a city, county, or city and county elects to grant
23 an additional franchise in any given area, it shall weigh
24 the positive and negative impacts on the community
25 being served.

26 SEC. 2. Section 53066.3 is added to the Government
27 Code, to read:

28 53066.3. (a) If a city, county, or city and county elects
29 to grant an additional cable television franchise in an area
30 where a franchise has already been granted to a cable
31 television operator, it shall do so only after a ~~duly noticed~~
32 ~~public hearing~~ *public hearing noticed pursuant to*
33 *Section 6066, in a newspaper of general circulation as*
34 *defined in Section 6000, where all of the following have*
35 *been considered:*

36 (1) Whether there is a public need for an additional
37 franchise.

38 (2) Whether there will be an unreasonable adverse
39 economic or aesthetic impact upon public or private
40 property within the area.

1 (3) Whether there will be an unreasonable disruption
2 or inconvenience to existing users, or any adverse effect
3 on future use, of utility poles, public easements, and the
4 public rights-of-way contrary to the intent of Section
5 767.5 of the Public Utilities Code.

6 (4) Whether the franchise applicant has the technical
7 and financial ability to perform.

8 (5) Whether there is any impact on the franchising
9 authority's interest in having universal cable service.

10 (6) Whether other societal interests generally
11 considered by franchising authorities will be met.

12 (7) Any other matters, both procedural and
13 substantive, as the city, county, or city and county may,
14 in its sole discretion, determine to be relevant.

15 (b) If a city, county, or city and county grants any
16 overlapping franchise, it shall not be on terms more or
17 less favorable than those in any existing franchise within
18 the city, county, or city and county, except as warranted
19 by the public interest.

20 (c) Nothing in this section prevents any city, county,
21 or city and county from considering the approval or
22 denial of an additional cable service franchise in all or any
23 part of the area of the city, county, or city and county, or
24 the imposing of additional terms and conditions upon the
25 granting of the franchise, as the city, county, or city and
26 county, in its sole discretion, determines is necessary or
27 appropriate.