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June 28, 1983

The Honorable Board of Supervisors
County of Sacramento
Sacramento, California

Re: Applicability of Government Code Section
84308 to Sacramento Metropolitan Cable
Television Commission

Honorable Members in Session:

Introduction

At your meeting of June 16, 1983, you asked me to report back to you on the disqualification and disclosure requirements of Government Code Section 84308 as they might apply to the Sacramento Metropolitan Cable Television Commission and to further report to you on the effect of certain changes proposed by Supervisor Bryan to the Cable Television Ordinance of the County.

Accordingly, in this memorandum I will address: (1) the applicability of the code section to the Cable Commission membership; (2) the substantive requirements of the code section and the regulations issued pursuant thereto; (3) disclosures required in the context of the application for the Sacramento Cable franchise; and (4) the effect of Supervisor Bryan's proposed ordinance change.

I. Applicability of Government Code Section
84308 to the Cable Television Commission

Government Code Section 84308 was enacted as AB 1040 in 1982 as an amendment to the Political Reform Act of 1974 (hereinafter "the Act"). In essence, it prohibits members of quasi-judicial boards or commissions from soliciting or accepting campaign contributions of Two Hundred Fifty Dollars (\$250.00) or more from persons participating in proceedings involving licenses, permits or other entitlements for use. It also requires disclosure and disqualification in connection with such proceedings by a member of a covered board or commission if the member has received campaign contributions of Two Hundred Fifty Dollars (\$250.00) or more within the previous twelve months from any participant in the proceedings.

Pursuant to this section, the Fair Political Practices Commission ("FPPC") has promulgated certain regulations (2 Cal.Admin. Code Section 18438, et seq.) which were effective January 26, 1983 providing additional interpretation and implementation of this section. Some controversy surrounds these regulations in that some have contended that they improperly exceed the scope of the legislation itself.

In general, a valid regulation of an administrative agency has the force and effect of law, but its validity is dependent upon whether the administrative agency was empowered to adopt the particular rule and, if so, whether the rule is reasonable. A regulation is presumed to be valid; therefore, the appellant has the burden of showing its unreasonableness (Freeman v. Contra Costa County Water District (1971) 18 CA 3d 404). However, a regulation will be invalidated if it is arbitrary, capricious or unreasonable (Maranville v. State Board of Equalization (1950) 99 CA 2d 841).

While not controlling, contemporaneous administrative construction of a statute by an agency charged with its enforcement and interpretation is entitled to great weight and unless clearly erroneous or unauthorized, the courts will generally not depart from such an interpretation (Richfield Oil Corp. v. Crawford (1952) 39 C2d 729).

At issue in the present controversy is the fact that the Act indicates that it is applicable to "quasi-judicial boards and commissions" which are involved in the granting of a "license, permit or other entitlement for use". Specifically, Administrative Code Section 18438.2 provides in part that:

"(a) An 'application for a license, permit or other entitlement for use' includes, but is not limited to, any proceeding to grant, deny, revoke, restrict, or modify:

...

(2) Any land use, license or other action relating to zoning, variances, subdivision maps, building permits, leases of public lands or facilities, or other similar proceedings;

(3) Any permit or license to carry on any business activity;

..." (Emphasis added).

Thus, assuming the validity of the regulation in question, the granting of a cable television franchise is rather clearly within the scope of the Government Code Section involved.

However, some have questioned the fact that the phrase "quasi-judicial" is used in other areas of the law to describe and distinguish certain types of actions undertaken by various state and local bodies. Those actions are usually contrasted with actions which are termed "quasi-legislative".

While the distinction between "quasi-judicial" and "quasi-legislative" acts is often quite fluid, there is a substantial body of law on the subject. Some cases have indicated that the distinction is that:

"The one (quasi-judicial) determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other (quasi-legislative) prescribes what the law shall be in future cases arising under it." (Wilson v. Hidden Valley Municipal Water District (1967) 256 CA 2d 271)

Examples of "quasi-judicial" proceedings include proceedings to issue or revoke licenses, building permits, zoning variances, or coastal development permits. Examples of "quasi-legislative" proceedings include approvals of annexations of territory to a city, decisions on zoning ordinances, or the adoption of regulations.

More to the point, the rule is firmly established that the granting of a franchise by a city or a county is a "quasi-legislative" act (Pacific Rock, etc. Co. v. City of Upland (1967) 67 C2d 666). Further, the grant of a cable television franchise has been specifically determined to be a "quasi-legislative" act (Monarch Cablevision Inc. v. City Council (1966) 239 CA 2d 206 and Orange County Cable Communications Co. v. City of San Clemente (1976) 59 CA 3d 165).

The FPCC in drafting the regulations, on the other hand, appears to have relied upon the fact that most of the cases utilizing these terms apply them to the acts involved and not the bodies performing the acts. Thus, the use of the term "quasi-judicial" in the subject section as applied to "boards and commissions" as opposed to specific acts of those boards and commissions seems to create an ambiguity.

As can be seen from the above, the FPPC regulations resolve the statutory ambiguity by disregarding the "quasi-judicial"/"quasi-legislative" distinction which the above-cited cases make in other contexts. The regulations instead have broad application to all those bodies considering applications for a "license, permit or other entitlement for use".

In view of the ambiguity, and the presumptions favoring administrative interpretation, it is my opinion that, giving consideration to the present state of the law and the regulations, Government Code Section 84308 does indeed apply to the Cable Television Commission, notwithstanding the asserted "quasi-legislative" nature of its franchise process.

However, it should be noted that the FPPC is presently considering, at the request of Humboldt County, a formal opinion dealing with the Humboldt County LAFCo and the precise issue set forth above. The FPPC has received its staff analysis on this issue as well as argument from both Humboldt County and the Metropolitan Water District of Southern California and is scheduled to make a final decision on this issue on July 12, 1983. If the FPPC were to adopt a revised view of this matter and amend its regulations to adopt the "quasi-judicial"/"quasi-legislative" distinction set forth above my opinion would change accordingly. It must be stressed, however, that there is no basis for anticipating such a change in position by the FPPC at this time.

II. Summary of the Provisions of the Act and Regulations

In summary, the respective subsections of Government Code Section 84308 provides as follows:

(a) Elected officers serving on quasi-judicial boards or commissions are prohibited from accepting, soliciting or directing contributions (\$250.00 or more) when the contributor has an application pending for or within three months after a permit, license or entitlement for use is granted to the contributor or when the contributor is a person who actively supports or opposes such a permit, provided that the officer knows or has reason to know that the contributor who actively supports or opposes has a financial interest. Each of the foregoing phrases has been interpreted and explained in FPPC regulations.

(b) (1) Prior to rendering any such decision, any member who has received a contribution from one who actively

supports or opposes such a permit and who has a financial interest must disclose that contribution.

(2) No elected or appointed officer shall vote if that officer has received such a contribution from one who actively supports or opposes the permit and who has a financial interest.

(3) However, if the officer returns the contribution within thirty (30) days from the later of: (a) the time the officer knows or should have known about the contribution, and (b) the date of the application; then the officer shall be permitted to vote.

(c) (1) Anyone who applies for such a permit shall include with the application a disclosure of contributions made to members of the Commission within twelve months before the date of the application.

(2) Anyone who actively supports or opposes such a permit shall disclose any contributions made within twelve months of their support or opposition.

(3) No applicant or a person who actively supports or opposes shall make a contribution during the pendency of the application or for three months thereafter.

(4) The majority shareholders of an applicant or an active supporter or opponent are included within the prohibitions.

(d) (1) Legislative bodies such as City Councils and Boards of Supervisors are excluded from the provisions of the Act.

(2) However, the provisions do apply to members of such bodies who also serve on the Commission.

(3) A person is an active supporter or opponent of a permit if he (a) lobbies in person, or (b) testifies in person, or (c) otherwise acts to influence any member of the Commission and has a financial interest.

FPPC regulations make clear that the Act has no application to contributions received prior to January 1, 1983.

III. Application to the Cable Franchising
Process in Sacramento

Assuming, by reason of the analysis set forth in Section I above, that the provisions of the Act and regulations apply to the Sacramento Metropolitan Cable Television Commission, during the relevant period (subsequent to January 1, 1983) it is clear that United-Tribune Cable of Sacramento is an applicant. In view of the Ordinance provisions rejecting applications of other applicants upon the tentative selection of United-Tribune, I do not believe that the three prior applicants would be considered "applicants" for purposes of the Act.

However, to the extent that they actively supported or opposed the permit to United through lobbying, testifying in a public meeting or otherwise attempting to influence the deliberations of the Commission while at the same time having a financial interest in the outcome, they would come within the purview of the Act. This determination is made in light of Section 87103 of the Government Code which defines a financial interest as follows:

"An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000).

(b) Any real property in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000).

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater."

The foregoing section is made applicable by the provisions of Section 84308.

It is clear that if the permit were denied or otherwise not granted to United-Tribune, and was subsequently received by one of the other bidders, such an award would have a "material financial effect" upon that bidder.

The question remains whether such material effect is "reasonably foreseeable" in a situation in which a bidder has the potential but no assurance that it will in fact receive the ultimate award.

The FPPC has considered the question of the "reasonable foreseeability" of the material financial effect in an analogously contingent situation involving the lifting of a water moratorium in Marin County (See In the Matter of: Opinion requested by Tom Thorner, on behalf of the Board of Directors, Marin Municipal Water District, FPPC Opinion No. 75-089, December 4, 1975, hereinafter "the Thorner Opinion"). In the Thorner Opinion, the FPPC analyzed in great detail the foreseeability of a financial effect upon a board member who was an officer of an industrial hardware company. The question presented was whether the officer would be disqualified by reason of the potential effect upon his business of increased construction activity resulting from the lifting of a water moratorium. The FPPC concluded that such a financial impact was indeed foreseeable and that the officer would therefore be disqualified.

Of course, the facts in the instant situation are not squarely on point. However, in view of the expressed likelihood of the submission of applications by the other prior applicants in the event of the demise of the United-Tribune application, I believe that, in light of the Thorner Opinion, the material financial effect upon the other former bidders and upon Group W Cable is sufficiently "foreseeable" as that term is used in the Act. Inasmuch as all three of the former applicants as well as Group W Cable appeared and testified in a public meeting of the Commission on June 9, 1983, and further, as concluded above, have a

"financial interest" as that term is defined, the prohibitions and disclosure requirements of Government Code Section 84308 would apply to the three prior bidders and Group W Cable as active supporters and/or opponents of the permit application.

Of course, given the application of the Act to the Commission, many other groups or persons could conceivably fall within the definition of an "active supporter or opponent". If any such person or entity meets the two-pronged test by: (1) lobbying, testifying or otherwise acting to influence the Commission, and (2) having a "financial interest", then that person or entity also is an "active supporter or opponent" and the prohibitions and disclosures of the Act apply to it.

IV. The Effect of Potential Ordinance Change

At your meeting of June 16, 1983, you asked me to examine the legal effect of the Ordinance changes proposed by Supervisor Bryan.

Section 5.50.214 of the Ordinance establishes the procedure for the issuance of the Initial CATV Franchise. As to the Initial Franchise, the Ordinance requires that the Resolution Offering the Franchise be approved by the City Council and the Board of Supervisors and then be adopted without change by the Board of Directors of the Commission. The Ordinance continues and expressly states that:

"The Board of Directors shall not be authorized to adopt a resolution offering the Initial CATV Franchise unless such resolution has been approved in advance by said Governing Bodies."

As I understand Supervisor Bryan's proposal, he would remove the Board of Directors of the Commission from this issuance process. To accomplish this, the Ordinance would need to be amended by: (1) deleting the last two sentences of the third paragraph of Section 5.50.214, and (2) prefacing each of the first two sentences of Section 5.50.218 with the words "Except as provided in Section 5.50.214 above with respect to the Initial CATV Franchise,...".

In my opinion, if these changes were made to the Ordinance, the Commission would not be, at least as to the issuance of the Initial CATV Franchise, issuing a "permit, license or entitlement for use" and would therefore be outside the purview of Government

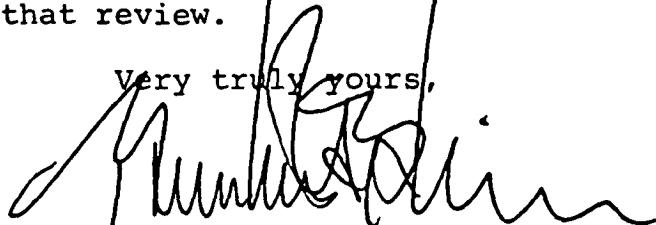
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Code Section 84308. While the change as described would not affect the subsequent supervisory and administrative role of the Commission, I understand that, if this change were made, your Executive Director has certain recommendations for you in this regard.

V. Summary and Conclusion

In my opinion, Government Code Section 84308 and the regulations issued pursuant thereto by the FPPC presently apply to the Sacramento Metropolitan Cable Television Commission and the elected members thereof. Further, in my opinion, the prohibition and disclosure requirements thereof presently apply to at least the four original applicants for the Initial CATV Franchise and Group W Cable. Finally, in my opinion, the Ordinance changes suggested by Supervisor Bryan would remove the Cable Television Commission from the purview of the Act and its regulations. However, in view of the pending FPPC review of this area, I would recommend that you defer any action for thirty (30) days to await the outcome of that review.

Very truly yours,



BRENTON A. BLEIER
Attorney at Law and
Special Counsel to the Sacramento
Metropolitan Cable Television
Commission

cc: Robert E. Smith
Executive Director

CABLE COMMISSION - UNITED TRIBUNE CABLE

Board of Supervisors - July 06, 1983

Report by: Carl Madonick

Here we are again on the merry-go-round of talks on cable television for Sacramento. This is the longest ride we've all been on at the tax payer's expense. I feel it's time to get off and solve the problem called "Cable Gate" (Watergate).

I'm not here to step on anyone's toes, but to offer my services to solve the problem of children fighting over a new toy. I feel that we the parents - the citizens of Sacramento - have to step in and stop the fighting.

Ladies and gentlemen, in this day and age there is a thing called sharing, helping one another. If you remember, in history neighbors helped one another when they built homes.

United Tribune has won the bid for Sacramento. I feel they have been given a raw deal; and even the citizens of Sacramento are left out in the cold - without the cable they have been waiting for.

Let's make today an historic day for Sacramento. Let's get Sacramento out of the dinosaur age and join the rest of the technological world.

Let's get a contract signed. I feel UTC can do the job so let's put our heads together and build this system for Sacramento.

In closing, I would like to say that when an athlete wins he or she is given a gold medal of honor. You don't go back and take the medal away from the athlete. So let United Cable have and keep the medal. Let's give them the support for being a winning athlete. So I'm asking, please, let United Tribune have a contract signed.

Thank You.

Lorraine

SACRAMENTO METROPOLITAN



Cable
Television
Commission

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ROBERT E. SMITH
EXECUTIVE DIRECTOR

June 30, 1983

To: Sacramento Metropolitan Cable Television Commission
From: Bob Smith, Executive Director
Sacramento Metropolitan Cable Television Commission
Subject: MEETING TIME CHANGE

The time of the July 6, 1983 combined Cable Commission, City Council and Board of Supervisors' meeting has been changed from 2:30 p.m. to 1:30 p.m. in the Board of Supervisors' Chambers, 700 H Street, Sacramento, CA. 95814.

Bob Smith

BOB SMITH, Executive Director
Sacramento Metropolitan Cable
Television Commission

RES:ab

cc: City Council
Local Media

Lorraine

SACRAMENTO METROPOLITAN



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ROBERT E. SMITH
EXECUTIVE DIRECTOR

June 27, 1983

To: Members, City Council/Board of Supervisors

From: Bob Smith, Executive Director
Sacramento Metropolitan Cable Television Commission

Subject: S.66 Update

As you are probably aware, S.66 passed the Senate 87-9 on June 14. This defeat was not unexpected.

Last minute amendments to the bill include one by Senator Pete Wilson (R-CA) to grandfather California's rate deregulation law for 5 years. Another amendment allows franchising authorities to request public and educational access channels, as well as government channels in their RFP. The ability to enforce services, facilities, and equipment in existence has been extended to include any RFP issued prior to September 30, 1982. However, this enforcement is severely limited because the operator is still allowed to remove, modify, or defer promised services, facilities, or equipment if a "significant change in circumstances" occurs.

A summary of the major provisions of the bill is attached.

The majority of amendments supported by the "dissident cities" and the U.S. Conference of Mayors were not included in the bill. The bill also does not satisfy ATT, which has vowed to kill the bill in the House.

According to the staff of the House Telecommunications Sub-committee, there will "definitely" be a cable bill coming out of Congress this year. Although the House bill probably will not be exactly like S.66, it may look a lot like the NLC/NCTA compromise which Sacramento, among other cities has not supported.

Both the cable industry and members of the House have stated that the cable industry is not guaranteed a victory in the House. Congressional representatives are traditionally more responsive to local issues

S.66 Update
June 27, 1983

and pressures. Staff has already been working closely with Representative Matsui's office and assisted in preparing testimony before the House Telecommunications Sub-committee.

A phone conference was held June 23 with representatives from other cities to discuss strategy for the House fight. Among the activities planned are:

- 1) Increased education of Congressional representatives to sensitize them on City and cable issues.
- 2) Expansion of our base of support to more cities and other interested organizations like NACO, the National Educational Association, and ATT.
- 3) A national media effort to tell the cities' side of the story.
- 4) Continue to coordinate efforts with the U.S. Conference of Mayors to act as the lead lobbying group.

Supervisor Sandy Smoley, as President of NACO, met with the Chairman of the House Telecommunications Sub-committee to express concern about S.66. Locally, a State Resolution opposing federal legislation which takes away local control over cable TV is in the Assembly Utilities and Commerce Committee. Assemblyman Lloyd Connelly is a co-author of the measure which supports the rights of state and local government to enforce cable franchises. Vice-Chairman Terry Kastanis will testify before the Committee to support AJR-60.

Bob

BOB SMITH, Executive Director
Sacramento Metropolitan Cable
Television Commission

RES:ab/jc

Attachment

SUMMARY OF S.66

Rate Deregulation

Effectively there is no rate regulation. California's rate deregulation law is grandfathered for 5 years. After that, rates can be raised automatically at the cable operator's request, if the franchising authority does not object. If the franchising authority objects, rates can still be automatically raised by an amount not to exceed the increase in the regional consumer price index for the past 12 months. This automatic increase can only occur 3 years in a row. After a year, it could occur for another 3 years in a row.

Franchise Fees

Franchise Fees will be 5% of the gross revenues of the cable system. They will not include payments given for the purpose of facilitating the use of access channels, or bonds, letters of credit, liquidated damages and other enforcement tools contained in the franchise.

Renewal of Franchises

The franchise is automatically renewed unless the franchise authority can prove the renewal to be unreasonable using vaguely defined criteria. A denial of renewal will be subject to court review. Renewal cannot be requested until 36 months before the end of the franchise.

Regulation of Services, Facilities & Equipment

The franchise authority may require channels for public, educational, and government access users; and the construction of facilities and equipment. The cable operator can offer additional services. However, any service, facility or equipment may be terminated, modified, or deferred by the cable operator due to a "significant change of circumstance". Any dispute regarding the terms and conditions of such modifications is subject to binding arbitration. (During testimony on the Senate floor, it was clear that "significant change in circumstances" included anticipation of revenue decline by the cable operator.)

Jurisdiction

The Federal Government has exclusive jurisdiction over cable communications. Any local law which is in conflict with provisions of S.66 will be null and void 6 months after the enactment of the bill. Local governments will be allowed to grant a franchise, oversee construction and operation, and enforce the terms of the franchise.