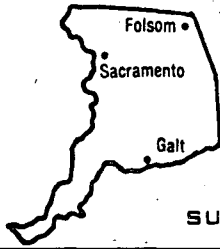


SACRAMENTO METROPOLITAN



Cable
CTC Television
 Commission

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ROBERT E. SMITH
 EXECUTIVE DIRECTOR

August 31, 1983

For Cable Commission Meeting of:
 September 7, 1983

To: Sacramento Metropolitan Cable Television Commission

From: Bob Smith, Executive Director

Subject: CHANGES IN ORGANIZATIONAL STRUCTURE OF THE SACRAMENTO METROPOLITAN
 CABLE TELEVISION COMMISSION RESULTING FROM GOVERNMENT CODE SECTION
 84308

On July 20, 1983, Mr. Lee B. Elam, County Counsel, distributed a memo detailing the impact of the Fair Political Practices Commission (FPPC) Ruling relative to Government Code 84308 on the Sacramento Metropolitan Cable Television Commission. In summary, the attached report indicates that while the Commission is unaffected by Government Code Section 84308 in issuing a franchise, it would be impacted if called upon to enforce a provision of that permit. Such "quasi-judicial" matters would require intense monitoring of campaign contributions to ensure against a violation of the Government Code when deciding these kinds of issues.

Further, Mr. Elam concluded that the Cable Commission staff ought to examine the Commission's organizational structure in light of this State law and offer recommendations to effectively resolve this problem. Resolution of this potential difficulty must be made prior to issuing a franchise because once issued, virtually all such changes would require concurrence by the Franchisee.

In my view, and outlined below, there are three alternatives available to the Commission, the Board of Supervisors and the City Council. Staff is recommending that Alternative 3 be conceptually approved by this Commission for comment and approval by the Folsom and Galt City Councils. With their comments, a final recommendation will then be presented to you for approval and ultimately that of the Sacramento City Council and Sacramento County Board of Supervisors.

The following are the three alternatives:

1. The status quo with the elected officials attempting to reject all campaign contributions, which would conflict with the FPPC ruling;
2. The elimination of the Commission, but provide for a limited small-city veto;
3. The retention of the Commission as a citizens' body with delegated powers but retain major remedial actions for the Board of Supervisors and City Council.

1. The Status Quo With No Campaign Contributions.

It is possible that the Commission could continue to operate as presently constituted. However, elected officeholders serving on the Commission would be precluded from receiving campaign contributions from applicants, active proponents or opponents of an applicant, as well as individuals having a financial interest in such applicant or other applicants. Such an approach would require no changes in the present organization structure, but would require intense monitoring of all campaign contributions--not only contributions from the Franchisee and its limited partners, but from proponents or opponents of any franchising matter brought before the Commission for decision. Yet, the same rule does not apply if the Commissioners are taking the very same actions as members of their respective legislative bodies. Because of the Corporate composition of both applicants and potential opponents, the monitoring of campaign contributions would require an intense effort. This is particularly troublesome since human errors could result in embarrassment and potential voting disqualifications.

2. The Elimination of the Commission with Limited Small-City Veto.

Under this alternative, the Board of Directors of the Commission would be eliminated and the joint powers agency would be governed by the City Council and Board of Supervisors jointly. This requires an affirmative vote of both bodies in order to take jurisdictional action as a joint powers agency. The weighted voting represented by the composition of the Commission would thus be eliminated including participation by Folsom and Galt in the decision making process.

However, in recognition of the loss of representation of the small cities by elimination of the Commission, they could be represented by non-voting delegates at joint meetings of the Board and Council called to conduct the Agency's business. Additionally, the concurrence of the governing bodies by the small cities would be required only in those instances in which (1) a change in the franchise documents would effect, directly and exclusively, the small city involved (such as the reduction or elimination of a facility, equipment or grant to or within the city) or (2) an instance in which a proposed change in the franchise document would disproportionately effect the small city as against the system at large.

The advantage of this approach is that it would allow the Council and Board to administer the franchise and at the same time assure the small cities that they would have participation in those issues directly effecting their constituents. The disadvantage lies in the difficulty of quantifying the nature and extent of any disproportionate effect upon these cities. Although a minor concern, it would also be difficult to coordinate the advisory representation of the two cities with the Board and Council.

3. Advisory Citizens Commission with Delegated Powers.

Under this alternative, as under number 2 above, the Board of Directors of the Commission would be displaced as the governing body by the Board and Council. However, the Commission would be retained with its current, weighted voting and membership. It would be composed of appointees made by, and serving at the pleasure of, the governing bodies of jurisdictions, (including individual elected officials who have decided to avoid contribution problems of the FPPC rules) currently represented by the Commission (5 by the County, 3 by the City of Sacramento, and 1 by the Cities of Galt and Folsom jointly).

All administrative and regulatory decisions would be fully delegated by the Board and Council of this reconstituted Commission, except for amendments to the franchise documents and proceedings under Article 5-b of the Ordinance (Remedies). In the latter instances, the Commission would be advisory but would conduct all necessary hearings and make recommendations to the Council and Board acting jointly. The decision of the Council and Board acting jointly, based upon the record of the hearing before the Commission and without further evidentiary hearing, would be final.

This approach would not preclude any appointing entity from designating an elected official to the Commission. It would also allow the small city representative to participate in a final manner as to most decisions regarding the franchise and in an advisory capacity as to matters pertaining to termination and amendment to the franchise documents.

Because of the minimal changes required to the current system by this approach and because of the lack of ambiguity in its administration, the staff recommends this third alternative as a revised organizational approach to the Commission.

In staff's view, the law and subsequent FPPC rules need to be changed. The composition of the Commission must be changed only because the elected officials serve on a regional decision-making body. The same decisions, if made by the legislative bodies alone, would not affect the official. Therefore, staff recommends that the City and County urge their state-elected officials to introduce legislation to remedy this dilemma.

It is, therefore, my recommendation that your Commission conceptually approve Alternative 3 and instruct staff to secure the recommendation of Folsom and Galt regarding your recommendation and present the Board and City Council with these findings for their concurrence.

Second, should all the participating jurisdictions approve your recommendation, then staff be instructed to prepare the necessary Ordinances to implement Alternative 3 prior to tentative selection of the franchisee.

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Third, urge the state legislature to change existing law to permit the Commission to function as originally envisioned without the unrealistic campaign contribution restrictions.



BOB SMITH, Executive Director
Sacramento Metropolitan Cable
Television Commission

RES:ab

Attachment

(catv043)

COUNTY OF SACRAMENTO

Inter-Department Correspondence

Date July 20, 1983

To : Chairperson and Members
Board of Supervisors

From : L. B. Elam
County Counsel

Subject : Conflict of Interest - Campaign Contributions

The purpose of this memorandum is to provide on-going legal advice concerning the application of Government Code Section 84308 to the Cable Television Commission.

As the Board is undoubtedly aware, after a hearing on July 12, the Fair Political Practices Commission issued an opinion to Humboldt County declaring that only quasi-judicial decisions by a Local Agency Formation Commission upon an application for a license or permit trigger the prohibitions against receipt of \$250 or more of campaign contributions from those who support or oppose the application. Since the actions of a Local Agency Formation Commission are ordinarily quasi-legislative in character, the opinion will result in Section 84308 having little impact upon officials seated on that type of body.

As of July 12, the regulations of the FPPC were so broad as to make the contribution prohibitions applicable to virtually any action by a LAFCO upon an application for a permit or license.

Since the opinion of Humboldt County conflicted with the FPPC's existing regulations, the FPPC directed that its regulations be amended and returned for official approval during a meeting in September. The substance of the directed amendments will establish a distinction between "quasi-legislative" and "quasi-judicial" actions of a covered body in relation to application of the campaign contribution prohibition. "Quasi-legislative" actions will not be subject to the prohibitions. "Quasi-judicial" actions will be.

The following is an analysis of the implications of the impact of Section 84308 in relation to your service on the Cable Television Commission.

a. Past Actions and Contributions

This Office finds no legal justification or legal reason which should motivate a Supervisor who may have received campaign

contributions since January 1, 1983, from or in behalf of a cable operator (including, but not limited to, United Tribune Cable), to return those contributions because of the prohibitions of Section 84308.

The foregoing conclusion is predicated upon the following factors:

(1) Any and all actions which the Commission has taken to date in relation to the Sacramento franchise have been legislative or quasi-legislative in nature, and not quasi-judicial. Determinations respecting the terms of a franchise and the discretion exercised in issuing one are fundamentally legislative in character.

(2) By issuance of its opinion to Humboldt County, the FPPC has implicitly generated doubt that it ever intended its regulations to apply to quasi-legislative action by a covered body.

(3) Formal amendments of the FPPC regulations embodying the quasi-legislative and quasi-judicial action distinction will be adopted in September. Although these regulations may not apply retroactively, it is virtually inconceivable that an enforcement action could be mounted upon the current regulations, which it now appears that the FPPC did not fully understand or agree with.

(4) Even if an enforcement proceeding were to be commenced, it is by no means clear that any Supervisor has violated the regulations in receiving campaign contributions. As noted in My July 5, 1983 memorandum, all actions to date by the Commission could be considered to be "ministerial" in nature, in view of the Cable Television Ordinance requirement that the City Council and Board of Supervisors jointly dictate the terms of the franchise and exercise the discretion required in order to issue it. Ministerial actions of a commission are excluded from coverage of Section 84308 by the existing FPPC regulations. The balance of the discussion in my July 5 memorandum show that express and implied requirements relating to the knowledge of the recipient of the contribution of all factual elements necessary to establish a violation at a particular point in time negate the inference that receipt of \$250 or more constitutes a per se violation. Furthermore, return of the contributions does not necessarily constitute a defense to a technical violation.

(5) There is no public policy inherent in Section 84308 which would be achieved by either application of the prohibitions to the prior actions of the Commission or return of any contributions which might have been received. Actions by individual supervisors as members of a board of supervisors are expressly exempted from coverage by Section 84308. The Cable Television Ordinance, enacted by the Board and Councils more than a year before Section 84308 became effective, require action by the Board and City Council on all substantive decisions which the Commission has made to date. Since the legislature did not intend to exclude a supervisor from participating as a member of the Board of Supervisors in a decision relating to the franchise, regardless of the amount or source of campaign contributions, it is difficult to conceive of any purpose which is served by applying the law to ministerial action by the Supervisor as a member of another body in relation to the same issue.

(6) For reasons discussed below, with respect to any "quasi-judicial" actions which the Commission might take in the future, it is assumed that the time span between the date of such actions and receipt of contributions would be such as to insulate contributions received during the past six months from application of Section 84308. In any event, the staff recommendation will be that the Commission be abolished, and that a new structure for administration of the franchise be established.

b. Future Commission Actions

If the policy decision is made to issue a new request for proposals for a franchise, no further action by the Cable Television Commission will be required for a prolonged period of time. Under the Cable Television Ordinance, it is the Board of Supervisors and City Councils which must approve and issue the RFP (County Code, Sec. 5.50.202). It is also the Board of Supervisors and Sacramento City Council which must make a tentative selection of the winning proposal. (County Code Sec. 5.50.210). The jurisdiction of the Cable Television Commission does not arise, except in connection with formal action in issuing the franchise after tentative selection has been made, and then, only in conformity with the terms and conditions and to the party dictated by the Board of Supervisors and City Council. (County Code, Sec. 5.50.214).

However, once the franchise is issued, the jurisdiction of the Cable Television Commission to administer the franchise becomes exclusive, and the Commission is vested by the Ordinance with a vast array of administrative powers. Many of these are "quasi-judicial" in nature, and would be subject to the proscriptions of Section 84308.

For example, in relation to the Ordinance requirements pertaining to completion of construction of the Cable Television System, the Board of Directors of the Commission is vested with authority to determine when delays in completion are chargeable as breaches of the franchise; whether liquidated damages should be assessed, and if so, the amount thereof; whether the franchise should be terminated for prolonged delay in completion; and, finally, when in fact the System has been completed. (County Code Secs. 5.50.400 through 5.50.444). The Commission is also charged with the responsibility of determining whether a breach has occurred and, if so, the penalty therefor in a variety of other situations relating to the performance of the Franchise. In each instance, the action of the Commission must be taken on the basis of substantive Ordinance terms governing the rights of the parties, and in relation to the receipt of specific facts to which the substantive terms must be applied. Although a final analysis will need to await review of the officially adopted FPPC regulations in September, the foregoing actions would predictably be treated as "quasi-judicial" within the meaning of those regulations.

Under the FPPC regulations, an "application for a license, permit or other entitlement for use", the support of or opposition to which the making of campaign contributions is restricted, includes action in granting, denying, revoking, restricting or modifying the license, permit or other entitlement. (Sec. 18438.2(a)). Although not clearly covered, this Office concludes that there is a significant likelihood that quasi-judicial action by the Commission which deals with enforcement of the cable television franchise would be covered by the regulation.

Therefore, within a period of months, perhaps a year, following issuance of a cable television franchise, it is foreseeable that there could be actions by the Cable Television Commission which would invoke the campaign contribution limitations established by Section 84308. Cumulative contributions of \$250 or more from the Franchisee or supporters of the Franchisee, whether received during the past six months or hereafter, could disqualify the recipient from voting on the Commission if less than a year has passed between receipt of the contributions and the date of action.

July 20, 1983

The obvious option of dealing with such a contingency by simply declining campaign contributions from the Franchisee and supporters is not a panacea. It is not presently known who the Franchisee will be. Campaign contributions by individuals who possess a financial interest in the Franchisee may disqualify an official from voting. The proliferation of associations of local private investors in cable operators, each of whom may make a campaign contribution regulated by Section 84308, creates a significant monitoring problem.

Commission staff, the City Attorney and I have considered potential alternative administrative mechanisms which might be established in order to permit monitoring and return of campaign contributions in a manner which does not threaten future voting capacity on the Commission. Fairly elaborate administrative mechanisms could be conceived. However, they would require extraordinary time to formulate, administer and enforce. They would not be fool-proof. It could not be assured that human error would not produce embarrassment, and potential voting disqualifications.

On the other hand, the Commission constitutes an ideal mechanism for melding into a single administrative body the four public agencies which will be encompassed by the franchise. Equally suitable alternative mechanisms for decision making which, for example, grant a voice to Folsom and Galt, and apportion voting power on the basis of volume of population, do not readily come to mind. Furthermore, it is assumed that a national firm planning to invest hundreds of millions of dollars in this community will be looking for a cohesive and decisive decision making process relating to administration of the franchise.

On balance, staff concludes that the most reliable and appropriate course of action lies in amendment or rescission of the joint powers agreement creating the Commission for the purpose of substituting a new administrative structure. Mr. Smith, the Executive Director of the Commission, will be meeting in the near future with officials from Folsom and Galt for the purpose of discussing these issues. He plans to present a report respecting these matters in September.



L. B. ELAM
County Counsel

cc: Robert Smith, Executive Director
Cable Television Commission
Brent Bleier, Legal Counsel
Cable Television Commission
James Jackson, Sacramento City Attorney