

COUNTY OF SACRAMENTO

Inter-Department Correspondence

Date October 2, 1981

To : Joint Sub-Committees
Cable Television Ordinance Review
City and County of Sacramento

From : L. B. Elam
County Counsel

Subject: Cable Television Ordinance - Sub-Chapter 1
through Sub-Chapter 4, Article 4-b
Meeting of October 7, 1981

The enclosed Sub-Chapter 1 through Sub-Chapter 4, Article 4-b represents approximately 60% of the draft of the Cable Television Ordinance which is being prepared for hearings by the Joint Sub-Committees. The remaining 40% will be presented for the Sub-Committees' meeting on October 14, 1981.

This memorandum will focus upon the principal changes from the March 1, 1981 Ordinance Draft which have been incorporated into the enclosed one.

Sub-Chapter 1 General Provisions

1. Basic Service. The definition of Basic Service has been altered to require only carriage of the 6 local stations, plus one of the K.V.I.E. channels required to be donated by the Franchisee, plus one of the Educational Consortium channels required to be donated by the Franchisee, plus one Access Channel, if an Access Channel is proposed by the Franchisee in its application. (Sec. 5.50.012-a). Any channels included within Basic Service in addition to the 9 required, would be carried at the discretion of the Franchisee.

2. Contractual Relationship. The "vested rights" language contained in the March 1, 1981 Draft Ordinance has been omitted in its entirety at the request of the interested operators.

In lieu thereof, a provision has been inserted which makes it clear that the relationship between the parties is contractual in nature. (Sec. 5.50.018). Section 5.50.018 not only defines the contractual relationship, but also contains rules of interpretation, and a recital which explains the manner in which the ordinance has been negotiated with interested operators by staff and the

process by which operators have been entitled to input directly to the governing bodies, for the purpose of negating any inference that the franchise constitutes a contract of adhesion.

3. Amendments. No amendment of the ordinance could become effective unless it is enacted by both the City Council of Sacramento and Board of Supervisors. No amendment adopted by those bodies would be effective within the Municipalities of Folsom, Galt or Isleton unless the governing bodies of those jurisdictions similarly enact the amendment. (Sec. 5.50.036).

Section 5.50.038 defines the circumstances under which a Franchisee is protected against amendment of the Ordinance once a franchise has been issued. In general, the power to amend would be comprehensive, with exceptions prescribed by subparagraphs "a" through "h" of Section 5.50.038. Within that portion of the Draft Ordinance enclosed herewith, among the significant provisions which would not be subject to amendment so as to affect the rights of a Franchisee, in the absence of an emergency or the consent of the Franchisee, are the following:

- a. The standards for valuing the property which the Cable Television Commission or its assignee is entitled to purchase in the event of breach, at the conclusion of the term of the franchise, or in the event of a requested assignment;
- b. The provisions defining minimum standards for the Cable Television System, such as channel capacity, number of channels, etc.;
- c. The provisions establishing prevailing rates;
- d. The provisions requiring donation of channels to K.V.I.E. and the Educational Consortium; and
- e. The provisions establishing requirements for construction of the Cable Television System, terms and conditions for extension, and procedural remedies in the event of failure of compliance.

4. Limitations of Actions. Interested operators have requested that there be included within the Ordinance a provision establishing a 30 day limit for the commencement of actions which challenge the validity of the provisions of the Ordinance and any administrative determination made under the Ordinance. The

provision is set forth in Section 5.50.048. The limitation applies to suits brought by third parties, not to actions which might be commenced by the Cable Television Commission, County or Cities.

5. Illegal Tapping. One of the operators has requested inclusion within the Ordinance of a provision which makes it illegal to tap a Cable Television System without paying the prescribed fee for the right to receive service. Other operators have not objected to the provision. The provision has been included in the form of Section 5.50.052.

Sub-Chapter 2 Cable Television Commission

The enclosed Draft contains few changes from the March 1, 1981 Ordinance Draft pertaining to the Cable Television Commission.

The Board of Directors would continue to consist of 9 members, 5 Supervisors, 3 Sacramento City Councilmen, and 1 representative of Folsom, Galt, and/or Isleton. The Commission would become operable and empowered to act 31 days following the date of selection of the Franchisee for the Initial CATV Franchise. (Sec. 5.50.106). The reason for the 31 day period, is that Folsom, Isleton and Galt would each be entitled within 30 days following selection of the Franchisee to veto the selection by withdrawing from the Commission and the franchising program.

Provisions have been added to Sub-Chapter 2, empowering elected officials on the Board of Directors to individually appoint representatives to serve on the Board in their place (Sec. 5.50.104), and empowering the Board to provide reasonable compensation for services rendered by its members (para 3-f).

Sub-Chapter 3 Issuance and Renewal of Franchises

1. Selection of Initial Franchisee. The process for such selection approved by the Joint Sub-Committees on September 30, 1981, requires the selection to be made during a single meeting of the City Council of Sacramento and Board of Supervisors sitting jointly. Voting would be through secret balloting, with immediate announcement of the results. Applicants receiving few votes would be eliminated during the course of balloting. However, if no selection is thereafter made, the applicants would be reinstated to the competition. The right to abstain from voting is conferred in order to insure that three Supervisors whose choice has been eliminated from competition temporarily could defeat selection. In order to be selected, the successful applicant would need to receive 5 Councilmen votes and 3 Supervisors votes during the same balloting.

Section 5.50.210 embodies the above process. The Section also provides that recesses not longer than 15 minutes would be permitted during the meeting at which selection is made, and that a decision by either the City Council or Board of Supervisors to adjourn the meeting at which selection is to be made in advance of selecting the Franchisee, would constitute an automatic rejection of all applications and deny the governing bodies the power to issue a franchise pursuant to the request for proposals.

Section 5.50.212 would give the Municipalities of Folsom, Galt and Isleton the opportunity to veto selection by withdrawing from the franchising program and from the Commission, if action disapproving the selection is taken within 30 days after the date of selection.

2. Renewal. The initial franchise of 15 years would be subject to renewal pursuant to an application filed by the Franchisee not later than 48 months prior to the expiration of the franchise. (Sec. 5.50.228). A year would be allowed to determine whether the renewal application should be granted. If no action is taken, the application would be deemed to have been denied. (Sec. 5.50.232). The Board of Directors of the Commission would be empowered to approve renewal. (Sec. 5.50.234). However, the City of Sacramento or County of Sacramento would be empowered to overrule the determination by the Board of Directors within 30 days following filing of the certificate of acceptance for renewal. (Sec. 5.50.238).

The Commission's existence terminates December 31, 2002, and no franchise could extend beyond that date. (para. 9 p. 22; sec. 5.50.224). Therefore, a renewal could not be for a term longer than five years, absent amendment of the Joint Powers Agreement extending the life of the Commission or a reorganization of the franchising process. The reason for endowing the Commission with a life five years longer than the term of the initial franchise, is to make it viable for the Commission to issue additional competing franchises should such be determined to be advisable.

3. Acquisition of Cable Television System. The terms and conditions under which acquisition of the Cable Television System is permitted by the Commission are controversial. These issues are the subject of a separate memorandum by this Office presented for consideration during the meeting on October 7. The purpose of the following discussion is to simply outline the contents of the enclosed Ordinance Draft.

Whereas the March 1, 1981 Draft Ordinance permitted acquisition of the System by the Commission only at the end of the term of a

franchise (should it not be renewed) or upon early termination of the franchise as a result of breach, the enclosed Draft Ordinance also permits acquisition in the event the Franchisee seeks approval of an assignment. (Sec. 5.50.240-c). This additional right has been recommended by C.T.I.C. (the consultant) as an alternative means of reacting to a determination by a Franchisee to sell the business to a third party.

Whereas the March 1, 1981 Draft Ordinance permitted the Commission to acquire all property of the Franchisee or any portion of the property at the discretion of the Commission the enclosed Draft Ordinance makes it clear that all property of the Franchisee must be acquired with very limited exceptions. (Sec. 5.50.242). This modification has been made at the request of interested operators. If the Commission elects to purchase, the purchase must include the Cable Television System, land, buildings and improvements utilized to provide services, cameras, equipment, vehicles, and books, accounts and records, including subscriber lists. At the request of interested operators, space utilized solely for business office purposes is excluded from the right of purchase. In addition, the Commission may elect to exclude from purchase land and improvements upon which no component of the System is situated and which is not essential to the System or the provision of services thereunder.

"Book Value" remains the standard applicable to an acquisition pursuant to early termination of a franchise as a result of breach. (Sec. 5.50.248-a). However, at the request of interested applicants, the definition of "Book Value" has been modified to require a 15 year straight-line depreciation schedule, instead of actual depreciation taken for purposes of taxation. (Sec. 5.50.246-a). The purpose of this revision is to insure that the purchase price will at least equal outstanding debt on the System resulting from construction loans, and thereby avoid lender resistance to the terms of the franchise.

"Market Value" or "Replacement Cost", whichever is lower is the standard for acquisition of the property at the conclusion of the term of the franchise, should the franchise not be renewed. (Sec. 5.50.248-c). "Replacement Cost" is defined as the direct cost of rebuilding the System at current prices, assuming equivalent utility and technological capacity, but utilizing modern materials and construction standards -- less depreciation and obsolescence from physical, functional and economic causes. (Sec. 5.50.246).

"Market Value" is the standard of valuation applicable in the event of acquisition of the property pursuant to a request by the

Franchisee for approval of an assignment. (Sec. 5.50.248). However, the appraiser must assume that the property to be purchased is not subject to utilization for the provision of cable television services within the Sacramento Community subsequent to expiration of the stated term of the franchise.

Real property which is leased by the Franchisee, would be subject to assignment to the Commission without special consideration, unless the Franchisee holds a leasehold interest with option to purchase. At the request of interested operators, residual value would be payable with respect to leases with options to purchase. (Sec. 5.50.248). No value of benefits would be attributed to the books and accounts of the business, including subscriber lists, which would be included in the purchase. (Sec. 5.50.248).

The procedure for acquisition would involve appointment by the Commission and by the Franchisee of one appraiser each. Those two appraisers would make independent appraisals, and attempt to agree upon the value of the property to be acquired. Any agreement would be binding upon the parties with respect to the values included. (Sec. 5.50.258). With respect to any valuation issues upon which the appraisers could not agree, a single arbitrator (who must be an appraiser) would be appointed. In addition, an advisor (who must be a lawyer) would be appointed. The arbitrator would decide the outstanding valuation issues, subject to legal advice by the advisor concerning the requirements of the Ordinance, whose advice would be binding. An adversary hearing could be held by the arbitrator, but is not required. (Sec. 5.50.260). The valuation process would consume 9 to 12 months under the procedure outlined.

Sub-Chapter 4
Article 4-a

System Capability and Standards
Prevailing Rates
Community Use

1. System Design. Pursuant to determinations during the public hearings of the City Council and Board, the Cable Television System is required to have at least two Subscriber Cables, one of which may be inoperable, and one institutional cable. Each cable must have a capacity of at least 35 channels. (Sec. 5.50.304).

However, pursuant to the determination made by the Joint Sub-Committees on September 30, 1981, the above requirements would be applicable only within the "Imposed Service Area". System

design standards within the single Proposed Service Area (Galt) would be left to the bidding process. (Sec. 5.50.300). The design of Systems extended from Service Areas pursuant to line extension requirements, would be the same as the design for the Service Area from which extension is made. (Sec. 5.50.424). The Ordinance would contain no minimum design standard with respect to Systems installed outside of Service Areas which are not required by the line extension provisions of Sections 5.50.424 or 5.50.426.

2. Prevailing Rates. On September 30, 1981, the Joint Sub-Committees approved the provisions relating to Prevailing Rates. Generally, these provisions require payment of the rates paid by other cable operators within the 10 metropolitan counties with respect to all work of construction, maintenance and extension of Cable Television Systems, whether the work is performed by the Franchisee or a party under contract with the Franchisee. The Board of Directors of the Commission would annually appoint an expert to make the prevailing rate determinations, and the determinations of the expert would be final and binding. Enforcement of the provisions would be through private suits by employees or unions seeking compliance and relief from underpayment (Secs. 5.50.316-5.50.326).

During the meeting on September 30, 1981, this Office was directed to contract the BIA and add language which would immunize subdividers from the prevailing rate requirements. Such language has been included in Section 5.50.318. In essence, prevailing rate requirements would not be applicable when a subdivider or contractor thereof installs cable in a new subdivision at the same time as public improvements and other utilities are being installed. The effect of this provision will be to allow the Franchisee to have cable in new subdivisions installed by the developer or its contractors, and thereby avoid applicability of the prevailing rate requirement to such installations.

As has been previously noted, the approach of the prevailing rate provisions is responsive to requests by interested operators that the survey area be the metropolitan counties, but that comparisons be made only to other cable operators.

3. Channels for K.V.I.E. and Educational Consortium. Sections 5.50.328 and 5.50.330 are the ones which commit 7 channels to K.V.I.E. and the Educational Consortium. These provisions have been previously considered by the Joint Sub-Committees, the enclosed Draft Ordinance contains no modifications, and further discussion is not required.

4. Community Use. A detailed concept of the Community Use provisions has previously been approved by the Joint Sub-Committees. In general, applicants are vested with the choice of either proposing or not proposing Community Use. However, if proposals are made, they must be in the form of either Access facilities and channel(s) or Access facilities and channel(s) and quantification of community use programming hours offered by the applicant respecting both applicant program production and program production by community groups. (Secs. 5.50.332-5.50.340). Further explanatory discussion is unnecessary in view of the prior determinations by the Joint Sub-Committees, and the absence of changes in the enclosed Ordinance Draft.

A request by K.V.I.E. in relation to Community Use, is the subject of a separate memorandum.

5. Resource Commitments. Section 5.50.342 makes it clear that an applicant is entitled to propose a variety of services or resources to the County, Cities or Educational Consortium. Such resources, if proposed, would be made an express part of the franchise obligations. To the extent the contents of applications respecting such proposals are vague or indefinite, between the date of selection of the Franchisee and issuance of the franchise staff will be able to discuss the proposals with the selectee and formulate sufficiently specific terms for insertion in the resolution offering the franchise to create viable contractual obligations.

However, Section 5.50.342 envisions a different approach with respect to services or resources offered by applicants to specifically identifiable, non-governmental, third parties. With respect to such contributions, Section 5.50.342 would provide that all such contributions must be disclosed in the application, but would not become franchise obligations; such contributions to be the subject of independent legally binding contractual commitments between applicants and the parties to whom the commitments are to be made. There are several reasons for this suggested approach, as follows:

- a. There are a variety of local organizations who could become the recipients of benefits offered by applicants, ranging from K.V.I.E., to health interests, to organizations representing minority or underprivileged interests. The nature and extent of contributions offered could range from on-going financial support, to the donation of channels, to the

allocation of channel time, to the construction of studio facilities, to the provision of sophisticated program production equipment.

- b. Unrestricted proposal applications, absent precise plans and specifications (of which there are necessarily none), constitutes a poor foundation for the creation of unambiguous, legally enforceable, contractual commitments.
- c. County and City staff should not be dealing with the subject matter of substantive proposals by applicants during the bid preparation process. There would be inadequate time for County and City staff to deal with such issues subsequently. Further, County and City staff are ill-suited to act as representatives of private parties in negotiating and drafting contractual commitments respecting benefits to be made available to those parties.
- d. All contracts with private parties through which the commitments by applicants would be made, would be required to be included with the applications, so that the awarding authorities would be assured at the time of deliberation of proposals that legally enforceable contingent obligations have been created, satisfactory to the parties upon whom the benefits would be conferred.
- e. It is common knowledge that in other jurisdictions there have been instances where commitments (for instance, of channels) have been made, the recipient has lost interest, and the channels have been utilized for purposes not expressed in the application. Disputes over those issues could be resolved between the Franchisee and the private parties, without involvement of the Commission therein.
- f. There would be an advantage in shielding the sensitive enforcement mechanisms of the Ordinance, particularly the bank, from the need of the Board of Directors to make decisions concerning who is right and wrong in potentially purely private misunderstandings between the Franchisee and private parties to whom benefits have been promised.

Article 4-b

Construction and Extension of System
Use of Streets

1. Service Areas. Pursuant to the determination by the Joint Sub-Committees on September 30, 1981, the enclosed Draft Ordinance has been revised to allow bidding of only a single Proposed Service Area, within Galt. (Sec. 5.50.404). Findings have been included for the purpose of rationalizing the decision to prohibit applicants from proposing service in other areas.

As in the March 1, 1981 Ordinance Draft, the enclosed one requires service to be provided throughout each Service Area. However, the interested operators have requested, and staff has included one exception. A Franchisee would be excused from serving a particular Dwelling Unit within a Service Area, if it is situated at least 500 feet from another Dwelling and would require an aerial or underground extension of cable in excess of 500 feet. (Sec. 5.50.412).

Although, with the above exception, service must be provided to 100% of the Dwelling Units within each Service Area, a Dwelling Unit is defined so as to exclude temporary lodging facilities, such as hotel and motel rooms. (Sec. 5.50.400).

2. Construction Schedule and Completion. As per determinations made during the public hearings by the City Council and Board, the schedule for completion of the System has been extended from 36 months to 51 months.

The enclosed Ordinance Draft contains a substantially more specific and comprehensive process for determining final completion of the System, than was contained in the March 1, 1981 Draft Ordinance. Under the enclosed Ordinance Draft, a Franchisee files a notice of completion when it decides that completion has been attained. (Sec. 5.50.416). A public hearing is then conducted by the Board of Directors of the Commission for the purpose of receiving comment, and the Commission is empowered to issue a list of deficiencies or other requirements for correction. If the Board of Directors makes a final order of completion, that order is conclusive as to everyone, and cannot be reexamined. (Sec. 5.50.418). A Franchisee is entitled to seek arbitration, if he contends that the Board of Directors is unreasonably refusing to make a final order of completion. The arbitrator's decision is final. (Sec. 5.50.420).

3. Service Outside Service Areas. During the Joint Sub-Committees meeting on September 30, 1981, erroneous information was provided respecting the circumstances under which a Franchisee may expand its system outside of Service Areas. It was noted that such expansion could not occur until completion of the System within Service Areas (i.e. approximately 51 months after issuance of the franchise).

The enclosed Ordinance Draft contains two approaches to extension of a System outside of Service Areas.

The first is line extension requirements. Line extension of the System is required when densities adjacent to the boundaries of a Service Area exceed certain limits. Expansion of the System under line extension requirements is, indeed, prohibited until after the System within Service Areas has been completed. (Sec. 5.50.424).

The second method of expansion is pursuant to an administrative procedure outlined by Section 5.50.446. Under that provision, the System may, at any time be expanded, pursuant to an administrative approval by the Board of Directors of the Commission. The design of the System, services provided and rates (if rates are regulated) would be subject to administrative approval and conditions imposed by the Board. Approval could be denied should the Board find that proposed delivery would be inadequate, or involve unreasonable cross-subsidization.

The provisions of Section 5.50.466 permitting expansion should be read in connection with the provisions of Section 5.50.042 in enclosed Sub-Chapter 1. As contained in the March 1, 1981 Draft Ordinance, the provisions of Section 5.50.042 simply reserved the right of the County and Cities to issue individual franchises within areas not served by the Franchisee under the Joint Powers Agreement Program. One of the interested operators requested 90 days notice to the Franchisee in advance of exercise of the reserved franchising authority, in order to entitle the Franchisee to expand into the new area and thereby override the franchising authority reserved to the County and Cities. The request was made during public hearings of the City Council and Board, and was approved at that time. The provisions of Section 5.50.446 establish an administrative procedure by which service can be guaranteed when a Franchisee thwarts the reserved franchising authority by expressing interest in serving territory outside a Service Area, as well as a mechanism to encourage such service.

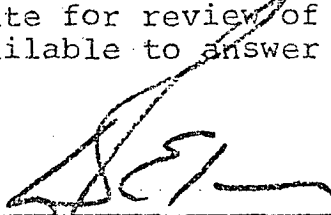
4. Undergrounding. At the request of interested operators, the provisions relating to undergrounding have been revised to require undergrounding only when there are no other utilities above ground. For example, if one utility line is above ground and others are below ground, the Franchisee would be authorized

to attach its cable to poles. Similarly, undergrounding of existing above-ground cable would be required only if all other utility lines are undergrounded -- such that if an overhead utility line were placed underground, but other utility lines remained overhead, overhead cable would not be required to be undergrounded until the other lines are also undergrounded. (Sec. 5.50.456).

5. Removal. The interested operators desire that the Ordinance vest in them discretion to remove or not remove underground cable at the conclusion of the franchise term, if the franchise is not renewed and the Commission does not purchase the System.

Staff recommends and Section 5.50.464 of the enclosed Ordinance Draft provides, that the Franchisee has a right to remove underground cable only if removal can be accomplished without trenching, and that the Franchisee may be required by the Commission to remove underground cable at its sole expense if removal is required in order to prevent hazard or promote future utilization of the streets for public purposes. At best, disruption of streets to remove underground cable at the conclusion of a franchise term by an operator who will no longer be in town, is burdensome. It is the view of staff that the provisions of Section 5.50.464 strike an equitable balance between the interests of an operator and those of the public agencies.

The foregoing discussion has been lengthy -- but so is the ordinance. Time has permitted only discussion of the most significant changes incorporated in the enclosed Ordinance Draft. The foregoing is not an adequate substitute for review of the text of the enclosure. Staff will be available to answer questions.



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cc: William Freeman, Assistant County Executive
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Interested Operators