

SACRAMENTO METROPOLITAN



Cable
Television
Commission

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ROBERT E. SMITH
EXECUTIVE DIRECTOR

May 2, 1983

FOR AGENDA OF
May 4, 1983

To: Members, Sacramento Metropolitan Cable Television Commission

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

Subject: FINAL DEMAND FOR RESOLUTION CHANGES BY UTC TO FACILITATE ACCEPTANCE
OF THE FRANCHISE

Attachment I is UTC's proposed Resolution language changes outlining the four demands which would secure an unconditional acceptance of the Franchise. Unfortunately, staff is unable to concur in these four demands as presented, and finds, in addition, that they are transmitted to the Commission without the required acceptance verification from the Parent Corporations. Although there is no agreement, the financial magnitude combined with the community impact of this contract make it critical that you at least receive and consider these "bottom-line" demands of UTC.

If UTC were to remove Rescission from its list and accept staff's recommended concessions, there is a basis for final agreement.

UNCONDITIONAL ACCEPTANCE

One of the prerequisites to securing Commission approval of changes in the Resolution is written proof that the Parent Corporations would accept the Franchise if the Resolution were altered in accordance with UTC's demands. While Mr. Cullen has secured signatures on the Certificate of Acceptance from the Chief Executive Officers of United and Tribune Cable Companies, the Tribune endorsement is subject to the "formality" of ratification by its Board of Directors. Further, Mr. Cullen indicates that the Board of Directors will not be able to approve such an authorization until May 31st, well after the May 13th filing deadline.

Therefore, while you may approve any or all of the four demands on May 4th, such action would not precipitate an automatic acceptance of the Franchise.

The following is a summary of the attached demands which have been characterized by Mr. Cullen as "non-negotiable" as well as the associated staff recommendations. In the meeting with Mr. Cullen on Friday, April 29, 1983, staff was informed that the language of each demand was also "non-negotiable".

UTC DEMANDS

1) PARENTAL COMPANY GUARANTEES

UTC is offering to establish a corporate liability limit of \$35 million during the 51 month construction period and \$10 million during the post construction period provided that:

- The \$35 million during the first 51 months will be reduced dollar for dollar by the amount of any equity or capital investments made during the construction period; and
- The \$10 million during the post construction period would be reduced by the amount of any Franchise fees paid and based upon UTC's pro-formas, would be eliminated in year six.

Staff Analysis:

The language proposed has three difficulties:

- a) By including UTC, UCTS, and TC3, the provision would not only limit the liability of the parent corporations, but also that of the local Joint Venture. It has always been our intent to hold the Joint Venture fully liable for their contractual obligations.
- b) The phrase "other capital invested" would allow UTC to decrease the parents' obligations to the Commission by structuring a debt which would have rights superior to the Commission (see Subordination below).
- c) The phrase "irrevocably committed by or on behalf of UTC" is vague and allows the Parents to simply state that funds are "committed" and thereby reduce their liability to ten million dollars. This could occur within days after acceptance of the Franchise.

Staff Position:

Attachment II indicates that the total reasonably quantifiable liability, exclusive of undeterminable amounts such as loss-of-bargain or other damages, is approximately \$152 million. Staff believes that it is not unreasonable to establish a lesser limit on corporate liability and that such a limit ought to be related to those community offerings and contractual commitments identified in the Application. It is important to note that it is virtually impossible for staff or anyone else to adequately protect against all damages which might occur during the cable franchise period.

However, community use activities, the cost of refranchising in case of a breach, and correction of construction defects are clearly expectations which ought to be protected. The total of these community use activities, which were important in the tentative selection of UTC, is \$50.8 million.

In staff's view, \$50.8 million is a reasonable amount to protect the community against a decision to breach during the construction period, yet have a reasonable basis upon which to limit corporate liability. The development of this ceiling includes \$29.6 million in operating expense grants to various community groups based on a percentage of gross revenues. UTC has argued that participation in the gross revenues receipts includes accepting the risk associated with the success or failure of the firm and should not be included in the calculations. While this is true, it is staff's view that the establishment of a \$50 million limit does not necessarily represent the method in which these funds would actually be allocated by the Commission in the event of recovery. In fact, the most likely allocation would be to offset potential deficits created by transferring ownership of a partially completed system from UTC to a subsequent franchisee. The new franchisee very likely will not pay full book value or "market value" for the system. It is our intent to attempt to insure for those unquantifiable costs that might occur in the future, as well as provide a corporate disincentive to abandon the Franchise because of weak financial projections during the construction period.

Therefore, staff recommends a \$50 million cap on the liability of the Parent Corporations to be removed upon issuance of a Certificate of Completion. Further, staff has no objections to the post construction \$10 million limit, nor that amount being reduced by the Franchise Fees as long as the staff language for subordination (attached) is adopted by the Commission and agreed to by UTC.

2) SUBORDINATION

UTC has submitted language which subordinates all the Commission's rights and privileges under the contract to all lenders, debtors, and even funds committed or transferred by the Parent Corporation to the Joint Ventures.

Staff Analysis:

There are several difficulties with the language proposed:

- a) Subordination to the interests of "any lender, creditor or other supplier of funds" would include the parents, as well as UTC, and thus allow the Buyout Provisions to be unilaterally changed by simply designating themselves as a "supplier of funds" and thereby subordinating the Commission's Buyout rights. The provision would subject the Commission to the same likelihood of litigation as a straightforward Ordinance change of Buyout.
- b) The phrase "full subordination" is not defined and may have broader implications than are related to the financing of the construction of the System.
- c) Not only does this provision eliminate Buyout and require the Commission to pay fair market value for the System, but it also requires payment of full market value in the event of a willful breach of the contract.
- d) Limited Partnership Transfer Language:
 - 1) It incorporates another vague subordination clause with the same effects as that discussed above.

- 2) It deletes the requirement that the transferee undertake and agree to be bound by the Franchise Documents.
- 3) It removes the ability of the Commission to enforce the limited partnership agreement.
- 4) It allows parties to assume management responsibilities of the System who have not obtained the prior approval of the Commission.
- 5) It allows repeated sales and resales of the System without the approval of the Commission rather than a single sale to allow construction of the System.

Staff Position:

It is a burden to UTC to withhold Commission subordination approval and yet require them to be obligated for all the contract commitments under the franchise. Therefore, staff has prepared language, which we view as a major concession and would subordinate 100% of our rights and privileges to any third party lender. This allows UTC full latitude to secure any financing they unilaterally deem appropriate.

However, the Commission's rights and remedies are transferred to the lender or to a subsequent owner in the event of a UTC default, and therefore are protected.

We have discussed our language (Attachment IV) with Crocker Bank in Los Angeles, who is experienced in making cable system loans, and who is considering entering a financial arrangement with UTC. It is the assessment of Mr. Mike Thomas of that firm, that our provision is fair and does not represent an undue burden, to at least that lending institution. We have also discussed this matter with other knowledgeable individuals and they concur.

Therefore, we recommend full subordination, but only to third party lenders.

3) THE EFFECTIVE DATE OF THE RESOLUTION

UTC proposes that the effective enforceability of all franchise commitments occur 180 days following the filing of a Certificate of Acceptance. This has been commonly characterized by staff as the "rescission period".

UTC would be required to only pay the Commission's actual operating costs during this period plus the \$250,000 post award fee.

In fairness to UTC, it should be noted that also during this period and because of the requirements to start construction in September of 1983, they may incur additional design, environmental impact, make-ready, and strand-mapping costs totaling approximately \$750,000 to \$1 million. This, combined with the expenditure of \$2.7 million already made by United would represent a significant commitment on their part even though they would have the right to walk.

Staff Analysis:

The language proposed has three difficulties:

- a) The use of the word "acceptable" in connection with financing terms and conditions would allow UTC complete discretion in determining whether or not they wished to go ahead with the System.
- b) Negotiations will most likely continue throughout this period.
- c) The provision limits the Commission's total potential recovery in the event of withdrawal by UTC during that period to \$250,000 to \$500,000 depending upon when the withdrawal of UTC occurred.

Staff Position:

United stated that they will submit in writing their willingness to be bound to the commitments and discontinue further negotiations. However, such an offering in the view of your legal counsel cannot be enforced.

4) COMMUNITY USE PROGRAMMING VOLUMES

United proposes a modification to the Resolution which simply changes the Resolution language from original non-repeated programming not previously broadcast of cablecast in the Sacramento area to the provision of the Ordinance which speaks only to not previously broadcast in the Sacramento area.

Staff Analysis:

The Ordinance includes a loophole by failing to use the more technical term "cablecast" as well as "broadcast". This means that all programs not previously shown on the six local broadcast channels would be counted toward UTC's programming commitment. By using this definition, UTC could produce only a small number of programs and repeat them many times to meet their hourly community use requirement.

Such a calculated ambiguity would most likely lead to litigation in the future.

The issue of whether or not a program could be repeated was discussed on April 13th, and as a matter of policy, the Commission determined that this would be a reduction of a commitment and voted against the UTC request.

BUYOUT

UTC reaffirmed that the current Buyout Provision, included in the RFP, the Ordinance, and used throughout the bidding process, is a fundamental problem. As of this writing, however, they are not raising this issue as one which would preclude their acceptance of the Franchise.

Staff Position:

In essence, the Commission is precluded, upon the advice of legal counsel, from granting this Ordinance change without risking law suits by the other unsuccessful bidders.

SUMMARY OF DEMANDS

In summary, given the four demands and the fact that the language as presented by UTC was non-negotiable, the staff was unable to reach agreement on any of them. However, it is your staff's view that with respect to corporate liability and subordination, major concessions to UTC are reasonable and appropriate, and if UTC were to remove Rescission from its list and accepts staff's recommended concessions, there is a basis for final agreement on the Franchise.

In addition, however, even if you grant all the UTC requests, they will be unable to unconditionally accept the Franchise until after the May 13, 1983 deadline because of the formality of obtaining ratification by the Tribune Company Board of Directors.

It is, therefore, staff's recommendation, unless UTC accepts staff's concessions, that you reject all of UTC's latest demands and that you allow the acceptance period under the Ordinance to expire on midnight May 13, 1983.

REBID AND REFRANCHISING

It is clear that should you approve staff's recommendation, UTC has stated it will not accept the Franchise, and Sacramento will face a new refranchising process. As a result, it is suggested that you direct staff to undertake the following action in the event that UTC's acceptance is not received by midnight May 13, 1983.

- May 16, 1983 - Staff review a draft "Boiler Plate" Resolution with those previous bidders interested in resubmitting applications for the Sacramento Franchise.
- May 17, 1983 - Request the City Council to instruct the City Attorney to prepare an Ordinance similar to that approved by the Board of Supervisors on April 14, 1983, to effectively restrict refranchising to only those bidders (including UTC) who previously submitted applications.
- June 1, 1983 - At the first regularly scheduled Commission meeting, approve a draft RFP which includes a Boiler-Plate Resolution previously offered to UTC for City Council and the Board of Supervisors' consideration.

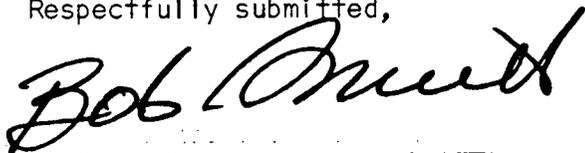
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- June 6 - 11, 1983 - Review during a pre-bid conference, the RFP with the four previous bidders and secure their understanding of the document and process.
- June 20, 1983 - Formally issue the RFP to the bidders with a 30-day response time for submission of revised applications as well as a completed Resolution Boiler-Plate form.
- June 20 - September 20, 1983 - Staff, during this 60-day review period will prepare a ranking and recommendation for the Commission's review, approval, and subsequent recommendation of a new Franchise to the Board and City Council.

While this is an optimistic time frame by utilizing the current Resolution, I am fairly comfortable with this schedule.

It is, therefore, my recommendation that you instruct staff to prepare the necessary RFP for your June 1st review.

Respectfully submitted,



BOB SMITH, Executive Director
Sacramento Metropolitan Cable
Television Commission

RES:ab

Attachments

ATTACHMENT I

UTC PROPOSED RESOLUTION CHANGES

EXHIBIT I

Those obligations or undertakings assumed hereunder by UTC, UCTS, TC3, United and Tribune shall not, under any conditions, collectively exceed the maximum total sum of thirty-five (35) million dollars (\$35,000,000) and such maximum total sum of potential collective liability or exposure shall decrease dollar for dollar by the amount of equity or other capital invested or irrevocably committed by or on behalf of UTC in the Sacramento Cable Television System until such declining balance shall reach a maximum total level of ten (10) million dollars (\$10,000,000), which amount shall be inclusive of any bonds or deposits posted pursuant to Sections 5.50.700 and 5.50.702 of the Ordinance (hereinafter "Residual Guarantee"). The Residual Guarantee shall be reduced dollar for dollar by the amount of franchise fees paid by UTC. Notwithstanding the foregoing, the Residual Guarantee may be in the form of bonds or letters of credit posted by or on behalf of the Franchisee.

Revised Exhibit II April 29, 1983

Notwithstanding any provision of this Resolution, the provisions this paragraph shall not become effective until one hundred and eighty (180) days following the filing of the Certificate of Acceptance or until the Franchisee has received an acceptable financing commitment or commitments, whichever occurs sooner. In the event Franchisee is unable to either: (i) arrange the financing necessary to construct and operate the system on acceptable terms and conditions, or (ii) if the Grantor fails to amend the Ordinance in a form consistent with the provision of Section 605 of Senate Bill 66 (Goldwater) as reported out of the Senate Commerce Committee on April 21, 1983, Franchisee may surrender the franchise without any liability or recourse whatsoever except to the extent of the actual cost of the Commission's operation since the filing of the Certificate of Acceptance and the amount of the award fee specified in Paragraph 16 of this Resolution. No later than forty-five (45) days following a written recision, the Commission shall return all bonds and deposits filed pursuant to Sections 5.50.700 and 5.50.702 of the Ordinance.

Section VII, Paragraph 27

9. Notwithstanding Section 5.50.752 of the Ordinance, Franchisee may for purposes of financing the construction or operation of the Cable Television System enter into agreements involving pledge, lease, mortgage or similar such arrangements of the assets or property of the Cable Television System as security for the loan or advancement of funds, and the Commission shall hereby be deemed to have affirmatively consented to all such agreements including, where applicable, the full subordination of any interest which the Commission may now or in the future hold in the Cable Television System to the interest or interests of ^{of any} the lender or other supplier of funds. ^{Creditor}

* * * * *

27. Consent to Transfer of Franchise. Notwithstanding Sections 5.50.750 through 5.50.758 of the Ordinance, the Commission hereby consents to the transfer and assignment of the franchise offered hereby by the Franchisee to a limited partnership entity or entities to be organized pursuant to the California Limited Partnership Act (Cal. Corp. C. 15621 et seq.) ("the limited partnership") provided that said transfer shall not become effective unless and until:

- a. UCTS, TC3, United and Tribune shall each acknowledge in a properly authorized writing that they are "named owners" and "named owners of the Franchisee" as those phrases are used in Section 5.50.756 of the Ordinance and this Resolution and that the undertakings, promises and covenants made by the filing of Certificate of Acceptance hereto are not diminished, impaired, or affected to any degree whatsoever by reason of the transfer; and
- b. At least UCTS and TC3 shall be general partners in the limited partnership unless otherwise approved by the Commission pursuant to Section 5.50.756 et seq. of the Ordinance; and
- c. The limited partnership shall have general partners which are not designated as "named owners of the Franchisee" herein, unless said additional general partners shall have applied for and received the approval of the Commission pursuant to Section 5.50.756 et. seq. of the Ordinance; and
- d. The limited partnership agreement shall provide that:

(1) No limited partner except as may be required by law shall be active in the conduct of the partnership's business.

- (2) Any amendments must be filed with the Clerk of the Commission on or before the date they take effect; and
- (3) The sale by a general partner of all or part of its interest shall not operate to relieve said general partner of any obligations under this Resolution unless the Commission shall have given its prior written consent to such relief; and
- e. Any amendment to the partnership agreement which has the effect of modifying or altering the provisions required by subparagraph f. hereof without the prior written approval of the Commission shall constitute a material breach of the Franchise Documents and give rise to proceedings under Section 5.50.820 et seq. of the Ordinance; and
- f. The Franchisee shall file with the Commission a financial statement, certified in unqualified opinion by a certified public accountant, reflecting that the sums of all considerations by the limited partnership to the Franchisee by reason of the transfer does not exceed the total of all sums expended by the Franchisee to parties other than the named owners of the Franchisee subsequent to the filing of the Certificate of Acceptance or if the sum of all considerations so paid does exceed said expenditures, that to the extent of such excess funds, the recipients of such excess funds are firmly and legally obligated to repay such excess funds to the limited partnership as necessary to complete the build of the system; and
- g. The Franchisee shall not be in material breach of any provision of the Franchise Documents at the time of the transfer; and
- h. On not less than thirty (30) days notice, Franchisee may apply to the Commission for a Certificate of Compliance indicating whether or not Franchisee is in compliance with all of the provisions, terms and conditions of the Franchise Documents for the purposes of this paragraph. Said Certificate shall be issued as of the date of Franchisee's application. The limited partnership, and no other party or entity, shall be entitled to rely upon said certificate for the purposes of the transfer by this paragraph; and
- i. The limited partnership shall file a fully executed copy of the partnership agreement and all necessary supporting documentation, in form acceptable to the Commission, with the Clerk of the Commission.

Should any transfer to a limited partnership take place hereunder, the Commission hereby consents under the Ordinance and this Resolution to subordination of any interest, present or future, it may hold or assume in the Cable Television system to their interest or interests held by the limited partners.

EXHIBIT IV

40. Community Use Programming Volumes. During the term of the franchise, video Community Use Programming shall be cablecast in the following volumes:
- a. Twenty-four Months. Commencing at the beginning of the twenty-fourth calendar month following filing of the Certificate of Acceptance and continuing through the end of the thirty-sixth month following filing of the Certificate of Acceptance, the Franchisee shall:
 - (1) Cablecast between the hours of 6:00 a.m. and 5:00 p.m. not less than ten (10) hours per week of new (not previously broadcast within the Sacramento Community) Community Use Programming; and
 - (2) Cablecast between the hours of 5:00 p.m. through 11:00 p.m. not less than forty (40) hours per week of new (not previously broadcast within the Sacramento Community) Community Use Programming.
 - b. Thirty-Seventh Month. Commencing at the beginning of the thirty-seventh calendar month following filing of the Certificate of Acceptance and continuing through the end of the fiftieth month following filing of the Certificate of Acceptance, the Franchisee shall:
 - (1) Cablecast between the hours of 6:00 a.m. and 5:00 p.m. not less than eighteen (18) hours per week of new (not previously broadcast within the Sacramento Community) Community Use Programming; and
 - (2) Cablecast between the hours of 5:00 p.m. through 11:00 p.m. not less than seventy-two (72) hours per week of new (not previously broadcast within the Sacramento Community) Community Use Programming.
 - c. Fifty-One Months. Commencing at the beginning of the Fifty-first calendar month following filing of the Certificate of Acceptance and continuing through the conclusion of the term of the franchise, the Franchisee shall:
 - (1) Cablecast between the hours of 6:00 a.m. and 5:00 p.m. not less than twenty-five (25) hours per week of new (not previously broadcast within the Sacramento Community) Community Use Programming; and
 - (2) Cablecast between the hours of 5:00 p.m. through 11:00 p.m. not less than one hundred (100) hours per week of new (not previously broadcast within the Sacramento Community) Community Use Programming.

ATTACHMENT II

DIRECT COMMUNITY LIABILITY LIMITS

	<u>Millions</u>
1) Street and Public Easement Bond	(2.5)
2) Proposed Minimum Liability Limits	55.3
3) Franchise Fees	56.7
4) Local Government Savings via I-Net	15.0
5) CTC, CRC, SAC Operating Grants	<u>25.1</u>
TOTAL COMMITMENT	<u>\$152.1</u>

ATTACHMENT III

PROPOSED MINIMUM LIABILITY LIMITS

BASED ON

APPLICATION PRO-FORMA

		<u>M i l l i o n s</u>				<u>Pro-Forma</u>
Community Grants:		<u>Facilities</u>	<u>Equipment</u>	<u>Equipment Replacement</u>	<u>Operating *</u>	
1)	CTC's, CRC's, SAC's	2.7	4.5			7.2
2)	KVIE	0.8	3.0	3.0	3.9	10.7
	Educational Consortium	0.8	1.0	1.0	6.5	9.3
	KXPR	0.3	0.1	0.1	0.2	0.7
	Other .344 Grants	0.0	0.6	0.6	1.9	3.1
3)	Grants to SC3					17.1
4)	Costs to Rebid Franchise					1.0
5)	City/County Government Grants					<u>1.7</u>
TOTAL						<u><u>\$50.8</u></u>

* Tied to Receipt of Gross Revenues

Street and Public Easement Reparation Bond and Security Deposit totaling \$2.75m, not included.

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Addition to Paragraph 13 relating to joint and several liability of certain named owners of the Franchisee:

The joint and several liability of the named owners of the Franchisee shall be limited to the sum of Fifty Million Dollars (\$50,000,000.00) except that said limitation shall be reduced to the sum of Ten Million Dollars (\$10,000,000.00) upon the filing of a Certificate of Completion of the System and said limitation shall be further reduced therefrom by the total of all franchise fees paid to the Commission pursuant to Section 5.50.602 of the Ordinance from the inception of the franchise to the date of the breach of the Franchisee giving rise to the aforementioned liability.

20. Subordination. Pursuant to Section 5.50.752 of the Ordinance, and in reliance upon the liability of certain named owners of the Franchisee pursuant to Paragraph 13 above, the Commission hereby consents and agrees to subordinate its rights under these Franchise Documents in the event of a breach by UTC to all of these creditors and limited partners which shall receive a voluntary security interest in the assets of the System from the Franchisee.

Said creditors and limited partners shall have the right to cure any breach by UTC of the terms and conditions of the Franchise Documents within the periods provided for cure by the Franchisee within said documents.

The foregoing subordination shall be effective unless:

- (1) The legal enforceability of the joint and several liability of certain named owners of the Franchisee for damages pursuant to Paragraph 13 above shall be in any way impaired or rendered ineffective by judicial action of any type; or
- (2) The aforesaid creditor or limited partner shall be or be succeeded by the Franchisee or any named owner thereof or any affiliate of the Franchisee or any named owner of the Franchisee.

For purposes of the foregoing sentence, an "affiliate of the Franchisee or any named owner of the Franchisee" shall be defined as an entity whose gross revenues or any portion thereof would be includable in the gross revenues of the Franchisee pursuant to Section 5.50.012m of the Ordinance or Paragraph 20 of the Miscellaneous Section of this Resolution.