

COUNTY OF SACRAMENTO  
CALIFORNIA

October 14, 1981

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

From: L. B. Elam  
County Counsel

Subject: Re: Cable Television Ordinance - Article 4-c,  
Sub-Chapter 4 through End  
Meeting of October 14, 1981

By memorandum dated October 2, 1981, this Office transmitted a hearing draft of Sub-Chapter 1 through Sub-Chapter 4, Article 4-b of the Cable Television Ordinance. The memorandum detailed relevant provisions of the draft, particularly in relation to changes in that Draft from the March 1, 1981 Draft Ordinance, and to preceding policy determinations by the Governing Bodies and Joint Sub-Committee.

Enclosed herewith is an entire hearing draft dated October 15, 1981, of the Cable Television Ordinance Sub-Chapter 1 through Sub-Chapter 4, Article 4-b of this enclosure was presented and considered during the Joint Sub-Committee's meeting on October 7, 1981. Consideration of Sub-Chapter 4, Article 4-c through the end of the Ordinance is scheduled for the meeting on October 14, 1981.

This memorandum will focus upon Sub-Chapter 4, Article 4-c through the end of the Ordinance. This memorandum, and the one dated October 2, 1981, a copy of which is beneath this one, constitute a staff discussion of the complete Ordinance.

Sub-Chapter 4  
Article 4-c

Services

1. Over-All Regulatory Approach. The over-all approach to the regulation of services provided by a Franchisee has been developed within the following context. Interested operators strongly object to the reservation of regulatory control. To the extent the control is to be reserved, the operators prefer that precise restrictive provisions be included within the ordinance to be adopted, so that all will know at the time applications are filed what restrictions apply, and so that all will be assured of complete freedom from restriction during the term of the franchise except as otherwise initially prescribed by the franchise ordinance. Protections afforded by the First Amendment of the United States Constitution limit to a not yet precisely defined extent, the scope of regulatory control which may be applied to broadcast programming. With respect to non-entertainment business oriented services which might be provided through a cable system, it is generally acknowledged that there are potentials for anti-trust violations both by a Franchisee provider of the services and a public agency

attempting to regulate them. The nature, magnitude and extent of services which may be provided by a Franchisee are not now known and probably will not be clearly defined by the application for the franchise. During this era of rapidly advancing technology, it is highly unlikely that an applicant would desire to be limited in the provision of services to those which it precisely describes in its application.

Within this context, the staff recommended regulatory approach is predicated upon the following principles:

- a. A specific regulatory framework should be developed only with respect to services which are known all applicants will offer to provide, primarily broadcast programming. Certainly, a relevant factor in selection of the Franchisee will be the type of home entertainment programming offered, how that programming is arranged ranged in Tiers of Service, and where premium services are placed within the Tiers. Since applicants tend to make and glamourize such proposals, the ordinance should provide some mechanism to insure that the promises are kept.
- b. There should be a reserved authority in the Board of Directors of the Cable Television Commission to regulate the provisions of broadcast programming to the extent permitted by constitutional limitations. Constitutional limitations will permit only precise, narrowly defined regulations which are carefully tailored to meet problems which have actually occurred.
- c. With respect to non-entertainment business services, there should be reserved an authority to restrict, or even prohibit such services, should a regulatory need to do so arise. For example, the staff recommendation that the broadly phrased prohibition against sale of television sets be eliminated from the ordinance was adopted. However, it is conceivable that an operator could choose to sell television sets or, perhaps, provide burglar alarm services, or, perhaps, provide a variety of other business associated services, which might ultimately be determined to require restriction, or even prohibition, as a result of actual damage caused to competitors or other harms. Since an authority should be reserved to regulate such non-entertainment business services, the ordinance should not establish either a right or duty on the part of a Franchisee to provide them, even if they have been identified in the application for the franchise.
- d. The scope of reserved regulatory authority should be co-extensive with that which may be legally exercised under the Police Power respecting any business within the community, and the franchise should not require a surrender of otherwise available defenses to regulatory control. Such a surrender would be of uncertain legal validity. With respect to anti-trust issues, the required surrender, itself, could conceivably violate anti-trust restrictions.

2. Entertainment Programming. Section 5.50.504 requires applicants who desire to propose entertainment programming to specifically identify the types of programs which will be broadcast, Tiers of Service, the number of channels within each Tier, minimum broadcasting time on each channel, etc.

Section 5.50.508 identifies such programming proposals as a material factor in selection, but also recognizes that changing circumstances will require changes in program offerings, Tier arrangements, etc. Such changes may result from marketing strategy, program availability and other factors. Finally, Section 5.50.508 provides that no such changes may materially reduce or eliminate programming of the nature, extent, volume or quality identified in the application, or the hierarchy relationship of such programming. Section 5.50.510 establishes arbitration as the remedy should the Board of Directors of the Cable Television Commission assert that a Franchisee has violated Section 5.50.508.

A Franchisee acquires the contractual right to provide only that entertainment programming which is specifically identified in the resolution offering the franchise, not all programming identified in its application. (Sec. 5.50.506).

Section 5.50.512 reserves to the Board of Directors of the Cable Television Commission authority to regulate entertainment programming which is detrimental to the peace, health, safety or welfare. However, any such regulation must be implemented by specific rules directed to particular evils. The rules would be enforced by suit brought against the Franchisee by the Commission.

3. Business Services. The enclosed Draft Ordinance contains no provision which would specifically mandate that a particular non-entertainment business service, such as burglar alarm services, home shopping services, and a myriad of other similar or dissimilar types of potential services, is mandated. This is true, whether the service is proposed within the application filed by the Franchisee or not.

Correspondingly, Section 5.50.506 makes it clear that a Franchisee does not by receiving the franchise, obtain a contractual entitlement to provide any such services. An authority is retained to regulate such services which is co-extensive with the Police Power defined by Article XI, Section 7 of the California Constitution.

The enclosed Draft Ordinance does not contain any specific restrictions upon business services. Any such restrictions would need to be added by amendments enacted by both the Board of Supervisors and City Council of Sacramento. (Sec. 5.50.036). Such amendments would not be effective within Galt, Folsom, or Isleton unless enacted by those municipalities. (Sec. 5.50.036). The right to make such amendments is reserved by Sections 5.50.038 and 5.50.500.

The enclosed Draft Ordinance does, however, authorize such restrictions to be imposed by administrative regulations enacted by the Board of Directors of the Cable Television Commission. The rule making authority could be evoked only after public hearings. (Sec. 5.50.550).

At the request of interested operators, a provision has been added which states that in relation to these issues, by accepting a franchise a Franchisee does not waive any otherwise applicable constitutional right. This provision is not as broad in scope as the applicants have requested. However, it does balance the provisions which recite that the government is not, by issuing a franchise, contracting away its regulatory authority.

4. Service Areas. Section 5.50.504 provides that services provided by Franchisees within Proposed Service Areas may differ from those provided within the Imposed Service Area, and that services may differ from one Proposed Service Area to another.

5. Other Provisions. The remainder of the provisions in Article 4-c deal with such matters as picture quality, continuity of service, adequacy of repair services, privacy and reporting. With the following exceptions, no significant changes have been made in these provisions since the joint public hearings by Board of Supervisors and City Council.

Provisions prohibiting sale of communication receivers and providing for specific regulation of anti-competitive practices, have been omitted pursuant to prior determinations by the Joint Sub-Committee. At the request of interested operators, a provision has been added to the Privacy Section authorizing Franchisees to "sweep" for the purpose of collecting aggregate data on viewing patterns by channel. (Sec. 5.50.538-a-b). A provision has been added to the Section on Affirmative Action, which includes a prohibition against discrimination in relation to marital status. (Sec. 5.50.546).

#### Article 4-d

##### Franchise Fees - Rates

Pre-written provisions of Article 4-d have been previously reviewed by the Joint Sub-Committee, and will not be further discussed in detail.

1. Franchise Fees. Pursuant to the policy decision by the Joint Sub-Committee, a uniform Franchise Fee in the amount of 5% per year is required whether or not a Franchisee has proposed Community Use Programming. (Sec. 5.50.602). A specific authority has been conferred upon the Cable Television Commission to contract for Community Use Programming, whether or not the Franchisee has proposed such Programming. (Sec. 5.50.548).

The minimum payment which a Franchisee is required to make annually is \$325,000. This sum has been reached on the basis of a variety of factors, including actual expected operating costs during the first year, a 10% contingency for attorneys fees, a 10% contingency for general purposes, and an allowance for inflation. The actual amount required to be paid by a Franchisee is limited to 120% of the annual operating budget. The maximum limitation of \$325,000 represents the figure above which the Franchisee is excused unless the 5% gross revenue fee yields more than that amount. Commencing with the second year of the franchise, the maximum amount of \$325,000 is inflated by a factor equivalent to the CPI. (Sec. 5.50.604).

2. Rates. The only change which has made in the previously reviewed rate provisions pertains to Service Areas Sections 5.50.618 and 5.50.624 have been revised to provide that rates and charges associated with Basic Service may vary from one Service Area to another, and that such charges are subject to approval by the Board of Directors in areas outside of Service Areas. The applicability of these provisions, like others relating to Basic Service Rates, would depend upon an election by the Franchisee to affirmatively propose them.

#### Article 4-e

#### Security - Indemnification - Insurance

1. Performance Bond. During the joint hearings of the Board of Supervisors and City Council, it was directed that the Performance Bond requirement be modified to permit the \$2.5 million bond to be reduced to \$1 million following completion of the Cable Television System. That change has been made. (Sec. 5.50.700).

2. Security Deposit. The March 1, 1981 Draft Ordinance provided for a cash security deposit in the amount of \$100,000. During the joint hearings of the Board of Supervisors and City Council staff orally recommended that the cash security deposit be increased to \$250,000. That recommendation was rejected.

The provisions of Section 5.50.702 require an initial cash deposit in the amount of \$250,000 which is subject to mandatory reduction to \$100,000 after the Cable Television System is complete. These provisions represent a renewed staff recommendation.

The purpose of the security deposit is to provide a readily available sum of cash from which the Cable Television Commission can draw in the event of breaches of the Franchise documents by the Franchisee. There is no other readily available source of such funds. A bonding company might or might not voluntarily pay damages. Involuntary collection of damages from the Franchisee would require levy of a writ of execution upon whatever assets the Franchisee may possess.

The cash deposit also provides a funding source in the event the Franchisee either fails to pay Franchise Fees or the budget requirements of the Cable Television Commission during the period when Franchise Fees are inadequate to cover such cost. Should the Franchisee fail to make such payments, the only instantly available source of operating capital for the Commission would be the County and Cities.

Given the fact that the initial operating budget of the Commission will be over \$200,000, an initial cash deposit requirement in the amount of \$250,000 is, in the opinion of staff, the absolute minimum which should be required. Even this amount could require the Commission to look to the County and Cities for operating revenues, in the event the Franchisee fails to make required payments.

Sub-Chapter 5  
Article 5-a

Assignments

The provisions relating to assignments and transfers have been revised to include an authority of the Board of Directors of the Cable Television Commission, to attach conditions to any approvals which it gives. (Sec. 5.50.758). Provisions have also been added authorizing purchase of the Cable Television System and other property of the Franchisee, in the event the Board of Directors refuses to grant such approval. (Secs. 5.50.758, 5.50.760).

Article 5-b

Remedies

1. Liquidated Damages. The March 1, 1981 Draft Ordinance contained liquidated amounts of \$500 per day for breaches relating to failure to complete or extend the Cable Television System, and \$100 per day for failure to file timely reports. During the joint hearings by the Board of Supervisors and City Council staff orally recommended that the damage amount for failure to complete be increased to \$1,000 per day. That recommendation was rejected. Staff renews its recommendation.

Section 5.50.804 prescribes liquidated amounts of \$1,000 per day for failures to complete or extend the System or make repairs ordered by the Board of Directors, and \$500 per day for each day in excess of five the Franchisee is late in filing a required report.

The 51 month schedule for completion of the System has been tailored to the needs of the operators, at their request. The completion schedule in the March 1, 1981 Draft Ordinance was only 36 months. A substantial damage amount should be associated with unexcused failures of a Franchisee to comply with the schedule. Similarly, citizens on the periphery of Service Areas denied benefit of the System, when line extensions are otherwise required, suffer a loss of services which a liquidated damage amount of \$1,000 per day should not be deemed to over-compensate.

It should be noted in this connection, that at the request of interested operators, Section 5.50.248 has been revised to preclude a Franchisee from being exposed to undue liability for violating line extension provisions. The revision prevents the Franchisee from being in breach unless it is notified of a duty to extend, and the Franchisee thereafter fails to make the extension. In this manner, the burden is shifted from the Franchisee to the Commission or the public to identify locations where line extension is required. The Franchisee is immunized from liability unless it fails to take action after notice is given.

The damage amount of \$500 per day is applicable to the failure of a Franchisee to file required reports identifying progress in completing the System, and annual reports of operations. Since this damage amount would become applicable only after a five day delay, it should be viewed as a prudent mechanism to encourage compliance with these provisions.

2. The Bank. The Joint Sub-Committee has approved a bank consisting of 20% of the channels on the Subscriber Network and directed that a substantial number of channels be released upon completion of the System. The Sub-Committee has not dealt with the question of whether the channels to be banked should consist of only video channels or also data channels. Staff has discussed this issue with interested operators and it recommends that the "bank" be limited to video channels.

The provisions for release of channels are set forth in Section 5.50.816. A prior draft of this section contained references to "video and data" channels. The haste in issuing the ordinance has resulted in the failure to correct that language. The language in that Section should be read as referring only to video channels, and where the language talks about a release of one video and one data channel, the language should be deemed to mean only one video channel. The language will be corrected after the meeting on October 14.

Section 5.50.816 contemplates the release of 50% of the "banked" channels if the Commission issues a Final Order of Completion by the end of the 51st month following the award of the franchise. Should the Final Order of Completion be issued by that date, completion would actually have occurred in advance of 51 month completion schedule prescribed by the Ordinance. The reason is that the Franchisee must first complete, then file a notice with the Commission asserting completion, and the Commission must then conduct hearings to determine whether completion has in fact been achieved. All this must occur before the Final Order of Completion is issued.

If the Final Order of Completion is issued subsequent to the beginning of the 52nd month following award of the Franchise, only 25% of the "banked" channels would be subject to release. Thus, the release mechanism would be designed to encourage completion slightly in advance of the required date. On the other hand, no matter how late the Franchisee completes, even if it is the tenth year of the Franchise, it would be entitled to 25% of the channels from the "bank" upon issuance of the Final Order of Completion.

Section 5.50.816 further provides that one year following the date of issuance of the Final Order of Completion, the Board of Directors of the Commission would be empowered to release all remaining channels from the "bank." This determination would be discretionary, based upon an appraisal of how performance has progressed to date. By one year following completion, there should be a reasonably good understanding of whether System quality is adequate, repair services are adequate, and Community Use Programming meets objectives established by the Franchise Documents. The discretionary release provision has been included at the request of interested operators.

The Board of Directors of the Commission would be required to release at least one channel each year for the first five years following issuance of the Final Order of Completion unless it finds that the Franchisee is in violation of particular provisions of the Franchise Documents or orders or directives of the Commission issued thereunder. At the conclusion of the sixth year following the issuance of the Final Order of Completion, all remaining "banked" channels would be required to be released absent findings of violations.

October 14, 1981

The foregoing concludes the discussion of Article 4-c through the end of the enclosed Draft Ordinance. Questions will be answered during the meeting on October 14, 1981.

  
L. B. ELAM Boto  
County Counsel

LBE:emw

cc: William Freeman, Assistant County Executive  
Mac Mailes, Assistant City Manager  
James Jackson, City Attorney  
Interested Operators