

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking for
Adoption of Amendments to a General
Order and Procedures to Implement the
Franchise Renewal Provisions of the
Digital Infrastructure and Video
Competition Act of 2006.

Rulemaking 13-05-007
(Filed May 23, 2013)

**REPLY COMMENTS OF THE
OF THE DIVISION OF RATEPAYER ADVOCATES**

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I. INTRODUCTION

The Division of Ratepayer Advocates (DRA) submits the following comments in support of the Commission’s efforts to create a statewide video franchise renewal process. DRA’s comments herein focus upon the need to create a public notice and comment procedure for the franchise renewal provisions of the Digital Infrastructure and Video Competition Act of 2006 (DIVCA).¹ As DRA stated in comments it filed on July 22, 2013, public notice and comment procedures for the franchise renewal provisions of DIVCA are necessary because Public Utilities Code² Section 5850(c) requires that the process for renewal of franchise applications under DIVCA be “consistent with federal law and regulations.” 47 United States Code (U.S.C.) § 546 (c)(1) and (h) requires notice and an opportunity for comment.³ In order for the state rules for franchise renewals to be consistent with federal law, the public must be afforded notice and an opportunity to file

¹ Public Utilities Code Sections 5800, *et seq.*

² All further references herein are to the Public Utilities Code unless otherwise noted.

³ 47 U.S.C. § 546(c)(1)(h).

comments on such applications. DRA notes that federal law sets forth both a formal and an informal process for franchise renewals, that often involves public hearings, debate, and community “needs assessment.”⁴

DRA supports adopting either a formal or informal franchise renewal process, or both, so long as the process provides the public (including DRA) sufficient notice and opportunity to comment on the franchise renewal application.⁵ Furthermore, DIVCA specifically allows DRA to participate in the renewal process and to “advocate on behalf of video subscribers regarding renewal of a state-issued franchise and enforcement of the provisions of [DIVCA]”.⁶

Consistent with the comments of several parties, DRA recommends that the Commission adopt a process for DIVCA franchise renewal applications (formal and/or informal) that permits the public, including DRA, a meaningful opportunity to submit comments on pending statewide franchise renewal applications. DRA also recommends that the Commission take additional comments on the specific issues on what information franchise renewal applications must contain.

II. NOTICE AND COMMENT PERIOD

A. CCTA, Verizon and AT&T Comments

According to the California Cable and Telecommunications Association (CCTA), DRA’s role in addressing consumer service and protection standards “is not a matter that affects the role of the Commission in implementing DIVCA.”⁷ Instead, CCTA claims that “DRA’s role in advocating on behalf of consumers on issues relating to Public Utilities Code § 5900 is a matter that DRA will need to resolve with local government

⁴ See generally *id.* at § 546(a), (c) and (h).

⁵ DRA notes that both processes are allowed under federal law and are therefore consistent with DIVCA. (See 47 U.S.C. § 546; Section 5850(c).)

⁶ Section 5900(k).

⁷ CCTA Comments at 12; see also Phase I Decision, D.07-03-014 at 202.

entities and the courts.”⁸ CCTA argues that DRA’s role in the renewal process is similarly limited, and does not include a right to participate directly in that process except to provide comments related to the franchise holder’s eligibility for renewal under Section 5850(d).⁹ CCTA also contends that DIVCA made “. . . the informal renewal process mandatory for the Commission . . . [and] the legislature made the express decision to forego the state’s right to invoke the 1984 Cable Communications Act’s (“Cable Act”) formal renewal procedures.”¹⁰ Thus, CCTA asserts that DIVCA should be “. . . interpreted to provide a limited opportunity for notice and comment to address (only) the franchise holder’s eligibility for a renewal (*i.e.*, whether it is in violation of a nonappealable court order arising under DIVCA).”¹¹ DRA disagrees with CCTA’s comments as discussed below.

Like CCTA, Verizon also believes that the Commission should adopt a franchise renewal process that is very limited in scope. In its comments, “Verizon proposes a process whereby the franchisee files a renewal application that (1) re-affirms and, if applicable, updates, the information it filed as part of its initial application under § 5840, and (2) verifies that the franchisee is not in violation of any final nonappealable order court order under § 5840(d).”¹²

AT&T contends that “[t]he importation of either the formal or informal federal renewal procedures would vastly complicate and delay renewal, and thereby deter competition”.¹³ Thus, AT&T asserts that the “. . . use of either federal renewal procedure

⁸ CCTA Comments at 12-13.

⁹ *Id.*

¹⁰ *Id.* at 2 (citations omitted).

¹¹ *Id.* (citations omitted).

¹² Verizon Comments at 3.

¹³ AT&T Comments at 7.

would violate DIVCA.”¹⁴ AT&T also relies on *Detroit v. Michigan*, 879 F. Supp. 2d 680 (E.D. Mich. 2012), to support its argument that renewal processes in the Cable Act are not mandatory, and therefore, the Commission is not required to adopt them under Section 5850 of DIVCA.¹⁵

DRA disagrees with CCTA’s, Verizon’s and AT&T’s interpretations of the applicable statutes. Section 5850 clearly states that “[r]enewal of a state franchise shall be consistent with federal law and regulations.” Applicable federal law, the Cable Act, sets forth a formal and informal franchise renewal process.¹⁶ Both processes provide the public with adequate notice and opportunity for comment.¹⁷ While CCTA and Verizon rely on language in Section 5450(b) of DIVCA, which states that “. . . the commission shall not impose any additional or different criteria” to support their arguments, they take this language out of context. The entirety of Section 5450(b) states: “(b) Except as provided in this section, the criteria and process described in Section 5840 shall apply to a renewal registration, and the commission shall not impose any additional or different criteria.” The subsequent section, Section 5950(c) provides, “[r]enewal of a state franchise shall be consistent with federal law and regulations.” Thus, the ability of the Commission to “impose any additional or different criteria” is limited only if it is inconsistent with federal law, namely the Cable Act.

Verizon’s proposed process is not consistent with federal law because it does not provide adequate notice and opportunity for comment. Certainly, DIVCA did not envision that the Cable Act’s notice and comment process would be limited only to the issue of whether the video service provider is in violation of any final nonappealable

¹⁴ *Id.*

¹⁵ *Id.* at 8.

¹⁶ 47 U.S.C. § 546.

¹⁷ *Id.*

court order. DIVCA clearly states that this is an *additional* issue that parties may comment on.¹⁸

AT&T's reliance on *Detroit v. Michigan* is misplaced. In that case, the City of Detroit argued that the renewal procedures in the Cable Act preempted the renewal provisions of Michigan's Uniform Video Services Local Franchise Act (Michigan Act).¹⁹ Under the Michigan Act, cable operators may apply for 10 year renewal periods.²⁰ The only other detail regarding franchise renewals in the Michigan Act is a reference the process for initial applications.²¹ Notably, the Michigan Act does not reference federal law and regulations. The federal district court in *Detroit v. Michigan* found that the renewal procedures under the Cable Act are not mandatory and that Congress “. . . envisioned the possibility of alternative procedures”²²

The language of DIVCA, however, makes it clear that *Detroit v. Michigan's* holding has no bearing on the Commission's implementation of renewal procedures. While the Michigan District Court held that the renewal provisions in the federal Cable Act are not mandatory and that Congress envisioned that state might adopt different renewal procedures, DIVCA clearly states that the renewal procedures adopted under DIVCA must be consistent with federal law and regulations. Read in its entirety, Section 5850 clearly indicates that the Commission shall adopt renewal procedures that are consistent with federal laws and regulations. Under *Detroit v. Michigan*, the California Legislature could have adopted different renewal procedures as lawmakers drafting the Michigan Act did, but they chose not to do so. Instead, the Legislature included the qualifying language in Section 5850(b), “Except as provided in this section . . .” and in

¹⁸ Section 5850(c), (d).

¹⁹ *Detroit v. Michigan*, 879 F. Supp. 680 (E.D. Mich. 2012) at 684.

²⁰ Mich. Comp. Laws § 484.3303(7).

²¹ *Detroit v. Michigan*, 879 F. Supp. at 689.

²² *Id.* at 697.

the subsequent subsection, Section 5850(c), the Legislature clearly stated that the renewal procedures must be consistent with federal laws and regulations. Thus, the Commission must adopt renewal procedures that are consistent with the Cable Act. Under the Cable Act's formal and informal renewal processes, the public, including DRA, must have adequate notice and opportunity to comment.

Furthermore, contrary to CCTA's and Verizon's comments, Section 5900(k) gives DRA the authority to advocate on the renewal process and enforcement of this section, as well as Sections 5890 and 5950. In order for Section 5900(k) to be meaningful, DRA must have an opportunity to provide comments, which it does not have under the current DIVCA application rules. Moreover, a Legislative Counsel's Digest of DIVCA (SB 2987) provided: "The bill would authorize the commission's Division of Ratepayer Advocates to advocate on behalf of video service customers in connection with state franchise renewal and enforcement of service standards."²³ DIVCA clearly envisioned that DRA would have the opportunity to meaningfully advocate on behalf of video service customers regarding franchise renewals.

DRA believes that there are several areas where it could provide meaningful, substantive input into the Commission's review of renewal applications in conjunction with the municipalities, who possess most of the necessary specific information. DRA explained this in Opening Comments, but repeats it here for convenience of reference. DRA's comments might include any of the following, but are not limited to:

- (1) Customer Service (Section 5900(a) requires franchise holders to comply with "customer service standards pertaining to the provision of video service");
- (2) Discrimination (pursuant to Section 5890(a), video service providers may not discriminate against or deny access to any group of residential

²³ AB 2987 Legislative Counsel's Digest, February 24, 2006.

http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_bill_20060929_chaptered.html

subscribers based on the income of the residents in the local area in which the group resides);

- (3) Public, Education and Government (PEG) access (Section 5870(a) requires video service providers to designate a sufficient amount of capacity on their networks to allow the provision of PEG channels and Section 5840 (e) (1) (B) (iv) requires the applicant to submit a statement saying that it will provide PEG channels and associated funding);²⁴
- (4) Cross-subsidization (pursuant to Section 5940, franchise holders who provide both telephone service and video service are not permitted to raise telephone rates to finance the costs of deploying a video network); and
- (5) Potential fines for a violation (under Section 5900(d), a material breach of the conditions of the franchise by the video service provider can result in a fine of \$500/day, not to exceed \$1500/offense and repeat offenses can result in fines up to \$2500/day not to exceed \$7500/offense).

DRA recommends that the Commission provide the public, including DRA, a minimum of 30 calendar days from the time the renewal application is noticed in the Commission's calendar, to provide comments. This proposed timeframe is consistent with the timeframe for submitting comments on responses and replies to applications, responses to a petition for rulemaking, applications for rehearing, and petitions for modification under the Commission's Rules of Practice and Procedure.²⁵ In making this recommendation, DRA assumes that the renewal application will be provided to DRA at the same time that it is submitted to the Commission. DRA would also support a longer comment period as well, consistent with other parties' comments.²⁶

²⁴ For instance, DRA is attuned to complaints about the increasingly poor, changing, and arbitrary channel placements allotted to some PEG access facilities. *See generally* <http://www.natoa.org/CRS%20PEG%20Report%2010-7-11.pdf>.

²⁵ Commission Rules of Practice and Procedure, Rules 2.6, 6.3, 16.1, 16.4.

²⁶ City of Palm Desert Comments at 1; Media Alliance Comments at 1.

B. Other Parties' Comments That Support DRA's Position

Several parties filed comments that are consistent with DRA's positions. For example, the League of California Cities and the California State Association of Counties ("League of Cities") stated that in order for DIVCA to not conflict with Cable Act's informal renewal process²⁷, ". . . the renewal process under DIVCA must be more than automatic; and the Commission must have the power (as franchising authority) to take those comments into account in determining whether renewal should be granted, denied, or conditioned."²⁸ As the League of California Cities correctly observed, "[t]he key is that there must be 'adequate' opportunity for notice and comment, which necessarily implies that the opportunity must be meaningful, not pro forma."²⁹

The City of Palm Desert also supports a process which would allow an opportunity to comment on the renewal of a franchise. In its comments, the City of Palm Desert reasoned that "in order for the Commission to make an informed decision on the renewal applications it receives, it must ensure that its rules provide an adequate opportunity for local jurisdictions to review and respond substantively to them."³⁰ The City of Palm Desert observed that providing adequate notice and opportunity for comment is important because local jurisdictions address ". . . issues of major importance to local communities [] including customer service, franchise fees, and PEG channel requirements."³¹

²⁷ 47 U.S.C. § 546(h) (Cable Act) provides: "...[n]otwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time."

²⁸ League of Cities Comments at 3.

²⁹ *Id.*

³⁰ City of Palm Desert Comments at 1.

³¹ City of Palm Desert Comments at 2.

Finally, Media Alliance's comments observed that, under the Cable Act³², a formal renewal process requires notice to the public with a comment period.³³ Further, Media Alliance contends that such comments should include among others things, customer service, technical service provision, service rates, Public, Education and Governmental (PEG) access channel provision and any concerns regarding redlining, channel-slamming and/or deceptive sales practices that the Commission monitors.³⁴

DRA supports the comments and positions of the League of Cities, City of Palm Desert and Media Alliance and agrees that, in order for the renewal provisions of DIVCA to be consistent with federal law, the Commission must adopt an adequate notice and comment process.

III. DIVCA RENEWALS

DIVCA requires the Commission to adopt a renewal process that gives the public adequate notice and opportunity for comment. As Verizon stated in its comments:

. . . nothing in federal law requires state franchising authorities to follow a specific renewal process. Further, the federal law permits two types of renewal proceedings but it does not require any particular type of proceeding, and the Commission is free to adopt any process that satisfies DIVCA.³⁵

DRA agrees with Verizon that the Commission has the authority to adopt a franchise renewal process. Under DIVCA, and consistent with federal law, the renewal process may be formal, informal or both. DRA believes that the Commission should adopt a franchise renewal process that satisfies the requirements of DIVCA and the Cable Act by giving the public, including DRA, adequate notice of franchise renewal

³² 47 U.S.C. § 546.

³³ Media Alliance Comments at 1.

³⁴ *Id.*

³⁵ Verizon Comments at 3.

applications and a meaningful opportunity for comment on franchise renewal applications.

IV. RULES IMPLEMENTING DIVCA SHOULD BE APPLIED EQUALLY TO ALL VIDEO SERVICE PROVIDERS

AT&T stated in its comments that federal renewal rules apply only to “cable operators” providing “cable service”. Therefore, AT&T reasoned that it “cannot be compelled to seek renewal . . .” since it is not a “cable operator” providing “cable service” under the Cable Act.³⁶ AT&T claims that because its U-verse service is not a “. . . one-way transmission to subscribers”, it is not a “cable operator” and is therefore not subject to the renewal provisions in the Cable Act.³⁷

DRA disagrees with AT&T’s position. First, whether or not AT&T is a “cable operator” under the Cable Act is irrelevant for purposes of Section 5850 of DIVCA. AT&T does not dispute that the Legislature has jurisdiction over it, and the Legislature may, and in fact, did adopt a renewal process that is consistent with federal law.³⁸

Second, contrary to AT&T’s assertions, AT&T is a telephone company when it provides telephone service; it is a cable operator when it provides cable service. The Cable Act defines “cable operator” as any person or group of persons:

- (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or
- (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;³⁹

The Cable Act defines “cable service” as:

³⁶ AT&T Comments at 16.

³⁷ *Id.* at 17.

³⁸ Section 5850.

³⁹ 47 U.S.C. § 522(5).

- (A) the one-way transmission to subscribers of
 - (i) video programming, or
 - (ii) other programming service, and
- (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;⁴⁰

AT&T claims that the issue of “[w]hether a video-programming service, such as AT&T’s U-verse video service, is a cable service ultimately turns on the meaning of ‘one-way transmission to subscribers.’”⁴¹ AT&T cites to a 2002 FCC Order (Cable Modem Declaratory Ruling)⁴² to support its position that its U-verse service is not a “one-way transmission” of video programming to subscribers. AT&T misconstrues the FCC’s Order.

With regard to the meaning of “one-way transmission”, the FCC stated in the Cable Modem Declaratory Ruling that:

The legislative history indicates that Congress intended the cable service definition “to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under section 621(c) and all other communications services that could be provided over a cable system.” Thus, the definition reflected the traditional view that the one-way delivery of television programs, movies, and sporting events is not a traditional common carrier activity.⁴³

The FCC further reasoned that:

⁴⁰ *Id.* at 522(6).

⁴¹ AT&T Comments at 17.

⁴² Declaratory Ruling and Notice of Proposed Rulemaking, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185 and related matters*, FCC 02-77, ¶ 61 (rel. Mar. 15, 2002) (emphases added) (hereinafter “*Cable Modem Declaratory Ruling*”)

⁴³ Cable Modem Declaratory Ruling, FCC 02-77, ¶ 61, pp. 36-37 (citations omitted).

While “cable service” is defined as the “one-way transmission” of video programming or other programming services, the definition specifically contemplates some subscriber interaction. The definition enacted in 1984 provided for “subscriber interaction, if any, which is required for the selection” of content, so that cable service includes subscribers’ ability to select video programming and information provided in other non-video programming services. . . . Thus, operators offering video programming or non-video information could also offer subscribers the on-line capability to choose the content of interest to them, but not to manipulate, customize or interact with the information on-line.⁴⁴

Thus, as the FCC affirmed, the Cable Act envisioned subscriber interaction with the cable service. AT&T claims that “. . . subscriber interaction that ‘produce[s] a subset of data individually tailored to the subscriber’s request’ would exceed the level of interaction that Congress established for a cable service.”⁴⁵ AT&T misinterprets the FCC’s Cable Modem Declaratory Ruling. The FCC stated that “. . . cable service includes subscribers’ ability to select video programming.”⁴⁶ What is not part of the definition of “cable service” are “. . . services offering a high degree of interactivity, such as offering subscribers the capability for tailoring a video image to a subscriber’s specific requests . . .”⁴⁷ Thus, while cable service includes subscriber interaction with the cable operator to customize video programming, it does not include manipulating the video image of a video program. AT&T’s U-verse service clearly falls under the definition of “cable service” and therefore, AT&T is a “cable operator” as defined by the Cable Act.

Moreover, the criteria and process described in Section 5840 applies to a renewal registration, and the commission may impose additional or different criteria for the renewal process to the extent that the renewal process is consistent with federal law. The Commission is not setting new guidelines, it is seeking to comply with statutory

⁴⁴ *Id.* at ¶ 64, p. 38 (citations omitted).

⁴⁵ AT&T Comment at 17-18 (citation omitted).

⁴⁶ Cable Modem Declaratory Ruling, FCC 02-77, ¶ 64, p. 38 (citations omitted).

⁴⁷ *Id.* at ¶ 64, p. 38.

guidance. Section 5840(c) defines an applicant who seeks to provide video service in this state for which a franchise has not already been issued after January 1, 2008 as “any person or corporation”. DRA interprets this to mean that the rules implementing DIVCA renewal process should apply equally to all video service providers, regardless of whether they claim that they are “cable operators”.

V. CONCLUSION

The Commission should adopt a DIVCA renewal process which applies equally to all video service providers in this state. This process should afford the public, including DRA, adequate notice and an opportunity to comment. The opportunity to comment should include at a minimum customer service, discrimination, PEG access, cross-subsidization, and potential fines for violation. DRA also recommends that the Commission take additional comments on the specific issues on what information franchise renewal applications must contain.

Respectfully submitted,

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