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)

COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON THE STAFF REPORT PROPOSING RULES TO AMEND GENERAL ORDER 169

I. INTRODUCTION

On December 24, 2013, the Assigned Commissioner issued a draft staff report proposing rules to amend General Order (GO) 169, regarding the renewal process for Digital Infrastructure and Video Competition Act of 2006 (DIVCA) franchises. Pursuant to the Scoping Memo issued with the report, the parties may comment on it no later than January 24, 2013. The Office of Ratepayer Advocates (ORA) respectfully recommends that the Commission not follow the draft staff report, because it contains an unfortunately constrained and overly narrow reading of Public Utilities Code Section 5850[1] relating to the DIVCA franchise renewal process. The staff report concludes that no parties are allowed to comment on renewal applications, except as to whether a video service

[1] All statutory references herein are to the Public Utilities Code unless otherwise noted. Section 5850 mandates that the renewal process must mirror the application process in Section 5840.

provider (VSP) seeking to renew its existing franchise is in violation of a final non appealable court order of any provision of DIVCA. This narrow (and incorrect) reading of Section 5850 abrogates the Commission's duty under Section 5840 to determine whether an application is complete or incomplete, and ignores the provisions of Section 5900(k) of DIVCA that specifically authorizes ORA to advocate on behalf of video subscribers *regarding renewal of state-issued franchises*.[2]

To remedy this error, ORA proposes a solution: during the comment period already proposed in the staff report, allow ORA to advocate on behalf of video subscribers by providing ORA an opportunity to comment on the completeness of the application, including whether the VSPs have complied with the requirements of Section 5840. This is entirely consistent with DIVCA, because Section 5840(h)(3) specifically requires that the Commission determine whether the application is incomplete and then to permit the VSP to amend the application to cure any deficiency. DIVCA does not limit parties' comments to the sole issue of whether the VSP has violated a final DIVCA order. To construe it that way is incorrect, and inconsistent with basic rules of statutory construction and with specific provisions of Section 5840, as explained more fully below.

II. THE COMMISSION'S INITIAL DETERMINATION TO BAN PROTESTS OR COMMENTS[3] ON DIVCA FRANCHISE APPLICATIONS WAS UNLAWFUL AND BAD POLICY

ORA respectfully maintains that the Commission made a legal mistake in D.07-03-014, when it determined that Section 5840 did not permit the filing of protests to (or comments on) DIVCA applications. Several parties pointed out the mistake at the

[2] Section 5900(k) states: "The Office of Ratepayer Advocates shall have authority to advocate on behalf of video subscribers regarding renewal of a state-issued franchise…"

[3] The terms "comments" and "protest" are used interchangeably herein. In this context, parties who wish to comment on the renewal application would in all likelihood be raising potential problems with the application, much like a protest. In D.07-03-014 the Commission refers to "protests", although the draft staff report refers to "comments", but they mean the same thing here.

time D.07-03-014 was issued.[4] The Commission's mistake to forbid substantive protests (which is adopted by the report) is both unlawful and bad policy, in violation of the letter and spirit of DIVCA. This mistake is based on a misreading of the timeline for review of applications, and an abrogation of the Commission's duty to do a substantive review of DIVCA franchise applications.[5] Unfortunately, by adopting the Commission's reasoning in D.07-03-014, the staff report perpetuates this mistake and does not allow for substantive comments.

A. Protests are Not Prohibited by DIVCA

Rule 2.6 of the Commission's Rules of Practice generally permit protests to any type of application. It is the Commission's long-standing policy to permit protests to applications, and ORA is unaware of any other analogous situation where the Commission forbids protests.[6] There is no rule or law that states that protests are only permitted where specifically authorized by statute.

D.07-03-014, however, departed from the Commission's normal practice by holding that DIVCA did not specifically authorize protests, thus they must be prohibited. DIVCA does not state that protests are disallowed. As discussed below, one rationale in D.07-03-014 behind this conclusion is that DIVCA did not permit sufficient time for protests.

That DIVCA did not ban protests is implicit in Section 5900(k), which specifically authorizes ORA to "advocate" during the franchise renewal process. It follows that if ORA is not allowed to file a protest (or substantive comments), it is effectively prohibited

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[4] D.07-03-014, p. 203.

[5] As noted below, some areas of DIVCA enforcement are reserved to "local entities", and some are granted to the Commission.

[6] For example, the Commission permits comments on applications for California Advanced Services Funds, even though Section 281 does not specifically provide for a notice and comment period. D.07-12-054, p. 28.

from carrying out its advocacy role. If ORA cannot file a protest, ORA cannot be a party to the proceeding in order to advocate.

B. The Commission Misread The Timeline Provisions Of Section 5840.

In D.07-03-014, the Commission mistakenly determined that it did not have sufficient time under DIVCA to provide a notice and comment period.[7] In fact, there is sufficient time to permit parties to submit substantive comments on the sufficiency of the renewal applications.

Without much explanation, the Commission stated: "Statutory restrictions similarly prevent us from accommodating a protest period during the application process." However, Section 5840 does allow sufficient time to file a protest. The process timeline for applications in Section 5840(h) is as follows:

1. The Commission has 30 days after the filing of an application[8] to review and determine the completeness of the application, and to notify the applicant of its finding. Section 5840(h)(1).
2. If complete, the Commission has 14 days from that finding to issue a franchise. Section 5840(h)(2).
3. If incomplete, the Commission must specify the incomplete items and permit the applicant to amend the application to cure any deficiency. Section 5840(h)(3). *Applicants have no time restriction on the amount of time permitted to amend the application.*
4. After the application is amended, the Commission shall have 30 days from to determine its completeness. Section 5840(h)(3). *There is no requirement that the Commission determine that the amended application is complete after the amendment; it may determine that the amended application is still incomplete.*

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[7] D.07-03-014, p. 87-88. See also, p. 95: "the fact that we have a tightly prescribed time frame to review an application supports the interpretation that no protests are contemplated by DIVCA."

[8] Section 5850 mandates a different due date for the renewal applications, but the timeline in Section 5840 begins based on the filing date of the application. In this case, the date would be when the renewal application is filed.

5. The failure of the Commission to notify the applicant of the completeness or incompleteness of the application before the 44th day after receipt of an application shall be deemed to constitute issuance. Section 5840(h)(4). *So long as the Commission notifies the applicant that the application is incomplete prior to the 44th day after filing, the application is not "deemed" granted.*

Thus, under this process timeline the Commission does in fact have sufficient time to allow interested parties to comment. The timeline clearly provides 30 days for the parties to review and comment on the sufficiency of the application. If the parties raise valid issues, there is a provision for the Commission to notify the applicant of the deficiency, and then the applicant has *an indeterminate amount of time* to rectify the deficiency. The section then provides additional time for the Commission to review the amended application. In Section 5840(h)(3), the Commission has an additional 30 days to determine whether an amended application is complete. So if the application is deemed incomplete, the Commission would have 60 days (30 days to review the application, and another 30 days to review the amendment) to make a final determination. This assumes that the applicant provides its amendment in one day – but in fact, the statute gives the applicant unlimited time to rectify the deficiencies. Thus, the timeline could be extended beyond 60 days depending on the applicant's actions. Moreover, there is no limitation on the number of times that the Commission may determine that the application is incomplete. In other words, if the Commission determines that the amendments are unsatisfactory, it could again notify the applicant that the application is incomplete, and the 30 day time limit would recommence.[9]

Strangely, the Commission seemed to misinterpret Section 5840(h)(4) as providing only 44 days for the entire process. The staff report, without much

[9] Pursuant to D.07-03-014, the Commission has several options if it determines ineligibility, including "rejection of an application, immediate suspension of a state video franchise, and/or issuance of an order to show cause for why a state video franchise should not be deemed invalid." D.07-03-014, page 102 and Conclusion of Law #120.

explanation, seems to adopt this incorrect interpretation.[10] (Nothing in ORA's proposal would affect the timeline for applications deemed complete.) However, Section 5840(h)(4) only applies to the *notification* of the completeness of the application – not to the actual granting of the franchise. That is, so long as the Commission notifies the applicant of the deficiencies within 44 days, the franchise is not "deemed" granted.

Additionally, the staff report appears to believe (similar to D.07-03-014) that the only review possible within the time constraints of Section 5840(h) are non-substantive. That is, the staff report apparently believes that the review for completeness is purely a "box-checking" exercise, without any review or verification of the substance of the information provided in the application. ORA strongly encourages the Commission to take a second look at the timeline provisions of Section 5840(h), which have been misinterpreted.

C. The Commission Is Authorized To Enforce Some Provisions Of DIVCA

In D.07-03-014, another rationale for disallowing protests is that the Commission can do "nothing" to enforce DIVCA, and therefore protests would "accomplish nothing".[11] However, D.07-03-014 is internally inconsistent, because in Ordering Paragraph #11 the Commission acknowledges that it has jurisdiction to enforce DIVCA standards such as no discrimination and no cross-subsidization. ORA points out that the Commission is also empowered to verify a VSP's compliance with provision of PEG channels and consumer protection laws during the renewal application process. (Sections 5840(e)(1)(B)(ii-iv)). D.07-03-014 goes on to state that if an application is found to be ineligible, the Commission can reject the application, suspend the franchise,

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[10] The staff report states: "If the application is complete, the Commission must issue a video franchise to the applicant within 44 days." However, the report does not address the timeline mandated for incomplete applications.

[11] See D.07-03-014, p. 93; "A protest here "would be an idle act" that "could accomplish nothing.""

or issue an order to show cause for why the franchise should not be deemed invalid.[12] Therefore, it does not logically follow that the Commission can do "nothing" to enforce DIVCA. Clearly, the Commission could bring an enforcement action. But during the renewal application process, the Commission is also empowered to determine ineligibility and withhold the franchise, if necessary.

Protests (or substantive comments) on renewal applications would not be a nullity. Interested parties could assist the Commission in pointing out the deficiencies in renewal applications, which could include a variety of topics. The staff report should not have adopted D.07-03-014's prohibition on substantive comments.

D. The Commission Should Fulfill Its Duty To Enforce Anti-Discrimination And Consumer Protection Laws Under DIVCA

It is clear that the Commission intended to be "tough" on DIVCA enforcement. However, by relegating review of applications to a non-substantive, fast-track, "box-checking" exercise, the Commission has failed in its duty to perform a substantive review of DIVCA applications. The Commission has not initiated a single DIVCA enforcement action, and as discussed below, has tied ORA's hands by refusing to accept complaints from ORA for DIVCA violations.

It is simply not good policy to continue to prevent interested parties from providing comments that would point out an applicant's eligibility problems. In fact, D.07-03-014 specifically noted that "such information is relevant to the Commission's review of an application…" Allowing parties an opportunity to present such information in no way violates DIVCA or the intent of D.07-03-014. Nor does it obstruct the goals of DIVCA to increase market competition for any applicant that is in compliance with the law.

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[12] D.07-03-014, p. 102.

In D.07-03-014, the Commission stated: "the Commission fully intends to enforce DIVCA provisions and allow significant public participation in its enforcement proceedings." Among the goals of DIVCA, the Commission noted, is the intent to "Create a fair and level playing field for all market competitors"; to "Promote the widespread access"; and to "Require market participants to comply with all applicable consumer protection laws". Since D.07-03-014, the Commission has done next-to-nothing to fulfill these promises.

The Commission's duties include promulgating rules on franchising (Section 5840); antidiscrimination (Section 5890); reporting (Sections 5920 and 5960); the prohibition against financing video deployment with rate increases for stand-alone, residential, primary line, basic telephone services (Sections 5940 and 5950); and regulatory fees (Section 401, Sections 440-444, Section 5840).[13] Allowing parties to provide comments on the applicant's compliance with these requirements would directly assist the Commission in determining the eligibility of the applicant and the completeness of the application.

The applicant's compliance with these requirements is supposed to be included with the application. Section 5840(e) specifically requires affidavits attesting that the applicant:

1. Has filed all required FCC forms. Section 5840(e)(1)(A).
2. Agrees to comply with all federal and state statutes, rules, and regulations. Section 5840(e)(1)(B).
3. Will not discriminate in the provision of video or cable services as provided in Section 5890. Section 5840(e)(1)(B)(i).
4. Will abide by all applicable consumer protection laws and rules as provided in Section 5900. Section 5840(e)(1)(B)(ii).
5. Will remit the fee required by subdivision (a) of Section 5860 to the local entity. Section 5840(e)(1)(B)(iii).

[13] D.07-03-014, Conclusion of Law #11.

6. Will provide PEG channels and the required funding as required by Section 5870. Section 5840(e)(1)(B)(iv).
7. Agrees to comply with all lawful city, county, or city and county regulations regarding the time, place, and manner of using the public rights-of-way. Section 5840(e)(1)(C).

As previously stated, nothing in Section 5840 prevents interested parties from commenting on, or investigating and presenting evidence contrary to, the applicant's compliance with these provisions. There is no provision in DIVCA that limits the parties' comments on these issues. The staff report does not explain the legal justification behind its limitation of parties' comments to merely whether the applicant is in violation of a final DIVCA order. As mentioned above, D.07-03-014 found that such information is relevant to the Commission's review, but then confusingly held that protests are a nullity and there is insufficient time for them – both patently wrong. It is bad policy for the Commission to prevent parties from submitting such information to the Commission in the form of comments on an application. If the Commission intends to fulfill its promise to vigorously enforce DIVCA, it should begin by permitting substantive review of the renewal applications.

III. SECTION 5900(K) SHOULD BE GIVEN SOME LEGAL WEIGHT

The staff report essentially reads Section 5900(k) out of existence. Apparently the staff report overlooks[14] Section 5900(k) because D.07-03-014 dismissed it out-of-hand. D.07-03-014 expressly found that Section 5900(k) gave ORA no "special right to protest", noting that "no part of DIVCA gives DRA the express right to advocate regarding a state video franchise application."[15] ORA disagrees with this interpretation. Considering that Section 5900(k) expressly states ORA may "advocate" for consumers

[14] ORA's Opening Comments made extensive references to Section 5900(k), which the staff report failed to mention.

[15] D.07-03-014, p. 96.

"regarding renewal of a state-issued franchise", the Commission should reconsider its decision to give no weight to Section 5900(k) in the past.

Section 5900(k) reads:

> The Office of Ratepayer Advocates shall have authority to advocate on behalf of video subscribers *regarding renewal of a state-issued franchise* and enforcement of this section, and Sections 5890 and 5950. For this purpose, the office shall have access to any information in the possession of the commission subject to all restrictions on disclosure of that information that are applicable to the commission. (Emphasis added.)

For this section to have any meaning, ORA must have the opportunity to file substantive comments on the franchise renewal applications.

The staff report focuses narrowly on Section 5850, which states that the Commission cannot impose any additional or different criteria than Section 5840, without considering whether any other provisions of DIVCA might affect the application renewal process. Section 5900(k) was clearly intended to give ORA the ability to "advocate on behalf of video subscribers", not merely at some undefined later date, *but during the renewal of the franchise process*. Those are the plain words used by Section 5900(k), but ignored by the staff report.

A basic rule of statutory construction is that statutes (and provisions within statutes) should not be read in a way that renders them meaningless. However, by narrowly focusing on Section 5850(a), the staff report errs by giving no weight to (in fact totally omitting any reference to) Section 5900(k). Although not explained, the report appears to imply that Section 5900(k) somehow raises additional or different criteria than Section 5840, and thus may not be considered. This interpretation cannot be correct, however, because Section 5840 does not state that ORA may not participate in the proceeding, nor does it disallow protests by interested parties. Simply put, there is no conflict between Section 5840 and Section 5900(k). Allowing ORA to comment on the sufficiency of the renewal application pursuant to Section 5850 does not add new criteria

to the application process, because there is not (and never was) a ban on allowing parties to comment.[16]

In fact, D.07-03-014 expressly recognized that parties may provide information to the Commission regarding the sufficiency of the application under Section 5840, when it stated: "we note that any party at any time can bring us information that demonstrates an applicant, pursuant to Public Utilities Code Section 5840 or 5930, is ineligible to obtain a state video franchise. Such information is relevant to the Commission's review of an application, and providing it does not constitute a protest to an application."[17]

A. The Commission Erred in Banning ORA From Filing Complaints Alleging DIVCA Violations

It is difficult to understand the appropriate time for ORA to "advocate on behalf of video subscribers regarding renewal of a state-issued franchise" if it is not during the renewal process. According to D.07-03-014, ORA may not file a protest. Compounding the problem, D.07-03-014 also states that ORA may not file a complaint against a VSP under DIVCA.[18] According to D.07-03-014, ORA's role is limited to participating in a Commission-initiated proceeding[19], and there have been no such proceedings to date. The rationale for a ban on complaints, although not altogether clear, appears to be that the Commission is not empowered to enforce DIVCA.[20] Again, this rationale makes no sense because the Commission elsewhere acknowledges that it is authorized to enforce certain provisions of DIVCA. It is as if two different people wrote D.07-03-014, and did not check what the other had written.

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[16] As noted by TURN in 2007, it was an "abuse of discretion" for the Commission to determine that protests were disallowed under DIVCA. D.07-03-014, p. 90.

[17] D.07-03-014, p. 102.

[18] D.07-03-014 states at page 201: "We, therefore, will not allow DRA to file complaints concerning the actions of state video franchise holders."

[19] Id., p. 202.

[20] At D.07-03-014: "DIVCA expressly gives local government entities, not DRA, the right to file complaints…"

Thus, the Commission has prevented ORA from performing its role under Section 5900(k). The staff report had an opportunity to rectify the Commission's mistakes, but again there is no weight given to Section 5900(k). ORA respectfully requests that the Commission not follow the staff report.

IV. WHAT IS THE COMMISSION AUTHORIZED TO DO IF AN APPLICATION IS DEEMED SUBSTANTIVELY INCOMPLETE?

It is simply not true that the Commission's powers to enforce Sections 5850 and 5840 are totally circumscribed. Section 5840 does not mandate a "box-checking" application process. Nothing in Section 5840 limits the Commission from conducting an investigation to verify that the information in the application is true and correct. In fact, the Commission is required to conduct such an investigation, within the timeline provided by Section 5840(h). It is an incorrect interpretation of the statute to say that the Commission must grant the application no later than 44 days after the application is filed, regardless of whether the application is deemed incomplete.

So, what is the Commission empowered to do? First and foremost, it must review the application and determine if it is complete. If the Commission determines an application is incomplete, it must notify the applicant of the deficiencies and permit the applicant to cure them. Once the Commission receives the amended application, it has another 30 days to investigate the amendments. There is no limitation on the number of times the Commission can notify the applicant that the application remains incomplete.

Nothing in DIVCA requires the Commission to grant a franchise if the applicant is ineligible. If ultimately the Commission determines that the applicant cannot satisfy the application requirements, the Commission has several options as described in D.07-03-014. For example, it can reject the application.[21] It can immediately suspend

[21] D.07-03-014, p. 102.

the franchise.[22] It can issue an order to show cause for why the franchise should not be deemed invalid.[23]

If the Commission merely reviews applications to see if they contain the necessary paperwork (or has "checked" the appropriate box), but does nothing to verify the accuracy or the validity of the statements therein, the Commission has failed its duties under the law and failed to live up to the promises made in D.07-03-014.

V. THE COMMISSION SHOULD RECTIFY ITS PRIOR MISTAKE AND PERMIT REVIEW OF DIVCA FRANCHISE RENEWAL APPLICATIONS

ORA recommends a simple solution – allow interested parties to comment on the completeness and veracity of the renewal application. The staff report already recommends a notice and comment period. Inexplicably, the staff report limits the comments to one very narrow area – whether there are violations of non appealable final orders against the applicant. However, Section 5850 contains no such prescription. In fact, Section 5850 specifically requires the Commission to impose the same requirements as Section 5840. It follows that the comments should be permitted to include a substantive review of the applicant's compliance with Section 5840. This includes verification of compliance with: all federal and state statutes, rules, and regulations (Section 5840(e)(1)(B)); non-discrimination(Section 5840(e)(1)(B)(i)); consumer protection laws (Section 5840(e)(1)(B)(ii)); provision of PEG channels (Section 5840(e)(1)(B)(iv)); and compliance with all lawful city, county, or city and county regulations regarding the time, place, and manner of using the public rights-of-way (Section 5840(e)(1)(C)).

Even if one argues that *enforcement* of certain provisions is reserved to "local entities", information regarding compliance can at least be considered in the application

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[22] Ibid.

[23] Ibid.

review process. Dozens of local entities intervened in R.06-10-005 and expressed a desire to file comments in response to DIVCA applications.[24] Allowing comments from cities could assist the Commission in determining whether local entities have engaged in enforcement of provisions over which the Commission does not have authority to enforce. DIVCA reserves enforcement authority over certain provisions to local entities, but it does not follow that the Commission may not consider any information whatsoever concerning those provisions. In fact, Section 5840 mandates that VSPs provide affidavits of compliance with the application – logically the Commission should be investigating and weighing that information when determining eligibility.

The Commission should use the parties' comments to assist in determining whether the application is complete in a substantive sense. If it is determined to be incomplete, the Commission must notify the applicant, who then has an indefinite amount of time to cure. After the application is amended, the Commission has 30 days to evaluate the veracity and completeness of the amendment. If the amendment is insufficient and the application is deemed to be ineligible, the Commission may reject the application. If there is a dispute of fact as to whether the application is complete, the Commission could set the matter for hearing.

Providing interested parties an opportunity to do discovery and provide comments on the completeness of the application could assist the Commission in conducting a meaningful review. A meaningful review of DIVCA applications would fulfill the Commission's promises made in 2007, and enhance consumer protection in cable services. Nothing in DIVCA requires the Commission to merely "check the box" and conduct no meaningful or substantive review of whether the information provided in the application is true and accurate.

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[24] D.07-03-014, pp. 91-92.

VI. CONCLUSION

In this proceeding, the Commission has an opportunity to revisit the narrow and overly limited findings in D.07-03-014, which mistakenly (and illegally) banned all protests or comments on DIVCA applications and held that the Commission's review is so circumscribed that it could not review the accuracy or veracity of DIVCA applications. Unfortunately, this relegated the Commission's review to merely a "box-checking" exercise to determine whether the application was "complete", without investigating whether the applicant complied with the substantive provisions of DIVCA.

The staff report makes one, tiny step towards rectifying the legal mistakes made in the past, by allowing comments on the renewal applications. But the staff report inexplicably limits the comments to one minor issue, and bans any substantive comments on the renewal application itself. Nothing in Section 5840 prohibits a substantive review. D.07-03-014 was flatly wrong on this, and the staff report unfortunately perpetuates this mistake.

Respectfully submitted,

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