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 OFFICE OF RATEPAYER ADVOCATES ON STAFF REPORT

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I. INTRODUCTION

The Office of Ratepayer Advocates (ORA) submits these reply comments in response to the comments on the staff report by other parties. AT&T, CCTA, and Verizon filed opening comments in support of the staff report. The League of Cities[1] filed opening comments similar to ORA's recommendations.

AT&T, CCTA, and Verizon's opening comments support a streamlined, expedited franchise renewal process wherein the Commission performs no meaningful or substantive review of the renewal applications. The League of Cities, a group that has collectively "extensive familiarity with cable and video franchising requirements and processes under state and federal law", supports ORA's position that the Commission should provide the opportunity to parties to engage in meaningful comment on renewal

[1] The League of Cities consists of the League of California Cities, the California State Association of Counties, the Cities of Long Beach and Palm Desert, and the County of Los Angeles and the Sacramento Metropolitan Cable Television Commission. The League's members include the "vast majority of the cities and counties in the State of California."

applications.[2] The League of Cities notes that "the Staff Report does not propose a process that would provide for adequate notice and comment"; and that ""adequate" necessarily implies that the opportunity must be meaningful, not *pro forma*."[3] The League of Cities correctly points out that the staff report ignores the beginning of Public Utilities Code Section 5850(b)[4] which begins "Except as provided in this section…" The Commission should give Section 5850(b) its full meaning, which includes other provisions of the Digital Infrastructure and Video Competition Act of 2006[5] (DIVCA). For example, Section 5900(k) expressly allows ORA to advocate on behalf of cable. subscribers during the franchise *renewal* process, which the staff report fails to mention.

AT&T, CCTA, and Verizon agree with the staff report, basing their comments on the interpretation of DIVCA as set forth in D.07-03-014. As stated in ORA's and the League of Cities' opening comments, the Commission previously made mistaken policy choices to disallow protests to cable franchise applications. However, AT&T, CCTA, and Verizon's (very brief) comments do not make a compelling case that the Commission should continue to perform a meaningless review during the franchise renewal process.

II. RECEIPT AND TIMING OF THE RENEWAL APPLICATIONS

The League of Cities does not oppose the staff report's recommendation that renewal applications be submitted 3 months prior to the 10-year expiration date.[6]

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[2] As defined in ORA's Opening Comments on the Staff Report (p.14), meaningful comments would include (but not be limited to) a substantive review of the applicant's compliance with Section 5840. This includes verification of compliance with: 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)).

[3] Comments Of The League Of California Cities, et al. (League of Cities), p. 5.

[4] Statutory references herein are to the Public Utilities Code unless otherwise noted.

[5] Public Utilities Code Sections 5800, *et seq*.

[6] League of Cities, p. 4.

However, the League of Cities also points out and ORA agrees, that the staff report errs in that it does not specify the earliest date upon which a renewal application may be received. Allowing video service providers (VSPs) to submit applications "at any time" could be problematic. Commission staff may not be prepared to begin processing applications years in advance. There may be DIVCA proceedings that are underway elsewhere, and final resolution may not yet have occurred. Section 5850(a) provides that DIVCA franchises are valid for ten years, after which the holder may apply for renewal. The intent is clear that the Legislature did not mean for franchises to be renewed every 8 years. Thus it would be reasonable for the Commission to limit renewals to every 10 years.

While DIVCA does not specifically state a timeframe during which applications must be received, the Commission's authority under Section 701 permits it to set a reasonable timeframe for receipt of applications. ORA agrees with the League of Cities that the rules should include a date before which a renewal application will not be considered by the Commission.[7] ORA recommends a deadline of 6 months before which applications will not be accepted, prior to the deadline for renewal. If the Commission requires that renewal applications be received no later than 3 months prior to the deadline, this provides a 3 month window of time for VSPs to submit their applications. This is a reasonable timeframe, although the Commission could consider a different one. Section 5850(a) is silent on this issue.

III. NOTICE AND COMMENT PERIOD

The League of Cities agrees that the staff report "correctly recognizes that the Commission's existing rules for processing applications must allow for adequate notice and the opportunity to comment to be consistent with the requirements of 47 U.S.C. §

[7] *Ibid*.

546(h)."[8] However, the League of Cities points out that the staff report does not allow for adequate notice and comment, for two reasons. First, the notice and comment period is too abbreviated to allow for a "genuine interchange" of participation. Second, "meaningful opportunity to comment requires some opportunity to address" matters such as whether the VSPs "actually have been responsive in the past" to the terms and conditions of the franchise to ensure that operators are being, and will continue to be, responsive to local needs.

The League of Cities disagrees with the staff report's conclusion that comments must be limited to whether the video service provider is in violation of a final nonappealable court order issued pursuant to DIVCA.[9] The League of Cities notes and ORA agrees that "Under federal law, the right to comment is a right to comment on the proposal for renewal *in toto*, not discrete elements or issues." Federal law contains no prohibition against raising other issues that may be pertinent to the renewal application. DIVCA also contains no prohibition on protests/comments, or raising substantive issues during the franchise renewal process. Section 5850(d) requires that the Commission consider whether a VSP is in violation of a final nonappealable court order under DIVCA, but the staff report mistakenly concludes that therefore this is the *only* thing the Commission may consider. Section 5850(d) contains no such limitation.

The League of Cities also correctly points out that the staff report does not allow sufficient time for adequate notice and comment. ORA agrees, because the proposed timeline is applicable to comments that are limited to only whether there is a violation of a final nonappealable court order. If the Commission permits meaningful comments on renewal applications, the proposed timeline is too short. The Commission would need, in that event, to reconsider the proposed timeline. ORA points out that the timeline in

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[8] *Ibid*.

[9] *Id*., p. 6.

Section 5840(h)(1) permits the Commission to consider the renewal applications for 30 days. This is sufficient time for the Commission to receive protests or comments. If the Commission deems the application incomplete, it must provide an opportunity for the applicant to amend the application, under Section 5840(h)(3). The statute does not specify how much time the applicant has to amend the application. After receipt of the amendment, the Commission has an additional 30 days to review the amended application. Pursuant to Section 701, the Commission has the authority to resolve factual disputes by setting the matter for an evidentiary hearing. Section 5820(a) provides further authority to the Commission, by providing that nothing "precludes the state from amending the provisions that establish the terms and conditions of the franchise".

A. The Commission's Powers To Review Franchise Renewal Applications

The League of Cities correctly expresses concern that the staff report mistakenly finds that "under DIVCA, a violation of a final nonappealable court order is the only basis for denying an application for renewal."[10] Section 5850(d) is not the sole basis on which the Commission may deny an application.

It is clear that Section 5850(d) is not the sole basis to deny an application. Section 5850(b) expressly provides that the commission "shall" impose the criteria in Section 5840, which includes verification that the VSP has done the following: filed all required FCC forms (Section 5840(e)(1)(A)); complied with all federal and state statutes, rules, and regulations (Section 5840(e)(1)(B)); not discriminated in the provision of video or cable services (Section 5840(e)(1)(B)(i)); abided by all applicable consumer protection laws and rules (Section 5840(e)(1)(B)(ii)); remitted the fees required by subdivision (a) of Section 5860 to the local entity (Section 5840(e)(1)(B)(iii)); provided PEG channels and the required funding (Section 5840(e)(1)(B)(iv)); and complied with all lawful city,

[10] League of Cities, p. 8.

county, or city and county regulations regarding the time, place, and manner of using the public rights-of-way (Section 5840(e)(1)(C)). It is clear that if the applicant fails to do these things, the application is incomplete. While DIVCA does not expressly state an application may be denied, under Section 701 the Commission has the authority to deny an application if it determines that an applicant is ineligible.[11] Clearly, the Legislature did not intend that the Commission grant licenses when the application is incomplete for reasons other than Section 5850(d).

The League of Cities also points that if Section 5850(d) is the sole basis to deny an application, then the phrase "except as provided in this section" in Section 5850(b) has no meaning.[12] ORA agrees. The Commission's powers to review an application are not limited solely to whether the applicant has a violation of a final nonappealable court order. The staff report ignores the findings in D.07-03-014, Ordering Paragraph #11, where the Commission acknowledges that it has jurisdiction to enforce DIVCA standards such as no discrimination and no cross-subsidization. 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). It is simply not logical, nor good policy, to conclude that while the Commission has authority over these areas, the Commission is barred from considering them during the renewal process. The phrase "except as provided in this section" should be interpreted as giving the Commission the authority to consider any DIVCA violations.

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[11] In D.07-03-014, the Commission held that it 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.

[12] League of Cities, p. 8.

It is important to note that local entities under DIVCA have an important role to play in reviewing operator performance.[13] Some parts of DIVCA, such as consumer protection and customer service standards (Section 5900), and PEG channels (Section 5870) vest primary authority to enforce in the local entities. However, the League of Cities notes that VSPs have generally been unwilling to respond to requests for information that would allow for ongoing review of performance, or have simply applied the law as they see fit notwithstanding specific rulings by the Commission.[14] Nothing in DIVCA prohibits local entities from raising these issues during the franchise renewal process, and good policy dictates that they should be allowed to do so.

B. No Additional Criteria Proposed

Section 5850(b) draws a distinction between "process" and "criteria". Section 5850(b) states that the process and criteria described in Section 5840 shall apply to renewal applications; however, Section 5850(b) states that only "additional and different *criteria*" (emphasis added) are prohibited. This distinction is important because process and criteria have materially different meanings. "Process" is "a series of actions or steps taken in order to achieve a particular end," while "criteria" means "a principle or standard by which something may be judged or decided".[15] Thus, there is no prohibition in Section 5850 against changing the process for renewal applications.

AT&T, CCTA, and Verizon conflate the two terms. For example, AT&T states "DIVCA requires that the renewal process be no more burdensome than the initial application process."[16] Verizon states "The renewal application process shall be the same

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[13] *Id*., p. 10.

[14] *Ibid*.

[15] Google dictionary.

[16] AT&T Comments, p. 1.

as the initial application process…"[17] However, Section 5850(b) does not state that the process for renewing franchises must not be different from the process created by Section 5840 (as interpreted by D.07-03-014). Instead, Section 5850(b) prohibits new or additional criteria, which is different. AT&T and Verizon ignore the important difference between the two terms.

This interpretation harmonizes Section 5850(b) with Section 5900(k), which allows ORA to advocate for video subscribers during the renewal process. Allowing ORA the ability to file meaningful comments that address the substantive areas in which the Commission has jurisdiction, does not add new "criteria"; it merely alters the "process" as relating to new applications described in Section 5840, as interpreted by D.07-03-014 and followed by the staff report. Nothing in DIVCA prevents the Commission from altering the process for renewal applications; in fact, Section 5900(k) appears to require it.

IV. CONCLUSION

The opening comments of the League of Cities correctly point out that the staff report is not consistent with certain provisions of DIVCA nor federal law, which permits meaningful comments on cable franchise applications. To be consistent with federal law, and to give meaning to other provisions of DIVCA such as Section 5900(k), the Commission should allow parties to comment on renewal applications relating to issues within the Commission's jurisdiction.

[17] Verizon Comments, p. 1.

Respectfully submitted,

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