BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Rulemaking for Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	Rulemaking 06-10-005

OPENING COMMENTS OF THE COUNTY OF LOS ANGELES, CALIFORNIA, THE CITY OF LOS ANGELES, CALIFORNIA, AND THE CITY OF CARLSBAD, CALIFORNIA ON THE PROPOSED DECISION ADOPTING A GENERAL ORDER AND PROCEDURES TO IMPLEMENT THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006

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The County of Los Angeles, California, the City of Los Angeles, California, and the City of Carlsbad, California (sometimes collectively referred to herein as the "Joint Responders") respectfully submit the following comments to the Proposed Decision Adopting a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA").

I. DIVCA DOES NOT ESTABLISH THE PUC AS THE SOLE FRANCHISING AUTHORITY FOR CABLE FRANCHISING IN CALIFORNIA

The Proposed Decision states that "[a]though a locality may renew an incumbent cable operator's franchise prior to January 2, 2008, the Commission, after that date, is the only government entity that may grant a video service provider a franchise to operate within California." (PD, 9-10). This statement appears to be based on an erroneous reading of the legislation, and exceeds the Commission's authority on two counts: (1) there is nothing in DIVCA which restricts a local entity and an incumbent cable operator from renewing the operator's franchise after January 2, 2008; and (2) DIVCA grants the PUC exclusive franchising authority after January 2 only for operators who have never held a franchise in the area to be served prior to that date.

In support of its conclusion, the Proposed Decision cites to section 5930(b) of DIVCA, which provides:

> When an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, the local entity may extend that franchise on the same terms and conditions through January 2, 2008.

(Proposed Order, p. 9). However, this provision does not deal with franchise *renewals*, it deals with franchise *extensions*. Extensions and renewals are two completely different concepts. An extension, as the term suggests, does not involve the granting of a new franchise, it involves extending an existing franchise beyond its original expiration date. Conversely, a renewal, which is governed by the franchise renewal provisions of the federal Cable Act, 47 U.S.C. Section 546, involves the grant of a new franchise. Thus, Section 5930(b), which grants local entities the option to extend a franchise through the date in which an incumbent cable operator may have an operative state franchise, has nothing to do with the authority of a local entity and an incumbent cable operator to renew a cable franchise either before or after January 2, 2008.

The Proposed Order points to Section 5840(a) for further support, stating that this section, read in conjunction with 5840(c), "clearly establishes that the Commission is intended to be the state's sole franchising authority.'" (Proposed Order, p 10, fn 21). However, a closer examination of the text of these two provisions establishes the opposite.

Section 5840(a) provides:

> The commission is the sole franchising authority for a *state franchise to provide video service under this division*. Neither the commission nor any local franchising entity or other local entity of the state may require *a holder of a state franchise* to obtain a separate franchise or otherwise impose any requirement on any *holder of a state franchise*. Section 53066, 53066.01, 53066.2, and 53066.3

> of the Government Code shall not apply *to holders of a state franchise.* (emphasis added).

It is clear from the plain language of this provision that the PUC is the sole franchise authority for state franchises granted *under Division 2.5 of the Public Utilities Code* – DIVCA. It is also clear that the Legislature did not, by this language or elsewhere in DIVCA, make the PUC the sole franchise authority for all cable franchises, or there would have been no reason for the repeated qualifying phrases italicized in the quoted passage. Significantly, although the Legislature, in Section 5840, makes it clear that provisions of the Government Code which govern local cable franchising authority ("Sections 53066, 53066.01, 53066.2 and 53055.3") do not apply to *holders of a state franchise*, the Legislature did not repeal these Government Code provisions in DIVCA. If the Legislature had intended for DIVCA to completely replace local franchising, it would have repealed these Government Code provisions – provisions of which the Legislature was obviously cognizant– rather than merely exempting state franchise holders from them.

Nor does Section 5840(c) support the PUC's conclusion. That section provides, in relevant part:

> Any person or corporation who seeks to provide video service in this state *for which a franchise has not already been issued,* after January 1, 2008, shall file an application for a state franchise with the commission.

The Proposed Decision's erroneous reading of this section – that the PUC is the sole franchising authority after January 1, 2008, thus local governments and incumbent cable operators may not renew local franchises after that date – renders the inclusion of the clause "for which a franchise has not already been issued" superfluous. If the Legislature's intent was as the Proposed Decision concludes, the Legislature would not have included the limiting language.

Section 5849(a) and 5840(c), read together, establish that new entrants – those who seek to provide video service in a location for which a franchise has not already been issued – have a transition period, until January 2, 2008, in which they can either seek a local franchise or obtain a state franchise. After January 2, 2008, such new entrants may only obtain a state franchise. However, these sections do not restrict an incumbent cable operator from obtaining a local franchise after January 2, 2008 in an area where a franchise has already been issued to it, nor do they prohibit a local entity and an incumbent from renewing a local franchise either before or after that date.[1] As such, the Proposed Decision overstates the PUC's authority. The conclusion of the Proposed Decision should be modified to be consistent with DIVCA.

II. DIVCA DOES NOT GRANT THE PUC AUTHORITY TO GRANT OR ORDER AUTOMATIC EXTENSIONS OF LOCAL FRANCHISES

In opening comments to the Order Instituting Rulemaking (OIR) in this proceeding filed by the County of Los Angeles, as well as reply comments filed jointly by the County, the City of Los Angeles, and the City of Carlsbad, Joint Responders extensively discuss the issue of DIVCA's grant of authority to local entities, rather than the PUC, to extend until January 2, 2008 local franchises which are expired or will expire prior to that date. See Opening Comments of the County of Los Angeles, pp. 3-4, 6-7; Reply Comments of the County of Los Angeles, City of Los Angeles, and City of Carlsbad, pp. 2-5. Consistent with PUC Procedural Rule 14.3(c), Joint Respondents will not reargue those positions here. However, Joint Respondents must address the erroneous assumptions of fact underlying the Proposed Decision's interpretation of Section 5930(b).

Section 5930(b) provides:

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[1] Other provisions of DIVCA support this analysis. For example, Section 5840(o), under specified conditions, "entitles" an incumbent cable operator to abrogate its local franchise and seek a state franchise, but it does not require the incumbent to do so. Similarly, Section 5930, under specified conditions, permits, but does not require, a local entity to force incumbent cable operators to seek a state franchise.

> When an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, *the local entity may extend* that franchise on the same terms and conditions through January 2, 2008. A state franchise issued to any incumbent cable operator shall not become operative prior to January 2, 2008. Pub. Util. Code, § 5930(b) (emphasis added).

As discussed in the foregoing section, Section 5930(b), by its plain language, sets forth a *local entity's* authority to extend a local franchise that is expired or will expire before a state franchise issued to the incumbent cable operator becomes operative. Section 5930(b) does not deal with the issue of franchise renewals in any respect. The Proposed Decision seems to acknowledge this fact (Proposed Decision, p. 18: "Pubic Utilities Code § 5930(b), however, does not provide us clear direction on how to treat local franchise renewals."). However, the Proposed Decision nevertheless proceeds with an analysis which attempts to explain why it is choosing to ignore the Legislature's clear use of the permissive word "may" in this section. The analysis, however, appears to be based in large part on the erroneous notion that Section 5930(b) addresses franchise *renewals* rather than short-term franchise *extensions*.

The Proposed Decision starts by weighing the possibility that the Legislature's use of the word "may" could mean that "the Legislature gives the local franchising authority discretion regarding renewal of a local franchise." (Proposed Decision, p. 18). The Proposed Decision weighs this against the possibility that "the Legislature recognizes that an incumbent cable operator may not want to renew its local franchise." (*Id.*) The Proposed Decision then reasons:

> If the Legislature instead replaced "may" with 'shall," the statute would provide that "local entity shall extend [a] franchise – even if the incumbent cable operator that is a party to the franchise wants to cease offering service. Forcing an incumbent cable operator to continue offering service against its will would make little sense.

(*Id.*)

This reasoning misses the mark in several respects. First, a local entity cannot force an incumbent cable operator to renew a franchise against its will, under Section 5930(b) or

otherwise. The federal Cable Act provides two separate procedures by which a cable franchise can be renewed. 47 U.S.C. Section 546(a) through (g) sets forth a set of detailed procedures for an administrative renewal process generally known as the "formal process." 47 U.S.C. Section 546(h) provides an alternative means of franchise renewal. Under this provision – commonly known as the "informal process" – the local franchising authority and the cable operator generally reach a negotiated agreement on the terms and conditions of a franchise renewal. A common component of both the informal and formal renewal processes is the incumbent cable operator's desire to renew its franchise. In the formal process, the incumbent cable operator seeks renewal by requesting that the local franchising entity commence administrative renewal proceedings; in the informal process, the incumbent cable operator negotiates a franchise renewal with the local entity. Thus, it seems unlikely that the Legislature was concerned about the possibility that a local entity, exercising its authority under Section 5930, could somehow renew an expired or expiring local franchise against the incumbent cable operator's will.

Second, as discussed earlier, a local entity that exercises its authority under Section 5930(b) is in fact not *renewing* the cable operator's franchise at all. The local entity is *extending* that franchise. And by the by the plain language of the statute it is extending the franchise only until January 2, 2008. It is difficult to imagine a situation where such a short-term extension would have the effect of "forcing a cable operator to offer service against its will." Further, the statute requires that a local entity extending an incumbent cable operator's expired or expiring franchise extend it "*on the same terms and conditions* through January 2, 2008." Thus, even if Section 5930(b) could be construed to grant the PUC authority to order automatic extensions – notwithstanding the plain language granting permissive authority to local entities – an incumbent operator seeking an extension under this section would still be required to continue providing the

service required under the local cable franchise until January 2, 2008, even in the unlikely event that it wished to "cease operating service."

Third, it seems apparent that if the Legislature had intended to say "shall" instead of "may" in Section 5830(b), it would have done so. The provisions of DIVCA that the Proposed Decision references in support of its conclusion demonstrate this point. (See Proposed Decision, p.19, n.51 and corresponding text.)

The Proposed Decision states elsewhere that the PUC shall not adopt proposals that fall outside the scope of its statutory authority. (*See, e.g.*, Proposed Decision, p. 4.) The PUC has no authority under DIVCA to grant extensions of local franchises, allow incumbent cable operators to unilaterally extend their franchises, or require local entities to grant such extensions. The Proposed Decision should be modified to remove these provisions.

III. THE PUC SHOULD ENSURE THAT LOCAL ENTITIES CAN EFFECTIVLY ENFORCE APPLICABLE PROVISIONS OF DIVCA

In discussing the reasons for backing off the OIR proposal to limit the number of affiliates of one company which could hold a state franchise, the Proposed Decision notes that the goal of that proposal was effective enforcement of DIVCA.

> Without such restrictions, we feared that it would be difficult, if not impossible, for the Commission to monitor and enforce statutory provisions when a single company has multiple communications subsidiaries or affiliates.

(Proposed Decision, p. 31). The Proposed Decision acknowledges that these concerns were "validated" by the franchising experience of the Joint Responders (*Id.*), and concludes that "Commission Action is necessary to ensure enforcement of statutory provisions regarding the cross-subsidization prohibition, build-out requirements, and reporting obligations." (Proposed Decision, p. 35). However, in crafting its "narrowly tailored" solution, the Proposed Decision ignores the fact that the PUC is not the only entity charged with enforcing the provisions of

DIVCA. The Legislature left to local entities enforcement authority over other areas of DIVCA, such as PEG, franchise fees, consumer protection and customer service, and rights-of-way management. Joint Responders believe the Legislature, in authorizing the PUC to "prohibit the holding of multiple franchises through separate subsidiaries or affiliates" (Pub. Util. C. Section 5040(f)), recognized the potential enforcement difficulties not only for the PUC, but for local entities as well. However, the Proposed Decision's "application affidavit" proposal does nothing to ensure effective enforcement by local entities.

For the reasons set forth in Reply Comments to the OIR (Reply Comments of the County of Los Angeles, City of Los Angeles, and City of Carlsbad, pp. 5-8), Joint Responders maintain that the single affiliate rule is the best way to ensure effective enforcement by both the PUC and local entities. However, if the PUC is to adopt the application affidavit approach set forth in the Proposed Decision, then it is imperative that the application affidavit be expanded to include protections for local entities. The affidavit should include a provision which requires an applicant to attest that a single identifiable entity within a family of companies – one with verifiable assets (as opposed to a holding company organized only to hold the franchise for tax purposes) – organized in the State of California, assumes full responsibility for the applicant's performance of *all* of its obligations under DIVCA and all other applicable local, state, and federal laws. Further, the applicant must attest that the responsible entity shall accept service of process, and shall submit to the jurisdiction of California courts.

These provisions, like the Proposed Decision's application affidavit proposals, are narrowly tailored. They are not a perfect solution to the difficulties local entities will face in enforcing DIVCA in light of the fact that, unlike local franchises, these state authorizations make traditional contractual, non-renewal, and revocation remedies unavailable. Indeed, as pointed

out earlier, the only real enforcement mechanism available to local entities under DIVCA is litigation. Even the penalty provisions available to local entities under DIVCA – for violations of customer service and consumer protection standards (Pub. Util. Code 5900) – are only enforceable by a local entity in the courts.[2] Accordingly, the Proposed Decision should be modified to include an application affidavit that helps ensure that local entities, as well the PUC, can effectively enforce the applicable provisions of DIVCA.

CONCLUSION

Joint Responders urge the PUC to modify the Proposed Decision and General Order to eliminate all references to the erroneous conclusion that the PUC is the sole franchising authority in the state of California, and any reference which restricts a local entity and an incumbent cable operator's authority under the Government Code and applicable federal law to continue to renew local franchises beyond January 2, 2008. The Proposed Decision and General Order should be further modified to clarify that the PUC is the sole franchise authority for state franchises, and that after January 1, 2008, any person or corporation wishing to provide video service in the state for which a franchise has not already been granted shall obtain a state franchise.

The Proposed Decision's conclusion that the PUC has the authority to grant automatic extensions for franchises that have expired or will expire prior to January 2, 2008 is not consistent with the language of the statute, and represents an impermissible expansion of the authority granted to the PUC by the Legislature under DIVCA. Any references to franchise extensions for incumbent cable operators should be consistent with the plain language of the

[2] The Proposed Decision states that the PUC "only will consider whether [customer service and consumer protection] enforcement actions and penalties assessed by a local entity were either uncontested or sustained by the courts." (Proposed Decision, p. 183)

statute. Any references to PUC-imposed automatic franchise extensions should be stricken from the Proposed Decision and General Order.

Finally, the PUC should modify the Proposed Decision and General Order to require that only one affiliate of a company may hold a state franchise and to require that the company that holds the state franchise be a California company. Alternatively, the PUC should amend the Proposed Decision and the General Order to add provisions to the application affidavit, at Appendix 3, requiring an applicant to designate a California company with verifiable assets which will accept responsibility for all of the applicant's obligations under DIVCA and applicable law, and which will accept service of process and submit to the jurisdiction of California courts.

Respectfully submitted,

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February 5, 2007

CERTIFICATE OF SERVICE

I certify that I have served a true copy of the original attached OPENING COMMENTS OF THE COUNTY OF LOS ANGELES, CALIFORNIA, THE CITY OF LOS ANGELES, CALIFORNIA, AND THE CITY OF CARLSBAD, CALIFORNIA ON THE PROPOSED DECISION ADOPTING A GENERAL ORDER AND PROCEDURES TO IMPLEMENT THE DIGITAL INFRASTRUCURE AND VIDEO COMPETITION ACT OF 2006 on all known parties of record in this proceeding or their attorneys of record.

Dated: February 5, 2007 at Washington, DC

/S/
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Service Lists

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