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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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	R. 13-05-007

COMMENTS OF THE CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION ON THE PROPOSED DECISION AMENDING GENERAL ORDER 169 TO IMPLEMENT THE FRANCHISE RENEWAL PROVISIONS OF THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the California Cable & Telecommunications Association (CCTA) [1] submits these Opening Comments on the May 27, 2014 Proposed Decision of Commissioner Michael R. Peevey (PD) [2] in the above-referenced proceeding implementing the franchise renewal provisions of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA").

INTRODUCTION AND SUMMARY

In DIVCA, the California legislature created a franchise renewal process that is consistent with the federal renewal process, and circumscribes specific options for this Commission. Specifically, the legislature provided in Section 5850(b) that the criteria and process described in Section 5840 (addressing the original state video franchise application) shall apply to a renewal "registration," and that the Commission "shall not impose any additional or

[1] CCTA is the industry's largest state cable and telecommunications association. CCTA is a leader in the development of video, broadband and communications policy in California, and represents the industry before the California Congressional Delegation, the State Legislature, state regulatory agencies and the state and federal courts.

[2] Proposed Decision of Commissioner Peevey, *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*, Cal. P.U.C., R. 13-05-007 (*rel.* May 27, 2014).

different criteria." Cal. Util. Code § 5850(b); *see also id.* § 5840. The only deviations the Commission may make from the criteria and process of Section 5840 are those necessary to ensure consistency with the federal informal process, and to ensure that a renewal applicant is not in violation of a non-appealable court order arising under DIVCA. *Id.* § 5950(c)-(d).

The December 13, 2013 Staff Report, issued in this proceeding and prepared by both the Communications and Legal Division staff, provided fully supported proposed rules properly based on DIVCA. The PD mirrors those proposed rules, with some minor modifications. Thus the PD and its proposed amendments to General Order (GO) 169 correctly determine that the Commission's state video franchise renewal registration process must mirror the criteria and process of the original state video franchise application authorized in Section 5840 and D. 07-03-014.[3] The PD further recognizes that the only modification needed to make the renewal registration process consistent with federal law (as required by Section 5850(c)) is an adequate opportunity for notice and limited comment on the sole criteria for which a franchise renewal can be denied under Section 5850(d) – whether a video franchise holder seeking renewal is in violation of a final nonappealable court order arising under DIVCA, accompanied by a court order supporting the existence of such a violation.[4]

Protests to and/or comments on any other issue are contrary to the express provisions of DIVCA, and further, undermine the intent of DIVCA to provide an efficient and economic process for applications and renewal registrations for state video franchises. By determining the video-related needs and interests of California communities, which are set out in various provisions of DIVCA, the California Legislature has imposed clear limits on the Commission's authority to promulgate new rules regarding the terms and conditions necessary for a state video

[3] PD at 5-6; GO § V.
[4] PD at 15-16; GO § V(B).

franchise, both in the application process and in the renewal registration process. To open the state video franchise renewal registration to provide for protests or further comments on a renewal registration that suggests the imposition of new criteria for the franchise renewal is not only contrary to DIVCA, it ultimately creates a process more burdensome and chaotic than the prior local video franchise proceedings that DIVCA replaced.[5] This does not mean that issues and concerns associated with a state video franchise holder's compliance are to be ignored. DIVCA provides express means to address these concerns either through a complaint process at the Commission during the term of the franchise, or in the courts.

The PD also correctly allows state video franchise holders seeking renewal to attest in the registration that no violations of final, nonappealable court orders issued pursuant to DIVCA have occurred. The PD also rightly permits a state video franchise holder to attest that it has cured a violation, since courts do not typically issue orders or ruling showing that a violation has been cured.[6] While the PD is clear that these attestations are permitted upon submission of the renewal registration, CCTA submits that the PD and General Order 169 should be clarified to ensure that Applicants may provide a court order or attestation of having cured a violation of a final, nonappealable court order in response to the submission of any comments challenging the video franchise holder's standing in this regard, and prior to the issuance of a letter of denial of the application by the Executive Director.[7] This clarification will ensure that the Applicant has adequate opportunity to respond to any allegations that could result in denial, and provide the Commission with the complete record it will require to ensure that it correctly determines the right to renewal.

[5] Nor is such a requirement necessary to comply with federal law, as the PD acknowledges. PD at 16.
[6] PD at 17-18.
[7] *See id.* at 18.

DISCUSSION

I. The PD Correctly Limits Comments To A Renewal Application To the Issue of Violations of Final, Nonappealable Court Orders Arising Under DIVCA.

The PD correctly determines that Section 5850(b) requires that the process for renewing state-issued video franchises be identical to the process set forth in Section 5840(a)-(q) unless the requirements set forth in Section 5850(c) and (d) necessitate that this process be modified.[8] The PD further recognizes that DIVCA easily accommodates the only substantive requirement of the informal renewal process under federal law – an "adequate" opportunity for notice and comment. 47 U.S.C. § 546(h). Given the narrow scope of DIVCA's Section 5850(c) and (d) exceptions, the PD thus correctly provides notice and a limited opportunity to comment on the sole issue affecting the video franchise holder's eligibility for renewal, *i.e.*, whether a video service provider is in violation of a final nonappealable court order.[9]

As the PD notes, both ORA and the Local Entities Group in this proceeding have claimed broader procedural and substantive rights, and have recommended that the Commission graft additional, extensive criteria and processes to the Section 5840 application that would allow them to submit comments on "substantive issues."[10] ORA has challenged the Commission's settled determinations in D. 07-03-014 prohibiting protests, and both the Local Entities Group and ORA have sought rights to collect evidence, lodge protests, and conduct investigations that are nowhere contemplated by DIVCA or the Cable Act's informal process. If granted, the result would be a renewal process that bears no resemblance to the initial application process under Section 5840. The PD correctly determines that these arguments contradict the plain language of Section 5850(b), which requires that the criteria and process authorized in Section 5840 be

[8] *Id.* at 14.
[9] *Id.* at 15.
[10] *Id.* at 8, 11.

applied to state video franchise renewal registrations,[11] and that ORA's challenges to the Commission's long-standing decision prescribing rules for the initial application process has already been rejected by the Court of Appeals.[12]

In this proceeding, ORA also has claimed that its authority to represent consumers in franchise renewals registrations pursuant to Section 5900(k) permits it to comment on a wide range of issues related to franchising. Contrary to ORA's claims, however, DIVCA strictly defines ORA's limited role in the renewal process. *See* Cal. Util. Code § 5900(k). Section 5900(k) provides that the Division of Ratepayer Advocates (DRA, now ORA) shall "have the authority" to advocate on behalf of video customers regarding renewal of a state-issued franchise, *and* enforcement of Sections 5890 (nondiscrimination requirements), 5900 (customer service standards), and 5950 (the 2 year freeze on basic service rates of telephone corporations providing video service). The PD correctly concludes that DIVCA and the proposed rules authorize ORA, as well as other parties, to advocate on behalf of video customers regarding state video franchise renewals by allowing comments on the sole issue affecting eligibility, the violation of a final, non-appealable court order arising under DIVCA.

Moreover, the PD does not limit or otherwise affect ORA's ability to advocate on behalf of video customers regarding enforcement of Sections 5890, 5900 and 5950. Enforcement of these sections is addressed to the courts or in a complaint proceeding at the Commission, not at renewal. For example, the recourse for a violation of Section 5890 is not a protest at franchise renewal, but rather, for the aggrieved local government to file a complaint at the Commission, or for the Commission to open an investigation on its own motion. Cal. Util. Code § 5890(g).[13] Similarly, local entities, not ORA, are solely empowered to enforce all customer service

[11] *Id.* at 14.
[12] *Id.*
[13] In addition, Section 5890(g) requires that public hearings be held.

standards pursuant to Section 5900(c), and appeals related to violations of customer service standards must be addressed to the courts, not to the Commission at franchise renewal. *Id.* § 5900(h). Presumably ORA may "advocate on behalf of video customers" in those enforcement proceedings. Even then, however, the local entities may not adopt or enforce any additional or different customer service or other performance standards simply because a franchise is up for renewal. *Id*. Furthermore, the basic service freeze mandated until January 1, 2009, is no longer in effect pursuant to DIVCA, and like the other itemized sections of DIVCA, would not affect a franchise renewal in the absence of a violation of a final non-appealable court order.

Thus, DIVCA provides the authority and opportunity for local governments to address these issues, and for ORA to advocate on behalf of customers regarding enforcement of these issues, not at renewal, but either through the complaint process at the Commission, where authorized, or, in most cases, in the courts. Similarly, local governments retain jurisdiction over franchise fees (Section 5850(4)(b)), and disputes concerning compensation are to be brought to a court of competent jurisdiction (Section 5860 (i)). Local governments, and not the Commission, retain jurisdiction over PEG fees and interconnection (Section 5870), and disputes over those issues are similarly to be determined by the courts (Section 5870(p)). Local governments also retain jurisdiction over encroachment permits and access to rights of way (Section 5885) and CEQA (Section 5885(b)). The local entities and the Commission are also limited under DIVCA regarding remuneration, since no local entity or any other political subdivision of the state may demand or add additional fees or charges or other remuneration of any kind from the video franchise holder other than franchise fees (Section 5860(c)).

Even if the state video renewal registration under DIVCA could be interpreted to accommodate the requests of the local entities and ORA (it cannot), the result would be an

illogical and absurd construction of the statute. The regulatory paradigm sought by the local entities and ORA would be more burdensome and chaotic than the local franchising framework that the Legislature, through DIVCA, sought to overturn. Most state video franchise holders will necessarily seek franchise renewals in the next few years, and many of those state franchises provide service in areas covering as many as 400 local entities. Assuming even half of those entities file comments or demand examination of local issues and concerns, the Commission will face a quagmire of proceedings of incredible complexity. The cost alone to each party, as well as to the Commission, could easily result in astronomical numbers. This is exactly the kind of burden and expense that DIVCA sought to eliminate.

Ultimately, as the PD recognizes, the Legislature intended that DIVCA eliminate the burdens associated with local franchising, instead establishing a state franchising approach that provides for an efficient and expedited application and renewal process. The DIVCA framework does not mean there is no recourse for local entities' concerns regarding actions of state video franchise holders. Those concerns may be addressed either in complaint proceedings or in the courts, not in state video franchise renewal registrations. The PD thus correctly determines that the renewal process must be based on the criteria and process provided by Section 5840, consistent with federal law requiring an opportunity for notice and comment. The singular factor relevant to renewal is whether a video franchise holder is in violation of a final nonappealable court order, and the PD correctly limits comments to that issue.

II. The PD Should Be Modified To Allow Responses To Comments Regarding Violations of Final, Non-appealable Court Orders.

The PD correctly allows state video franchise holders seeking renewal to attest in the registration that no violations of final, nonappealable court orders issued pursuant to DIVCA have occurred. The PD also correctly permits the state video franchise holder to attest that it has

cured a violation, since courts do not typically issue orders or rulings showing that a violation has been cured.[14]

While the PD is clear that these attestations are permitted upon submission of the renewal registration, it is not entirely clear from the language adopted in the PD that once a party has alleged that the state video franchise holder is not eligible for renewal, that the video franchise holder has the opportunity to rebut the allegation. Without the ability to rebut an allegation of ineligibility, the Commission could conceivably issue a letter denying renewal based on incomplete facts. CCTA thus submits that the Commission should modify the PD and its proposed amendments to GO 169 to ensure that Applicants may provide a court order or attestation of having cured a violation of a final, nonappealable court order in response to the submission of any comments challenging the video franchise holder's eligibility in this regard, and prior to the issuance of a letter of denial of the application by the Executive Director.[15] Specifically, CCTA proposes the following revision to Section V.D. of GO 169, as indicated in italics below:

> …If a court has found the Applicant to be in violation of a final non-appealable court order, issued pursuant to the Digital Information and Video Competition Act (Cal. Pub. Code §§ 5800 *et seq*.), it must provide, with this Application, a further court order or ruling demonstrating that the violation has been cured, if one exists. If no such order exists, the Applicant must submit a declaration attesting that the Applicant has cured the violation. *If a party alleges that the Applicant is in violation of a non-appealable court order issued pursuant to the Digital Information and Video Competition Act (Cal. Publ. Code §§ 5800* et seq.*) after the Applicant has submitted this Application, the Applicant may supplement this Application with a court order or ruling demonstrating that the violation has been cured, if one exists, or with a declaration attesting that the Applicant has cured the violation.* The Commission may subsequently revoke a franchise if any other party disputes the Applicant's declaration and obtains a court order finding a continuing violation of a non-appealable court order.

[14] PD at 17-18.
[15] *See id.* at 18.

This clarification will ensure that the Applicant has adequate opportunity to respond to any allegations that could result in denial, and provide the Commission with the complete record it will require to ensure that it correctly determines the right to renewal

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