

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 ASSIGNED COMMISSIONER'S PROPOSED DECISION**

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I. INTRODUCTION

Pursuant to the Commission’s Rules of Practice and Procedure Rule 14.3, the Office of Ratepayer Advocates (ORA) submits these comments on the Proposed Decision (PD) of Assigned Commissioner Michael R. Peevey issued on May 27, 2014, which amends “General Order 169 To Implement The Franchise Renewal Provisions Of The Digital Infrastructure And Video Competition Act Of 2006”. ORA points out the legal errors made in the PD regarding the franchise renewal process under the Digital Infrastructure and Video Competition Act of 2006 (DIVCA)¹. ORA also provides recommendations for modifying the DIVCA franchise renewal process as authorized under Section 5850.

¹ DIVCA is contained in Public Utilities Code Sections 5800 *et seq.*

II. SUMMARY OF RECOMMENDATIONS

ORA respectfully recommends the following changes to the PD, which if made will better reflect the Commission's statutory obligations under DIVCA, as well as the stated intent of the original DIVCA franchise decision, Decision (D.) D.07-03-014.

1. Modify the proposed renewal process to afford ORA and interested parties to protest applications for renewal of DIVCA franchises, limited to the issues over which the Commission maintains jurisdiction.²

These recommendations are necessary to comport with Public Utilities Code³ Section 5900(k), which provides that ORA "shall have authority to advocate on behalf of video subscribers regarding renewal of a state-issued franchise". Additionally, Section 5850(c) requires the renewal process to be consistent with federal law, which permits public notice and comment on video franchise renewal applications. If the PD is adopted, neither ORA nor the public is provided with an opportunity to provide comment on behalf of video subscribers during the application renewal process, as required by law.

ORA has created a suggested modified renewal process, consistent with DIVCA, that allows the public and ORA an appropriate level of review and sufficient time to comment of franchise renewal applications, in Attachment A attached hereto.

As described herein, in some instances the Commission's oversight and implementation of DIVCA has been insufficient. The PD should be modified so that parties may submit comments on certain compliance issues during the renewal process in order to assist the Commission in conducting oversight and enforcement of DIVCA, which is mandated by Section 5840(e), and required in the renewal process by Section 5850(b).

² ORA's detailed recommended changes to the PD's conclusions of law are below, at p. 11.

³ Statutory references herein are to the Public Utilities Code unless otherwise noted.

III. THE PD COMMITS LEGAL ERROR

A. The PD Misconstrues Section 5850

The PD misinterprets Section 5850 and commits legal error, as described below. In addition, it should be noted that Section 5850 applies solely to franchise renewal applications under DIVCA, which will be occurring for the first time. Arguments made by parties in the original DIVCA rulemaking proceeding regarding the new application process are no longer relevant, as there are two statutes, Section 5850 and Section 5900(k), which apply only to the renewal process. No court of appeal has yet been presented with any of the interpretations set forth in the PD regarding Section 5850; these interpretations are a matter of first impression. The PD mistakenly implies that the Court of Appeal has already rejected ORA's arguments regarding the renewal process.⁴

1. Section 5850 Does Not Prohibit Additional Process in the Renewal Application

ORA's Comments on the Commission's Staff Report⁵ noted that allowing ORA to comment on the sufficiency of the renewal application pursuant to Section 5850 does not add new criteria to the application process. Protests are merely a procedural vehicle in which parties can raise concerns about the applicant's compliance with existing criteria in the application. Moreover, there is not (and never was) a ban in DIVCA on allowing parties to comment on applications.

However, the PD includes a provision of General Order (GO) 169 that states, "No person or entity may file a protest to an Application."⁶ The PD provides almost no explanation why Section 5850 bans protests or comments⁷ by parties. In fact, neither

⁴ See Footnote 22 of the PD, which states, "ORA's arguments were disposed of in D.07-11-014, again on rehearing in D.07-11-049, and summarily rejected by the Court of Appeals."

⁵ ORA's Comments On The Staff Report Proposing Rules To Amend General Order 169, filed on January 24, 2014, p. 10.

⁶ PD, Attachment A, p. A-11.

⁷ The terms "comments" and "protests" 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

(Continued on next page)

Section 5850, nor any other part of DIVCA, state that there is a ban on protests. Protests are simply not mentioned in DIVCA.

Conclusion of Law #1 in the PD restates Section 5850 without providing any explanation. Section 5850 states that while the “criteria and process” described in Section 5840 shall apply to renewal applications, the Commission may not impose additional or different “criteria”. Thus, the plain meaning is that the Commission may not limit the “criteria and process” as described in Section 5840, and the Commission may not impose new “criteria” in the renewal applications, but the Commission may impose additional “process” for renewal applications. Thus, the Commission may impose new procedures that do not impose new criteria. The PD fails to identify the fundamental differences between “criteria” and “process”.

Protests are merely a procedural vehicle in which interested parties point out deficiencies in an application. In and of themselves, protests do not impose any criteria on the application. “Criteria” in its normal meaning refers to “standards, measures, specifications, yardsticks, etc.” (The term is not defined in DIVCA.) Thus, the Commission may not impose additional standards or specifications on DIVCA renewal applications. Protests do not do that – protests merely point out existing standards or specifications that have not been met by the applicant.

If the PD was correct that no new criteria or processes could be introduced in the renewal application process, then it must be true that protests are prohibited because they were originally banned in D.07-03-014. Yet the PD violates its own conclusion by finding that protests are permitted (but then mistakenly limits the subject matter of the protests, which is discussed more below). Thus, it is not true that Section 5850 bans all

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application, much like a protest. In D.07-03-014 the Commission refers to “protests”, although the draft staff report and PD refer to “comments”, but they mean the same thing here.

new processes, yet this appears to be the only rationale provided by the PD for prohibiting ORA from filing protests.

If the PD bases its conclusion that protests are banned because Section 5850 prohibits new or additional “process” in the renewal application, this is a mistake of law, because Section 5850 only prohibits new or additional “criteria”, not process. If the PD bases its conclusion that Section 5850 bans protests on the rationale that protests are new and additional “criteria”, this is a mistake of fact because protests do not, in and of themselves, impose any criteria.

2. The PD is Inconsistent with Federal Law

The PD commits legal error by stating that “47 USC § 546(h) does not provide for such broad comment” that would allow for issues beyond final non-appealable court orders.⁸ The PD correctly finds that protests are permitted because federal law 47 USC § 546(h) permits them, but then commits legal error by limiting such protests to violations of final non-appealable court orders. It is not reasonable to limit protests in a way that federal law does not.

47 USC § 546(h) allows for expedited renewal “proposals”, and provides that “a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time.” In other words, under Section 546(h) parties may comment on any aspect of a renewal proposal. There is no limitation in Section 546(h) on the scope of parties’ comments. The PD provides no explanation why it finds that Section 546(h) “does not provide for such broad comment.”

Moreover, 47 USC § 546(d) permits a franchising authority to deny a renewal proposal if the following criteria stated in 47 USC § 546(c) are not met: (A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law; (B) the quality of the operator’s service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or

⁸ PD, p. 16.

quality of cable services or other services provided over the system, has been reasonable in light of community needs; (C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and (D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

Presumably, public comment at the federal level is allowed on any of the items listed above, because all of those are reasons for denial of the application. The PD thus commits legal error by limiting protests solely to whether there is a violation of a final non-appealable court order, in that federal law contains no limitation on broader public comments.

The PD states that the reason for imposing this limitation is that Section 5850 "limits this Commission's renewal inquiry to whether a video service provider is in violation of a final non-appealable court order issued pursuant to DIVCA." As discussed below, DIVCA contains no such limitation.

3. The PD Commits Legal Error by Inserting a Limitation into Section 5850(d) That Does Not Exist

The PD commits legal error by finding that the sole inquiry in the renewal application is whether there is a violation by the cable operator of a violation of a final non-appealable court order issued pursuant to DIVCA.² However, Section 5850(d) does not state that this is the sole permissible area of interest in reviewing renewal applications.

Section 5850(d) states: "The commission shall not renew the franchise if the video service provider is in violation of any final non-appealable court order issued pursuant to this division." The phrase "only if" does not appear in Section 5850(d). A violation of a final non-appealable court order is one reason not to renew the cable franchise, but

² PD, Conclusion of Law #3.

clearly, it is not the only reason. Other reasons for denial include the criteria established in Section 5840, as stated in Section 5850(b). Those criteria include:

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).
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).

Nothing in DIVCA requires the Commission to grant a franchise if the applicant is ineligible under Section 5840. In addition, under Sections 5940 and 5950 cable operators that also provide basic telephone service are prohibited from raising rates to finance the cost of deploying a cable network. 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.¹⁰ It can immediately suspend the franchise.¹¹ It can issue an order to show cause for why the franchise should not be deemed invalid.¹²

Thus, the PD has no legal justification for limiting the protests in such a way as to prevent comment on any of the legitimate criteria in Section 5840. If protests are allowed, it is legal error to disallow comment on the cable operators' compliance with the criteria

¹⁰ D.07-03-014, p. 102.

¹¹ *Ibid.*

¹² *Ibid.*

in Section 5840. Moreover, as discussed above, it is inconsistent with federal law, which contains no such restriction.

B. The PD Renders Section 5900(k) Meaningless

The PD commits further legal error by interpreting Section 5850 in such a way as to render Section 5900(k) meaningless, which specifically authorizes ORA to advocate on behalf of video subscribers regarding renewal of state-issued franchises.¹³

The PD mentions that “ORA argues that the only way to reconcile the renewal provisions of DIVCA set forth in § 5850 with ORA’s right to advocate on behalf of consumers in a renewal proceeding, as set forth in § 5900(k), is to allow it to file protests or substantive comments...” Unfortunately, the PD never addresses ORA’s argument.

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, the PD errs by giving no weight to (in fact totally omitting any reference to) Section 5900(k). Although not explained, the PD 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 Section 5840 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 protests in and of themselves do not introduce new criteria. Moreover, the ban on protests was never based on anything explicit in DIVCA.¹⁴

¹³ 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...”

¹⁴ 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.

IV. THE IMPLEMENTATION AND OVERSIGHT PROVISIONS OF THE PD OVER DIVCA RENEWALS ARE INSUFFICIENT AND INEFFECTIVE

The Commission has never initiated an enforcement action pursuant to DIVCA, and its oversight has been minimal. The existing procedures must be updated to consider not only whether cable operators will be in compliance in the future (as contemplated in Section 5840, which was designed for “new” applications) but also whether cable operators have been in compliance for the past 7 years. So far, the Commission’s oversight has been ineffective, and the PD does not strengthen it any.

Two examples illustrate this point. First, earlier this year the City of Los Angeles filed a lawsuit against Time Warner Cable for approximately \$10 million. The City of Los Angeles alleges that TWC has profited billions in Los Angeles while refusing to pay about \$10 million in franchise fees, relating to a dispute over the provision of public, education, and government (PEG) channels.

Yet Section 5840(e)(1)(B)(iii) specifically requires cable operators to verify that they have remitted all fees required by the local entity. Further, Section 5840(e)(1)(B)(iv) requires the cable operators to verify they have provided the required PEG channels.

Under the PD’s overly narrow and incorrect reading of Section 5850, the Commission is not verifying the operators’ legal obligation to pay local franchise fees and provide the required PEG channels. In fact, the City of Los Angeles would be prohibited from raising its concerns during the renewal process. Under Section 5840(e)(1)(B)(iii), the Commission should verify that the applicant is in compliance with local franchise obligations; yet under the PD, the Commission would not consider it.

A second example is from the Commission’s 2013 Annual DIVCA Report, where Commission staff report that AT&T and Verizon have not provided sufficient data “to conduct the analysis necessary to ensure that AT&T’s and Verizon’s standalone basic

service rates are not cross-subsidizing the network used to provide video service”.¹⁵ As a result, the Commission is unable to verify that cable operators are not illegally cross-subsidizing operations. Although the Report recommends that the Commission initiate a formal enforcement action, to date no action has been taken.

During this proceeding, ORA has been, and will continue to, work with Commission staff in reviewing current franchise renewal processes. During discussions between ORA and Commission staff, however, questions have arisen that need to be addressed, including:

1. Clarification of the data reported by the franchisees in regard to build-out and low-income requirements.
2. The lack of information provided by franchisees in regard to cross-subsidization compliance.¹⁶
3. The need to improve processes for tracking relevant consumer complaints to ensure compliance with consumer protection requirements.¹⁷
4. The applicants’ compliance with PEG channel requirements.

Permitting parties to submit comments on these issues during the renewal process would assist the Commission in conducting oversight and enforcement of DIVCA, which is mandated by the specific provisions of Section 5840(e), and required in the renewal process by Section 5850(b).

Another consideration is that interested parties such as ORA are hindered in their ability to conduct discovery and bring violations to the Commission’s attention because of the prohibition on filing protests. Without a procedural vehicle to raise legitimate concerns such as the operators’ compliance with Section 5840, ORA is unable to carry

¹⁵ 2013 DIVCA Report, p. 16. http://www.cpuc.ca.gov/NR/ronlyres/0300C1C7-554A-4BE2-8FC0-D570A0275189/0/DIVCAReport5thAnnual_130621.pdf

¹⁶ *Ibid.*

¹⁷ ORA has learned that the Commission receives DIVCA complaints from consumers, which are not tracked through the Consumer Affairs Branch.

out its statutory obligation under Section 5900(k) (and also Section 309.5, which authorizes ORA to represent and advocate on behalf of customers on matters within the Commission’s jurisdiction) to advocate on behalf of video subscribers, and the Commission is unaware of potential concerns that parties might raise in the renewal process, as highlighted by the situation in the City of Los Angeles.

V. THE PD SHOULD BE MODIFIED TO ALLOW PARTIES TO COMMENT ON THE SUFFICIENCY OF RENEWAL APPLICATIONS, AS REQUIRED BY LAW

Consistent with the arguments made above and required by law, ORA recommends that Conclusions of Law #3 and #4 be removed from the PD. Instead, ORA recommends inserting new conclusions of law that read as follows:

1. The criteria for renewing state-issued franchises must be identical to the criteria established for issuing new franchises described in Section 5840; however, Section 5850 permits the Commission to establish new processes where required by existing law.
2. Modifications to the initial application process are necessary to comply with Section 5850(c), (d), and Section 5900(k).
3. Section 5850(c) requires that state franchises be consistent with federal law. 47 USC § 546(h) requires that the public be provided with “adequate notice and opportunity to comment” on renewal applications.
4. Section 5850(d) prohibits the Commission from renewing the franchise if the applicant is in violation of any final non-appealable court order issued pursuant to DIVCA.
5. Section 5900(k) requires ORA to advocate on behalf of video subscribers during the renewal process.
6. State and federal law require that the Commission create a process to allow for public notice and comment on renewal applications.

In addition, the PD adopts Attachment A that contains the specific rules for renewal applications. At page A-11 of Attachment, Section IV(C), should be modified to read: “C. PROTESTS TO STATE VIDEO FRANCHISE APPLICATIONS ALLOWED. Persons or entities may file a protest to an Application.”

These new conclusions of law are fully and completely consistent with Section 5850, because under Section 5850(b) the criteria and process for renewal must be the same as the original applications “except as provided in this section”, which means that the process must take Section 5900(k) into account. Moreover, while Section 5850(b) requires that the “criteria” remain the same as Section 5840, it does not prohibit additional process. Additionally, these recommendations are necessary to “be consistent with federal law” which allows for adequate public comment on renewal applications, as required by Section 5850(c). Finally, Section 5850(d) plainly does not state that the “only” permissible criteria for protests is whether the applicant has committed a “violation of final non-appealable court order”; while this is one consideration, review must also consider the requirements of Section 5840, which are much broader.

As illustrated on Attachment A, ORA’s modified renewal process would not substantially alter the current process proposed in the PD, and would be fully consistent with the timeline provisions of Sections 5840(h)(1-4).

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 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. The Commission is now faced with renewal applications, and the Commission staff has collected data to verify whether cable operators have been in compliance with DIVCA. Under the PD, the Commission would not review whether the applicant complied with the substantive provisions of DIVCA.¹⁸ However, this data can and should be made

¹⁸ Such substantive issues include prevention of discrimination (Section 5890) and cross-subsidization (Section 5940 and 5950), and consumer protection (Section 5900). (See Conclusion of Law #11, D.07-03-014.)

available to parties to allow them to assist the Commission in a meaningful review of renewal applications.¹⁹

The PD takes a small step towards rectifying the legal mistakes made in the past, by allowing comments on the renewal applications limited to one narrow issue. However, nothing in Sections 5850 or 5840 require a prohibition of substantive protests by the parties. In fact, federal law and Section 5900(k) require that the Commission provide sufficient process for ORA and the public to engage in meaningful comment and review of franchise renewal applications, which would assist the Commission in its oversight of DIVCA. The appropriate vehicle to raise such concerns would be through a protest/comment period. Therefore, ORA recommends that the modifications listed herein and the attached proposed DIVCA renewal process be adopted.

Respectfully submitted,

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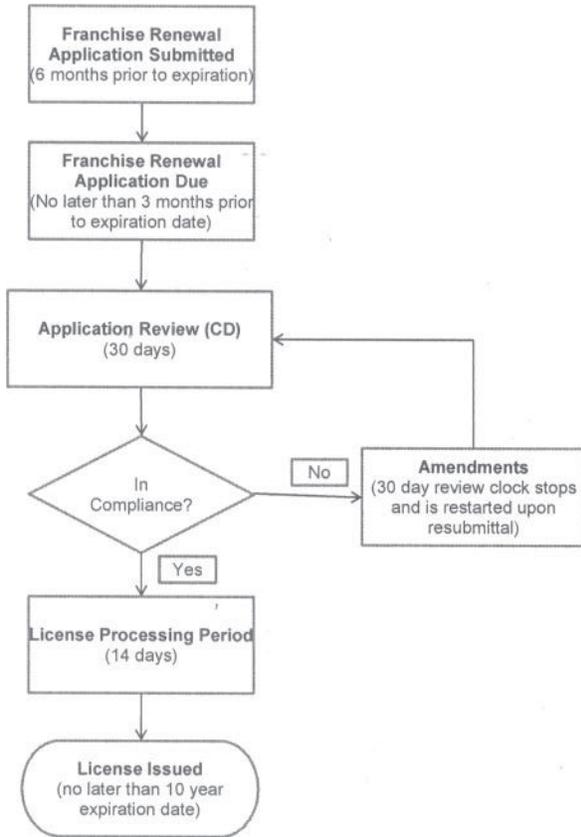
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¹⁹ In fact, both Section 5900(k) – (ORA “shall have access to any information in the possession of the commission”) – and D.07-03-014 – (ORA “shall have access to any information in the possession of the commission.”) require that staff provide ORA with data in order to carry out its role in advocating on behalf of subscribers.

ATTACHMENT

Staff Report Process



ORA Proposed Process

