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MEMORANDUM

Date: June 9, 2014

To: Dean R. Lotter, City Manager

From: Robert J.V. Vose, Assistant City Attorney

Re: North Suburban Communications Commission

Comcast recently distributed a memorandum dated May 23, 2014 ("Memo") to the ten member cities comprising the North Suburban Communications Commission ("NSCC"). The Memo was prepared by Randy Tietjen, Esq. of Robbins, Kaplan, Miller & Ciresi. We were asked to review and comment on the Memo.

BACKGROUND

On behalf of its member cities, the NSCC is conducting proceedings to consider renewal of Comcast's cable franchise. The cities previously issued separate but essentially identical franchises. Under the joint powers agreement establishing the NSCC, the cities retain the power to issue renewed franchises. Although the NSCC is handling negotiation of franchise terms, the determination of final terms is ultimately up to the member cities.

Cable franchise renewals are largely governed by federal law. As contemplated by applicable law, the NSCC commissioned a technical audit of Comcast's system, an audit of Comcast's franchise fee and PEG Fee payments, and a "needs assessment" study including a resident survey. These efforts resulted in several lengthy reports. Because attempts to negotiate a renewed franchise were initially unsuccessful, the NSCC requested that Comcast submit a detailed formal renewal proposal. Together, these materials exceed 1000 pages in length.

The NSCC has recommended that the member cities preliminarily deny Comcast's proposal. The NSCC staff prepared a report ("Report") summarizing ways in which Comcast's proposal is inadequate to address the needs, interests and concerns that the NSCC identified. A preliminary denial would result in the NSCC conducting further renewal proceedings including, potentially, an administrative hearing (similar to a trial) to evaluate whether Comcast's proposal reasonably meets the needs identified by the NSCC. Comcast, of course, urges the member cities to accept its renewal proposal.

COMMENTS

We did not review all of the consultant reports prepared for the NSCC or Comcast's lengthy renewal proposal. Rather, we reviewed the Memo and Report. We additionally asked the NSCC's legal counsel to respond to several specific questions about the status of the renewal proceedings.

The Report states that the "top four issues for renewed franchises" are: 1) continuation of Institutional Network facilities and services; 2) PEG funding and channel capacity; 3) customer service, and; 4) whether NSCC financial reserves should be used for immediate or short term capital needs. The Report indicates that Comcast's proposal fails to adequately address these issues.

Comcast's Memo, however, suggests that the only real issue is PEG funding; specifically funding for PEG operations (i.e. salaries, overhead, etc). Comcast asserts that funding for PEG capital costs (studio, cameras, equipment, etc.) can be required over-and-above franchise fees but funding for PEG operations cannot. Comcast says it will not voluntarily agree to provide operational funding even though its predecessor did.

Operational funding is plainly an important issue to the NSCC. The Report indicates that the loss of the current operational funding over-and-above franchise fees would threaten North Suburban Access Corporation's ability to provide PEG programming at current levels unless the member cities contribute a larger portion of franchise fees to PEG expenses.[1] However, the NSCC has also explained that PEG operational support is not being required in the formal renewal process and is not a basis for the recommended preliminary denial. The NSCC indicates that Comcast has been notified of this in writing.

The relative importance of the "top four issues" to the City, and the extent to which Comcast's proposal misses the mark on each, are policy considerations. The only legal issue appears to be whether PEG operational funding can be required over and above franchise fees, and whether Comcast's refusal to continue such funding is a basis to preliminarily deny the proposal. But that legal question is apparently not in dispute—the NSCC is not demanding such funding in the formal renewal.[2] Accordingly, whether it is appropriate for the City to preliminarily deny

[1] It is my understanding that the member cities have historically received a significant portion of Comcast's franchise fee payments and treat such funds as general revenues.

[2] There may be middle ground between the desire for continued PEG operational funding and Comcast's refusal to agree to continue such funding. The parties could simply agree to a total PEG funding amount with the NSCC

Comcast's proposal so that the identified issues can be further addressed is a policy matter not a legal judgment.

However, there is also a sound legal reason to preliminarily deny Comcast's renewal proposal. Exhibit 1 to Comcast's renewal proposal is a complete franchise ordinance. Acceptance of Comcast's proposal by an NSCC member city would apparently result in acceptance of the franchise ordinance as drafted by Comcast.

The basic purpose of the franchise ordinance is to appropriately regulate Comcast's system and service offerings. The Report identifies a myriad of legal or "boilerplate" ordinance provisions that Comcast has not included or has not drafted in a manner that would normally be acceptable. For this reason alone, we cannot recommend adoption of the franchise ordinance Comcast drafted. Even if the City is not inclined to push further on the four issues identified above, preliminary denial of Comcast's proposal appears necessary simply to have adequate time to prepare a more appropriate and complete franchise ordinance.

In addition, if some member cities approve Comcast's proposal and some preliminarily deny, the NSCC and its member cities will be faced with completing franchise renewal while simultaneously addressing the impact of the member cities taking divergent positions on appropriate franchise terms. The NSCC will need to conduct further renewal proceedings on behalf of cities that preliminarily deny, and cities that approve the proposal will need to take further steps to finalize and adopt a franchise reflecting Comcast's proposal.

In this scenario, the member cities will need to evaluate whether to continue to cooperate in a cable commission despite no longer having identical franchises. This arrangement would be possible, but would be more challenging than the current arrangement. Even if all cities wish to continue with the current cable commission, the relationships among the member cities will almost certainly need to be adjusted somewhat. The terms of the current joint powers agreement would likely need to be changed. In my experience, the challenges posed by considering changes to a joint powers organization are more difficult when negotiations with a third party (Comcast) are ongoing simultaneously.

CONCLUSION

The NSCC recommends that the City preliminarily deny Comcast's renewal proposal so that several outstanding issues can be further addressed. In addition, however, it is appropriate to preliminarily deny Comcast's renewal proposal simply because the fully drafted franchise ordinance Comcast has submitted is not in a form or substance that is acceptable.

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simply retaining the right to expend those funds lawfully. Comcast would not specifically agree to provide PEG operational funding. This arrangement is not uncommon in my experience.