

June 13 1987

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PACIFIC WEST CABLE COMPANY,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL NO. S-83-1034 MLS
)	
CITY OF SACRAMENTO, CALIFORNIA,)	
a municipal corporation; and)	
COUNTY OF SACRAMENTO,)	
CALIFORNIA, a municipal)	
corporation,)	
)	
Defendants.)	

MEMORANDUM DECISION,
CONCLUSIONS OF LAW
AND
ORDER FOR JUDGMENT

Jury trial of this action commenced on March 23, 1987. After 29 days of trial, the matter was submitted to the jury on June 3 on a series of special verdicts. The jury returned twenty-two of the special verdicts on June 5. After entering those verdicts, the court asked the jury to continue deliberating on the remaining special verdicts. On June 9, the jury notified the court that it had reached unanimous agreement on eight of the special verdicts but were hopelessly deadlocked

1 on the remaining five verdicts. The court accepted and entered
2 the additional eight verdicts and then discharged the jury.

3 The court conducted one additional hearing and
4 received two sets of briefs (one prior to the hearing and one
5 after) on the issue of the proper judgment, if any, to be
6 entered on the special verdicts. The matter has now been
7 submitted. The following constitutes the court's judgment,
8 including its analysis and conclusions, on the jury's special
9 verdicts and in response to plaintiff's request for injunctive
10 relief.

11 I. BACKGROUND

12 A. The Issue of the Franchise ^{1/}

13 In November of 1981, the Sacramento City Council and
14 County Board of Supervisors enacted substantially identical
15 cable television^{2/} ordinances (the "cable television
16 ordinance"). The ordinance established the exclusive procedure
17 for awarding cable television franchises. Under the cable
18 television ordinance, any such franchise is deemed to constitute
19 a contract between the franchisee and the Sacramento

20
21 1/ Much of the information is taken from the stipulated
22 statement of facts. A slightly modified version of this
statement of facts was read to the jury as jury instruction
number 15.

23 2/ Cable television companies may distribute, among other
24 things, news, information and entertainment to viewers. It does
25 so by transmitting electronic signals to and from a central
26 location (a "head end") through cables to the television sets of
subscribers. These cables are attached to public utility poles
or placed in underground conduit.

1 Metropolitan Cable Television Commission (the "cable
2 commission"), which is a joint powers authority formed pursuant
3 to California law by defendants and two other cities.
4 Furthermore, the possession of a franchise is a requirement for
5 access to utility easements and underground conduits in
6 Sacramento.

7 Pursuant to the provisions of the cable television
8 ordinance, a request for proposals for the award of a cable
9 television franchise within the city and county was issued.
10 Defendants received four proposals. After conducting various
11 meetings and hearings on the proposals and considering the
12 reports prepared by the consultant retained by the county,
13 defendants selected a firm called United Tribune Cable of
14 Sacramento as the tentative franchisee.

15 Further public hearings, meetings and negotiations
16 ensued on the precise terms and conditions of the franchise to

August 1992 a representative of plaintiff had conversations

1 of Sacramento,^{3/} which offer was accepted.

2 On or after December 8, 1983, defendants received a
3 letter from plaintiff concerning the issuance of an additional
4 cable franchise. The city attorney and county counsel responded
5 by letters dated January 25, 1984 and February 1, 1984,
6 respectively. Plaintiff's attorney responded to those letters
7 on February 24, 1984. The city attorney and county counsel
8 answered by letters dated March 30, 1984 and April 6, 1984,
9 respectively.

10 B. This Suit

11 When defendants persisted in their refusal to issue
12 plaintiff a cable television franchise, plaintiff filed suit on
13 September 9, 1983, alleging that defendants' refusal to issue it
14 a franchise violated the first and fourteenth amendments to the
15 United States Constitution, sections 1 and 2 of the Sherman Act,
16 15 U.S.C. §§ 1 and 2, and article I, section 2 of the California
17 Constitution.

18 Plaintiff moved for a preliminary injunction that
19 would have allowed it to lay its conduit along with the cables
20 being laid by the franchisee. The motion was denied on the
21 ground that plaintiff had failed to show irreparable injury.
22 See Pacific West Cable Co. v. City of Sacramento, 762 F.2d 1018

23
24 3/ In January of 1985, defendants amended the franchise to
25 permit (among other things) Scripps Howard Cable Company of
26 Sacramento, which was one of the partners in Cablevision, to
succeed to the partnership interest of two of the other
partners. Defendants also permitted the name of the partnership
to be changed from Cablevision of Sacramento to Sacramento Cable
Television.

1 (9th Cir. 1985) (mem.) (affirming denial). Plaintiff also moved
2 for a second preliminary injunction to enjoin defendants from
3 denying it the opportunity to build and own a cable television
4 system; this motion was also denied. See Pacific West Cable Co.
5 v. City of Sacramento, California, 798 F.2d 353 (9th Cir. 1986)
6 (affirming denial).

7 Finally, the court dismissed plaintiff's antitrust
8 claims for failure to state a claim upon which relief may be
9 granted. See Preferred Communications v. City of Los Angeles,
10 754 F.2d 1396, 1411-15 (9th Cir. 1985), aff'd on other and
11 narrower grounds, ___ U.S. ___, 106 S. Ct. 380 (1986).

12 II. SPECIAL VERDICTS

13 At the close of evidence and final argument, the case
14 was submitted to the jury on general instructions and eighteen
15 special verdicts (many of which had several subparts). See Fed.
16 R. Civ. P. 49(a).^{4/} The court used special verdicts over the

17
18 ^{4/} The use of special verdicts is authorized by Federal Rule
of Civil Procedure 49(a), which provides:

19 The court may require a jury to return only a
20 special verdict in the form of a special written
21 finding upon each issue of fact. In that event the
22 court may submit to the jury written questions
23 susceptible of categorical or other brief answer or
24 may submit written forms of the several special
25 findings which might properly be made under the
26 pleadings and evidence; or it may use such other
method of submitting the issues and requiring the
written findings thereon as it deems most appropriate.
The court shall give to the jury such explanation and
instruction concerning the matter thus submitted as
may be necessary to enable the jury to make its
findings upon each issue. If in so doing the court
omits any issue of fact raised by the pleadings or by
(Footnote continued)

1 objection of plaintiff, which argued that it was entitled to a
2 general jury verdict and instructions on the law.

3 A. Advantages of Special Verdicts

4 There were several advantages to using special
5 verdicts in this case. The general verdict is usually either
6 all wrong or all right because it is an inseparable and
7 inscrutable unit. 5A Moore's Federal Practice ¶ 49.02 (2d ed.
8 1986) (quoting Sunderland, Verdicts, General and Special, 29 Yale
9 L.J. 253, 259 (1920)). Special verdicts, on the other hand,
10 isolate fact findings in such a way as to allow reviewing courts
11 to make determinations as a matter of law while preserving the
12 jury's role as a fact finder. Brown, Federal Special Verdicts:
13 the Doubt Eliminator, 44 F.R.D. 338, 346-48 (1967).

14 For this reason, special verdicts are a valuable tool
15 when the law is uncertain or in a state of development; special

16 _____
17 (Footnote 4 continued)

18 the evidence, each party waives his right to a trial
19 by jury of the issue so omitted unless before the jury
20 retires he demands its submission to the jury. As to
21 an issue omitted without such demand the court may
make a finding; or, if it fails to do so, it shall be
deemed to have made a finding in accord with the
judgment on the special verdict.

22 There has apparently been no question as to the
23 constitutionality of Rule 49. Nollen Berger v. United Airlines,
Inc., 216 F. Supp. 734, 737 (S.D. Cal. 1963) (citing Walker v.
New Mexico & So. Pacific R.R. Co., 165 U.S. 593 (1897), rev'd on
other grounds sub nom., United Airlines, Inc. v. Wiener, 335
24 F.2d 379 (9th Cir.), cert. dismissed, sub nom., United Airlines,
Inc. v. United States, 379 U.S. 951 (1964); see also 5A Moore's
25 Federal Practice ¶ 49.01[3] (2d ed. 1986).
26

1 verdicts minimize the need for, and scope of, a new trial in the
2 event of an error of law or a misapplication of law to the
3 facts. Id. at 342, 348; see also Wright and Miller, Federal
4 Practice and Procedure, § 2505 at 494-95 (1971); Wright, The Use
5 of Special Verdicts in Federal Court, 38 F.R.D. 199, 202 (1965).
6 The Second Circuit endorsed the use of special verdicts in
7 Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir.
8 1979), cert. denied, 444 U.S. 1093 (1980):

9 We note en passant, however, that in
10 large and complex cases such as this,
11 involving many novel legal issues, the
12 better practice would have been to require
13 special verdicts or the submission of
14 interrogatories to the jury pursuant to
15 Fed.R.Civ.P. 49. In that way the right to a
16 jury trial of all factual issues is
17 preserved while the probability of a
18 laborious and expensive retrial is reduced.
19 See SCM Corp. v. Xerox Corp., 463 F. Supp.
20 983, 988-90 & nn.13, 15 (D. Conn. 1978),
21 remanded on other grounds, 599 F.2d 32 (2d
22 Cir. 1979). Certainly the already difficult
23 task of reviewing a case of this magnitude
24 would have been eased somewhat for this
25 court if we knew precisely what the jury's
26 findings were on several specific factual
issues.

19 Id. at 279; see also Envirex, Inc. v. Ecological Recovery
20 Associates, Inc., 454 F. Supp. 1329, 1339-40 (M.D. Pa. 1978),
21 aff'd, 601 F.2d 574 (3d Cir. 1979) (special verdicts are
22 preferred in complicated cases). The Ninth Circuit has also
23 approved the use of special verdicts as facilitating its review
24 for harmless error. See Pacific Greyhound Lines v. Zane, 160
25 F.2d 731, 737 n.6 (9th Cir. 1947).

26 //

1 The court is especially concerned about the
2 possibility of legal errors in this case inasmuch as the Supreme
3 Court has explicitly declined to decide the legal issues raised
4 by cable television franchising in the absence of a fully
5 developed factual record, City of Los Angeles v. Preferred
6 Communications, Inc., 106 S. Ct. at 2037-38, even though it did
7 note that where speech and conduct are joined in a single course
8 of action, first amendment values must be "balanced" against
9 competing societal interests. Id. at 2038 (citing to Members of
10 the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805-07
11 (1984), and United States v. O'Brien, 391 U.S. 367, 376-77, reh'g
12 denied, 393 U.S. 900 (1968)).

13 The Ninth Circuit also relied on Vincent and O'Brien
14 in holding that a cable company's first amendment claims should

1 questions of fact which must be resolved by the jury and
2 questions of law which must be resolved by the court is an
3 elusive one in first amendment jurisprudence. See generally
4 Parker, Free Expression and the Function of the Jury, 65 Bos. L.
5 Rev. 483 (1983). For example, the Supreme Court has struggled
6 with the distinction between law and fact in applying the test
7 for "actual malice" under New York Times v. Sullivan, 376 U.S.
8 254 (1964), in defamation cases. See Bose Corp. v. Consumers
9 Union of United States, Inc., 466 U.S. 485, 498-512, reh'g
10 denied, 467 U.S. 1267 (1984).

11 The Supreme Court and Ninth Circuit have also both
12 held that the balancing of interests which occurs in cases in
13 which an employee is discharged for allegedly exercising first
14 amendment free speech rights is one of law. Connick v. Meyers,
15 461 U.S. 138, 148 n.7, 150 n.10 (1983); Loya v. Desert Sands
16 Unified School District, 721 F.2d 279, 281 (9th Cir. 1983). In
17 fact, the Ninth Circuit has held that it is error for a trial
18 court to leave the balancing to the jury. Loya, 721 F.2d at
19 281-82; see also Keller v. City of Reno, 587 F. Supp. 21, 23 n.4
20 (D. Nev. 1984). This has prompted some courts to conclude that
21 the extent of protection afforded by the first amendment is
22 ultimately a question of law and that the jury's function is to
23 find the underlying facts to which the legal standard is
24 ultimately applied. Kim v. Coppin State College, 662 F.2d 1055,
25 1062 (4th Cir. 1981) (cited in Keller, 587 F. Supp. at 23 n.4);
26 but see Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir.

1 1987)(jury has no role to play; entire matter for court
2 determination).

3 The use of special verdicts enables the jury to find
4 these underlying facts and then allows the court to apply the
5 law to the facts as found. See Quaker City Gear Works, Inc. v.
6 Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984)(citing 5A
7 Moore's Federal Practice, § 49.02 at 49-8 (2d ed. 1984)), cert.
8 denied, 471 U.S. 1136 (1985). This procedure assigns to the
9 trial judge the responsibility of applying appropriate legal
10 principles to the facts as found by the jury; the jury need not
11 be instructed on the legal principles which the judge applies to
12 the facts. 5A Moore's Federal Practice ¶ 49.02 (2d ed. 1986).
13 Special verdicts thus eliminate the necessity of complicated
14 instructions on the law, R.H. Baker & Co. v. Smith-Blair, Inc.,
15 331 F.2d 506, 511 (9th Cir. 1964)(quoting Moore's with
16 approval), instructions which, in this case, may result in the
17 jury performing tasks which must be performed by the judge.
18 Because of the uncertainty in the judge/jury division of labor,
19 special verdicts assure that the jury does not impermissibly
20 decide a question of law. See Weiner, The Civil Jury Trial and
21 the Law-Fact Distinction, 54 Cal. L. Rev. 1867, 1867-68
22 (1966)(referring generally to Coke's dichotomy and the
23 respective provinces of judge and jurors in a civil case); but
24 see Parker, supra, at 550-56 (special interrogatories under
25 Federal Rule of Civil Procedure 49(b) represent an appropriate
26 //

1 "middle course" between the general and special verdict
2 procedures).

3 B. The Jury's Special Verdicts

4 The special verdicts themselves, together with the
5 jury's answers, are attached as appendix A. The following is a
6 narrative summary of the jury's findings.

7 The jury found that plaintiff had the technical and
8 financial capabilities to construct and operate a cable

1 workers or noise, visual clutter, environmental and/or aesthetic
2 problems. Even so, the jury said that defendants did not use
3 these problems as a pretext for justifying their franchising
4 process.

5 As for whether cable television is a natural monopoly,
6 the jury found that it was not. In other words, the jury was
7 persuaded that "head-to-head" competition is likely to occur and
8 endure in the Sacramento market. Moreover, the jury concluded
9 that this justification was a sham or pretext for granting a
10 single cable television franchise and that defendants used this
11 justification to promote the making of cash payments and the
12 provision of in kind services by the company ultimately selected
13 as the franchisee. They also concluded that this justification
14 was used to obtain increased campaign contributions for local

1 defendants were motivated to provide such benefits by a desire
2 to obtain increased political influence and to favor local
3 officials' political supporters.

4 The jury was also persuaded that the public has a
5 significant interest in both the financial and technical
6 qualifications or background of any company constructing or
7 operating a cable television system in Sacramento. The jury
8 determined that defendants' franchising process promoted the
9 public's interest in having financially sound cable television
10 operators but did not promote the interest in having technically
11 sound operators. According to the jury, defendants did not use
12 such interest as pretexes to justify the franchising process

1 defendants oppose plaintiff's views. Also unanswered are the
2 special verdicts on whether the franchising process applies
3 evenhandedly, regardless of viewpoint, and whether defendants'
4 purpose was to advance the expression of one viewpoint and
5 discourage the expression of another.

6 C. The Court's Task

7 Once the special verdicts are recorded, the court then
8 applies the law to the facts and enters judgment as provided in
9 Federal Rule of Civil Procedure 58. Quaker City, 747 F.2d at
10 1453. Entry of judgment upon a jury's special verdict is
11 subject not only to precedential guidelines but to
12 constitutional constraints as well. Griffin v. Matherne, 471
13 F.2d 911, 915 (5th Cir.), reh'g denied, 474 F.2d 1347 (1973).
14 The seventh amendment requires that if there is a view of the
15 case which makes the jury's answers consistent, the court must
16 adopt that view and enter judgment accordingly. Id.; see also
17 Ladnier v. Murray, 769 F.2d 195, 198 (4th Cir. 1985) (court has
18 duty to harmonize answers if fairly possible). Finally, a
19 special verdict must, of course, be construed in light of
20 surrounding circumstances. R.H. Baker, 331 F.2d at 509.

21 III. FINDINGS AND CONCLUSIONS BY THE COURT

22 A. Mootness as a Result of Change in Cable Policy

23 The threshold question the court must address concerns
24 an issue which arose after the jury returned its special
25 verdicts. Defendants enacted ordinances which opened up the
26 cable market to competition. These ordinances impose certain

1 requirements^{5/} on would-be cable operators but otherwise abandon
2 the single franchise policy. Defendants observe that plaintiff
3 is only challenging defendants' determination that there should
4 be a single provider of cable television services in Sacramento.
5 Because this is no longer defendants' policy, defendants argue
6 that plaintiff's request for injunctive and declaratory relief is
7 moot.

8 A case, or a question in a case, is considered moot if
9 it has lost its character as a present, live controversy.
10 Aguirre v. S.S. Sohio Intrepid, 801 F.2d 1185, 1189 (9th Cir.
11 1986). The basic question is whether there is a sufficient
12 prospect that the decision will have an impact on the parties,
13 Williams v. I.N.S., 795 F.2d 738, 741 (9th Cir. 1986) (quoting
14 13A C. Wright, A. Miller and E. Cooper, Federal Practice and
15 Procedure § 3533 at 212 (2d ed. 1984), inasmuch as federal
16 courts are without power to decide questions that cannot affect
17 the rights of litigants. Aguirre, 801 F.2d at 1189 (citing
18 North Carolina v. Rice, 404 U.S. 244, 246 (1971)). When events
19 subsequent to the filing of a complaint moot issues in a case,
20 no justiciable controversy is presented. Id. (citing Flast v.

21
22 ^{5/} Under the new ordinances, the applications for a cable
23 license require (1) the applicant's identity, (2) compliance
with all zoning, building and encroachment ordinances, (3) a map
of the license area, (4) a small application fee, (5) a

1 Cohen, 392 U.S. 83, 95 (1968)).

2 In Armster v. United States District Court, 806 F.2d
3 1347 (9th Cir. 1986), the Ninth Circuit indicated that the
4 ultimate question is the likelihood of recurrence of the
5 challenged activity. Id. at 1358. When there is a reasonable
6 possibility that the unlawful conduct will recur, the mere
7 cessation of that conduct will not render the challenged conduct
8 immune from judicial scrutiny. Id. at 1358-59. There is a
9 "powerful presumption favoring adjudication" under such
10 circumstances. Id. at 1359 (quoting Fallon, Of Justiciability,
11 Remedies, and Public Law Litigation: Notes on the Jurisprudence
12 of Lyons, 59 N.Y.U.L. Rev. 1, 27 (1984)).

13 The court does not question defendants' good faith in
14 adopting these new ordinances. However, the new ordinances are
15 presently under attack; the existing franchisee recently filed
16 suit in state court against, inter alia, the defendants in this
17 suit. The state court suit alleges that the new ordinances are
18 unconstitutionally vague and violate the Cable Communications
19 Policy Act of 1984, 47 U.S.C. §§ 521 et seq. The complaint also
20 alleges that the new ordinances conflict with provisions of the
21 old cable television ordinance (which was not repealed) and
22 various contractual obligations of defendants. There is also a
23 due process claim. The complaint seeks declaratory and
24 injunctive relief, as well as damages. It specifically seeks an
25 injunction against the issuance of licenses under the new
26 ordinances.

1 On July 2, 1987, the complaint was removed to this
2 court and has been assigned to the undersigned.^{6/} Plaintiff has
3 since notified the court of its intent to seek a preliminary
4 injunction which would enjoin defendants from issuing any
5 licenses under the new ordinances.

6 This court cannot, at this early stage, express any
7 views on the merits of these attacks on the new ordinances. The
8 attacks nonetheless create the possibility that any licenses
9 issued under the ordinances will ultimately be invalidated. If
10 this occurs, plaintiff in the instant case will not receive the
11 relief it sought in initiating this lawsuit: the right to enter
12 the Sacramento cable television market.

13 In short, this court can only resolve one lawsuit at a
14 time. The law on cable television franchising/licensing is too
15 uncertain for this court to even begin to predict the outcome of
16 this second suit. Consequently, it must assume that the second
17 lawsuit creates a reasonable possibility that permanent licenses
18 will not be issued under the new ordinances or, if they are,
19 they may be subsequently declared invalid. Because of this, the
20 court's decision vis-a-vis injunctive relief in the instant case
21 will have an impact on the parties and will affect plaintiff's
22 rights. Therefore, plaintiff's request for injunctive and
23 declaratory relief is not moot.^{7/}

24
25 ^{6/} See order relating cases dated August 3, 1987.

26 ^{7/} Of course, a final determination as to the validity of the
new ordinances may moot this controversy at some point in the
future. The court's holding is simply that, at this point,
plaintiff's request for injunctive and declaratory relief is
justiciable.

1 B. Plaintiff's First Amendment Rights

2 Plaintiff claims, in essence, that defendants' refusal
3 to give plaintiff permission to construct and operate a cable
4 television system in the Sacramento metropolitan area infringes
5 on plaintiff's free speech rights under the United States and
6 California Constitutions.^{8/} Plaintiff emphasizes that it is
7 challenging only that aspect of defendants' franchising process
8 which resulted in the selection of a single cable television
9 franchisee and the consequent exclusion of plaintiff from the
10 cable market. Plaintiff is not asking the court to decide what
11 requirements generally may or may not be imposed on one engaging
12 in the cable television business.

13 1. Plaintiff's Speech is Protected
14 by the First Amendment

15 As a threshold matter, the court notes that both the
16 Supreme Court and Ninth Circuit have determined that cable
17 television system operators are entitled to some degree of first
18 amendment protection. Preferred, 754 F.2d at 1403 (it is clear
19 "some" first amendment protection exists), aff'd on narrower
20 grounds, 106 S. Ct. at 2037 (proposed activities "seem to
21 implicate" first amendment interests); see also Pacific West,
22 798 F.2d at 355 ("Pacific West's proposed cable broadcasting

23
24 ^{8/} Nearly all of the briefing in this case -- particularly the
25 post-trial briefing -- has focused on plaintiff's federal
26 constitutional rights. Because the court finds the federal
constitutional claim dispositive, it does not reach the state
constitutional claim.

1 activities undoubtedly implicate first amendment interests . .
2 .").

3 The jury found in this case that plaintiff has the
4 technical and financial capabilities to construct and operate a
5 cable television system, and hence is a first amendment speaker.
6 As such, plaintiff's exclusion from the cable television market
7 creates a first amendment issue.

8 2. Standard to be Applied

9 Of course, to say that defendants' franchising process
10 presents a first amendment issue is not to say that it
11 constitutes a first amendment violation. See Vincent, 466 U.S.
12 at 803-05 (quoting Metromedia, Inc. v. San Diego, 453 U.S. 490,
13 561 (1981) (Burger, C.J., dissenting)). The mere fact that a
14 regulation imposes a limitation on constitutionally protected
15 speech does not mean the regulation is invalid; the question is
16 whether the regulation represents a constitutionally permissible
17 restriction on speech. See Consolidated Edison Co. of New York,
18 Inc. v. Public Service Commission of New York, 447 U.S. 530, 535
19 (1980).

20 Defendants argue that this determination cannot be
21 made at this point because the jury was unable to agree on any
22 of the special verdicts dealing with "content-neutrality" of
23 defendants' policy. Regulations adopted with a purpose to
24 suppress first amendment rights are presumptively invalid;
25 however, this presumption only applies if suppression of speech
26 is a predominant purpose in enacting the regulation. Walnut

1 Properties, Inc. v. City of Whittier, 808 F.2d 1331, 1334-35
2 (9th Cir. 1986) (citing City of Renton v. Playtime Theatres, 475
3 U.S. 41, ___, 106 S. Ct. 925, 928-29, reh'g denied, ___ U.S.
4 ___, 106 S. Ct. 1663 (1986)). "Content-based" suppression of
5 speech is impermissible because government may not grant the use
6 of a forum to people whose views it finds acceptable, but deny
7 use to those wishing to express less favored or more
8 controversial views. Renton, 106 S. Ct. at 929 (quoting Police
9 Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972)).

10 Defendants contend that the jury's inability to agree
11 on defendants' purposes in using their franchising process means
12 that the only appropriate course of action at this point is to
13 schedule further trial limited to the issue of content-
14 neutrality, citing Iacurci v. Lummus Co., 387 U.S. 86, 87
15 (1967) (per curiam), and 5A Moore's Federal Practice ¶ 49.03[4]
16 at 49-29. These authorities stand for the proposition that a
17 jury's failure to determine an issue actually submitted to it
18 requires a new trial on the issue, because the right to a jury
19 trial thereon has not been waived.

20 The court agrees that it would be improper for the
21 court to make an affirmative finding on whether defendants'
22 policy does indeed discriminate against speech and speakers
23 based on viewpoint.^{9/} However, a new trial is only necessary if

24 ^{9/} The court notes that plaintiff does indeed ask for such a
25

1 the jury's determination on that issue would make a difference
2 to the court's judgment. See Union Pacific Railroad Co. v.
3 Bridal Veil Lumber Co., 219 F.2d 825, 831-32 (9th Cir.
4 1955) (jury's disagreement on "vital question" left "a gaping
5 hole" in special verdict requiring a new trial), cert. denied,
6 350 U.S. 981 (1956). Even if the jury found in defendants'
7 favor during the new trial, the court would find that
8 defendants' policy does not survive the lesser scrutiny applied
9 to viewpoint-neutral regulations. Because of this, no new trial
10 is necessary.

11 Accordingly, the court will assume, for the purposes
12 of analysis, that defendants' policy is viewpoint-neutral.^{10/}
13 The appropriate framework for reviewing a viewpoint-neutral
14 regulation is set forth in O'Brien, 391 U.S. at 377. Under
15 O'Brien,

16 [a] government regulation is sufficiently
17 justified if it is within the constitutional
18 power of government; if it furthers an
19 important or substantial governmental
20 interest; if the governmental interest is
21 unrelated to the suppression of free
22 expression; and if the incidental
23 restriction on alleged first amendment
24 freedoms is no greater than is essential to
25 the furtherance of that interest.

26 ^{10/} The district court in Century Federal, Inc. v. City of
Palo Alto, California, 648 F. Supp. 1465 (N.D. Cal. 1986), also
assumed, for the purposes of a summary judgment motion, that the
franchising process was content-neutral. Id. at 1475 n.16. It
therefore applied the O'Brien test. Id. at 1475; but see
Preferred, 754 F.2d at 1406 (single franchise policy creates a
serious risk that public officials will discriminate on the
basis of the content of, and views expressed in, the company's
programs).

1 391 U.S. at 377; see also Preferred, 754 F.2d at 1405-06, 106 S.
2 Ct. at 2037-38 (also referring to O'Brien test).

3 A regulation is "no greater than essential" under
4 O'Brien if it promotes a substantial government interest which
5 would be achieved less effectively absent the regulation.
6 United States v. Albertini, 472 U.S. 675, ___, 105 S. Ct. 2897,
7 2907 (1985). Regulations are not invalid simply because there
8 is some imaginable alternative that might be less burdensome on
9 speech, id.; some "substantially relevant correlation" between
10 the interests asserted and the single franchise policy must
11 exist. See Pacific Gas and Electric v. Public Utilities
12 Commission of California, 475 U.S. 1, ___, 106 S. Ct. 903, 913
13 (discussing the definition of a "narrowly tailored" means), reh'g
14 denied, ___ U.S. ___, 106 S. Ct. 1667 (1986); see also Clark v.
15 Community for Creative Non-Violence, 468 U.S. 288, 298 n.8
16 (1984) (O'Brien requires an "adequate nexus between regulation
17 and interest sought to be served"); Preferred, 754 F.2d at 1406
18 (requiring a "more sharply focused response").

19 The court notes in passing that defendants' policy
20 cannot be justified as a content-neutral "time, place and
21 manner" regulation. Time, place and manner restrictions are
22 acceptable so long as they are designed to serve a substantial
23 government interest and do not unreasonably limit alternative
24 avenues of communication. City of Renton, 106 S. Ct. at
25 928 (citing Clark, 468 U.S. at 293, Vincent, 466 U.S. at 807,
26 and Heffron v. International Society for Krishna Consciousness,

1 Inc., 452 U.S. 640, 647 (1981)). In this case, the jury found
2 that defendants had not left open ample alternative channels of
3 communication for plaintiff, and persons like plaintiff, who
4 wish to express their views. See also Preferred, 754 F.2d at
5 1410 (public access channels not an adequate substitute for
6 right to operate a cable system). Defendants' single franchise
7 policy results in plaintiff's cable television speech being
8 restricted, in essence, to "no time, no place and no manner." See
9 Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-77 (1981).^{11/}

10 3. Analysis

11 a. Constitutional Power of Government
12 to Regulate Cable Television

13 The authority of local government to authorize the
14 construction and operation of cable systems within its
15 jurisdiction is recognized under both state and federal law.

16 /////

17
18 ^{11/} An example of a reasonable time, place and manner
19 regulation of cable television might involve restricting the
20 intervals at which cable television systems are installed, e.g.,
21 allowing access to utility underground conduits every few years.
22 This might constitute the "sharply focused response," see
23 Preferred, 754 F.2d at 1406, to defendants' asserted interest in
24 controlling the number of times its citizens must bear the
25 inconvenience of having their streets and yards dug up. See
26 Community Communications Co. v. City of Boulder, 660 F.2d 1370,
1377 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982);
Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d
119, 127-28 (7th Cir. 1982); Berkshire Cablevision of Rhode
Island v. Burke, 571 F. Supp. 976, 984 (D. R.I. 1983), vacated
as moot, 773 F.2d 382 (1st Cir. 1985). The court notes,
however, that the jury rejected all of the justifications for
defendants' policy based on the disruptiveness of installing
cable television systems.

1 Section 53066 of the California Government Code provides, in
2 pertinent part:

3 Any city or county or city and county in