

Installation of an OVS is likely to involve hundreds or thousands of street cuts, vault installations, and the like, adding massively to cities' already considerable right-of-way costs.

By any criterion, the public rights-of-way represent an asset of immense value.<sup>21</sup> First, local governments incur sizable costs to acquire rights-of-way. Los Angeles has invested approximately \$5 billion in its streets.<sup>22</sup> Second in addition to acquisition costs, local governments also incur immense costs in constructing and developing rights-of-way. Los Angeles spends approximately \$70 million annually to repair and maintain its streets.<sup>23</sup> The City and County of Denver, for example, expend approximately \$45 million annually to maintain their rights of way, which encompass 1700 miles of streets. The Texas Transportation Institute estimated that the costs of traffic congestion related to construction in 50 urban areas reached almost \$39.1 billion.<sup>24</sup>

The long term costs to local governments of allowing installation of just "one additional wire" for an OVS are far more than the "de minimis" amount suggested in the Order. Each street cut shortens street life, thereby requiring a city to incur additional costs of more frequent

---

difference in degree, but not in principle" (emphasis added), citing Butler v. Frontier Telephone Co., 186 N.Y. 486.

<sup>21</sup> As of 1992, there were over 930,000 miles of electric cables and telephone cables and over 2.5 million miles of natural gas, sewer and water pipes and mains in the rights-of-way. This excludes cable wiring. See Raymond L. Sterling, University of Minnesota, Indirect Costs of Utility Placement and Repair Beneath Streets, No. 94-20 at 2 (1994) ("Minnesota Study").

<sup>22</sup> Scott Declaration at ¶ 6.

<sup>23</sup> Scott Declaration at ¶ 3.

<sup>24</sup> Minnesota Study at 3

street resurfacing.<sup>25</sup> The magnitude of this additional cost can be enormous. Even though Los Angeles spends \$70 million per year to repave 200 miles of street per year, this massive budget does not keep pace; the City has a backlog of deferred street maintenance of roughly \$1 billion, a figure that can only mushroom further if additional persons are allowed to install systems in the streets without additional compensation to the City.<sup>26</sup> Similarly, with approximately 6000 street cuts per year, the City of Cincinnati has determined that its minimum cost for repaving alone is \$2,000,000.<sup>27</sup> The City of San Francisco has estimated similar costs based on the paving life of its streets.<sup>28</sup>

A recent study by the University of Minnesota concludes that the value of the easement related to construction of a utility within that easement is approximately 40% of the direct construction costs.<sup>29</sup> That study concludes that the total value of the rights-of-way in the City of Minneapolis alone, as measured in 1981, was an estimated \$2.2 billion.<sup>30</sup> The fact is that

---

<sup>25</sup> Experts have calculated that the service life of a street diminishes by up to fifty percent if it absorbs more than nine cuts over time. The service life of a street with less than nine cuts but more than 3 cuts is reduced by a full 30 percent. See Ghassan Tarakji, San Francisco State University, The Effect of Utility Cuts on the Service Life of Pavements in San Francisco (May 1995) ("SF Report").

<sup>26</sup> Scott Declaration at ¶ 5.

<sup>27</sup> Cincinnati Infrastructure Institute, University of Cincinnati, Final Report on Impact of Utility Cuts on Performance of Street Pavements (1995), contained in Report of the City of Anaheim on Impact of Utility Cuts on Pavement and Proposed Street Deterioration Fee (1995). The City has estimated that the minimum cost of repairing the average street cut is nearly \$1,000 to provide proper reinforcement, leveling and hauling material.

<sup>28</sup> See SF Report.

<sup>29</sup> Minnesota Study at 15.

<sup>30</sup> Minnesota Study at 10. This translates to a value of approximately \$5.70 per foot. Id. at 11.

any construction or reconstruction in city streets results in massive and substantial costs to local governments.

Moreover, the above represents only the impact of one OVS operator. If the Commission's rules permit "any person" to occupy the rights-of-way for OVS, the value of the local rights-of-way -- and the additional costs imposed on local governments -- must be multiplied by however many "persons" take advantage of the Order's generous offer of unlimited access to local government property. Such a furor of construction in the public rights-of-way may better be described as "de maximis" than de minimis.

**C. The Order Fails to Clearly Preserve Local Management of the Rights-of-Way.**

The Order claims to preserve a local authority's right to manage its rights-of-way.<sup>31</sup> But, the Order seems unable to grasp that a "franchise" is precisely the instrument through which a local government manages access to its rights-of-way. Local law typically requires that only those holding franchises are eligible to obtain street and rights-of-way permits. Under the Order, however, apparently anyone may obtain a rights-of-way permit by bypassing the franchise process through which a local government determines who is eligible to use its property. Thus, the Order's claimed preemption of local franchising would deprive local governments of the ability to manage their rights-of-way adequately.<sup>32</sup>

---

<sup>31</sup> Order at ¶¶ 208-210.

<sup>32</sup> The Commission should in any case revise its rules to require that OVS certifications be served on all affected local governments and state specifically which local governments are affected. Cf. Module D, line 1 instructions to Form 1275 (OVS applicant need only "Describe generally" the areas affected). Without notice of intent to establish an OVS

Moreover, the Order mistakenly suggests that local governments must apply management requirements "equally" — a far more inflexible standard than the "nondiscriminatory and competitively neutral" standard of the 1996 Act.<sup>33</sup> "Nondiscriminatory" does not necessarily mean "equal" in every case (and the Commission's own treatment of an OVS operator's "nondiscriminatory" carriage rates makes it clear that the Commission agrees). The Commission's preemption bid itself, however, would automatically defeat this condition. Other right-of-way users seeking permits will normally be subject to a franchise, and the permitting process will assume that such a franchise takes care of such matters as insurance and indemnification. Yet the Commission seeks to create a special, privileged class of users that, despite local laws to the contrary, are not required to obtain a franchise to be eligible for a permit, and so may need to be treated differently for permitting purposes. Thus, again, the Order raises a wholly unnecessary thicket of equal protection, due process and Tenth Amendment issues.

---

system in its rights-of-way, local authorities may be unable to apply the necessary management conditions. See Order at ¶¶ 29, 34. Given the incredibly short time periods involved in OVS certification, failure to require adequate notice violates due process.

<sup>33</sup> Order at ¶ 209.

**II. OVS SUPPORT FOR PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS MUST MATCH THE OBLIGATIONS DEFINED IN THE CABLE OPERATOR'S FRANCHISE AGREEMENT.**

**A. An OVS Operator Must Provide Additional Support to Match the Cable Operator's Franchise Obligations, Not Merely Split The Operator's Preexisting Obligations.**

The Order properly recognizes that an OVS operator must match all PEG obligations of the incumbent cable operator. But the Order's language seems to suggest that the OVS operator may do so by merely sharing the cable operator's existing franchise obligations, rather than by truly matching those obligations.<sup>34</sup> In addition to depriving the community of fair compensation for a second system in its streets, such an approach would be inconsistent with the statute. The OVS operator's obligations must be no greater or less than those of the cable operator. But those of the cable operator are established by its franchise agreement, and the Commission may not reduce them, or a further taking of local government property would result. Thus, the OVS operator must provide additional PEG support equal to what the cable operator's franchise requires from the cable operator.<sup>35</sup>

Common sense requires that an additional user of the rights-of-way should pay additional compensation. The OVS operator places additional burdens on the rights-of-way, and the admission of a second user represents additional market value to the community. The OVS operator can no more simply split the cable operator's existing payments than a new tenant, leasing a new office from a landlord, can merely split rent payments made by a prior tenant for

---

<sup>34</sup> See ¶¶ 142, 145-146, 148-150.

<sup>35</sup> See NLC Comments at 35.

that tenant's office. Nor, when ESPN signs up a new cable operator to carry its existing programming, does its new customer merely split current payments made by ESPN's existing customers. Rather, the new customer must pay an amount equal to, and over and above, what prior customers pay.

The Order appears to mistakenly assume that a community has already obtained all the PEG support it could possibly need from the incumbent cable operator. But the cable operator provides only the PEG support the community succeeded in bargaining for (at the time of the last franchise negotiation) from one right-of-way user, not for two or more right-of-way users. Like any property owner, a local government has the right to obtain additional compensation in the form of PEG from the new OVS entrant, and the Commission should revise its rules to make this clear.

**B. An OVS Operator Must Match I-Net Obligations As Part of PEG Obligations.**

Although the Order generally requires an OVS operator to match the cable operator's PEG support (subject to the "sharing" ambiguity discussed above), it distinguishes I-nets from all other PEG obligations. The Order apparently concludes that an OVS operator is not required to build an I-net (even if the local cable operator is), but only to "designate" access channels on an I-net if it should (for unfathomable reasons) decide to build one without being required to do so.<sup>36</sup> This conclusion is based on a lack of understanding as to how I-nets actually work.

---

<sup>36</sup> Order at ¶ 143.

The Cable Act treats I-nets as part of the PEG compensation a franchising authority may receive: the only mention of the term in the Cable Act is in section 611. This treatment is borne out by the facts. Normally, an I-net is an internal network that connects only governmental sites — municipal buildings, schools, libraries, fire stations, and the like. Cable operators build I-Nets pursuant to franchise PEG requirements to serve public, educational, and/or governmental purposes. No channels are "designated" for any other use on the I-net.<sup>37</sup> Thus, an I-net is entirely a creature of PEG.

Thus, the Order's attempt to match the cable operator's obligations by allowing a franchising authority to "designate channels" on an I-Net misses the mark. No I-Net on which to designate channels will exist unless it is created as part of the OVS operator's obligation to match PEG requirements. To fulfill the statutory requirement that the OVS operator's PEG requirements be no greater and no less, the Commission's rules must place the OVS operator under exactly the same I-Net requirements as the cable operator.

### **III. ALLOWING "ANY PERSON" TO BECOME AN OVS OPERATOR CONFLICTS WITH THE COMMUNICATIONS ACT.**

The Order concludes that "any person," including (under some circumstances) the incumbent cable operator, can become an OVS operator.<sup>38</sup> We have already shown why this conclusion contradicts the statutory language and the legislative history.<sup>39</sup> But the error of the

---

<sup>37</sup> See, e.g., Alexandria Franchise at § 5(b)(1) ("shall be for use by governmental and educational users").

<sup>38</sup> Order at ¶¶ 12-26.

<sup>39</sup> See NLC Comments at 46-48; NLC Reply Comments at 32-34.

Order's conclusion is underscored by the havoc it wreaks on several other parts of the statute — both the Cable Act and the 1996 Act.

As the Order observes, Section 302 of the 1996 Act rests on the premise that an OVS is a new entrant, competing with an incumbent cable operator.<sup>40</sup> This assumption permits the statute to establish a yardstick for the OVS operator's PEG and fee in lieu obligation by reference to PEG obligations and franchise fee of the incumbent cable operator.<sup>41</sup> But the Commission's rules abandon this fundamental premise by allowing incumbent cable operators to convert to OVS — either where effective competition exists, or by Commission waiver where competition is not feasible.<sup>42</sup>

The Order's provision that a cable operator cannot convert to OVS if this would mean violating or abandoning an existing franchise agreement,<sup>43</sup> while helpful, is not sufficient. A cable operator might, for example, argue that when its current franchise agreement expires, it need not seek renewal, but could instead declare itself an OVS with no need for a local franchise agreement. Incumbent cable operators might also seek to devise corporate restructurings to allow them to escape their existing contracts and convert to OVS. The result in a particular community could well be either a single cable-turned-OVS (under FCC waiver), or two competing OVS entities. That result, however, would do violence to several other parts of the Communications Act:

---

<sup>40</sup> Order at ¶ 24.

<sup>41</sup> See § 653(c)(2)(A).

<sup>42</sup> Order at ¶¶ 24-25.

<sup>43</sup> Id. at ¶ 26.

**(1) The Cable Act provisions for updating PEG obligations would be defeated.** The Cable Act assumes that franchise renewal will provide an opportunity for a community to revisit and update its cable-related community needs and interests.<sup>44</sup> If the cable operator converts to OVS, however, there will be no franchise renewal. It appears that the Order rules would then require the former cable operator to continue to abide by its former franchise obligations, but with no provision for review and readjustment, defeating the intent of Congress.<sup>45</sup> Such a result would be particularly onerous for communities reaching the end of long-term franchises whose PEG needs have increased significantly over the previous franchise period.

**(2) The 1996 Act's buyout provisions are defeated.** The 1996 Act prohibits cable-telco buyouts. The prohibition, however, is couched in terms of "cable operators."<sup>46</sup> Thus, if a cable operator can convert to OVS, there would be no "cable operator" in the market, and buyout restrictions would not apply, allowing the cable-turned-OVS to acquire or be acquired by a local LEC. Congress never intended such evasions; instead, the buyout language confirms that Congress never intended cable operators or other non-LEC "persons" to be OVS operators.

**(3) Renewal negotiations are distorted by a cable operator's alleged OVS option.** The 1996 Act left the Cable Act renewal provisions unchanged. Those provisions allow a community to deny renewal and evict a cable operator if it fails to meet certain criteria -- in particular, to meet the community's future cable-related community needs and interests, taking

---

<sup>44</sup> See 47 U.S.C. § 546(c)(1)(D). See also NLC Comments at 32-34; NLC Reply Comments at 32.

<sup>45</sup> Order at ¶ 151.

<sup>46</sup> See 1996 Act section 302(a) (adding new § 652).

into account their costs.<sup>47</sup> Under the Order's interpretation of the OVS provision, however, it appears that a community could determine its future needs and interests, deny renewal based on the cable operator's refusal to meet those requirements, have its denial upheld by a court — and then have the cable operator abandon its expiring cable franchise and convert to OVS, bound not by the newly-verified future needs and interests, but only by the outdated requirements of its former franchise. In this way the cable operator could thumb its nose at community needs, and yet, like the Ancient Mariner's albatross, continue to hang around the neck of the community, which would have no way to remove it. Again, Congress cannot have intended such an anomaly.

It is clear from these examples that the Order's notion that an incumbent cable operator and any other non-LEC can become an OVS is untenable in light of the structure of the Communications Act. Nor is that notion supported by sound policy. The Order claims that non-LEC OVS would provide the same benefits as LEC OVS.<sup>48</sup> But that is not the statutory goal of OVS, which was to provide a new option for LEC entry into video distribution, providing competition to incumbent cable operators.<sup>49</sup> The Commission should revise its rules to provide that only LECs may become OVS operators, and that in any case no existing cable operator may become OVS in its cable franchise territory.

---

<sup>47</sup> 47 U.S.C. § 546(c)(1)(D).

<sup>48</sup> Order at ¶ 18.

<sup>49</sup> See NLC Comments at 3-5, 47-48; NLC Reply Comments at 3-5.

**IV. THE COMMISSION'S RULES REGARDING OPEN ACCESS WILL NOT ACHIEVE THE STATUTORY PURPOSE OF OVS.**

The Order's rules fall far short of fulfilling the statutory requirements of ensuring open access, nondiscrimination, and reasonable rates. The cumulative effect of the rules is that an OVS operator will in all likelihood be able to have a system that is just as closed as a cable system.

The aggregate effect of the rules may best be illustrated by an example. Assume that a small, aspiring video programming provider, Independent Video Services ("Independent"), seeks to provide video programming through an OVS operated by LEC Video Systems ("LEC"). Under the Order's scheme, Independent sees LEC's Notice of Intent (NOI) and asks LEC for the necessary additional information. § 76.1503(b); Order at ¶ 47-48. Independent must then meet LEC's application criteria, which the rules leave entirely open-ended, but which may include meeting LEC's uncircumscribed demands to ensure that Independent's request is bona fide and that it will deliver the promised programming: paying a deposit in advance; and demonstrating Independent's creditworthiness to LEC's satisfaction. § 76.1503(b)(3); Order at ¶¶ 38, 49. When the 90-day enrollment period ends, LEC will allocate capacity through an undefined process, subject only to ill-defined canons of fairness. § 76.1503(c)(2). In addition, LEC can require Independent to purchase capacity in full-channel units, thus preventing it from starting out gradually as many cable programmers did by initially providing only part-time service. § 76.1503(c)(iv); Order at ¶¶ 38, 85-88

Assuming Independent can meet LEC's self-defined application criteria, and that capacity is available, Independent must now decide whether the rates, terms, and conditions LEC offers (including the allocated capacity) are (a) nondiscriminatory, and (b) reasonable. Only

Independent can make this decision, because the Commission will not even review LEC's rates until Independent makes a complaint. Moreover, if Independent's application is rejected by LEC, it is not clear whether Independent will have the alternative of subleasing capacity from other, more favored providers, since there appears to be nothing in the Commission's rules to prevent the OVS operator from forbidding such subleasing.<sup>50</sup>

Independent cannot decide whether LEC's terms are fair until it has already incurred the costs of completing LEC's application process. This is because (i) Independent will not know its actual carriage rates (as distinct from a "preliminary estimate") until its application is accepted; (ii) Independent cannot find out anyone else's rates without discovery, since the rates are not made public; (iii) Independent cannot use discovery except by filing an FCC complaint, and even then discovery is limited; and (iv) a complaint may only be filed by a video programming provider that has sought carriage.<sup>51</sup> Thus, Independent faces a significant financial barrier before it can even try to find out whether LEC is treating it fairly. Moreover, because Independent cannot find out any other carriage rates for comparison without filing a complaint, the Commission's rules will encourage routine filing of carriage complaints by all video programming providers and thus flood the Commission with complaints.

Assuming, however, that Independent can muster the resources necessary to file a complaint, it must first LEC give ten days' advance notice, § 76.1513(c). But the complaint must then plead sufficient facts to constitute a violation of the Commission's rules, § 76.1513(e)(1)(v), and provide evidence showing such a violation, § 76.1513(e)(1)(vii). And,

---

<sup>50</sup> See NLC Comments at 24.

<sup>51</sup> See § 76.1503(b)(2); Order at ¶ 132; § 76.1513(i); Order at ¶ 128.

if Independent wishes to claim discrimination, it must provide documentary evidence or an affidavit describing the differential of which it complains, § 76.1513(e)(1)(viii). How Independent could possibly meet this burden is unexplained, since Independent will have no access to anyone else's rate except through discovery, and Independent cannot get discovery until after it files the complaint, and then only at the Commission's discretion. Thus, the rules place Independent in a Catch-22 situation: it cannot file a discrimination complaint without evidence of other parties' rates, but it can get no evidence of others' rates until it files a complaint.

If Independent nonetheless manages to file a rate complaint, its burden of proof will depend on how much capacity the OVS operator controls, but not according to the 1/3 standard of the statute. Rather, the Commission will apply a "strong presumption" that LEC's rates are reasonable and place the burden on Independent as long as one-third of the OVS capacity is occupied by an unaffiliated video programming provider, and Independent's rate is no higher than the average of any independent providers' rates.<sup>52</sup> The second criterion is largely meaningless, since only LEC has the necessary information to calculate that average, which may be "weighted" in a variety of ways left entirely indeterminate by the Commission's rules.<sup>53</sup> Thus the burden of proof depends almost wholly on the one-third capacity criterion.

Since Independent has no access to anyone else's rates, it can hardly hope to overcome the "strong presumption" as long as LEC can manage to secure one favored programmer to occupy one-third of system capacity. Thus, in effect, the Commission's rules turn the OVS operator's two-thirds set-aside obligation into a one-third set-aside obligation. Thus, as long as

---

<sup>52</sup> § 76.1504(c).

<sup>53</sup> See Order at ¶ 122

the OVS operator can make arrangements with a single, technically unaffiliated ally to occupy one-third of the channels (perhaps compensating its ally through non-ownership benefits such as favorable financing, depending on how the Commission decides to define "affiliation"), the OVS operator can effectively close the door on all other access to its system.<sup>54</sup>

If Independent nonetheless plods doggedly through the Commission's dispute resolution process, it can obtain discovery only at the Commission's discretion, § 76.1513(i). If Independent succeeds in discovering other parties' carriage terms, it will be rewarded with elaborate (and expensive) burdens in the cause of keeping LEC's terms confidential, § 76.1513(j). And if Independent does manage to identify any differences in LEC's rates, LEC's ability to claim justifications for any differences is open-ended, § 76.1504(b)(1).

If Independent complains that LEC's rates are unreasonable, as distinct from discriminatory, LEC's proper rate will be determined by a vague imputed rate formula, § 76.1504(e), whose inputs and methodology will be known only to LEC. Moreover, LEC may apparently include in its rate calculations a value for "loss of subscribers" to competitors. If this means that LEC can charge Independent the same rate for carriage that LEC could have charged subscribers for its own programming, then (a) Independent cannot possibly compete with LEC (or with the cable operator's system); and (b) LEC would in any case receive the same compensation as would a cable operator for all its channels. Thus, it becomes child's play for LEC to become, to all intents and purposes, a cable operator, by pricing all carriage applicants out of the market.

---

<sup>54</sup> See Comments of National League of Cities and National Association of Telecommunications Officers and Advisors in CS Docket No. 96-85 (June 4, 1996).

While attempting to run this Sisyphean regulatory gauntlet, Independent faces one constant threat: If its complaint is held to be "frivolous," it is subject to sanctions, § 76.1513(s). Together with the considerable costs of complying with the Commission's process, and the Catch-22 regarding evidence for the complaint, this additional club ensures that LEC need waste little sleep over the possibility that a programmer complainant has any real chance of disturbing LEC's cozy two-thirds direct control and one-third indirect control (through a single favored, "unaffiliated" programmer) over all its capacity

Finally, if Independent's actual rate differs from LEC's "preliminary estimate," or if LEC changes Independent's rate unfavorably at a later date, Independent, like Sisyphus, must start all over again.

The only justification offered in the Order for this daunting regulatory gauntlet is that there is no "record" that the gauntlet would impose hardship on small programmers.<sup>55</sup> But this bootstrap is a perversion of the statute. The Act requires the Commission to adopt rules that prevent discrimination and ensure reasonable rates. These requirements already make clear Congress' concern that these abuses were likely to occur in the absence of adequate rules. And the LECs' own comments have shown that they have every incentive to exploit any opening in the Commission's rules to gain the "flexibility" of a cable operator.<sup>56</sup> That evidence alone is sufficient to show the irrationality of the Order's one-sided regime favoring OVS operators.

---

<sup>55</sup> Order at ¶ 85 n.211.

<sup>56</sup> See NLC Reply Comments at 6-8, 25.

V. CONCLUSION

For the reasons stated above, the Commission should substantially revise the Order and the rules adopted therein as indicated above.

Respectfully submitted.

THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES  
CONFERENCE OF MAYORS; THE NATIONAL  
ASSOCIATION OF COUNTIES; MONTGOMERY COUNTY,  
MARYLAND; AND THE CITY OF LOS ANGELES,  
CALIFORNIA

By   
Tillman L. Lay  
Frederick E. Ellrod III  
Kristin M. Neun  
Miller, Canfield, Paddock and Stone, P.L.C  
1225 19th Street, N.W  
Suite 400  
Washington, D.C. 20036  
(202) 785-0600

Their Attorneys

July 5, 1996

WAFS1\46255.4\107577-00001

## APPENDIX

1. Franchise Agreement Between Tele-Vue Systems, Inc. D/B/A Viacom Cable and King County, Washington (1995).
2. Cable Television Franchise Agreement Between City of Alexandria, Virginia and Jones Intercable of Alexandria, Inc (1994).
3. Franchise Agreement Between City of New York and Metropolitan Fiber Systems of New York, Inc. (No. 68 1990).
4. Cable Television Franchise Agreement Between Boone County, Kentucky and Jacor Cable, Inc. (Ordinance No. 450.4 1989).
5. Cable Television Franchise Agreement Between County of Boone, Kentucky and Storer Communications of Northern Kentucky, Inc. (Ordinance No. 450.1 1980).
6. Declaration of Gregory L. Scott, No. 96-46 (F.C.C. petition for reconsideration filed Jul. 5, 1996)
7. Ghassan Tarakji, San Francisco State University, The Effect of Utility Cuts on the Service Life of Pavements in San Francisco (Vol. 1 1995) (on file with Dept. of Pub. Works City and County of San Francisco)
8. Report of City of Anaheim on Impact of Utility Cuts on Pavement and Proposed Street Deterioration Fee (1995).
9. Raymond L. Sterling, University of Minnesota, Indirect Costs of Utility Placement and Repair Beneath Streets (No. 94-20 1994) (Minn. Dept. of Transp. Off. of Research Administration; available from National Technical Information Services).
10. City and County of Denver Department of Public Works Schedule of Expenditures (1994).
11. National League of Cities Right of Way Material



Appendix B

FRANCHISE AGREEMENT  
BETWEEN  
TELE-VUE SYSTEMS, INC. D/B/A VIACOM CABLE  
AND  
KING COUNTY, WASHINGTON  
1995

**TABLE OF CONTENTS**

	<u>Page</u>
EXHIBIT A . . . . .	4
EXHIBIT B	
<b>DRAFT PROPOSED FRANCHISE AGREEMENT . . . . .</b>	<b>5</b>
<b>CABLE TELEVISION FRANCHISE AGREEMENT . . . . .</b>	<b>1</b>
<b>1. Definitions . . . . .</b>	<b>2</b>
<b>2. Grant of Authority; Limits and Reservations. . . . .</b>	<b>3</b>
(a) Grant of Authority . . . . .	3
(b) Scope of Franchise. . . . .	4
(c) Exercise of Authority Under Franchise. . . . .	5
(d) Activities of Affiliates. . . . .	6
(e) Franchise Not Exclusive. . . . .	6
(f) Relation to Other Cable Franchises. . . . .	6
(g) Construction of Agreement. . . . .	7
(h) Relation to Cable Ordinance. . . . .	7
(i) Relation to Other Provisions of Law. . . . .	8
(j) Relation to Prior Franchise. . . . .	8
(k) Effect of Grant. . . . .	9
(l) Effect of Acceptance. . . . .	9
(m) Franchisee Bears Its Own Costs. . . . .	9
(n) No Waiver. . . . .	10
(o) No Recourse. . . . .	10
(p) External Costs. . . . .	10
<b>3. Effect of Changes in Law. . . . .</b>	<b>11</b>
(a) Severability. . . . .	11
(b) Effect of Change in Law. . . . .	12
<b>4. Transfers. . . . .</b>	<b>13</b>
(a) Control. . . . .	13
(b) Application for Transfer. . . . .	14
(c) Notice of Transfer. . . . .	14
(d) Review of Transfer. . . . .	15
(e) Mandatory Conditions. . . . .	15
(f) Limitation on Transfer. . . . .	16
(g) Other Changes in Ownership. . . . .	16
<b>5. Franchise Fee. . . . .</b>	<b>17</b>
(a) Payment to County. . . . .	17
(b) Not in Lieu of Any Other Assessments, Tax or Fee . . . . .	17
(c) Payments. . . . .	18
(d) No Accord or Satisfaction. . . . .	18

(e)	Payment on Termination. . . . .	18
(f)	New Business Holiday. . . . .	19
(g)	Limit on Certain Payments. . . . .	20
(h)	Utility Tax Offset. . . . .	21
<b>6.</b>	<b>Notices.</b> . . . .	<b>21</b>
<b>7.</b>	<b>Insurance Requirements.</b> . . . .	<b>22</b>
(a)	General Requirement. . . . .	22
(b)	Scope of Insurance. . . . .	23
(c)	Initial Insurance Limits. . . . .	23
(d)	Deductibles and Self-Insured Retentions. . . . .	24
(e)	Endorsements. . . . .	24
(f)	Acceptability of Insurers. . . . .	25
(g)	Verification of Coverage. . . . .	26
<b>8.</b>	<b>Indemnification.</b> . . . .	<b>26</b>
(a)	Scope of Indemnity. . . . .	26
(b)	Duty to Give Notice and Tender Defense. . . . .	28
(c)	Exception to Duty to Tender Defense. . . . .	28
<b>9.</b>	<b>Security Fund, Performance Bond and Letter of Credit.</b> . . . .	<b>29</b>
(a)	Amount. . . . .	29
(b)	Use. . . . .	29
(c)	Restoration of Fund. . . . .	30
(d)	Effect of Assessment Exhausting Fund. . . . .	30
(f)	Performance Bond. . . . .	31
(g)	Letter of Credit. . . . .	31
<b>10.</b>	<b>Liquidated Damages.</b> . . . .	<b>32</b>
(a)	Amounts. . . . .	32
(b)	Effect on Duty to Comply. . . . .	34
(c)	Accrual. . . . .	34
<b>11.</b>	<b>Relationship of Remedies.</b> . . . .	<b>35</b>
(a)	Remedies are Non-exclusive. . . . .	35
(b)	No Election of Remedies. . . . .	35
<b>12.</b>	<b>Non-discrimination.</b> . . . .	<b>35</b>
(a)	No Discrimination. . . . .	35
(b)	Equal Employment Plan. . . . .	37
(c)	Minority/Women's Business Procurement Program . . . . .	38
(d)	Annual Reports. . . . .	40
<b>13.</b>	<b>Rates.</b> . . . .	<b>40</b>
(a)	Rates and Charges Regulated. . . . .	40
(b)	Manner of Regulation. . . . .	41
(c)	Rate Schedules. . . . .	41
(d)	Experimental Services. . . . .	41
<b>14.</b>	<b>Customer service.</b> . . . .	<b>42</b>

<b>15. System Facilities, Equipment and Services.</b>	42
(a) System Upgrade	42
(b) Institutional Network	51
(c) Interim System Upgrade	53
(d) System Upgrade and Institutional Network Schedule	54
(e) Full Cable Service to Certain Facilities	57
(f) Proof of Performance Tests	58
(g) Leased Access Channels	59
(h) Customer Service Monitoring	59
(i) Local Office	59
(j) Emergency Broadcasts	60
(k) Interconnection	60
(l) Uses of System	60
(m) Additional Capacity	61
(n) Programming	61
<b>16. Channels, Facilities, Equipment and Services for Public, Educational and Government Use.</b>	61
(a) Access Channels	61
(b) Capital Grant for Access Equipment and Facilities	70
(c) Return Feed From Facilities:	72
(d) Management of Channels	74
(e) Program Guide:	74
(f) Costs and Payments Not Franchise Fees	75
(g) Editorial Control	75
(h) Minority Programming Channels:	75
<b>17. Timing and Planning of Construction; Extension.</b>	76
(a) Interconnection.	76
(b) Line Extensions.	77
(c) Construction of the Institutional Network.	77
(d) Permit Fees.	78
(e) Retention of Discretion.	79
<b>18. Conditions on Use of Rights of Way: Specific Practices.</b>	79
(a) Use of Public and Private Property; Generally.	79
(b) Use of Poles and Conduits.	82
(c) Repair and Restoration of Property.	84
(d) Movement of Cable System For and By County.	86
(e) Movement for Other Franchise Holders.	87
(f) Movement for Other Permittees.	88
(g) Tree Trimming and Excavation.	88
(h) Decisions of County Road Engineer.	88
<b>19. Operation and Reporting Provisions.</b>	89
(a) Books and Records	89
(b) Reports.	91
(c) Books and Records Must Be Complete.	98
(d) Provision of Other Materials.	99
(e) Retention of Records; Relation to Privacy Rights	99
(f) Charges for Inspection, Audits or Tests.	100

<b>20. Remedies.</b>	101
(a) Rights of County.	101
(b) Rights of Franchisee.	102
(d) Duty to Exhaust Remedies.	103
(e) Effect of Revocation or Forfeiture.	103
<b>21. Abandonment.</b>	104
(a) Effect of Abandonment.	104
(b) What Constitutes Abandonment.	104
<b>22. Exercise of Right to Purchase.</b>	105
(a) Option to Purchase.	105
(b) Arbitration.	105
(c) Rights Not Waived.	106
<b>23. Miscellaneous Provisions.</b>	106
(a) Governing Law.	106
(b) Force Majeure	106
(c) Connections to System; Use of Antennae	107
(d) Calculation of Time	108
(e) Time of Essence; Maintenance of Records of Essence	108
(f) Guarantee.	108
(g) Captions	109

CABLE SYSTEMS

FRANCHISE NO. \_\_\_\_

In the matter of the application of Tele-Vue Systems, Inc. d/b/a Viacom Cable for a Franchise to construct, operate and repair a Cable System in, over, along and under County streets, alleys, roads and compatible utility easement rights-of-way in King County, Washington for the purpose of transmitting video, data and voice signals.

---

Tele-Vue Systems, Inc. d/b/a Viacom Cable filed an Application for a Franchise to construct, operate and repair a Cable System in, over, along and under County roads and appropriate right-of-way within the unincorporated portion of the area described in Appendix A for the purpose of transmitting video, data and voice signals. The King County Council held a public hearing on the Application on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

Legal notice of the Application and of the hearing were given as required by law.

---

The King County Council having considered the interests proposed and advanced, has found that the grant of a Franchise, subject to conditions, is in the public interest. It hereby ORDERS, pursuant to Ordinance No. \_\_\_\_\_, that a Cable System Franchise is granted to Tele-Vue Systems, Inc. d/b/a Viacom Cable, subject to the conditions set forth in the Franchise Agreement attached as Appendix B hereto, this Franchise and Ordinance No. \_\_\_\_\_. This Franchise grants the right, subject to conditions, to construct, operate and repair a Cable System in, over, along and under County roads and appropriate right-of-way within the unincorporated portions of the area described in Appendix A for the purpose of transmitting video, data and voice signals commencing on the effective date of the Franchise through and including \_\_\_\_\_, 2005. The Franchise shall become effective when the Franchisee has:

- A. Signed the Franchise Agreement attached as Appendix B;
- B. Signed the Construction Agreement Filed attached as Appendix C;
- C. Signed an unconditional acceptance of this Franchise attached as Appendix D; and

D. Made all payments, posted all securities and supplied all information that it is required to supply prior to or upon the effective date of the Franchise.

Provided that, all these actions must be completed within 30 days of the effective date of Ordinance No. \_\_\_\_\_, or the Franchise shall be null and void and without effect.

Tele-Vue Systems, Inc.  
d/b/a Viacom Cable

King County, Washington

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_