COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2002-CA-701

INSIGHT COMMUNICATIONS CO., LP AND INSIGHT KENTUCKY PARTNERS II, LP F/K/A INTERMEDIA PARTNERS OF KENTUCKY, LP

APPELLANTS,

v.

CITY OF LOUISVILLE, KENTUCKY

APPELLEE.

Appeal from Jefferson Circuit No. 00-CI-07100

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BRIEF OF APPELLEE

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent on December 24, 2002, by electronic mail and U.S. Mail, postage prepaid, to Laurence J. Zielke, Janice Theriot and Adam Shadburne, Pedley, Zielke, Gordinier & Pence, 1150 Starks Building, 455 South Fourth Avenue, Louisville, KY 40202, and by U.S. Mail, postage prepaid, to the Honorable Lisabeth Abramson, Jefferson Circuit Court, Division Three, Jefferson Judicial Center, 700 West Jefferson Street, Louisville, KY 40202.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee, the City of Louisville, Kentucky ("the City"), does not believe that the issues in this case are at all "complex" or that oral argument is necessary to clarify them, as Appellants Insight Communications Company, LP, *et al.* (collectively "Insight") contend. Nevertheless, to ensure that the City will have an opportunity to respond to any new arguments that Insight may make in its reply brief, the City joins in Insight's request for oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The City objects to Insight's Statement of the Case, which contains numerous significant factual errors, baseless characterizations, and unsupportable conclusions.[1] The City offers the following counterstatement of the case, which rests entirely on facts that are undisputed or indisputable.

Regulatory Background

The parties agree that disputes over cable franchises are largely governed by contract law. As the cases discussed in Section I.C. below indicate, however, courts should interpret cable franchises in ways that do not undermine important national policies. Toward this end, the City begins with a brief summary the regulatory background of this controversy.

In 1984, Congress enacted the first comprehensive federal legislation governing cable television, the Cable Communications Policy Act of 1984 ("Cable Act"). Believing that a deregulatory approach would stimulate competition in the cable industry and result in lower prices and better service, Congress imposed minimal regulation on the industry. Over the next eight years, however, Congress's expectations went unfulfilled.

In response, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. The Act imposed rate regulation and introduced numerous

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[1] This is also true of other portions of Insight's brief. For example, Insight would have this Court believe that "based on the evidence of record, Knology should have been given less time to build than Insight because Knology's new construction is a *simpler* task than Insight's system upgrade." Insight's Brief at 18. Insight knows perfectly well that this statement cannot be reconciled with the testimony of its own witnesses and other evidence in *Knology, Inc. v. Insight Communications Co., L.P., et al.*, Civ. No. 3:00CV-723-R (W.D.Ky.).

specific measures to promote competition in the cable industry. In the legislative history of the Act, Congress explained:

> Passage of the Cable Competition Policy Act of 1984 (Cable Act) was premised on the expectation that emerging competition in the video marketplace would result in reasonable rates for cable service and improved customer services practices. Since passage of the Cable Act, however, competition to cable from alternative multichannel video technologies largely has failed to materialize. At the same time, consumer complaints about high and rising cable rates and poor customer service practices have become widespread. Concerns also have been raised about the evolving structure of the video programming marketplace and its implications for the flow of news, information, and entertainment to the American people.

H. R. Rep. No. 102-628, 102nd Cong., 2d Sess., 1992 WL 166238 at *26.

One important factor that contributed to the lack of competition was that "[s]ome cable operators [had] behaved in an anticompetitive fashion against unaffiliated programming services and alternative multichannel video system providers." *Id*. at *29. The resulting "scarcity of overbuilds," Congress observed, "[was] to be expected in light of the strong national monopoly characteristics of cable systems." *Id*. One such characteristic was that "incumbent cable systems often wage[d] legal battles to prevent cities from awarding second franchises." S. Rep. No. 102-92, 102nd Cong., 1st Sess. 1991, 1991 WL 125145 at *13 (Leg. Hist.)

Four years later, in the Telecommunications Act of 1996, Congress reiterated its pro-competitive national policy for the cable industry and extended the policy to cover telecommunications services. H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 1996 WL 46795 at *1, *148 (Leg. Hist.). According to the Federal Communications Commission ("FCC"), the agency responsible for administering the federal communications laws,

> [U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, *by allowing all providers to enter all markets*. The opening of *all telecommunications markets to all providers* will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. *The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges*.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 1996 WL 452885 ¶ 4 (rel August 8, 1996) (emphasis added). As one of the Senate managers of the Telecommunications Act succinctly observed, "In short, [the Act] constructs a framework where *everybody* can compete *everywhere* in *everything*." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added).

In furtherance of the pro-competitive policies of the federal communications laws, Section 541(a) of the Cable Act and Section 253(a) of the Telecommunications Act prohibit state and local governments from expressly or effectively imposing barriers to entry on potential competitors, including measures that result in unreasonable delays.[2] In *Knology, Inc. v. Insight Communications Co., LP, et al.*, 2001 WL 1750839 (W.D. Ky. 2001), the federal district court found that these provisions of the Cable Act and Telecommunications Act apply to, and invalidate, provisions in cable franchises such as the automatic stay provision in Section 38 of Insight's franchise.

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[2] *See also TCG New York, Inc. v. City of White Plains*, 503 F.3d 67, 76 (2d Cir. 2002); *In re Silver Star Telephone Co.*, 12 FCC Rcd 15,639, 1997 WL 591969, ¶¶ 38-39 (1997), *aff'd, RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000); *In re AVR, L.P.*, 14 FCC Rcd 11,064, 1999 WL 335803 ¶¶ 4, 12, 23 (1999); *AT&T v. City of Austin*, 975 F. Supp. 928, 942 (W.D. Tex. 1997), *vacated on other grounds*, 235 F.3d 241 (5th Cir. 2000).

The Insight and Knology Franchises

The City of Louisville is the authority that is responsible for awarding franchises to providers of cable service in Louisville. In 1972, the City enacted a master cable ordinance, *Ordinance #142, Series 1972*, that established conditions for awarding new cable franchises in the City.[3] Attachment 2 to the City SJ Memo. Among other things, the ordinance specified a term of 15 years, required that cable operators construct their systems within five years of the award of the franchise, and left cable operators free to decide the order in which they would build out their systems. *Id.*, §§ II.A, XII.B, XXVII.

In 1973, the City awarded the first cable franchise in Louisville to Insight's predecessor, River City Cable Television. *Ordinance #162, Series 1973*, Attachment 3 to the City SJ Memo. River City (later known as CPI of Louisville) did not complete its construction of the cable system until approximately April 1, 1981. *Ordinance #92, Series* 1980, Attachment 4 to the City SJ Memo. It thus took Insight's predecessors nearly 7½ years to complete construction of the original cable system in the City, even though they faced no competition from any other provider of cable services.

In 1998, the City enacted *Ordinance #76, Series 1998* (As Amended), to renew the cable franchise of InterMedia Partners of Kentucky, LP, which by then had acquired the Louisville franchise. Exhibit A to Insight's Complaint. The renewal franchise had a 12-year term and a 15-month deadline for completion of an upgrade of the system. *Id.*, §§ 38, 44. Considered together, these provisions gave InterMedia approximately 10¾ to

[3] The ordinances and other materials discussed in this section were attached as exhibits to the Insight's Complaint, Record on Appeal beginning at 1, or the City's memorandum in support of its motion for summary judgment ("City SJ Memo"), Record on Appeal beginning at 305.

operate a fully upgraded cable system capable of providing subscribers various traditional and new products and services, including high speed access to the Internet. The renewal franchise required InterMedia to extend the benefits of the upgrade to "both low and high income areas." It also allowed the City to begin proceedings to revoke the franchise if InterMedia failed to cure a material breach of the franchise within 60 days of receiving notice of the breach. *Id.*, § 52.

In Section 38, *Ordinance #76, Series 1998* sets forth the "level playing field" requirement that Insight has invoked in this case:

> The rights and privileges granted by this ordinance to Operator are not exclusive and nothing herein is intended to or shall be construed so as to prevent the City from granting other and similar rights, privileges and franchises to any other person, firm, association or corporation, provided, however, that such rights, privileges and franchises are neither "more favorable" nor "less favorable" than those granted to Operator herein. The parties agree that a subsequent franchise shall not be considered either "more favorable" or "less favorable" if the rights, privileges granted and burdens imposed in the subsequent franchise are substantially similar to those contained in this Franchise Ordinance. Any subsequent franchise shall contain a provision suspending the effective date for sixty (60) days during which time after prompt written notice is given by the City to Operator, if Operator claims to be aggrieved, parties shall seek a Declaration of Rights in a court of competent jurisdiction during which time the effective date of the subsequent franchise shall be suspended pending a final and nonappealable decision resolving the issue.

In 1999, the City passed *Resolution #134, Series 1999*, through which it concurred in InterMedia's transfer of control of the franchise to Insight. Exhibit D to Insight's Complaint. As part of the transfer process, Insight agreed to pay the City $100,000 per year for a five-year period. *Id*. at ¶ 2.

In February 2000, Knology began to discuss with the City the possibility of obtaining a cable franchise to construct and operate in the City a sophisticated communications network capable of simultaneously providing competitive voice, video,

data and other communications services. Over the next few months, the City reviewed Knology's application and supporting materials. Insight Complaint, ¶¶ 9-10. At a hearing on August 15, 2000, Insight made a presentation to a committee of the Board of Aldermen and proposed ten changes to the terms and conditions in the draft franchise for Knology which was then under discussion. Insight Complaint ¶¶ 20-21 and Exhibit F. On August 21, 2000, a committee of the Board conducted a hearing on Knology's financial, technical and legal qualifications and received a letter from Knology's counsel responding to each of the major points that Insight had raised in a letter to the Board dated August 14. Insight Complaint ¶ 21. The City heard oral testimony and received other evidence from representatives of the City, Insight and Knology. *Id.*

In a further effort to resolve the issues that Insight had raised, the Board convened a mediation on August 27, 2000, among the City, Knology and Insight before the Honorable Judge Ben Shobe. Insight Complaint at ¶¶ 25-27. During the mediation, Knology agreed to a reduction of its construction deadline from 5 years to 4½ years. Knology also agreed to make an annual contribution of $100,000 for five years to help improve the City's technological capabilities. Notwithstanding these concessions by Knology, Insight continued to press its "level playing field" objections.

On August 29, 2000, the Board of Aldermen voted 8-3 in favor of *Ordinance #114, Series 2000*, which created a cable franchise that contained the revised terms and conditions to which Knology had agreed. Insight's Complaint ¶ 33. On September 12, 2000, the mayor of Louisville signed *Resolution 87, Series 2000*, which accepted Knology's bid to provide cable services in the City pursuant to *Ordinance #114, Series 2000*. Insight's Complaint ¶ 33.

Insight's and Knology's franchises are identical in most respects. Both franchises permit the franchisee to construct, erect, install, maintain, operate, repair, replace, remove or restore its cable system within the geographical limits of the City. All relevant definitions are the same. The franchises have the same provisions governing franchise fees, billing practices, advance fees, late fees, collections, disconnections, downgrades, complaint resolution, service logs and other consumer issues. They have identical requirements for technical matters, for keeping books and records, for furnishing reports, and for maintaining equal employment opportunity. They have identical default provisions. Both franchises also require construction to occur in a manner that does not discriminate among neighborhoods, and each has a map attached spelling out precisely how construction is to proceed.

The franchises do differ in some ways, reflecting the differences in Insight's and Knology's circumstances. Because Insight's cable system was constructed decades ago, the Insight franchise does not have an original construction deadline such as the 5-year deadline in River City's franchise or the 4½ year deadline in Section 45 of the Knology franchise. Nor does Insight's franchise have a liquidated-damages provision, such as Section 45(2) of Knology's franchise, which applies solely to original construction. Conversely, because Knology was to construct an entirely new cable system, its franchise does not have a deadline for completing an upgrade, such as the 15-month provision in Section 45 of the Insight franchise.

Section 38 of the Insight franchise contains a term of 12 years, whereas Section 39(1) of the Knology franchise, like River City's, has a term of 15 years. The City's

rationale in awarding Knology a term of 15 years term was set forth as follows in Section 39(1):

> The term of this Franchise shall be fifteen (15) years from the date this Franchise is granted to the Operator. The term of this Franchise reflects that the City and Operator recognize that Operator will likely only have a complete Cable System for approximately ten (10) years of the Franchise.

The Insight franchise is more favorable than the Knology franchise in several respects. First, Section 45 of the Insight franchise requires Insight's cable system to have a capacity of 750 Mhz, whereas Section 44 of Knology's franchise requires Knology's cable system to have a capacity ranging from 750 and 860 Mhz and to be designed to accommodate upgrades to 1000 Mhz. Second, at the time that they obtained their original and renewal franchises, neither Insight nor its predecessors had to contend with level playing field and automatic stay provisions that put them at risk of years of time-consuming, expensive and disruptive litigation. Third, the Insight franchise does not contain an indemnity provision, such as Section 10 of the Knology franchise, that threatened to cost Insight hundreds of thousands of dollars to reimburse the City for its attorneys fees in litigation arising out of the City's award of a franchise to it.[4]

[4] As indicated above, at the time that the City agreed to the transfer of InterMedia's franchise to Insight in 1999, Insight agreed to pay $500,000 to the City to settle a lawsuit in which the City was seeking to recover certain alleged overcharges from InterMedia. Subsequently, Knology agreed to make a similar payment of $500,000 to the City, even though it obtained no consideration comparable to Insight's. The Insight franchise is thus substantially more favorable than Knology's on this item. Because the transfer resolution does not mention the settlement in question, however, extrinsic evidence would have been necessary to link the settlement to Insight's payment of $500,000. As a result, the City did not rely on this point in the context of its summary judgment motion. Nor did the circuit court refer to it in its Opinion and Order.

The Circuit Court's Decision

On November 2, 2000, Insight sued the City in the Jefferson County Circuit Court. Insight alleged that the City had violated Section 38 of Insight's franchise by awarding Knology a franchise that was more favorable than Insight's franchise in four specific respects: (1) Knology's term of 15 years was longer than Insight's term of 12 years; (2) Knology's 4½-year construction period was longer than Insight's 15-month upgrade period; (3) Insight's franchise required it to upgrade its system in all sectors of the City simultaneously whereas Knology's franchise allowed it to "cherry pick" neighborhoods; and (4) Insight faced the possibility of termination of its franchise if, within 60 days of receiving notice, it failed to cure a default in meeting its upgrade schedule, whereas the City's only remedy in the event of a failure by Knology to meet its construction schedule was liquidated damages of $600 per day for a period of up to eighteen months. Insight also made various other claims that it is not pursuing in this appeal.

The City answered Insight's complaint, and the parties proceeded with discovery. After responding to Insight's interrogatories and document requests, the City moved for summary judgment on all issues. In the absence of Kentucky case law, the City cited cases from Connecticut, Illinois and Minnesota that interpreted state statutes with level playing field provisions that mirror the language in Insight's franchise.[5] These cases

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[5] *United Cable Television Services Corp. v. Dep't of Public Utility Control*, 235 Conn. 334, 663 A.2d 1011 (1995); *Cable Systems of Southern Connecticut, Ltd. v. Connecticut DPUC*, 1996 WL 661818 (Conn. Super); *Comcast Cablevision of New Haven, Inc. v. Connecticut DPUC*, 1996 WL 6611805 (Conn. Super); *New England Cable Television Ass'n, Inc. v. Department of Public Utility Control*, 27 Conn. 95, 717 A.2d 1276 (1998); *Cable TV Fund 14-A, Ltd. v. City of Naperville*,

established that (1) franchises must be compared, not on an item-by-item basis, but as entire packages; (2) "equal" benefits and "equal" burdens are not required; rather, the appropriate standard is "substantial" similarity; (3) to achieve an apples-to-apples comparison to the maximum practical extent, the appropriate comparison is not between a new entrant's original franchise and an incumbent's renewal franchise, but between the new entrant's original franchise and the original franchise that the incumbent (or its predecessor) obtained at the time that its situation most closely resembled that of the new entrant; (4) if the incumbent or its predecessor failed to meet construction deadlines set forth in the original franchise, the court should base its comparison on the incumbent's (or its predecessor's) actual experience (5) it is inappropriate to compare a new entrant's burden in constructing an entirely new system with an incumbent's burden in upgrading an existing system; and (6) a franchising authority may properly give weight to both the added risks that a new entrant faces in attempting to enter a market against entrenched competition and the benefits of incumbency that an existing provider enjoys.

The circuit court found that it was appropriate to decide the case on summary judgment in the City's favor because there was "no ambiguity in the relevant contracts," and the relevant terms of the Insight and Knology franchises were substantially similar as a matter of law. *Order and Opinion* at 6-7 (Attachment A to Brief of Appellants). First, the court declined to limit itself to an item-by-item comparison between the 15-year term of Knology's franchise and the 12-year term of Insight's franchise. Rather, the court found that the City could properly consider the combined effects of the term and

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1997 WL 209692 (ND. Ill); *In re: Dakota Telecommunications Group,* 590 N.W.2d 644 (Minn. App. 1999).

construction provisions of Insight's and Knology's respective franchises and grant Insight and Knology "essentially identical franchise terms, *i.e.* 10 years" to operate fully completed cable systems. *Id*. at 7.

Second, the circuit court rejected Insight's claim that the 4½ year construction period in Knology's franchise was more favorable than the 15-month upgrade period in Insight's franchise. Like all other courts that had previously faced this issue, the circuit court found that "new construction and system upgrades are completely different tasks." *Order and Opinion* at 7.

Third, for the same reason, the court also rejected Insight's claim that the liquidated-damages provision in Knology's franchise, which applies solely to new construction, is more favorable than the default provision in Insight's franchise. *Id*. at 9.

Fourth, the court rejected Insight's claim that Knology's franchise allows it to "cherry pick" neighborhoods in the course of building out its system. Comparing Section 45(5) of the Knology franchise with Section 43(3) of the Insight franchise, the court concluded that Knology and Insight had essentially the same non-discrimination obligations. *Id*. at 8.

ARGUMENT

Insight is now on its third theory of this case. Initially, Insight maintained that its level playing field claims pose a "a pure question of law" that the circuit court could resolve by laying the Insight and Knology franchises "side by side" and deciding on summary judgment whether the franchises are substantially similar.[6] When the City

[6] Insight's Preliminary Statements and Memorandum of Law Opposing Knology's Motion for Preliminary Injunction, at 1 n.2, *Knology, Inc. v. Insight Communications Co., L.P., et al.*, Civ. No. 3:00CV-723-R (W.D.Ky.), Appendix

promptly filed a motion for summary judgment and showed that a side-by-side comparison requires a decision in the City's favor, Insight abruptly changed its tune. At that point, Insight advanced the new argument that "[t]he City has offered only the undisputed terms of the relevant franchises as if they were somehow dispositive of the procedural question of summary judgment in the hope that the Court will impute the undisputed nature of the *terms* to the disputed *effects* those terms have on the favorability and burdensomeness of the franchises upon the relevant holders thereof" (Insight's emphasis).[7] Now, on appeal, Insight has changed its position yet again. Now, Insight insists that a court can *never* decide a level playing field case on summary judgment unless the terms of the two franchises are identical, and perhaps not even then. According to Insight, if there are any differences between the franchises, a court must "always" allow the incumbent to obtain as much discovery it wants and then conduct a jury trial on whether the two franchises are "substantially similar." Insight's Brief at 4-5. Not only is Insight's argument incorrect for the reasons discussed below, but it is also absurd when viewed against the backdrop of the pro-competitive national policies embodied in the Cable and Telecommunications Acts.

I. THE CIRCUIT COURT COMMITTED NO REVERSIBLE ERRORS

A. The Relevant Standards

On appeal, the standard of review when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as

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A to City of Louisville's Memorandum in Support of Motion for Summary Judgment (Attachment A hereto).

[7] Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 13.

to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, Ky. App., 916 S.W.2d 779, 781 (1996). The reviewing court may consider the trial court's conclusions of law *de novo*. *Lewis v. B&R Corporation*, Ky. App., 56 -S.W.3d 432, 436 (2001).

As the circuit court correctly stated, "[a] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence that there is a genuine issue of material fact requiring trial." *Opinion and Order* at 6, citing *Steelvest v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 482 (1991). "Summary judgment can be proper on any issue including state of mind questions such as intent and expectation. Generally when any claim has no substance or controlling facts are not in dispute, summary judgment can be proper." *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co.*, Ky., 814 S.W.2d 273, 276-77 (1991).

In particular, "the interpretation of a contract is typically an issue of law," *Opinion and Order*, citing *Morganfield National Bank v. Damion Elder & Sons*, Ky., 836 S.W.2d 893, 895 (1992). "The proper construction of a contract is a matter which should not be submitted to a jury 'unless it depends upon a choice among reasonable inferences to be drawn from extrinsic evidence admissible apart from the application of the parole evidence rule.'" *Id.*, quoting *Cook United, Inc. v. Waits*, Ky., 512 S.W.2d 493, 495 (1974). With regard to the parole evidence rule, extrinsic evidence "is not considered unless the contract itself is so ambiguous that it is necessary to resort to extrinsic evidence to determine the parties' intent." *Id.*, citing *Central Bank & Trust Co. v. Kincaid*, Ky., 617 S.W.2d 32, 33 (1981).

Furthermore, where it is clear that there is no dispute as to evidentiary facts, but only as to the legal conclusions to be drawn, a summary judgment is proper. *Holladay v. Peabody Coal Company,* 560 S.W.2d 550 (Ky. 1977). "The mere fact that legal conclusions may be drawn from undisputed evidentiary facts in controversy does not prevent summary judgment." *Commonwealth v. Whitworth,* 74 S.W.3d 695, 698 (Ky. 2002).

B. The Circuit Court Correctly Decided the Level Playing Field Issues In this Case As a Matter of Law

Insight has not met its burden of presenting affirmative evidence sufficient to show that there are any genuine issues of material fact requiring trial. To be sure, Insight has offered affidavits containing assertions of fact with which the City disagrees. Assuming (without conceding) that the "facts" alleged in these affidavits are true, they are not inconsistent with the key facts on which the City and the circuit court have relied, nor are they "material" or "controlling" facts with respect to the legal issues governing this case.

Specifically, Insight does not contest the operative terms of the two franchises, nor does Insight suggest that these terms are ambiguous. For example, there is no dispute that the Insight franchise has a 12-year term and a 15-month upgrade period and that subtracting 15 months from 12 years leaves 10¾ years for Insight to operate a fully completed cable system. Nor is there any dispute that the Knology franchise has a 15-year term and a 4½ year construction period and that subtracting 4½ years from 15 years leaves 10½ years for Knology to operate a complete cable system. Thus, there is no genuine issue of fact as to whether the two franchises give Insight and Knology essentially the same period of time to operate fully complete cable systems. Furthermore,

given the circuit court's reliance on the express language of Section 39 of the Knology franchise, there can be no question that the City actually relied on this manner of comparing the combined term and construction provisions of the two franchises. Thus, the only question is whether, as a matter of law, the circuit court was justified in upholding the City's method of comparison. The City submits that the answer is clearly affirmative.[8]

Likewise, Insight does not challenge the factual underpinnings of the circuit court's finding that the Insight and Knology franchises impose comparable "simultaneous build" requirements. Nor could Insight do so, as Section 43(3) of its franchise states that "The construction timetable is such that both low and high income areas will receive the benefits of the upgrade and construction," and Section 45(5) of the Knology franchise states that "In planning and undertaking construction, the Operator shall treat all areas and neighborhoods in the City on a substantially equal basis in order that Cable Services will be available to potential subscribers at substantially the same time." Furthermore, appended to both the Insight and Knology franchises are maps that prescribed the precise order in which Insight was to upgrade and Knology was to construct their systems. Given the comparable language of the relevant provisions and the maps attached to the two franchises, Insight was required to come forward with concrete evidentiary support

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[8] Insight suggests that Knology could obtain a longer and more lucrative period to operate a complete cable system by accelerating its construction schedule. Insight Brief at 19 n.9. As the circuit court correctly noted, however, the court's task is to determine whether the franchise terms at issue favor one competitor over another, not to speculate about what the competitors will ultimately do in the marketplace. "Section 38 protects Insight, the incumbent, from a franchisee who has received a substantially more favorable contract; it does not guarantee Insight the right to dissect financially it competitor and then argue that the two competitors' burden must match." *Opinion and Order* at 8.

for its claim that Knology was free to "cherry pick" neighborhoods in building out its system. Insight offered no evidence at all on this issue.[9]

Similarly, Insight offered no evidence to suggest that a genuine issue of exists on whether a new build and an upgrade involve different tasks. To the contrary, Insight's own affiant admitted that Insight's task in upgrading its system was different from Knology's in constructing a new system because "Insight already ha[d] support cable in place for its new system, and Knology does not." Sherman Affidavit at ¶ 5, Attachment E to Brief of Appellants. Furthermore, even Insight now admits that a new build and an upgrade are "obviously" and "necessarily" different. Insight's Brief at 24-25. Insight struggled mightily to convince the circuit court that the differences between an upgrade and a new build are insignificant and that, if anything, an upgrade is more burdensome than a new build, but Insight's efforts in this regard were irrelevant, because it is the *existence* of the difference, not its *magnitude*, that counts as a matter of law.

As the cases that the City cited uniformly hold, a court in a level playing field case should compare franchises in their entirety and should not attempt to make item-by-item comparisons. *See* cases cited at 9 n.5. If item-by-item comparisons are inappropriate even as between apples and apples, then they are most certainly inappropriate as between apples and oranges. Indeed, if Insight were correct that incumbents could force courts to compare apples to oranges and thereby subject franchising authorities and new entrants to the massive costs and burdens of discovery and jury trials on whether the apples and oranges are substantially similar, there would be

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[9] In fact, as Insight knows, the map attached to Knology's franchise required Knology to begin construction in one of Louisville's low income areas.

no end to the mischief that incumbents could create to protect their monopolies from competition. Furthermore, the circuit court's ruling that a new build and a rebuild involve different tasks was consistent with the only other court decisions that had addressed this issue. Thus, in *Cable Systems of Southern Connecticut, Ltd.*, 1996 WL 661818 at *4, the court found that "[t]he comparison between Fibervision's task in creating a new system and Cablevision's rebuild plan is conceded by Cablevision to be of different projects. ... It also represents a different task, which is facilitated by Cablevision's substantial existing customer base." Similarly, in *Comcast Cablevision of New Haven, Inc.*, 1996 WL 6611805 (Conn. Super.) at *4, the court found that "[t]he analogy between initial installation of a system and the rebuild of an existing system with a substantial customer base, is not compelling." Insight cited no contrary cases, and the City has not found any.

In summary, while Insight and the City do indeed disagree on several issues of fact, these disagreements are irrelevant to the legal issues posed by the City's motion for summary judgment. On the key evidentiary facts that matter for the purposes of the City's motion, Insight failed to meet its burden of showing the existence of any genuine issues of fact that precluded the circuit from deciding the motion in the City's as a matter of law.

C. None of the Cases That Insight Cites Requires Treating the Level Playing Field Issues in this Case as Questions of Fact

According to Insight, case law holds that application of a "substantial similarity" standard is "always" a question of fact. Insight's Brief at 5. None of the cases upon which Insight relies supports this conclusion.

Insight's first case is *Gleason v. Norwest Mortgage, Inc.*, 243 F.3d 130 (3d Cir. 2001), which Insight claims to be "closely analogous to the case at bar." Insight's Brief at 5. According to Insight, *Gleason* is "in direct conflict with the trial court's holding in the present case" because the Third Circuit held that "'Generally, a determination of substantial similarity would be a jury issue.'" *Id*. at 6, quoting *Gleason*, 243 F.3d at 241. Obviously, the Third Circuit's use of the term "generally" undermines Insight's claim that "substantial similarity" is "always" a question of fact. Furthermore, as Insight concedes in a footnote, the Third Circuit actually *upheld* the district court's award of summary judgment on some of the "substantial similarity" issues in the case, ruling that no reasonable juror could have found that the contracts were not substantially similar on these issues. Insight's Brief at 6 n.3, citing *Gleason*, 243 F.3d at 241. It is also instructive to consider the "substantial similarity" issue on which the Third Circuit did find that further fact-finding was necessary – *i.e.*, whether the defendant had manipulated the price it allocated within a collection of several properties to the one property on which the plaintiff had a right to submit a matching bid. *Gleason*, 243 F.3d at 142-43. That is clearly the kind of factual issue that has no parallel here. Thus, if anything, *Gleason* supports to the circuit court's determination that the "substantial similarity" issue in this case could be resolved on summary judgment.

The second case on which Insight relies is *Knology, Inc. v. Insight Comm. Co. and City of Louisville*, Civ. Action No. 3:00CV-723-R (W.D. Ky.). According to Insight, the district court in *Knology* held that "it needed facts to make a finding of substantial similarity between Insight's and Knology's franchises," as Insight claims in its Brief of Appellants at 6. Again, Insight is incorrect.

Shortly after Insight sued the City in this case, Knology filed an action against Insight and the City in the U.S. District Court for the Western District of Kentucky. In part, Knology contended that the automatic stay provision in Section 38 of the Insight franchise is an unlawful barrier to entry under both the Cable Act and the Telecommunications Act. Knology also claimed that Insight violated antitrust, civil rights and other laws by bringing "sham" litigation against the City, for the sole purpose of impeding Knology's entry into the Louisville market. Knology moved for a preliminary injunction against enforcement of the automatic stay provision, and Insight moved to dismiss Knology's suit. On March 21, 2001, the district court issued separate orders deciding both motions in Knology's favor. Appendices D and G to Insight's Brief.

In the decision that Insight cites, the district court said nothing about needing more facts to decide whether the Insight and Knology franchises are "substantially similar." To the contrary, the district court made clear that it was addressing a completely different issue – whether Insight's suit against the City was a "sham." *Knology*, at 6 (Appendix D). As Insight acknowledges, "sham litigation" occurs when "'the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.'" *Id*. at 6, quoting *Prof'l Real Estate Investors v. Columbia Pictures Indus.,* Inc., 508 U.S. 49, 56 (1993). The standard of proof applicable to the "sham litigation" issue in *Knology* is considerably higher the standard applicable to the "substantially similarity" issue here – *i.e.*, Insight can win the "sham litigation" issue in *Knology* even if it loses the "substantial similarity" issue here if it had a realistic prospect of success. Thus, the district court's desire to obtain more facts before ruling on the "sham litigation" issue in the *Knology* case is not inconsistent with

the circuit court's determination that the City is entitled to summary judgment on the "substantial similarity" issue here.

Furthermore, it bears repeating that, on the same day, the *Knology* court also struck down the automatic stay provision in Section 38 of the Insight franchise, finding that it has the effect of delaying Knology's entry into the Louisville market and thus violates both the Cable Act and the Telecommunications Act. *Knology*, 2001 WL 1750839 at *4 (W.D. Ky. 2001). *Knology* thus supports the City's position that courts should interpret cable franchises in a manner that advances the public's interest in obtaining competition as rapidly as possible. *See also United Cable*, 663 A.2d at 1025 (interpretation advanced by incumbent "would frustrate one of the purposes of the [Connecticut level playing field law] to provide consumers with the benefits of competition"); *New England Cable Television Association*, 717 A.2d at 1293 (franchising authority "is obligated to tailor the terms and conditions so as best to serve the public interest, while striving to prevent institutional advantages for new competitors. It is not permitted, however, to stifle competition, which is in the best interest of the public, for the protection of incumbent providers …"); *In re: Dakota Telecommunications Group*, 590 N.W.2d at 648 ("Although the Cable Act also intends to further the public's interest by only awarding franchises to responsible cable operators, it does not support an incumbent franchise's attempt to secure a monopoly by challenging the fitness of new, competing franchises").

Insight's third case is *New England Cable Television Association*. According to Insight, that case "closely parallels many of the other 'level playing field' cases offered by the City." Insight's Brief at 7. Insight claims that *New England Cable Television*

Association is significant here because the Connecticut Department of Public Utility Control (DPUC) "conducted extensive public hearings at which all of the parties were provided with the opportunity to present evidence and cross-examine witnesses," and because the Connecticut court held that the DPUC's determination that the new franchisee's certificate was not more favorable than the incumbents' franchises was "primarily a factual conclusion." Insight's Brief at 7-8, quoting *New England Cable Television Association*, 717 A.2d at 1280, 1289.

Insight fails to appreciate that it was not the Connecticut court, but the DPUC, that conducted the "extensive public hearings" at which all sides had the opportunity to participate. Nor does Insight appear to realize that it was not the court, but the DPUC, that reached the "primarily … factual conclusion" that awarding a certificate to the new entrant was appropriate. Here, as the local franchising authority for Louisville, the City is the DPUC's counterpart. The City not only conducted extensive public hearings at which Insight had a full opportunity to participate, but the City even convened an extraordinary mediation to accommodate the interests of all concerned, including Insight. Insight does not contend otherwise. Furthermore, after the DPUC issued its certificate to the new entrant, the Connecticut court did not replicate or expand upon the DPUC's fact-gathering process, but merely reviewed its conclusions for error as a matter of law. Here, that is precisely what the circuit court did.

Finally, Insight relies upon a number of construction cases applying a "substantial performance" standard. Insight's Brief at 8-9. As Insight notes, these cases involve the factual comparison between work required in a contract and work actually performed by the contractor. These cases are inapposite where, as here, there is no dispute as to the

evidentiary facts and all that need be decided is whether the two contracts are substantially similar as a matter of law.

D. The Circuit Court Did Not Make Impermissible or Erroneous Findings of Fact

In the alternative, Insight argues that the circuit court misapplied its conclusion that the "substantially similar" issue is a matter of law by making impermissible and erroneous findings of fact. Again, Insight is incorrect.

First, Insight maintains that, in concluding that new construction and upgrades involve different tasks, the circuit court improperly made a finding of fact. Insight's Brief at 17-19. Insight has apparently confused what a court can do in the context of a motion for summary judgment with what a court can do in the context of a motion to dismiss on the pleadings. In the context of a motion for summary judgment, a court not only has the authority, but the duty to make findings of fact – i.e., the material facts as to which there is no genuine issue. *See* cases cited in Section I.A. Indeed, the very purpose of summary judgment is to avoid unnecessary trial by determining whether, on the material undisputed facts of record, the case can be decided as a matter of law. Here, as shown above, it is undisputed that new construction and upgrades involve different tasks. Thus, the circuit court's finding to that effect was entirely proper.

Second, Insight claims that the City misled the circuit court by arguing that the Knology franchise should be compared to River City's original franchise and the actual experience of Insight's predecessors rather than to Insight's franchise of 1998. Insight's Brief at 21. At the outset, the City never suggested that the court should ignore Insight's 1998 franchise; rather, the City maintained only that the court should look back to the original franchise and actual experience of Insight's predecessors with respect to matters

– particularly matters pertaining to new construction – that are not addressed in Insight's renewal franchise. That, in fact, is just what the courts did in *Cable Systems of Southern Connecticut, Ltd.*, 1996 WL 661818 at *3, and *New England Cable Television Association*, 717 A.2d at 1291. As it turns out, however, the circuit court did not rely on the City's suggestion. Thus, Insight's objection is purely academic.

Third, Insight takes issue with the following statement near the end of the circuit court's discussion of the "substantial similarity" issue:

> There will never be an apple-to-apple comparison for Insight and another franchisee simply because Insight is the incumbent which in its own right and through it predecessors has been the exclusive provider of cable television services in the City for almost thirty years. No new cable television franchisee can ever be in the same position as a thirty-year veteran.

Insight's Brief at 21, quoting *Opinion and Order* at 9. According to Insight, this too was an inappropriate finding of fact.

As the City demonstrated, citing *Cable Systems of Southern Connecticut, Ltd.*, 1996 WL 661818 at *4, and *Comcast Cablevision of New Haven, Inc.* 1996 WL 6611805 at *4, the circuit court had ample authority to take Insight's vast benefits of incumbency into account. Nevertheless, the court declined to do so. Although it made the self-evident statement quoted above in its conclusion, the circuit court did not actually rely on it in responding to the four ways in which Insight claimed the Knology franchise was more favorable than Insight's franchise. Thus, here again, Insight's objection is of no consequence.

Finally, Insight maintains that the circuit court's conclusion that a new build cannot be compared to an upgrade "defies common sense." Insight's Brief at 24. According to Insight, because any post-1998 franchise would "obviously" cover new

construction, which is "necessarily" different from an upgrade, the parties must have intended that new construction provisions in any post-1998 franchise be compared to the upgrade provisions in Insight's 1998 franchise. *Id*. In other words, Insight is saying that because new builds and upgrades are not comparable, the parties must have intended that they be compared. The circuit court plainly was under no duty to embrace Insight's convoluted reasoning.

II. CONCLUSION

For all of the foregoing reasons, the City submits that the circuit court's decision was well reasoned and correct in all respects. Accordingly, the City urges this Court to affirm the decision and dismiss this appeal.

Respectfully submitted,

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APPENDIX A