NO. 00-CI-07100 **JEFFERSON CIRCUIT COURT**

DIVISION THREE (03)

INSIGHT COMMUNICATIONS COMPANY, L.P. and INSIGHT KENTUCKY PARTNERS II, L.P. F/K/A INTERMEDIA PARTNERS OF KENTUCKY, L.P. **PLAINTIFF**

vs. **THE CITY OF LOUISVILLE'S, MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

CITY OF LOUISVILLE **DEFENDANT**

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INTRODUCTION

In this case, Insight[1] seeks a declaratory judgment that the City of Louisville ("the City") violated the "level playing field" provision in Insight's cable franchise by awarding Knology, Inc. a more favorable cable franchise than Insight's. Insight also objects to the Knology franchise on procedural grounds and claims that the City improperly withheld certain information from Insight. For the reasons discussed below, the City urges the Court to enter a summary judgment dismissing all of Insight's claims.

As Insight has admitted, the level playing field issues in this case involve "a pure question of law" that can and should be resolved "on the merits on cross-motions for summary judgment."[2] Insight characterizes that question as follows: "[W]hen Insight's and Knology's franchises are compared side-by-side[,] do they impose equal burdens and confer

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[1] For the purposes of this brief, the term "Insight" includes the plaintiffs Insight Communications Company, L.P. and Insight Kentucky Partners II, L.P. F/K/A Intermedia Partners of Kentucky, L.P. and their predecessors in Louisville.

[2] 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) (Attachment 1 hereto).

equal benefits on their respective franchisees[?]"[3] The City agrees that this case involves a purely legal issue, but it disagrees with Insight's characterization and application of the law to the undisputed facts.

A substantial body of "level playing field" cases has emerged in recent years. As the City will show below, these cases uniformly hold 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, under both the relevant cases and the specific terms of the Insight franchise, the appropriate standard is "substantial" similarity; (3) when comparing the terms and the build-out requirements of franchises, the appropriate comparison is not between the new entrant's franchise and an incumbent's renewal franchise, but between the new entrant's franchise and the original franchise that the incumbent (or its predecessor) obtained at the time that its situation more closely resembled that of the new entrant today; (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. Judged objectively by these standards, Insight's claims of disadvantage are utterly baseless.

Summary judgment in the City's favor is also warranted on Insight's procedural claims. As the City will demonstrate, Insight lacks standing to raise these claims. They are

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[3] *Id*.

also irrelevant, as Insight has essentially conceded by admitting that this case should be resolved simply by comparing the faces of the relevant franchises. Furthermore, Insight cannot meet its burden of demonstrating that the City's actions were unlawful.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

1. In 1972, the City enacted *Ordinance #142, Series 1972* (Approved 10/24/72)[4] to establish conditions for awarding original cable franchises in the City. Among other things, the ordinance specified a term of 15 years. *Id*., § II.A It required that cable operators construct their systems within 5 years of the award of the franchise.[5] *Id*., § XII.B. The ordinance left cable operators free to decide the order in which they would build out their systems. *Id*. It also allowed the City to revoke a franchise if the cable operator failed to cure a default within 30 days of receiving a written notice of violation and demand for cure. *Id*., § XXVII.

2. In 1973, the City enacted *Ordinance #163, Series 1973* (Approved 11/26/73)[6] to award the first cable franchise in Louisville to Insight's predecessor, River City Cable Television. The ordinance incorporated by reference the requirements of *Ordinance 142, Series 1972*.

3. River City did not complete its construction of the cable system within the 5-year deadline that its franchise had imposed. Rather, as reflected in Paragraph 2 of *Resolution #92, Series 1980* (Approved 6/3/80) and Paragraph 2 of Memorandum of Understanding

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[4] Attachment 2.

[5] Alternatively, anticipating the possibility of a lengthy federal approval process, the ordinance required build-out within 4 years of approval by the Federal Communication Communications if such approval turned out to be necessary. *Id*., § XII.B.

attached to this resolution,[7] River City's successor – CPI of Louisville – did not complete construction of the system until some time "on or about April 1, 1981." It thus took Insight's predecessors nearly 7½ years to complete the construction of Insight's cable system.

4. In the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996, Congress established strong pro-competitive policies and measures intended to break down cable and telecommunications monopolies in local markets, to promote robust competition in all communications markets, to enhance universal service, and to accelerate the deployment of advanced telecommunication services and capabilities to all Americans as rapidly as possible.[8]

5. In 1998, the City enacted *Ordinance #76, Series 1998* (As Amended) (Effective May 12, 1998)[9] to renew the cable franchise of InterMedia Partners of Kentucky, LP, which by then had acquired the franchise. The renewal franchise had a 12-year term and a 15-month deadline for completion of an upgrade of the system, *Id*., §§ 38, 44. The ordinance required InterMedia to extend the benefits of the upgrade to "both low and high income areas" but did not prescribe how InterMedia should achieve this objective. *Id*., § 44(3). The ordinance also allowed the City to revoke the franchise if, after giving InterMedia notice and an opportunity for a hearing, the City found that InterMedia had failed to cure a breach or violation of the franchise within 60 days of receiving notice and a demand for such action, *Id*., § 52.

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6 Attachment 3.

7 Attachment 4.

8 H. R. Rep. No. 102-862, at 1-2, 34, 46 (1992); S. Rep. No. 104-230, at 1 (1996).

9 *See* Complaint, Exhibit A.

6. In § 38, *Ordinance #76, Series 1998* set 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.

7. In *Resolution #134, Series 1999* (Approved September 16, 1999),[10] the City concurred in Insight's acquisition of control of InterMedia's franchise.

8. 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, including confidential proprietary information that Knology provided to the City on the understanding that the City would treat it as confidential.

9. On August 8, the Board reviewed and approved publication of a proposed Invitation For Bid (IFB) Ordinance, Number O-112-8-00. The IFB Ordinance set forth the terms and conditions under which the City would sell a cable television franchise to an

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[10] *See* Complaint, Exhibit D.

interested bidder. Publication occurred on August 12, 2000, through an advertisement in the Louisville *Courier-Journal* that instructed potential bidders to submit responsive bids by 10 AM of August 21st. On August 14th, Insight sent the Board a letter objecting to several terms and conditions in the IFB Ordinance.[11]

10. On August 17th, by a letter to the Director of Public Works, Knology agreed to the terms and conditions in the IFB Ordinance.[12] No other bidder came forward before the deadline of Augustl 21st. Later on August 21st, 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 its letter to the Board dated August 14th.[13]

11. In an effort to resolve the dispute over the terms and conditions of the IFB Ordinance, the City, Knology and Insight participated in a mediation with the Honorable Ben Shobe, a retired judge of this Court. During the mediation, Knology agreed to two changes to the IFB Ordinance. First, it agreed to a reduction of the construction deadline from 5 years to 4½ years. Second, Knology agreed that, over the next five years, it would make an annual contribution of $100,000 to help improve the City's technological abilities. Notwithstanding these concessions by Knology, Insight refused to waive its "level playing field" objections to the IFB Ordinance.

12. After the IFB Ordinance was amended to incorporate the changes to which Knology had agreed, the Board of Alderman approved it on August 29, 2000, as *Ordinance*

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[11] *See* Complaint, Exhibit F.

[12] Attachment 5.

[13] Attachment 6.

#114, Series 2000 (As Amended).[14] At the same time, the Board approved *Resolution #187, Series 2000*,[15] which awarded a franchise to Knology pursuant to *Ordinance 114, Series 2000*. The Mayor signed both of these documents on September 12, 2000.

13. Knology's franchise is identical to the Insight franchise in most respects. Both franchises permit the franchisee, as operator, to construct, erect, install, maintain, operate, repair, replace, remove or restore the cable system within the geographical limits of the City. All relevant definitions are the same. The franchises have an identical Line Extension Policy, which prevents "cherry picking" of subscribers and prohibits discriminatory practices. The two franchises have the same provisions governing franchise fees, billing practices, advance fees, late fees, collections, disconnections, downgrades, complaint resolution, service logs and other consumer protection issues. They also have identical technical requirements regarding the capacity of the cable system, identical requirements for keeping books and records and for furnishing reports, and identical requirements for maintaining equal employment opportunity.

14. Like the term of the original franchise awarded to Insight's predecessor, River City Cable, the term of the Knology franchise is 15 years. Compare *Ordinance #142, Series 1972* (Approved 10/24/72), §IIA with *Ordinance #114, Series 2000* (As Amended), § 39.[16] Knology's construction deadline is 4½ years, 6 months less than the 5-year construction deadline in the River City franchise. Compare *Ordinance #142, Series 1972* (Approved 10/24/72), §XIB with *Ordinance #114, Series 2000* (As Amended), § 45.[17] Knology's 4½

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[14] *See* Complaint, Exhibit B.

[15] *See* Complaint, Exhibit C.

[16] *See* Attachment 2, §IIA and Complaint, Exhibit B, §39.

[17] *See* Attachment 2, §XIB and Complaint, Exhibit B, §45.

year construction deadline is also nearly 3 years less than the time that Insight's predecessors actually took to complete Insight's system.

15. River City's franchise left it free to construct its system in whatever order it decided. By contrast, Knology's franchise requires it to plan and construct its system so as to "treat all areas and neighborhoods in the City on a substantially equal basis in order that Cable Service will be available to potential subscribers at substantially the same time." Compare *Ordinance #142, Series 1972* (Approved 10/24/72), §XIB with *Ordinance No.114, Series 2000* (As Amended), §45(5).[18]

16. There is one provision in the Knology franchise that is not present in the River City franchise – in the event of unexcused delays in meeting the construction schedule specified in the franchise, Knology is subject to liquidated damages of $600 per day, but such liquidated damages are the City's sole remedy for the first 18 months of unexcused delays. *Ordinance No.114, Series 2000* (As Amended), §45(2).[19] After 18 months, however, the City can obtain both liquidated damages and all other remedies set forth in Section 54 of the Knology Franchise. *Id*.

17. Insight's renewal franchise has requirements for an upgrade of the cable system but does not address new construction. As a result, it does not have default and cure provisions that apply to new construction.

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[18] *See* Attachment 2, §XIB and Complaint, Exhibit B, §45(5).

[19] *See* Complaint, Exhibit B, §45(5).

ARGUMENT

I. THE RELEVANT STANDARDS

A. Standard of Review of Motions for Summary Judgment

The City has moved the Court for summary judgment on all claims in Insight's complaint. Under CR 56.03, the City is entitled to judgment "forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In *James Graham Brown Foundation, Inc. v. St. Paul Fire and Marine Insurance Co.*, Ky., 814 S.W.2d 273 (1991), the Supreme Court of Kentucky gave the following summary of Kentucky's standard for reviewing a motion for summary judgment:

> The purpose of summary judgment and the standard to be used in reviewing such an action require that the procedure is designed to expedite the disposition of cases. The grounds for summary judgment are that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The circuit court is not authorized to render a summary judgment if there exists a material fact which requires a trial. The function of summary judgment is to terminate the litigation when it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor. It is proper where the movant shows that the adverse party could not prevail under any circumstances. Civil Rule 56.03; *Paintsville Hospital Company v. Rose*, Ky., 683 S.W.2d 255 (1985); *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476 (1991). The only duty of the court on a motion for summary judgment is to determine whether there are genuine issues to be tried and not to resolve them. *Mitchell v. Jones*, Ky., 283 S.W.2d 716 (1955).

In *Perkins v. Hauslauden*, 828 S.W.2d 652, 654 (Ky. 1992), the Court subsequently made clear that "[w]e accept that "impossible" is used in a practical sense, not in an absolute sense." In *Hoke v. Cullinan*, 914 S.W.2d 335, 337 (1996), the Court added that:

> Contrary to the view of some, our decision in *Steelvest, Inc. v. Scansteel Service Ctr.*, Ky., 807 S.W.2d 476 (1991), does not preclude summary judgment. Provided litigants are given an opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate.

In this case, the City and Insight agree that there are no genuine issues of material fact and that the Court can resolve relevant the "level playing field" issues by applying the appropriate legal standards to the franchise agreements of record. The parties disagree over which franchise provisions should be compared and how the comparison should be done, but these are purely legal issues for which no trial is necessary.

B. Relevant Substantive Standards

Our research has disclosed no Kentucky cases addressing claims of the kind that Insight has raised in this case. Several other courts have done so, however, and these courts have consistently rejected every one of the level playing field arguments that Insight is making here. These decisions are also instructive with respect to Insight's procedural claims.

In *United Cable Television Services Corp. v. Dep't of Public Utility Control*, 235 Conn. 334, 663 A.2d 1011 (1995)[20], an incumbent cable operator alleged that the franchising authority[21] had unlawfully awarded a cable franchise to a new entrant without properly considering its financial responsibility, ability to perform efficiently and fourteen other factors. The incumbent further alleged that the franchising authority had also violated Connecticut's

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[20] Attachment 7.

[21] Although Connecticut franchises cable operators at the state level through the Department of Public Utility Control (DPUC), the principles enunciated in *United Cable* and other Connecticut cases apply as well to community-based franchising authorities.

"level playing field" law[22] by approving the new franchise on terms and conditions that were more favorable than the counterpart terms and conditions in the incumbent's franchise.

As an initial matter, the court found that incumbent lacked standing to challenge the general fitness of the new entrant. The court determined that the incumbent was not "aggrieved" as a matter of law by having to meet new competition, was not within the zone of interests protected by Connecticut's cable franchising requirements, and was not a proper representative to uphold the public-interest provisions of the Connecticut franchising law. *Id*., 663 A.2d at 1018-19. Rather, the court concluded, the incumbent had standing "only to raise claims regarding the terms of competition pursuant to [Connecticut's level playing field law]." *Id*., 663 A.2d at 1019.

The *United Cable* court made no specific rulings under the level playing field law, but it laid down standards that several other courts later embraced. Among other things, the *United Cable* court observed that it would frustrate the goal of providing consumers the benefits of competition "if existing cable providers voluntarily could take on additional burdens in order to reap a future benefit and then have potential competitors bound by those new terms viewed in isolation without reference to the terms of the original certificate." *Id*., 663 A.2d at 1025. The court also noted that "[a] proper inquiry requires consideration of the entire package of terms and conditions required of both cable providers in order adequately to determine whether one has been favored over the other." *Id*. at 1025.

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[22] Connecticut General Statutes § 16-331(g) provides: "Each certificate of public convenience and necessity for a franchise issued pursuant to this section shall be nonexclusive, and each such certificate issued for a franchise in any area of the state where an existing franchise is currently operating shall not contain more favorable terms or conditions than those imposed on the existing franchise. This subsection

In November 1996, the Superior Court of Connecticut decided two cases that addressed several issues that are present in this case. In *Cable Systems of Southern Connecticut, Ltd. v. Connecticut DPUC*, 1996 WL 661818[23], the court applied the rationale of *United Cable* in response to – among other things – the following issue raised by the incumbent: "whether there is a comparison between Fibervision's new system construction and Cablevision's system rebuild." *Id*., at *3. 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." *Id*., at *4.

In the second case, *Comcast Cablevision of New Haven, Inc. v. Connecticut DPUC*, 1996 WL 6611805[24], the incumbent Comcast complained that Fibervision's franchise had a 12-year build-out requirement, as compared with Comcast's 6-year requirement, and that the DPUC had improperly considered Comcast's benefits of incumbency. The court compared Fibervision's build-out schedule with the original build-out schedule in the franchise of *Comcast's predecessor* and found that Fibervision's annual completion percentage would "certainly [be] comparable to *Plaintiff's initial progress*." *Id*. at *3 (emphasis added). The court also found that Fibervision planned to complete its entire system of 737 miles within 12 years, whereas Comcast and its predecessors actually took 15 years to build only 525 miles. *Id*. Accordingly, with respect to buildout, the court concluded,

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shall not apply to the length of the term of such certification as may be determined pursuant to subsection (d) of this section."

23 Attachment 8.

24 Attachment 9.

> To the extent that it is meaningful for the court to engage in an item-by-item comparison, such endeavor fails to show unfair competition with respect to the build-out schedule imposed on Fibervision *compared with the history of Comcast and its predecessors*.
>
> This is especially the case where Fibervision is creating a "state-of-the-art" system compared with what was installed in the 1970's. Comcast also refers to its obligation to rebuild its system in three years.
>
> *The analogy between initial installation of a system and the rebuild of an existing system with a substantial customer base, is not compelling*.

Id. at *3 - *4 (emphasis added). Turning to the incumbency issue, the court found:

> Plaintiff's argument that the advantage of incumbency opinion is not supported in the record ignores undisputed evidence in the record. The record reveals that Comcast has been the monopoly cable television provider in the franchise area, with 68,000 customers and "is a subsidiary of one of the largest cable providers in the United States. Its marketing power is massive, especially in light of its interlocking ties with programming suppliers."

Id. at *4.

In *New England Cable Television Ass'n, Inc. v. Department of Public Utility Control*, 27 Conn. 95, 717 A.2d 1276 (1998)[25], various incumbent operators challenged the DPUC's award of a statewide cable franchise to Personal Vision. The Supreme Court of Connecticut upheld the franchise and took the occasion to reaffirm and extend the principles that it had enunciated in *United Cable*. Among other things, the Court reiterated that incumbent cable operators have no standing to challenge decisions by the franchising authority on issues other than level-playing-field issues, because "incumbent franchisees are not representatives of the public" and "fall outside the zone of interest to be protected by [Connecticut's franchising laws]," *id*., 717 A.2d at 1283. A franchising authority "must consider the entire package of terms and conditions applicable to the incumbent franchisee compared with those of the new

[25] Attachment 10.

competitor" and must recognize that it is "the totality of the terms that controls the determination of whether one certificate is more favorable than another." *Id*. at 1287. "Where one term may be construed as more favorable, another term that is less favorable may fill the gap to leave the terms and conditions of the certificate, on balance, no more favorable than that of the existing franchisee." *Id*.

Specifically, with respect to buildout obligations, the court compared apples-to-apples – i.e., the new entrant's original construction schedule with the *original* construction schedules and actual performance of the incumbents and their predecessors. *Id*., 717 A.2d at 1291. The court echoed the district court's finding that "there are certain benefits that inherently inure to the plaintiffs' status as incumbents that serve to offset the inherent advantages applicable to a statewide franchise." *Id*., 717 A.2d at 1292 n.27. The court also found that it was appropriate for the franchising authority to find that "if Personal Vision does reap some benefit from increased economies of scale" as a result of operating statewide, "the advantage is no more than an appropriate return for the increased financial risk that Personal Vision will bear in engaging in this project." *Id*., 717 A.2d at 1292-92. The court concluded:

> The department's sole duty pursuant to [the Connecticut level playing field law] is to ensure that the specific terms of a competitor's certificate are not, on balance, more favorable than those of the incumbents. The department 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 who are not yet ready to meet the challenge of competition because they have not taken advantage of the present regulatory scheme.

Id., 717 A.2d at 1293.

Courts in other states have applied the same reasoning as the Connecticut courts and have reached similar conclusions. For example, in *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 WL 209692 (ND. Ill)[26], the court found,

> The Illinois Overbuild Act states " ... no such additional ... franchise shall be granted under terms or conditions more favorable or less burdensome to the applicant than those required under the existing cable television franchise...." 65 ILCS § 5/11- 42-11(e). Nothing in the above language supports the conclusion that new and existing franchises must contain identical terms. Courts interpreting similar statutes in other states have reached the same conclusion. [Citations to Connecticut cases omitted.]
>
> Rather than requiring identical terms for new and existing franchises, this Court interprets the Illinois Overbuild Act to require terms and conditions under a new franchise that, when considered as a whole, are no more favorable or less burdensome than the total package of the terms and conditions under the existing franchise. See *United Cable*, 1994 WL 495402 at *5 (concluding that the Connecticut "Level Playing Field" Act requires a "comparison of the entire package of terms and conditions imposed on the existing and the new franchisee to determine whether, as a whole, the terms and conditions are more favorable."). This Court agrees with the *United Cable* court's observation that
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>> if [the new franchisee] were required to achieve point-by-point equality in terms and conditions, the [franchise authority] would be put in the position of imposing particular requirements on a new entrant not because of any particular need but simply to match the situation that existed at the time of the application of the existing entrant, without regard to new information, new technology or other temporal developments. 1994 WL 495402 at *5.

Naperville, at *12.

Similarly, in *In re: Dakota Telecommunications Group*, 590 N.W.2d 644 (Minn. App. 1999)[27], the incumbent cable operator, Bresnan Communications, challenged the City of Marshall, Minnesota's award of a second cable franchise to Dakota Telecommunications

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[26] Attachment 11.

[27] Attachment 12.

Group (DTG). Bresnan alleged that the City's action was arbitrary and capricious because the City had failed to give adequate consideration to DTG's financial ability. Bresnan also alleged that the City had violated Bresnan's due process rights by refusing to conduct a public hearing at which Bresnan could examine DTG's employees and the City's staff and consultants with regard to DTG's financial ability.

The court held that Bresnan lacked standing to challenge DTG's general fitness for a franchise, citing *New England Cable Television Ass'n, United Cable* and *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411 (8th Cir. 1976).[28] *Dakota*, 590 N.W.2d at 648. The court also rejected Bresnan's contention that it had standing under the federal Cable Act. The court reasoned,

> The Cable Act intends to promote competition within the cable communications market. *See* Minn.Stat. § 238.01 (noting statute created to "encourage areawide service * * * and discourage concentration of control and ownership"); *see also* 47 U.S.C. § 541(a)(1) (forbidding state franchising authorities from granting exclusive franchises or unreasonably refusing to award additional, competitive franchises). *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*. *See* Minn. Stat. § 238.01 (encouraging rapid development of cable industry that is responsive to public's interest); *see also* 47 U.S.C. § 521(2) (noting purpose of Federal Cable Act is to assure cable industry is developing in response to local community's needs); *see Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 139, 59 S.Ct. 366, 370, 83 L.Ed. 543 (1939) (stating franchise "exist[s] as a corporation, and * * * in the absence of a specific charter contract * * * creates no right to be free of competition"); *cf. Twin Ports*, 257 N.W.2d at 346 (concluding relator, whose business lost money once agency issued competitor's license, had standing to contest agency's decision in light of statute restricting number of ambulance services for quality-assurance purposes).

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[28] The court characterized *Churchill* as holding that "common carriers, whose sole motivation in case was economic self-interest, did not establish standing to contest commission's grant of permit under National Environmental Policy Act." *Dakota*, 590 N.W.2d at 648. *See* Attachment 13.

Dakota, 590 N.W.2d at 648 (emphasis added).

Next, the court assumed that Bresnan had standing and rejected on the merits Bresnan's attack on the City's assessment of DTG's financial ability. The court noted that neither federal or state law prescribes exactly how a City should weigh evidence about an applicant's financial ability, and it satisfied itself that the City had indeed focused on DTG's ability to construct and initially operate its system. Then, applying standard principles of municipal corporation law, the court deferred to the City's judgment on DTG's financial ability. *Dakota*, 590 N.W.2d at 648.

Turning to Bresnan's due process arguments, the court found that the City did not abuse its discretion in denying Bresnan a hearing because Bresnan, as the holder of a non-exclusive franchise, did not have a property right in freedom from competition. *Dakota*, 590 N.W.2d at 648. The court also found that the City had adequately considered Bresnan's franchise rights during its negotiations with DTG. *Id*.

II. THE CITY IS ENTITLED TO SUMMARY JUDGMENT ON INSIGHT'S "LEVEL PLAYING FIELD" CLAIMS

Insight alleges that Knology's franchise establishes an unlevel playing field in Louisville because it is more favorable than Insight's renewal franchise in four respects – (1) Knology's franchise has a term of 15 years, whereas Insight's renewal franchise has a term of 12 years; (2) Knology is required to complete construction of its system in 4½years, whereas Insight had only 15 months to upgrade its system; (3) Knology is not required to construct its system in all portions of the City at once, as Insight was required to do in its upgrade; and (4) Knology's franchise has more favorable default provisions than Insight's franchise. These

claims cannot withstand scrutiny when judged under the legal standards discussed in the previous section.

First, as *United Cable, Cable Systems of Southern Connecticut, Comcast Cablevision of New Haven* and *New England Telephone Association* make clear, comparing the 15-year term of Knology's original franchise with the 12-year term of Insight's renewal franchise is inappropriate as a matter of law. Rather, the proper comparison is between the term in the Knology franchise and the 15-year term in the original franchise of Insight's predecessor, River City Cable.

Second, it is similarly inappropriate to compare Knology's 4½ year deadline for constructing a new system with Insight's 15-month deadline for upgrading its existing system. As the same cases indicate, new construction and system upgrades are completely different tasks. Again, the proper comparison is between Knology's franchise and the original River City franchise. Such a comparison shows that Knology's 4½year construction deadline is actually 6 months shorter than the 5-year construction deadline in the River City franchise as well as *3 years* shorter than the time Insight's predecessors actually took to build out the Insight system. This tremendous advantage for Insight would itself outweigh any advantages that Knology might have under other provisions of its franchise.

It is also noteworthy that when Knology completes its 4½year build-out, it will have 10½years left on its 15-year term to operate a fully provisioned system. The 15-month upgrade contemplated by Insight's renewal franchise gave Insight 10¾years to operate a fully provisioned system. In fact, Insight has an advantage since its system will be fully upgraded and capable of deriving enhanced revenues from offering advanced services throughout the City long before Knology.

Third, Insight is doubly wrong in asserting that Knology's franchise is more favorable than Insight's because Knology has no obligation, similar to Insight's, to build out all areas of the City simultaneously.[29] For one thing, Insight has apparently overlooked Section 45(5) of Knology's franchise, which requires Knology, in "undertaking planning and construction," to "treat all areas and neighborhoods in the City on a substantially equal basis in order that Cable Service will be available to potential subscribers at substantially the same time." This mistake, without more, is fatal to Insight's argument.

Moreover, Insight again erroneously compares Knology's original franchise to Insight's renewal franchise rather than to the River City franchise, which left Insight's predecessors free to decide for themselves where they would build out their system. Thus, once again, any advantage that might exist runs in Insight's favor.

Fourth, there is no merit to Insight's claim that the default provisions in Knology's franchise are more favorable than Insight's. First, under both the Knology franchise and the Insight renewal franchise, the operator must generally cure substantial defaults within 60 days of receiving notice from the City, and Knology and Insight are generally subject to the same termination and revocation procedures. The only difference between the default provisions in the Knology franchise and the Insight renewal franchise is that the Knology franchise has a special provision that applies to delays in new construction and the Insight renewal franchise, which does not address new construction, has no such provision. Once again, for the reasons discussed previously, the Knology franchise and the Insight renewal franchise cannot properly be compared because they cover distinct subjects.

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[29] For the purposes of summary judgment, the City assumes (without conceding) that Insight's renewed franchise required Insight to upgrade its system in all parts of the

Even assuming that one could properly compare these two franchises, the construction default provision in Knology's franchise does not give Knology any advantage over Insight. While the City cannot terminate Knology's franchise for 18 months in the event of a delay in meeting specified construction deadline, it can assess Knology liquidated damages of $600 per day during the 18-month period (whereas there are no liquidated damages in Insight's franchise.) Afterward, the City can obtain *both* liquidated damages and all other remedies that are commonly available to address significant defaults. Insight's renewal franchise does not afford Insight the slight protection that Knology has negotiated, but neither does it expose Insight to the additional burdens that Knology would have to bear.

The construction default provision in the Knology franchise is also no more favorable than the default provision in the original River City franchise. As just discussed, the additional benefits and burdens provided by the Knology provision offset one another. Furthermore, if the construction default provision in Knology's franchise had been in effect when River City and CPL of Louisville, the City could have charged them $600 a day during their very substantial delays in completing the construction of the system. Thus, in practice, Insight's predecessors actually fared much better than Knology would fare in similar circumstances under the construction default provision its franchise.

In summary, as the cases cited in the previous section hold, an item-by-item comparison is inappropriate. If one conducts such analysis, however, it becomes readily apparent that, far from having the less favorable franchise, Insight has actually benefited disproportionately on 3 of the 4 criteria on which it relies. On the 4th criterion – term – the parties are dead even.

City simultaneously.

In addition to these advantages, the Court can also take into account the tremendous benefits of incumbency that Insight has in Louisville. These benefits would themselves outweigh any advantages that Knology may have over Insight.

III. THE CITY IS ENTITLED TO SUMMARY JUDGMENT ON INSIGHT'S OTHER CLAIMS

In addition to its level playing field claims, Insight makes two other claims in its complaint. First, in Paragraph 45, Insight contends that the Knology franchise is void as a matter of law because the City did not advertise the amendments to *Ordinance #114, Series 2000 (As amended)*. Second, in Paragraph 46, Insight alleges that the City violated the Kentucky Open Records Act by failing to allow Insight to inspect certain records that it obtained from Knology. These claims, too, should be dismissed on summary judgment.

A. Insight has failed to plead its claim properly.

Insight does not challenge the City's publication of notice of the IFB Ordinance on August 12, 2000. Instead, Insight asserts that the Knology franchise should be voided because the City failed to re-advertise the IFB Ordinance after amending it to reflect the additional burdens that Knology assumed in an effort to accommodate Insight's objections during the mediation. There are several problems with Insight's cynical analysis.

In *Fish v. Elliott*, 554 S.W.2d 94 (Ky. App., 1977), the Court found that KRS 424.990, the statute outlining the penalties for violations of KRS 424.260 (the advertisement statute) confers standing "on citizens of the governmental unit to enforce by suit the requirements of the law." However, the Court further held that "…the legislature intends that the certainty of one's citizenship and consequent standing be clearly established. The nexus of one's relationship to the governmental unit, therefore, should be on the face of the pleading."

Id., at 97. In *Fish*, the Court found that the complaint contained "no allegations whatever which would give the Court any indication as to the residence or citizenship of the appellant and that, consequently, he has statutory standing pursuant to KRS 424.990…. [I]n the absence of these proper allegations, the lower court should have dismissed appellant's entire complaint for lack of jurisdiction." *Id*. at 97. Similarly, Insight has failed to assert "proper allegations" in it Complaint establishing standing. Therefore, pursuant to *Fish*, Insight's Complaint, at least as it pertains to the allegations that the City violated KRS 424.260, should be dismissed.

B. The City was not required to re-advertise the amended IFB Ordinance.

Should this Court find that Insight has properly established that it has standing to "enforce by suit the requirements of the law," Insight's claim still fails as the City followed the requirements of the advertising statute. Additionally, the City is entitled to "the presumption that municipalities act properly in enacting legislation." *Communications Systems, Inc. v. City of Danville*, 880 F.2d 887, 891 (6th Cir. 1989).[30]

The City was not required to publish notice of the amended IFB Ordinance. The only differences between the original IFB Ordinance and the amended IFB Ordinance were that the latter reflected Knology's acceptance of a shorter construction deadline (4½years rather than 5 years) and of an obligation to make an annual contribution of $100,000 contribution at the beginning (rather than at the end) of each of the next five years. These changes made the amended IFB Ordinance *more burdensome* and, therefore, *less attractive*, not more attractive, to potential bidders than the original IFB Ordinance.

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[30] Attachment 14.

In a Kentucky case with similar facts, *Cumberland Telephone & Telegraph Co. v. City of Hickman*, Ky., 111 S.W. 311 (1908), the Court refused to find a franchise invalid on advertising grounds. .In that case, the town council granted a telephone franchise as follows: On August 16, 1894, an ordinance detailing the terms of the franchise was introduced. *Id.* at 312. Thereafter (but before the ordinance was enacted), the terms of the franchise were advertised and bids accepted. *Id.* On September 3, 1894, the town council both enacted the ordinance detailing the terms of the franchise and awarded the franchise. *Id.* Two years later, on March 11, 1895, the town council amended the franchise, extending the term but reducing the maximum charges the franchisee could charge. *Id.* The town council did not advertise prior to amending the franchise. *Id.*

The Court in *Cumberland Telephone* affirmed the validity of the franchise despite the fact that the ordinance setting forth its terms had not been adopted at the time such terms had been advertised and despite the fact that the amendment to the franchise had not been advertised. *Id.* at 315. Particularly instructive to this case, in approving of the amendment of the franchise without advertisement, the Court stated:

> If the ordinance granted any *additional privilege* in the streets and public places of the city, there would be irresistible force in appellant's contention here; or, even if there was some *material change in the terms of the grant, so as that the city was or might have been prejudiced* by the fact, a very grave question would arise whether such an ordinance was not in effect the granting of a franchise without a sale. But we do not find such to be the case here.

Id. (emphasis added).

The only difference between the procedure followed in the granting of the franchise at issue in *Cumberland Telephone* and the procedure followed in granting Knology's cable franchise is that the changes to the Ordinance setting forth the terms of the franchise awarded

to Knology were made prior to the award of the franchise rather than two years afterward as in *Cumberland Telephone*. Certainly if it was acceptable to amend a franchise without advertisement *two years* after the initial advertisement, it is acceptable to amend a franchise without further advertisement within *two weeks* after the initial advertisement.

In the instant case, the changes to the Ordinance as introduced made the franchise *more favorable to the City and less favorable to a potential franchisee*. As was the case in *Cumberland Telephone*, the City here "gave only what it had originally agreed to grant, and got in exchange a better consideration." *Id.* at 315. Therefore, as in *Cumberland Telephone*, the fact that the City did not advertise changes to the IFB Ordinance which were beneficial to the City does not constitute grounds for invalidating the franchise.

Furthermore, the City's actions here were fully consistent with the purpose of Kentucky Constitution Section 164, which sets forth the advertisement requirement. As most recently stated by the Kentucky Supreme Court: "The purpose of this section is to prevent governmental agencies of any kind from giving away, or disposing of at inadequate prices, the rights and privileges which belong to its citizens and to compel the disposition of public property to be accomplished publicly and for the highest and best value." *E.M. Bailey Distrib. Co. v. Conagra, Inc.*, Ky., 676 S.W.2d 770, 773 (1984). In essence, then, the advertisement requirement serves two closely related functions: (1) it ensures that citizens will be notified that their government will be selling public property so that they may scrutinize the process; and (2) it ensures that potential purchasers of the public property are

notified of the sale so that they might bid on such property (thereby maximizing price by maximizing demand).[31]

Certainly, Insight cannot argue that the public had no opportunity to scrutinize the creation and award of the cable franchise to Knology. There were several public meetings held after publication of the advertisement of the franchise, during at least one of which Insight itself commented extensively on the IFB Ordinance. *Complaint* at Paragraphs 19-22, 24 and 33. No less than two Courier-Journal editorials commented on the situation. *Id.* at Paragraph 23.

Insight also cannot argue that potential purchasers were deprived of an opportunity to bid on the franchise by the fact that the changes to the IFB Ordinance were not advertised. Remember, the only changes made to the franchise terms after advertisement made the franchise *less attractive* to potential purchasers. It simply defies logic to argue that the City's advertisement of adverse changes (from the perspective of a potential purchaser) would have persuaded a bidder to come forward when more attractive terms had failed to do so. Furthermore, the changes were made less than two weeks after the advertisement. Certainly it is not unreasonable to expect that persons put on notice by the advertisement should monitor the evolution of the underlying Ordinance[32] over the course of a couple of weeks.

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[31] This latter function is tempered somewhat in the case of cable television franchises because federal law prohibits the award of exclusive franchises and mandates that a franchising authority may not unreasonably refuse to award an additional competitive franchise. 47 U.S.C. § 541(a)(1). Because the City must grant a cable franchise to all qualified applicants who agree to meet the obligations set forth in a franchise ordinance, the notion of a true "auction" (where there is one winning high bidder) is not appropriate in this context.

[32] The advertisement itself did not contain the terms of the franchise but rather made reference to the IFB Ordinance.

Finally, Insight's citation to K.R.S. Chapter 424, in its Complaint, is misleading. While K.R.S. Chapter 424 contains provisions covering advertising procedures generally, it does not contain any provision expressly addressing re-advertisement.

Second, the one case which Insight cites in support of its claim, *City of Owensboro v. Evansville and Ohio Valley Transit Co*., Ky. App., 448 S.W.2d 335 (1969), is at best (for Insight) distinguishable and in fact undermines Insight's position. A review of the facts and holding of that case unequivocally demonstrates why it lends no insight into the instant case.

Although somewhat sketchy, the facts of *City of Owensboro* appear to be as follows: A city created, advertised and awarded a franchise for bus service to one of two bidders. *Id*. at 376. As awarded, the franchise required that the franchisee pay the city a fee and provide service solely in exchange for the right to charge reasonable customer fares. *Id*. Later, without further advertisement, the City entered into a contract with the successful bidder which, instead of requiring the franchisee to pay the city, required that the city pay the franchise a subsidy to ensure that it would earn a 5% profit over cost. *Id*. at 376-77.

City of Owensboro is easily distinguished from the instant case. First, the changes made to the franchise in *City of Owensboro* made the franchise *more beneficial to the franchisee and more burdensome to the city*. Here, the changes went in favor of the City. As discussed above and in the *Cumberland Telephone* case, this represents a critical distinction. Second, the changes made in the franchise in *City of Owensboro* completely restructured the nature of the consideration "paid" for the franchise. Here, the changes affected the timing of certain franchisee obligations, but did not (as in *City of Owensboro*) constitute a wholesale change in the substantive nature and existence of those obligations.

In fact, *City of Owensboro* actually undermines Insight's position. Although ultimately finding in favor of the city[33] under the unique facts presented, the Court there recognized that re-advertising is not necessary in all cases:

> We do not believe that the provisions of the subsidy contract can fairly be considered to deal only with regulatory details….When the city here advertised a franchise with no subsidy, and then in less than two weeks executed a contract to the successful bidder giving him a substantial subsidy, there cannot be said to have been a fair attempt to comply with advertising requirements.

Id.at 377-78. Thus, implicitly, the Court in *City of Owensboro* recognized that advertisement might not have been necessary if the changes dealt with, for example, regulatory details. This directly contradicts Insight's formalistic position that any change, no matter how minor, requires re-advertisement.

Third, Insight's reliance on *Opinion of the Attorney General* 94-20 is puzzling. OAG 94-20 involved a county's open-ended advertisement for bids that did not include the materials to be purchased, quantity, time period or other limiting information. After the sole bidder won the contract, it periodically sent county substantial invoices for road work allegedly done under the contract. After discussing the general purposes of the bidding process, the Attorney General found the arrangement "little more than a sham" and found it unenforceable. This opinion appears to have nothing whatsoever to do with the issues involved in this case.

B. The City Properly Withheld Knology's Confidential Data From Insight

Insight's final claim – that the City violated the Kentucky Open Records law by withholding certain information from Insight – is equally without merit for several reasons.

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[33] Contrary to the situation here, it was the city itself which sought to invalidate the franchise in question.

On October 2, 2000, the Plaintiff made an Open Records Request for various documents, including "all financial information provided to the City, members of the Board of Aldermen, agents of the Board of Aldermen or agents of the City, by any respondent/bidder attempting to seek a cable franchise with the City of Louisville (excluding Insight and/or its predecessors)."[34] Although, initially, there was some miscommunication regarding which financial documents would be disclosed and which documents were exempt from disclosure, that issue has been resolved. At issue are Knology's "Financial Projections" for the operation of its system in Louisville over the next few years. It is undisputed that at the time Knology provided these documents to the City, it requested they be kept confidential.[35] Pursuant to the petition submitted by Knology, it asserts that its competitors would be afforded an unfair competitive advantage if this information were not kept confidential. "The information sought to be protected…is not generally known outside Knology, and is not provided to the public. The internal use of Knolgoy's Financial Projections is restricted to only those employees who have a legitimate business reason for reviewing such information." (*Id*., pg. 2.) Therefore, these records, pursuant to KRS 61.878(1)(c)(1), are exempt from disclosure as they are "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records."

In *Marina Management Services, Inc. v. Commonwealth of Kentucky, Cabinet for Tourism*, Ky., 906 S.W.2d 318 (1995), the Supreme Court addressed the issue of the scope of the exemption contained in KRS 61.878(1)(c). In that case, "[t]he records submitted to the

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[34] Letter from Keith Hall dated October 2, 2000. *See* Complaint, Exhibit K.

[35] *See* Petition of Knology for Confidential Treatment, Attachment 15.

Parks Department include[d] information on asset values, notes payable, rental amounts on houseboats, related party transactions, profit margins, net earnings, and capital income." *Id*., at p. 319. The Court found that the exemption applied because "[t]he most obvious disadvantage may be the ability to ascertain the economic status of the entities without the hurdles systematically associated with acquisition of such information about privately owned organizations. Further, the facts on the record indicate that the audit statements were disclosed confidentially to Tourism and the Auditor's Office. On these facts alone, the exemption clearly applies." *Id*. at p. 319.

As in *Marina*, the documents at issue in this case were disclosed confidentially to the City. Additionally, the documents are of a nature that if openly disclosed would permit an unfair commercial advantage to competitors and they are generally recognized as confidential or proprietary. Therefore, pursuant to KRS 6.1878(1)(c)(1) and *Marina Management Services*, these documents were properly withheld from disclosure.

CONCLUSION

The issues presented in this case involve a pure question of law. It is clear that once the Court makes the proper comparison between the franchise granted to Knology, the franchise granted to Insight's predecessors and the franchise granted to Insight, the franchise granted to Knology is substantially similar to the franchise granted to the Plaintiff. Additionally, the Plaintiff has failed to present any evidence that City failed to properly advertise the IFB Ordinance. The undisputed facts are that the IFB Ordinance was advertised on August 12, 2000. Finally, the Plaintiff has failed to establish that the City violated the Open Records Act. It is undisputed that the documents withheld from disclosure were

Knology's "Financial Projections." Pursuant to KRS 6.1878(1)(c)(1), these records are exempt from disclosure.

For the foregoing reasons, the City respectfully requests this Honorable Court to grant the City's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that a copy of the foregoing was mailed on April ____, 2001, via first-class U.S. mail, postage prepaid to: to Laurence J. Zielke and Keith A. Hall, PEDLEY, ZIELKE, GORDINIER & PENCE, 1150 Starks Building, 455 South Fourth Avenue, Louisville, KY 40202.

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