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.

CITY OF LOUISVILLE **DEFENDANT**

THE CITY OF LOUISVILLE'S, REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Having previously maintained that this case involves "a pure question of law" that can be resolved promptly on summary judgment simply by comparing the relevant franchises "side-by-side," Insight has now executed an abrupt U-Turn.[1] Faced with the City's showing that such a comparison requires summary judgment in the City's favor, Insight now insists that there are genuine issues of material fact in this case by resorting to extrinsic evidence and claiming further discovery and a trial is necessary. Insight does not suggest that the terms of the relevant franchises are unclear, ambiguous or disputed. Rather, Insight contends that "[t]he disputed *effect* of the respective franchise terms is the material question of fact in the case at bar, not the undisputed terms themselves." *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment* at 15.

As the City will show below, Insight was right the first time, and its new approach is fundamentally flawed. In the absence of any dispute about the meaning of terms of the franchises

in question, the only issue left to be resolved is whether, on balance, those terms are "substantially" similar. That is a purely legal question for the Court to decide. Furthermore, the "factual disputes" that Insight suggests exist are irrelevant to the legal issues and, therefore, no "genuine" issues of material fact exist.

The City also urges the Court to bear in mind, as it considers the specific arguments of the parties, that in the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996, Congress established strong pro-competitive policies and enacted numerous specific measures intended to break down cable and telecommunications monopolies, 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.[2] If Insight's position in this case prevails, it will enable incumbent cable operators to thwart Congress's pro-competitive purposes by subjecting cities and potential entrants to the specter of years of time-consuming, burdensome and costly litigation over whether the effects of new franchises, as distinguished from their terms and conditions, somehow favor the new franchisee. The Court should not allow this to occur.

Regarding the other claims filed by Insight, it has, apparently, conceded that the City was correct in denying its open records request pertaining to the financial documents as it did not address that issue in its response to the City's Motion for Summary Judgment. Although Insight asserts that it has standing to challenge the award of the IFB Ordinance based upon an alleged violation of the advertisement requirement, Insight has failed to allege, on the face of its

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[1] 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 A to the City's Opening Brief.

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

complaint, the nexus of its relationship to the City. An allegation that the City failed to comply with the substantial similarity requirement of the franchises is not a basis to assert standing to challenge the award of the franchise based upon an alleged violation of the advertisement requirement. Additionally, Insight has failed to cite any authority to support its position that re-advertisement of a franchise is required.

ARGUMENT

I. INSIGHT HAS NOT SHOWN THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT IN FAVOR OF THE CITY

Section 38 of the Insight franchise prevents the City from awarding "rights, privileges and franchises" that are "more favorable" or "less favorable" than Insight's. Section 38 goes on to say 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."

Given the absence of any Kentucky cases on point, the City, in its opening brief, invited the Court to look for guidance in interpreting Section 38 to several cases that had interpreted state "level playing field" statutes with language nearly identical. In these cases, the courts of Connecticut, Illinois and Minnesota had uniformly held that (1) franchises should be compared, not on an item-by-item basis, but as entire packages; (2) "equal" benefits and "equal" burdens are not required; rather, "substantial" similarity is all that is necessary; (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. *City's Motion for Summary Judgment* at 10-17.

Applying the standards articulated in these cases, the City compared Knology's franchise to the franchises that Insight or its predecessors operated under when their circumstances were most similar to Knology's. For the most part, this meant comparing Knology's franchise with the virtually identical language in Insight's current franchise. In some instances, however, as the cases to which the City had looked to for guidance indicated, the appropriate comparison was between Knology's franchise and the franchise of Insight's predecessor when it had first entered the Louisville market.[3] [4] The City's analysis showed that Insight could not meet its burden of proving that Insight's franchise is less favorable than Knology's franchise in any of the four ways that Insight had suggested in its complaint. Accordingly, the City asked the Court to issue a summary judgment in the City's favor.

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[3] The only difference is that Insight's predecessors faced no competition, whereas Knology faces an incumbent that dominates the market and has just upgraded its facilities.

[4] Insisting that C.P.I. of Louisville was the entity that built the first cable system in Louisville, Insight takes the City to task for referring to the original franchise in Louisville as the River City franchise. *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment* at 12 n.15. In fact, River City simply changed its name to C.P.I. of Louisville in 1978 and obtained a new ordinance from the City that made the name change retroactive. Ordinance 106, Series 1978, Attachment E to Insight's Brief.

In its brief in opposition to the City's Motion for Summary Judgment, Insight argues that summary judgment is inappropriate here, despite the absence of any dispute on the meaning of the terms of the franchises in issue, because the Court must go behind the language of the franchises to compare their effects in the market place. According to Insight, "[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. This, clearly, is not correct." *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment Insight's Reply Brief* at 13.

In support of its argument, Insight offers the Court two affidavits. The first is an affidavit by Reba Doutrick, one of the negotiators of the franchise that Insight acquired from InterMedia Partners. Ms. Doutrick states that the parties intensively negotiated every line of the franchise and that she, personally, believed that the franchise prohibited the City from granting any subsequent franchisee a longer term or a longer construction schedule than Insight obtained. The second is an affidavit by Henry Sherman, whom Insight describes as an "expert in the cable industry."[5] Mr. Sherman admits that a new build and a rebuild involve different tasks. *Sherman* Affidavit ¶ 5. But without offering any financial analysis or other concrete data, he concludes that

[5] Insight relies on Mr. Sherman's affidavit to support three of the four grounds on which Insight alleges that Knology's franchise is more favorable than Insight's. On the fourth point – Knology's benefit from supposedly not having to build out all areas of the City at the same time – Insight relies solely upon its counsel's analysis of the language of the Insight's and Knology's franchises. This analysis completely ignores the provision in Knology's franchise that 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

the difference between the two processes is "slight." *Id*. Mr. Sherman also presents various analyses that supposedly show that the effect of Knology's franchise on Knology is financially more favorable than the effect of Insight's franchise on Insight. [6]

Turning to cases that the City has cited, Insight focuses solely on the Connecticut cases and contends that they are distinguishable and inapposite here. According to Insight, they involve interpretations of statutory language rather than contract terms, judicial review of agency action rather than judicial review of a contract, and conclusions based on substantial administrative records rather than bare franchise language.

Insight then, inexplicably, suggests that the Court apply copyright law to this case.

Finally, Insight contends that summary judgment is inappropriate because it has not had an opportunity to complete discovery, particularly a deposition of Adrian Herbst, one of the City's outside counsel. According to Insight, in such a deposition, Mr. Herbst would acknowledge that the advice that he gave to the City was incorrect.

None of Insight's arguments or affidavits raises any genuine issues of material fact. First, nothing in Section 38 or any other provision of the Insight franchise requires the City, when granting new franchises, to perform an item-by-item comparison with Insight's franchise; to compare the economic effects of functionally different tasks; to attempt to evaluate the potential financial impacts that Insight's franchise may have on Insight over the life of the franchise; or to attempt to ensure that subsequent franchises will have similar effects on the new grantees. On its

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Service will be available to potential subscribers at substantially the same time." *Ordinance No.114, Series 2000* (As Amended), §45(5).

[6] Neither Insight nor Mr. Sherman addresses the City's point that Knology will have 10½ years left on its 15-year term to operate a fully provisioned system after it completes its 4½year build-out, and Insight will have 10¾years out of its 12-year term to operate a fully provisioned system after completing it 15-month upgrade.

face, Section 38 only prohibits the City from granting "rights, privileges and franchises" – i.e., terms and conditions of operating a cable system in Louisville – that, taken as a whole, are no more favorable than the terms and conditions in Insight's franchise, taken as a whole. Indeed, read literally, Section 38 does not even require the City to achieve "substantial" similarity but merely affords the City a safe harbor if it does so. Given Insight's concession that the terms and conditions of the franchises in issue are undisputed, all that is left is for the Court to apply the law to the undisputed terms of these franchises. *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992) ("interpretation of contracts is an issue of law for the court to decide"); *Fay E. Sams Money Purchase Plan v. Jansen*, 3 S.W.3d 753, 757 (Ky.App. 1997) (same).

A. Assuming, Without Conceding, That Insight's Affidavits Are True, They Do Not Establish The Existence of Any Genuine Issue of Material Fact

Assuming (for the purposes of the City's Motion for Summary Judgment only) that what Ms. Doutrick and Mr. Sherman say in their affidavits is true, these affidavits do not create any genuine issues of material fact. Simply put, they are irrelevant. Insight's use of them is premised on its belief that the Court should compare the sections of its renewal franchise dealing with system upgrade with the sections of Knology's franchise dealing with new construction. As Insight concedes, however, an "upgrade" and "new construction" represent different activities. Although Insight attempts to debate the amount of differences between the two, it does not deny that they are indeed different. Therefore, under the case law discussed by the City in its Memorandum in Support of its Motion for Summary Judgment, the Court should compare the provisions governing construction in Insight and its predecessor's original franchise with the construction provisions of Knology's franchise. Insight has not, and indeed cannot, dispute that

the construction provisions of its predecessor's franchise are at best no more burdensome than those of Knology's franchise. Therefore, the City is clearly entitled to summary judgment on this issue.

The affidavits tendered by Insight merely constitute extrinsic evidence of what the parties intended, but did not say, when they entered into Insight's franchise. It is well settled in Kentucky that resorting to extrinsic evidence for such a purpose is inappropriate. As the Supreme Court of Kentucky held in *Central Bank & Trust Co. v. Kinkaid*, 617 S.W.2d 32 (Ky. 1981):

> First of all we need to determine whether the terms of the [contract] are ambiguous. If they are, then extrinsic evidence may be resorted to in an effort to determine the intention of the parties; if not, then extrinsic evidence may not be resorted to. The criterion in determining the intention of the parties is not what did the parties mean to say, but rather the criterion is what did the parties mean by what they said. An ambiguous contract is one capable of more than one different, reasonable interpretation. The right to contract is a valuable right limited only by constitutional or statutory provisions, public policy, or the desires of the parties. In our effort to determine whether the terms of the option are ambiguous, we have challenged the intention of the parties by every expression and statement contained within the four corners of the instrument. As we do this, any doubt that may have come forth in each instant fades like ectoplasmic vapor when exposed to the light of the [contract] as a complete instrument.

Id. at 33; *see also Dennis v. Bird*, 941 S.W.2d 486, 488-89 (Ky. App. 1997) ("construction of a deed is a matter of law, and the intentions of the parties are to be gathered from the four corners of the instrument."); *Fay E. Sams Money Purchase Plan v. Jansen*, 3 S.W.3d 753, 757 (Ky. App. 1997) ("interpretation of contracts is an issue of law for the court to decide. … The basic principle followed in the construction of deeds is to determine the intention of the grantor as gathered from the four corners of the instrument.") (Citations omitted). Again, Insight's admission that the terms of the franchises in issue are unambiguous and undisputed is fatal to Insight's argument that summary judgment is inappropriate in this case because resorting to extrinsic evidence becomes necessary.

B. The Level-Playing-Field Cases Cited By The City Are Applicable To This Case

Insight's effort to denigrate the level-playing-field cases that the City has cited is both unwarranted and incorrect. For one thing, the City does not contend that these cases are binding on this Court. Rather, the City suggests only that they offer useful guidance because the courts involved dealt thoughtfully with many of the same issues that are present here. Insight does not cite any level-playing-field cases that are inconsistent with the decisions that the City has cited. Moreover, the City submits that the existing body of case law on what "substantial similarity" means in the context of cable franchising is far more worthy of the Court's attention than the complete inapposite standards of copyright law to which Insight steers the Court in its brief.

In any event, none of Insight's specific criticisms of the cases that the City has cited holds up under analysis. It is immaterial that these cases involve state statutes rather than contracts, as the statutes in question have virtually the same operative language as Section 38. Moreover, the Insight franchise is not just a contract but is also a municipal ordinance. There is also no merit to Insight's point that the Connecticut cases are somehow less helpful because they involve judicial review of agency action rather than judicial review of a contract. After all, the Connecticut agency in issue is the franchising authority for Connecticut, as the City is here, and what counts here is that the courts found that the Connecticut agency had reasonably resolved many of the same level-playing-field issues that are now before this Court. Besides, Insight fails to mention the Illinois and Minnesota cases cited in the City's opening brief, in which the courts reviewed franchises rather than administrative decisions, just as this Court needs to do. Those cases also cited, with approval, the rationale of the Connecticut case. This Court, the City submits, should do the same.

Furthermore, while it is true that the Connecticut franchising authority conducted extensive hearings before reaching some of its conclusions, the Courts in the relevant cases did not rely on any prior factual determinations to conclude that it is inappropriate to compare the construction of a new system with an upgrade of an existing system because they involve different tasks. In one case, the court relied on the incumbent's admission – similar to Insight's here – that a new build and an upgrade involve different tasks. *Cable Systems of Southern Connecticut, Ltd. v. Connecticut DPUC*, 1996 WL 661818 at *4 ("[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."). In the second case, the court simply found that the incumbent's apple-to-oranges comparison lacked merit *Comcast Cablevision of New Haven, Inc. v. Connecticut DPUC*, 1996 WL 6611805 at *4 ("The analogy between initial installation of a system and the rebuild of an existing system with a substantial customer base, is not compelling."). In any event, contrary to Insight's suggestion, even if the Connecticut franchising agency and the Connecticut courts had held extensive hearings on the differences between a new build and an upgrade, it does not follow that this Court – and every other court that faces this issue - must re-litigate it and cannot be guided by the Connecticut courts' legal conclusions that it is inappropriate to compare these tasks in a level-playing-field analysis. To the contrary, considerations of comity and judicial economy suggest that this Court should embrace the conclusions that the Connecticut courts reached.

C. Insight Has Failed To Present Any Authority To Support Its Position that It Should Be Allowed To Depose Adrian Herbst

The question of whether Insight's and Knology's franchises are substantially similar is purely a question of law. The fact that, prior to the awarding of the franchise to Knology, the City requested a legal opinion from Mr. Herbst regarding the substantial similarity of the two franchises does not create a fact issue nor does it make the testimony of Mr. Herbst relevant and/or admissible.

Even if this Court denies the City's Motion for Summary Judgment, Mr. Herbst will not be called as an expert witness for the City. Mr. Herbst's report and his opinions regarding the substantial similarity of the two franchises are simply inadmissible as evidence.

The Plaintiff attempts to argue that if it were allowed to depose Mr. Herbst, it would *possibly* obtain an "admission" from Mr. Herbst that Knolgoy's 15-year franchise term is more favorable than Insight's 12 year term. First, the Plaintiff is engaging in pure speculation as to whether Mr. Herbst would in fact make such an "admission." More importantly, however, whether Mr. Herbst believes the 15 year term contained in Knology's franchise is more favorable than the 12 year term contained in Insight's franchise[7] is not relevant to this case. The City has not asserted a defense based upon legal advice of its counsel. Therefore, the fact that the City relied on Mr. Herbst's report in determining that the two franchises are substantially similar is irrelevant to this lawsuit. The issue before this Court is simply whether or not the two franchises are substantially similar – not what a member of the City's legal team thinks about the substantial similarity of the franchises.

[7] A point the City does not concede.

II. INSIGHT DOES NOT HAVE STANDING TO CHALLENGE THE AWARD OF THE FRANCHISE BASED UPON AN ALLEGED VIOLATION OF THE IFB ORDINANCE

Insight asserts that it has standing because "[b]y passing an ordinance that grants a franchise to Knology that is not 'substantially similar' to Insight's franchise, the City has interfered with Insight's rights and thus, Insight has standing to attack the IFB ordinance." *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment Insight's Reply Brief*, pg. 29-30. This is simply incorrect. By alleging that the City passed a franchise that is not "substantially similar" to Insight's franchise, Insight has standing to challenge the City's award of the franchise to Knology based upon contractual provisions contained in both Insight's and Knology's respective franchises. However, having standing to challenge the award of the franchise based upon an alleged breach of the "substantially similar" provision does not give Insight standing to challenge the award of the franchise based upon an alleged violation of the advertisement requirement.

"It is fundamental that in order to have standing in a lawsuit a party must have a judicially recognizable interest in the subject matter of the suit." *Healthamerica Corp. of Kentucky v. Humana Health Plan, Inc*., Ky., 697 S.W.2d 946, 947 (1985). The Court in that case found that "HealthAmerica, as a disappointed competitor, ha[d] no standing to judicially contest the award of a public contract to another entity." *Id.* at pg. 947.

Plaintiff mistakenly states that *Fish v. Elliott*, Ky. App., 554 S.W.2d 94 (1977), is not applicable to this case. To the contrary, it is directly on point. The Plaintiff argues that KRS 424.380 is at issue in this case and not KRS 424.990, the statute referred to in *Fish*. Regardless of which statute the Court dealt with in *Fish*, the holding is applicable to both statutes. "The Supreme Court of Kentucky has consistently held that naked municipal citizenship is not sufficient

to confer standing to challenge an official act of municipality." *Fish*, at 96. However, the Court in *Fish* went on to hold that "the legislature may, by statute, confer standing on individual citizens." Id., at 96 citing *Martin v. Thompson*, Ky., 253 S.W.2d 15 (1952) and *Kentucky State Board of Dental Examiners v. Payne*, 213 Ky. 382, 281 S.W. 188 (1926). In *Fish*, the Court found that KRS 424.990 specifically conferred standing to citizens "to enforce by suit the requirements of the law." *Id*., at 97. Just as KRS 424.990 conferred standing to citizens, so does KRS 424.380 by stating that "[t]he Circuit Courts of this state shall have the jurisdiction to enforce the purposes of this chapter, by injunction or other appropriate order, upon application by any citizen of this state." However, the Court in *Fish* further held that "it would seem 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. Although KRS 424.380 confers standing to a citizen to bring suit to enforce the requirements of the advertisement law, by failing to show the nexus of its relationship to the governmental unit on the face of the Complaint, the Plaintiff lacks standing to challenge the advertisement of the IFB ordinance.

III. THE CITY DULY ADVERTISED THE IFB ORDINANCE

Insight's response to the City's Motion for Summary Judgment on this issue completely ignores the undisputed facts of this case and misstates the position taken by the City with respect to this issue. It is undisputed that the IFB Ordinance, as introduced at the Board of Aldermen meeting on August 8, 2000, **was advertised**. *See Insight's Complaint for Declaration of Rights, Paragraph 18.*

The only issue here is whether a second advertisement needed to be run after certain changes were made in the IFB Ordinance after the initial advertisement. The City has asserted and

continues to assert that such changes did not constitute material changes to the IFB Ordinance and that therefore the previous advertisement satisfied the City's obligations under Kentucky Constitution Section 164 and KRS Chapter 424. Insight apparently intends for the Court to believe that re-advertisement is required whenever any change is made in a franchise after initial advertisement, no matter how minor. If that is the case, Insight utterly fails to provide compelling authority for that notion.

First, Insight fails to identify any aspect of Kentucky Constitution Section 164 or KRS Chapter 424 explicitly requiring, of even addressing, re-advertisement. Second, Insight fails to identify any Kentucky case supporting such a draconian position. Certainly, Insight cannot rely on *City of Owensboro v. Evansville & Ohio Valley Transit Co.*, Ky. App., 448 S.W.2d 335 (1969) or *City of Princeton v. Princeton Electric Light & Power Co.*, Ky. App., 179 S.W. 1074 (1915), the only cases cited by Insight which come even remotely near the issue presented here.[8] Insight cites both cases for the proposition that "a city cannot advertise one kind of franchise and sell another—'the only thing that can be lawfully sold is the thing which has been advertised for sale.'" *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at p. 34.* The City discussed in detail why *City of Owensboro* can be distinguished and why it in fact undermines Insight's position in the City's Memorandum in Support of its Motion for Summary Judgment.

Similarly, if one looks at *City of Princeton* in whole rather than pulling a "sound bite" out of context, one can see that *City of Princeton* is easily distinguished from, and provides no insight

[8] Insight's citation of *Handy v. Warren County Fiscal Court*, Ky. App., 570 S.W.2d 663 (1978) can be discounted completely. That case simply discusses the advertisement requirement set forth in KRS 442.260 generally. Whether or not a franchise needs to be advertised in general is not at

into, the instant case. The facts of *City of Princeton* may be summarized as follows: In 1896, the City of Princeton advertised and awarded a franchise to furnish that city with electric lights for a period of 10 years beginning January 1, 1897. *City of Princeton*, 179 S.W. at 1075-1076. Approximately ten years later, in late 1906, the City of Princeton attempted to grant the successor to the original franchisee a franchise running from 1907 to 1917, without advertising this later franchise. *Id.* In finding the second franchise invalid, the Court held that by its express terms the initial franchise expired on January 1, 1907 and that, therefore, the franchise running from 1907 to 1917 constituted a separate franchise that should have been advertised. *Id.* at 1075. In so finding, the Court noted: "Further, the alleged franchise from 1907 until 1917 is materially different, both as to the thing granted and the terms and conditions upon which it was granted, from the one which was granted in 1896." *Id*. Obviously, the circumstances of *City of Princeton* stand in stark contrast to the circumstances of the instant case.

At best (for Insight), the quotation from *City of Owensboro* and *City of Princeton* relied upon by Insight simply begs the question—whether the changes made to the IFB Ordinance after advertisement were so substantial that the amended IFB Ordinance represented a "different" franchise. As already discussed in detail in the City's Memorandum in Support of its Motion for Summary Judgement, the answer to that question is "no."[9]

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issue here. The only real issue is whether the IFB Ordinance, after amendment, represented a materially different franchise, thereby requiring a second advertisement.

[9] At the risk of lending more credence to Insight's argument than it deserves, the City believes a few words should be said about Insight's vain attempt to discount the applicability of *Cumberland Telephone & Telegraph Co. v. City of Hickman*, Ky. App., 111 S.W. 311 (1908). Insight claims that case cannot control because it "relies on 3636 Ky. Stat. 1903, which explains that an ordinance shall not be passed on the same day that it is introduced." *Insight's Memorandum in Opposition to Defendant's Motion for Summary Judgement* at p. 33. Contrary to Insight's assertion, even a casual reading of the case makes it quite obvious that the Court also determined the validity of the granting and subsequent amendment of the franchise in question based on

CONCLUSION

Insight's attempt to persuade the Court to compare the effect of the upgrade and term provisions of its renewal franchise with the effect of the new build and term provisions of Knology's franchise must fail as a matter of law. As Insight concedes, an upgrade is different from a new build. As courts have recognized, a new entrant faces different challenges than the incumbent. In essence, Insight is asking the Court to compare the wrong provisions – its apple with Knology's orange. Courts have recognized that the appropriate comparison under these circumstances is between the provisions of the new entrant's franchise and those of the original franchise of the incumbent. As discussed in the City's Memorandum in Support of its Motion for Summary Judgment, a comparison of those provisions demonstrates unequivocally that the franchises are substantially similar.

Having conceded that the City did not violate the Open Records Law by not responding to the City's motion regarding that issue, this Court should find that the City did not violate the Open Records Law.

Kentucky Constitution Section 164 (the origin of the advertisement requirement at issue here). As stated by the Court:

> We conclude that the granting of the franchise in the manner done in this case was regular, and in strict conformity with the requirements of the Constitution (section 164) and statute (section 3636, Ky. St. 1903).
>
> Appellant contends that the ordinance of March 11, 1895 [the amendment of the franchise], was void, because it was also the granting of a franchise without sale, and because the ordinance was passed on the same day it was introduced….But we do not find such to be the case here.

Cumberland Telephone at 315. The City will not presume to speculate as to the reasons for Insight's undeniable oversight.

Insight does not have standing, without alleging on the face of the Complaint its nexus to the City, to challenge the award of the IFB Ordinance by alleging a violation of the advertisement requirement. Furthermore, the City did not violate the advertising requirements. It is undisputed that the IFB Ordinance was advertised. There is no requirement that it must be re-advertised.

For the foregoing reasons, the Defendants respectfully request this Honorable Court to grant their Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that a copy of the foregoing was mailed on June 15, 2001, via first-class U.S. mail, postage prepaid to: Laurence J. Zielke and Benjamin S. Schecter, PEDLEY, ZIELKE, GORDINIER & PENCE, 1150 Starks Building, 455 South Fourth Avenue, Louisville, KY 40202.

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