
MEMORANDUM

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TO: COUNCILMEMBER QUAN AND MEMBERS OF THE FINANCE COMMITTEE
FROM: COUNCILMEMBER NANCY NADEL
SUBJECT: LABOR REPRESENTATION FOR FRANCHISE AGREEMENTS
DATE: 10/5/2005
CC:

SUMMARY

In the franchise agreement negotiations, Comcast has stated that inclusion of labor language in our contract with them is a dealbreaker. However, if council is interested in pursuing inclusion of labor language to address our cable provider, there are other alternatives we can explore. Along with the Comcast contract, staff is recommending changes to our Administrative regulations as well. CWA has requested that we consider amending the city's regulations to include labor language also. I will be making a motion for staff to come back with an analysis of this alternative, and have attached the proposal for review.

Note: Language in the existing Ordinance Amendment which is already part of the packet to the Board and approved as to form and legality is in plain text. Additions we are proposing to this amendment are single underline italics. Deletions are ~~strikethrough~~.

OAKLAND CITY COUNCIL

ORDINANCE No. _____ C.M.S.

AN ORDINANCE OF THE CITY OF OAKLAND AMENDING CHAPTER 5.16 OF TITLE 5 OF THE OAKLAND MUNICIPAL CODE TO REGULATE THE OCCUPANCY AND USE OF PUBLIC RIGHTS-OF WAY BY CABLE SYSTEMS AND OPEN VIDEO SYSTEMS, TO PROVIDE FOR ESTABLISHMENT OF CUSTOMER SERVICE STANDARDS; ESTABLISHING FRANCHISE AND LICENSING REQUIREMENTS FOR OPERATORS OF SUCH SYSTEMS AND TO PRESCRIBE MINIMUM CHARGES, TERMS, AND CONDITIONS FOR AND UPON THE CONSTRUCTION, MAINTENANCE, AND REPAIR OF SUCH SYSTEMS

WHEREAS, it is anticipated that an ever-increasing number of companies will request access to and use of Public rights-of-way for provision of cable and other services to the public; and WHEREAS, the City of Oakland ("City") has the authority to regulate the use of streets, Public rights-of-way, and other City property, and to grant access thereto upon certain terms and conditions; and

WHEREAS, the public streets, alleys, utility easements dedicated for compatible uses, and other rights-of-way within the City: 1) are critical to the travel of Persons and the transport of goods and other tangibles in the business and social life of the community by all citizens; 2) are a unique and physically limited resource so that proper management by the City is necessary to maximize the efficiency and to minimize the costs to the taxpayers of the foregoing uses, and to prevent harm to the community; and 3) are intended for public uses and must be managed and controlled consistent with that intent; and

WHEREAS, the right to occupy the Public rights-of-way cannot be granted to all Persons, and those who are granted that right obtain significant benefits; and

WHEREAS, the right to use the Public rights-of-way therefore must be exercised in a manner consistent with the public interest; and

WHEREAS, the City wishes to promote the availability of high-quality and diverse services to the City residents, businesses, the City, and other public institutions; and to promote the availability of diverse information resources to the community, including through the development of advanced systems that can support public, educational, and governmental programming and high-speed access to the Internet; and

WHEREAS, the City wishes to provide opportunities to the public to obtain access to communications facilities for the purpose of disseminating and receiving information; to promote competitive cable rates and services; to take advantage of opportunities presented by cable and open video systems to provide for more open government; to enhance educational opportunities throughout the community and provide opportunities for building a stronger community; and to allow flexibility to respond to changes in technology, subscriber interests, and competitive factors that will affect the health, welfare, and well-being of the community; and

WHEREAS, the City finds that it is in the interest of the public to franchise and to establish standards for franchising such operators in a manner that promotes these objectives and otherwise protects the public interest;

WHEREAS, the Council finds this ordinance is subject to exemptions from the California Environmental Quality Act (CEQA), including without limitation, CEQA Guidelines sections 15301; 15302; and 15305.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF OAKLAND:

SECTION 1, Chapter 5.16 of Title 5 of the Oakland Municipal Code is hereby amended to read in its entirety as follows:

...

5.16.360 Failures to Perform

A. If a Cable Communications System Operator fails to perform work that it is required to perform within the time provided for performance, the City may perform the work or cause the work to be performed and bill the Operator therefor. Except in the case of safety issues or other urgent circumstances, the City shall provide the Operator with 30 days notice and opportunity to perform the work before the City acts pursuant to this section 5.16.360. The Operator shall pay the actual cost incurred within thirty (30) days receipt of invoice. City will not unreasonably deny a request for an extension of time to perform, where the City Administrator finds that the delay will not adversely affect the work, the City, third parties affected by the work, or the public.

B. Liability for Contractors'/Subcontractors' Failure To Perform. If a contractor or subcontractor performing work, labor or services in the City on behalf of a Cable Communications System Operator fails to take reasonable steps to perform work that is required, or fails to abide by the consumer protection standards and customer service standards of Section 5.16.570, then the Cable System Operator shall be liable for any failures or breaches committed by its contractors, subcontractors, or agents just as if the Cable Communications System Operator itself had committed the breach.

C. Within (7) days of using a contractor or subcontractor for work, labor or services in the City the Cable Communications System Operator shall notify the City's Contract Compliance and Employment Services Office and provide a detailed scope of service. Such notification shall inform the City of the name of the contractor, subcontractor and/or any company they are working for, the nature of the work to be performed and the expected period of time during which the contractor/subcontractor is expected to be utilized. The seven day notice requirement shall be extended in the event it is made impossible or impracticable by war or riots, civil disturbances, floods or other Acts of God.

...

5.16.680 Discrimination Prohibited

A. A Cable Communications System Operator shall not unlawfully discriminate among Persons or the City or take any retaliatory action against a Person or the City because of that Person's exercise of any right it may have under federal, state, or local law, nor may the Operator require a Person or the City to waive such rights as a condition of taking service.

B. A Cable Communications System Operator shall not refuse to employ, discharge from employment, or unlawfully discriminate against any Person in compensation or in terms, conditions, or privileges of employment because of race, color, creed, national origin, sex, age,

disability, religion, ethnic background, marital status ~~or~~ sexual orientation, *or an employee's decision to form, join and/or participate in the activities of employee organizations of their own choosing for the purpose of representation. A Cable Communications System Operator shall deal with representatives duly elected by a majority of its employees for purposes of collective bargaining in accordance with applicable laws and* ~~[A Cable Communications System Operator]~~ shall comply with all federal, state, and local laws and regulations governing equal employment opportunities, *labor relations* and hiring practices, as the same may be amended from time to time."

C. A Cable Communications System Operator shall not unlawfully discriminate among Persons or the City or take any retaliatory action against a Person or the City, including its own employees or the employees of any of its contractors, for speaking before or filing a complaint with any government agency or court of law in the City. Accordingly any internal policies, employee handbooks, directives, or codes of conduct which limits Comcast's employees' rights to speak in a public forum about Comcast's business operations, products or services unless expressly authorized to do so, shall not be construed to limit them from speaking out in any setting against any perceived violation of federal, state or local law, or this franchise, or in informing, testifying or participating in any government agency or court sponsored proceeding in the City.

SEC. 5.16.80 LABOR REPRESENTATION PROCEDURES IN FRANCHISES IN WHICH THE CITY HAS AN ONGOING PROPRIETARY INTEREST

Sec. 1. Findings and Declarations.

Sec. 2. Definitions.

Sec.3. Policy, Requirements and Procedures to Minimize Labor/Management Conflict When City Has Proprietary Interest.

Sec. 4. Scope and Exemptions.

Sec. 5. Enforcement.

SEC. 1 FINDINGS AND DECLARATIONS.

It is anticipated that an ever-increasing number of companies will request access to and use of Public rights-of-way for provision of cable and other services to the public. The City has the authority to regulate the use of streets, Public rights-of-way, and other City property, and to grant access thereto upon certain terms and conditions. The public streets, alleys, utility easements dedicated for compatible uses, and other rights-of-way within the City: 1) are critical to the travel of Persons and the transport of goods and other tangibles in the business and social life of the community by all citizens; 2) are a unique and physically limited resource so that proper management by the City is necessary to maximize the efficiency and to minimize the costs to the taxpayers of the foregoing uses, and to prevent harm to the community; and 3) are intended for public uses and must be managed and controlled consistent with that intent. The

right to occupy the Public rights-of-way cannot be granted to all Persons, and those who are granted that right obtain significant benefits. Public rights of way are constitutionally protected, tangible and valuable real estate.

(b) In such situations, the City must make prudent business decisions, as does any private business entity, to ensure efficient and cost-effective management of its public rights of way and other City property, and to maximize benefit and minimize risk. One of those risks is the possibility of labor/management conflict arising out of labor union organizing campaigns. Such conflict can adversely affect: the safe and efficient use of streets and sidewalks; the City's emergency communications systems; the public's access to government, public information and services; as well as receipt of revenue, including but not limited to franchise fees, by causing delay in the delivery of services, completion of projects, and/or by reducing revenues or increasing costs of the project when they are completed.

(c) To minimize the risks to the public health, safety and general welfare in circumstances where costly labor/management conflict has arisen in the past, the City enacts this Section which creates a Cable System Franchise Workers' Rights Board and requires that Franchisee's shall agree to non-confrontational and expeditious procedures by which their workers can register their preference regarding union representation.

(d) A major potential source of labor/ management conflict that threatens the economic interests of the City is the possibility of economic action taken by labor unions against Franchisee's when labor unions seek to organize their workers over employer opposition to unionization. Experience has demonstrated that organizing drives pursuant to formal and adversarial union certification processes often deteriorate into protracted and acrimonious labor/management conflict. That conflict potentially can result in construction delays, work stoppages, picketing, strikes and more recently, in consumer boycotts or other forms of "corporate campaigns" that can generate negative publicity and reduced revenues.

(e) One way to reduce the City's risk where it has a proprietary interest in a cable system franchise is to create a Cable System Television Workers Rights Board within the executive branch which shall monitor Franchisee's adherence to or violations of federal/state or city labor laws or standards.

(f) Another way to reduce the City's risk where it has a proprietary interest in a cable system franchise is to require that Franchisee's agree to a lawful, non-confrontational alternative process for resolving a union organizing campaign. That alternative process is a so-called "card check" wherein employee preference regarding whether or not to be represented by a labor union to act as their exclusive collective bargaining representative is determined based on signed authorization cards. Private employers are authorized under existing federal law to agree voluntarily to use this procedure in lieu of NLRB-supervised election procedures.

(g) The Oakland City Council finds based on local history that compliance with these procedures will help reduce the possibility of labor/management conflict jeopardizing the City's proprietary interest in a cable system franchise. To ensure that card check procedures are required only to the extent necessary to ensure the goal of minimizing labor/management

conflict, an employer who agrees to such procedures and performs its obligations under a card check agreement will be relieved of further obligation to abide by those procedures if a labor organization engages in economic action such as striking, picketing or boycotting the employer in the course of an organizing drive and at a site covered by this Section.

(h) This Article is not enacted to favor any particular outcome in the determination of employer preference regarding union representation, nor to skew the procedures in such a determination to favor nor hinder any party to such a determination. Likewise, this Article is not intended to enact or express any generally applicable policy regarding labor/management relations, or to regulate those relations in any way, but is intended only to protect the City's proprietary interest in certain narrowly prescribed circumstances where the City commits its economic resources and/or its related interests are put at risk by certain forms of labor/management conflict.

SEC 2. DEFINITIONS.

For purposes of this Article, the following definitions shall apply:

(1) "Card check agreement" means a written agreement between an employer and a labor organization providing a procedure for determining employee preference on the subject of whether to be represented by a labor organization for collective bargaining, and if so, by which labor organization to be represented, which provides, at a minimum, the following:

(a) Determining employee preference regarding union representation shall be by a card check procedure conducted by a neutral third party in lieu of a formal election;

(b) All disputes over interpretation or application of the parties' card check agreement, and over issues regarding how to carry out the card check process or specific card check procedures shall be submitted to binding arbitration;

(c) Forbearance by any labor organization from economic action against the employer at the worksite of an organizing drive covered by this Article, and in relation to an organizing campaign only (not to the terms of a collective bargaining agreement), so long as the employer complies with the terms of the card check agreement;

(d) Language and procedures prohibiting the labor organization or the employer from coercing or intimidating employees, explicitly or implicitly, in selecting or not selecting a bargaining representative.

(2) "Collective bargaining agreement" means an agreement between an employer and a labor organization regarding wages, hours and other terms and conditions of employment of the employer's employees. For purposes of this Article, a collective bargaining agreement does not include a card check agreement as defined herein.

(3) "Economic action" means concerted action initiated or conducted by a labor union and/or employees acting in concert therewith, to bring economic pressure to bear against an

employer, as part of a campaign to organize employees or prospective employees of that employer, including such activities as striking, picketing, or boycotting. A lawsuit to enforce this Article is not "economic action."

(4) "Labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(5) "Proprietary interest" means any non-regulatory arrangement or circumstance in which the financial or other non-regulatory interests of the City in a cable system franchise could be adversely affected by labor/management conflict or consumer boycotts potentially resulting from a union organizing campaign, in the following circumstances:

- (i) The City receives significant ongoing revenue under a franchise in the form of:
 - a. franchise fees;
 - b. capitol facilities grants;
 - c. equipment and/or support for public educational and governmental channels or institutional networks;
 - d. reimbursement for expenses of an Independent Evaluator;
 - e. cash payments;
 - f. and other in kind contributions that are not fees, including but not limited to provision of cable modem services to homeless facilities.

(ii) In addition to the circumstances described in (i) above, the City shall be deemed to have a proprietary interest in a franchise if the City determines or an interested party demonstrates that there is a significant risk that the City's financial or other non-regulatory interest cable system franchise could be adversely affected by labor/management conflict or consumer boycotts potentially resulting from a union organizing campaign.

SEC. 3. POLICY, REQUIREMENTS AND PROCEDURES TO MINIMIZE LABOR/MANAGEMENT CONFLICT WHEN CITY HAS PROPRIETARY INTEREST.

(a) **General Policy.** The Oakland City Council declares as a matter of general policy that when the City has a proprietary interest in a franchise, it is essential for the protection of the City's investment and/or business interests to require that Franchisee's agree to abide by card check procedures for determining employee preference on the subject of labor union representation, as specified in this Article.

(b) **Primary Obligations.** Pursuant to the policy stated in Subsection (a), the following requirements are imposed, except no Franchisee shall be responsible for obligations under this Article if that person or entity is otherwise exempt from those obligations pursuant to Section 4 (b), or if the City does not have a Proprietary Interest in the franchise:

(1) **Employers.** A Franchisee of employees working in a cable system franchise shall:

(i) Enter into a card check agreement, as specified in this Article, with a labor organization which requests such an agreement for the purpose of seeking to represent those employees.

(ii) If the parties are unable to agree to the terms of a card check agreement within 60 days of the commencement of such negotiations, they must enter into expedited binding arbitration in which the terms of a card check agreement will be imposed by an arbitrator. In such proceedings, to be conducted by an experienced labor arbitrator selected as provided by the rules of the American Arbitration Association or equivalent organization, the arbitrator shall consider any model card check agreement provided by the City and/or to prevailing practices and the terms of card check agreements in the same or similar industries, except that such card check agreement must include the mandatory terms identified in Section 2(1);

(iii) Comply with the terms of that card check agreement and this Article; and

(iv) Include in any contract/subcontract which contemplates or permits a Contractor to perform, work, services or labor on Franchisee's behalf, a provision requiring that subcontractor to comply with the requirements provided in this Article. This provision shall be a material and mandatory term of such subcontract, binding on all successors and assigns, and shall state (modified as necessary to accommodate particular circumstances):

"The City of Oakland has enacted an Ordinance at Chapter 5, Section 16.90 of its Administrative Code, which may apply to [Subcontractor]. Its terms are expressly incorporated by reference hereto. To the extent [Subcontractor] or its successors or assigns employs employees in a cable system franchise within the scope of that Ordinance, [Subcontractor] hereby agrees as a material condition of this [Subcontract] to enter into and abide by a Card Check Agreement with a Labor Organization or Organizations seeking to represent [Subcontractor's] employees, if and as required by that Article, and to otherwise fully comply with the requirements of that Article. [Subcontractor] recognizes that, as required by that Article, it must enter into a Card Check Agreement with a Labor Organization(s) as specified by that Article before executing this [Subcontract], and that being party to such a Card Check Agreement(s) is a condition precedent of rights or obligations under this [Subcontract]."

Notwithstanding the requirements provided in (i)—(iv), any employer who has in good faith fully complied with those requirements will be excused from further compliance as to a labor organization which has taken economic action against that employer at that site in furtherance of a campaign to organize that employer's employees at that site for collective bargaining. This clause shall not be interpreted, however, to apply to economic action against an employer at other locations where that employer does business, or at any location for purposes other than organizing the employer's employees; nor shall economic action by one labor organization excuse an employer from the obligations of this Article or a card check agreement as to a different labor organization.

(2) The City.

- (i) **Establishment of Board.** The City hereby establishes a Cable System Television Workers Rights Board within the Executive Branch that will monitor Franchisee's adherence to or violations of federal, state and city labor laws/standards.
- (ii) **Appointment, Composition of Board.** The Board shall consist of eight voting members composed of 2 city elected leaders, 2 city appointed staffers, 2 members of the religious community of the City, and 2 members of the community at large. The Board members will be appointed by the Mayor, subject to approval or rejection by Resolution of the City Council. No person shall be eligible to serve as a member of the Cable System Television Workers Rights Board who is a cable system Franchisee or Operator or is employed by a cable system Franchisee or Operator within the City
- (iii) **Powers and Duties:** The Cable System Television Workers Rights Board will intervene with Cable Franchisee's to resolve situations that threaten workers' rights. Actions of the Cable System Television Workers Rights Board may include: meeting with Franchisee's who are violating workers rights or resisting efforts of workers to have a voice in the workplace; holding public hearings or press conferences; issuing public statements about particular violations of cable system workers' rights. The Cable System Television Workers Rights Board will on a regular basis request that Franchisee's give written notice of any pending unfair labor practice charge, lawsuit, or complaint involving its own and/or its contractors/ subcontractors' workers' rights of association, including incidents relating to organizing efforts, union membership drives, union representatives' access to workers and any management practices intended to counter unionization. Said written notice should include what substantive steps Franchisee's and/or its contractors/subcontractors are taking, if any, to resolve the charge, lawsuit, complaint and maintain labor harmony.

(iv) **Model Card Check Agreement.** To facilitate the requirements imposed by this Section, the City Attorney or his/her designee may provide a model recommended card check agreement that includes the mandatory terms identified in Section 2(1) and which provides the maximum protection against labor/management conflict arising out of an organizing drive, and make such model recommended agreement available to parties required to enter into such agreement. The City may also prepare guidelines establishing standards and procedures related to this Article. Notwithstanding this provision regarding the preparation of a model card check agreement or related guidelines, this Article shall be self-executing, and shall apply in all circumstances and to the extent provided in this Article, in the absence of or regardless of such model card check agreement or guidelines.

(v) **Requests for Proposals ("RFPs").** Any commission, department, authority or officer of the City which issues/reviews a proposal to obtain a new franchise, transfer a franchise, renew or extend an existing franchise or otherwise modify a franchise after the effective date of this ordinance, must include in such document a summary description of and reference to the policy and requirements of this Article. Failure to include description or reference to this Article in an RFP or similar document shall not exempt any developer, manager/operator or employer otherwise subject to the requirements of this Article.

(c) **Applicability of This Article.** The policy and obligations established above shall apply to Franchisees whenever the City has a proprietary interest in a franchise, except as otherwise provided hereunder. The determination whether or not the City has a proprietary interest in a franchise, and if so, whether an exemption applies under Section 4(b), shall be made on a case-by-case basis by the City Attorney or his/her designee by applying the standards and principles described. Any party otherwise subject to the terms of this Article because the City has a proprietary interest in a franchise that claims an exemption from the terms of this Article under Section 4 (b) below shall have the burden of demonstrating that the basis for such exemption is clearly present.

SEC. 4. SCOPE AND EXEMPTIONS.

(a) **Scope.** The requirements of this Article apply only to the procedures for determining employee preference regarding whether to be represented by a labor organization for purposes of collective bargaining and/or by which labor organization to be represented. Accordingly, this Article does not apply to the process of collective bargaining in the event a labor organization has been recognized as the bargaining representative for employees of employers subject to this Article. Moreover, nothing in the Article requires an employer or other entity subject to this Article to recognize a particular labor organization; nor does any provision of this Article require that a collective bargaining agreement be entered into with any labor organization, or that an employer submit to arbitration regarding the terms of a collective bargaining agreement.

(b) **Exemptions.** The requirements of this Article shall not apply to:

(1) Any employer which has entered into a card check agreement with a labor organization regarding such employees which agreement provides at least equal protection from labor/management conflict as provided by the minimum terms provided in Article; or

(2) Any franchisee where the employer is an agency of the federal government or a statewide agency or entity ("public agency") and that public agency would prohibit application of this Article.

SEC. 5. ENFORCEMENT.

(a) The requirement that Franchisee enter into and comply with card check agreements with labor organizations in the circumstances provided in this Article, and the requirement they contractually obligate their successors, assigns or subcontractors to be bound by that former requirement are essential consideration for the City's agreement to any City franchise containing that requirement.

(b) The City shall investigate complaints that this Article has been violated and may take any action necessary to enforce compliance, including but not limited to instituting a civil action for an injunction and/or specific performance.

(c) In the event the City brings a civil enforcement action for violation of this Article, any taxpayer or any person or association by or with a direct interest in compliance with this Article may join in that enforcement action as a real party in interest. In the event the City declines to institute a civil enforcement action for violation of this Article, a taxpayer or directly interested person or association may bring a civil proceeding on its own behalf and on behalf of the City against that employer and seek all remedies available for violation of this Article and/or breach of a card check agreement required by this Article available under state law, including but not limited to monetary, injunctive and declaratory relief. In view of the difficulty of determining actual damages incurred by such a violation, liquidated damages may be awarded at the rate of \$1,000 per day of violation, to be distributed equally between a private plaintiff, if any, and the general fund of the City, unless such liquidated damages award is found to be so excessive in relation to the violator's resources as to constitute a penalty.