

November 22, 2011

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED
CONFIRMATION BY ELECTRONIC MAIL**

Mike O'Connell
Jefferson County Attorney
600 W. Jefferson Street
Suite 2086
Louisville, KY 40202

Dear Mr. O'Connell:

As communications counsel with extensive experience in cable television franchising and regulatory matters, including, among other things, the applicable provisions of the Communications Act of 1934, as amended (the "**Act**"), and the regulations and policies of the Federal Communications Commission (the "**FCC**"), as well as our experience litigating such matters in federal and state court, Insight Communications Company, Inc. and its affiliate Insight Kentucky Partners II, L.P. (collectively, "**Insight**") have requested that we respond to your letter, dated November 17, 2011, and its attached notices (the "**Termination Notices**") issued by Mayor Greg Fischer.¹ Mayor Fischer's Termination Notices purport to terminate Insight's "tenancy of the public rights-of-way" under franchises to serve the City of Louisville (the "**City**") and Jefferson County (the "**County**"). As explained in detail below, the Termination Notices flagrantly violate the plain terms of the franchise agreements authorizing Insight to serve the City and the County (the "**Franchise Agreements**"),² as well as numerous provisions of applicable federal and local law.³ The Termination Notices therefore are void and entirely unenforceable.

¹ Letter, dated November 17, 2011, from Mike O'Connell, Jefferson County Attorney, to Elizabeth Grier, Vice President, Administration, Insight, and Ed Kozelek, Regional Vice President of Government Relations, Time Warner Cable Inc.

² The Termination Notices apparently assume that Insight is operating under two separate Franchises: Ordinance No. 32, Series 1994, originally adopted by Jefferson County, and Ordinance No. 76, Series 1998, originally adopted by the City of Louisville. Mayor Fischer's September 2, 2011 letter to Michael Willner, however, recognized consolidation creating the Louisville/Jefferson County Metro Government and confirmed that Ordinance No. 76, Series 1998 is "the cable television Franchise Agreement that currently governs the relationship and responsibilities between" Louisville Metro and Insight. The analysis set forth in this letter is the same regardless of whether Insight is deemed to hold one or two franchises covering Louisville Metro.

³ This response does not waive and hereby expressly reserves all rights under the Franchise Agreements and federal, state, and local law, including but not limited to the right to object at any time, on any ground, and in any forum to the Termination Notices and any associated or related Metro action in connection with the franchises or the Transaction.

Given Insight's full cooperation with the Louisville/Jefferson County Metro Government's ("Metro's") review of the transfer of control associated with the Time Warner Cable Inc. ("TWC") - Insight merger (the "Transaction") and its on-going franchise renewal negotiations with Metro, Insight is surprised and dismayed by the Mayor's unsupported and illegal Termination Notices. The Termination Notices notwithstanding, Insight does not intend to, and will not, abandon the residents and institutions of the Louisville area on or after the arbitrary and unenforceable termination dates reflected in the Termination Notices unless and until ordered to do so by a court of competent jurisdiction. Despite the Mayor's unlawful attempt to terminate Insight's important public services, Insight will continue providing critical services to hospitals, schools, fire departments, police, and emergency medical services in addition to its more than 150,000 residential and commercial customers in the City and the County until the transfer of control to TWC is completed. The analysis supporting Insight's position is outlined in the following paragraphs.

The Termination Violates Federal and Local Law.

The Threatened Termination Violates the Federal Communications Act.

The Franchise Agreements, which the Termination Notices acknowledge are in full force and effect,⁴ are governed by federal law. In fact, Section 1 of both the Louisville and Jefferson County ordinances explicitly states that federal and state cable television laws and regulations govern the Franchise Agreements. The term of franchise and renewal section of Ordinance 76 Series 1998 (as amended) additionally incorporates the federal statute regarding franchise renewals and states that "[t]he provisions of federal law 47 U.S.C. Section 546 [commonly referred to as Section 626 of the Communications Act] shall apply to any renewal of the franchise awarded herein."

Pursuant to Section 626 of the Act, upon commencement of the statutory renewal process, the franchise continues to be valid until such time as the franchising authority completes the renewal process according to the procedures established by the Communications Act. *See Rolla Cable System, Inc. v. City of Rolla*, 745 F.Supp. 574, 575-76 (E.D. Mo. 1990). *Rolla Cable* and a variety of other federal court decisions demonstrate that, in light of the renewal protections established by Congress, the technical expiration of a franchise does not give a local franchising authority like Metro the right to unilaterally declare a franchise terminated where the franchisee continues to perform its obligations under the franchising agreement and the franchising authority has "reaped the benefits of the agreement" pending renewal. *Id.*

In this case, Metro continues to benefit from the Franchise Agreements by, among other things, receiving distribution payments from the Commonwealth of Kentucky from the collection of multichannel video excise taxes collected from subscribers located in Louisville and Jefferson County, occupying and using for Metro's benefit significant portions of Insight's valuable bandwidth for the provision of certain programming broadcasts on Metro Channel 25, and receiving free television service to, among other locations, the offices of numerous Metro

⁴ The Mayor's purported terminations of the Louisville and Jefferson County Franchise Agreements on December 30 and December 19, respectively, constitute an admission that the Franchise Agreements are currently in full force and effect.

officials. Moreover, Metro and Insight have been actively negotiating a franchise renewal agreement while Insight has continued to perform all of its obligations under the Franchise Agreements. Federal law therefore prohibits the Mayor from terminating the Franchise Agreements based solely on the technical expiration of the franchise term.

The Threatened Terminations Violate Insight's Property and Due Process Rights.

The provisions of Section 626 of the Act create "a significant federal law property expectation in the renewal of a franchise" that is entitled to the protection of due process.⁵ The Mayor's purported termination of the Franchise Agreements violates the procedural protections to which Insight is entitled under both federal law and the Franchise Agreements, and therefore violates Insight's substantive property right in the expected renewal of its franchise.

Insight invoked, and thus preserved, the procedural protections conferred upon it by Section 626 in a notice to Metro dated September 14, 2007. Insight's right to continue operating under the expired franchises therefore cannot be terminated absent a final decision to deny renewal. To deny renewal, the Act would require Metro to, among other things:

- (i) commence a formal proceeding to evaluate renewal of Insight's franchise;
- (ii) conduct a valid formal community needs assessment that permits input from the public;
- (iii) solicit a formal proposal from Insight of terms for a renewal franchise agreement;
- (iv) make a preliminary determination regarding whether to renew Insight's franchises based on a number of factors, including whether its proposal is sufficient to meet the ascertained needs of the Louisville and Jefferson County communities in view of their cost; and
- (v) if it preliminarily determines not to renew the franchise, conduct a public hearing permitting Insight to defend its renewal proposal, and issue a final written determination of renewal or non-renewal that may be appealed to federal court.

Metro has taken none of these steps. To the extent the Mayor seeks to terminate the Franchise Agreements without complying with Section 626 of the Act, Metro may be subject to immediate suit in federal court and injunction for violating Insight's constitutional and statutory rights.

The Threatened Terminations Violate Local Law and Breach the Franchise Agreements.

Even if the federal Constitution and the Communications Act did not guarantee these important due process and property rights to Insight, the Termination Notices also constitute a material breach of the Franchise Agreement in several respects. Section 52 of Ordinance 76, Series 1998 (as amended) sets forth the procedure under which Louisville Metro may terminate an existing franchise.⁶ Section 52 only permits termination of the Franchise Agreement "in the

⁵ See *Eastern Telecom. Corp. v. Borough of East Conemaugh*, 872 F.2d 30, 35 (3rd Cir. 1989).

⁶ To be valid under the Franchise, termination of Insight's existing rights also must be harmonized with Section 1 of both Franchise Agreements, which explicitly make them subordinate to applicable federal and state laws and regulations governing cable television. The term of franchise and renewal section of Ordinance 76 Series 1998 (as amended) similarly incorporates governing federal law.

event of the violation of any provision hereof, or the breach or other failure, refusal or neglect by the Franchisee to perform its obligations under the terms and conditions of the Franchise Ordinance in accordance herewith.” The Termination Notices are unsustainable under Section 52 and breach the obligation of procedural guarantees included in the Franchise Agreements for the following reasons, among others:

- The Termination Notices fail to allege, as required by Section 42(1) of the Ordinance, an event, act or omission on the part of Insight “which represents a substantial violation of an integral provision of this ordinance” or a material compromise of “the corporate character, or legal, financial or technical integrity and/or stability of the system or the Operator to such a degree that the interests of the subscribers are negatively affected.”
- The Termination Notices are *ultra vires* and of no force and effect because, under Section 52(2), the decision to terminate – subject to the numerous procedural protections contained in the Ordinance as well as the federal and state laws referenced herein – is explicitly reserved to the legislative branch of government, *i.e.*, the Metro Council. The Mayor simply lacks any authority to terminate the Franchise Agreements and has usurped powers reserved to the legislative branch of government.
- Even if the Termination Notices had stated with specificity an alleged act of non-compliance that satisfied the high standards of Section 42 and even if Metro had acted properly through its legislative body in accordance with Section 52(2), Metro is required by law to give Insight 60 days in which to cure any alleged deficiency or afford itself the protections outlined in Section 50. *See* Section 52(2).
- Moreover, even if all of the above-referenced steps had been properly followed, Section 52(5) requires that the franchisee shall have a full opportunity to be heard upon the adoption of an ordinance setting forth the legislature’s ruling.
- Finally, Section 52(2)(c) allows final decision by the legislative branch to terminate a franchise ordinance to be appealed under *de novo* review to a court of competent jurisdiction.

The Termination Notices failed to accord to Insight any of these legally mandated procedural guarantees. The Mayor’s unilateral action demonstrates a profound and astounding disrespect for the powers specifically reserved to the legislative branch of government and for Insight’s procedural rights under the Franchise Agreements and other applicable law.

**Insight Will Not Abandon Service to Louisville or Jefferson County
Absent an Enforceable Court Order.**

Given the numerous violations of Insight’s federal, state, and local rights described above, Insight has no intention of terminating service to Louisville or Jefferson County during the upcoming holiday season, or at any time in the future, absent an enforceable order from a court of competent jurisdiction. Moreover, in the unlikely event that such an order is obtained, Insight fully intends to seek and expects to receive a stay on the grounds that an order terminating Insight’s delivery of cable, telephone, and Internet service to its more than 150,000 residential and commercial customers and its provision of critical infrastructure and service to

many important community institutions will cause immediate and irreparable harm to the public interest. Such critical services placed in jeopardy by the Termination Notices include, but are not limited to:

- The Emergency Alert System used to alert the general public in the event of a weather or other national emergency;
- Essential services used by various hospitals for community patient care and records;
- Service to large venues relied upon by the general public, including, among others, the KFC Yum! Center, the University of Louisville, and Spalding University;
- Service to sustain air traffic control at Louisville International Airport and Bowman Field;
- Services to fire, police and EMS stations;
- Service to a variety to public, private and parochial schools;
- Service to countless private businesses, especially in Louisville's downtown core; and
- Local telephone and E911 services to tens of thousands of residential customers.

In short, Insight will protect its customers, local businesses, educational institutions, and public services such as hospitals, police, fire departments, and EMS stations from the Mayor's illegal attempt to interrupt the essential services that Insight provides to the communities it serves.

The Way Forward.

Despite the Mayor's unilateral and unlawful actions, which are void under applicable law, Insight remains willing to continue efforts to renew the existing Franchise Agreements or to honor the offer both companies made in the Grier/Kozelek Letter of November 16, 2011, which was referred to in the Termination Notices. The sole purpose of the Grier/Kozelek Letter was to assure local franchising authorities such as Metro that upon the closing of the Transaction, services will continue just as they are today under the terms and conditions of the Franchise Agreements and that TWC will be willing in the future to negotiate a renewal of the franchises.

The Grier/Kozelek Letter in no way alters Metro's continuing obligations to Insight under its existing Franchise Agreements or its responsibility to afford Insight all the protections of federal law, including those outlined above, as well as its obligation to timely address Insight's request for approval of the Transaction pursuant to Section 617 of the Communications Act, 47 U.S.C. § 537. Insight and TWC did not in any way suggest that formal extensions or renewals of the Franchise Agreements between Insight and the City and County are necessary for Metro to approve the Transaction or that the absence of such extensions or renewals would be an appropriate consideration in Metro's analysis of the Transaction. To the contrary, under Section 617, when presented with a request for approval of a franchise transfer, Metro may consider only whether the proposed transferee, TWC, has the requisite legal, technical, and financial capabilities to operate the cable systems serving the City and the County. The renewal status of the franchises is irrelevant to this determination. TWC unquestionably possesses the requisite qualifications, so Metro lacks any grounds for denying approval of the Transaction. Metro

Mike O'Connell
Jefferson County Attorney
November 22, 2011
Page 6

simply cannot avoid its statutory duty to consider the Transaction under the governing legal standards by the Mayor unilaterally declaring the franchises to be terminated.

Based on the foregoing, Mayor Fischer should immediately rescind the invalid Termination Notices. In the event the Termination Notices are not promptly rescinded, Insight reserves all of its rights to take any appropriate action under applicable law.⁷ Insight nevertheless remains willing to continue the franchise renewal negotiations or to honor the offer made in the November 16 Grier/Kozelek letter. If we continue informal renewal discussions, Insight hopes the administration will return to the franchise passed unanimously by the Public Works committee of the Metro Council in November 2010, which accurately reflects the level of regulatory oversight appropriate in the current competitive environment for multichannel video services.

Sincerely,



Gary S. Lutzker
Counsel for Insight Communications Company, Inc.

GSL/sad

cc: Ms. Ellen Cox Call, Esq., Insight Communications
Mr. Byron Leet, Esq., Wyatt Tarrant and Combs
Ms. Janice Theriot, Esq., Zielke Law Firm
Mr. Elliot Brecher, Esq., Insight Communications
Mr. Keith A. Hall, Esq., Insight Communications

⁷ If the Termination Notices are not promptly rescinded, and even though they are invalid and *ultra vires* for the reasons set forth above and do not constitute a denial of renewal, Insight may be forced to preserve its rights by seeking timely judicial review pursuant to 47 U.S.C. § 555.