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Narrowing Broadcasting

Jeff Chester is executive director of the Center for Digital Democracy.

Comcast, the nation's largest and most powerful cable company, wants to kill off public access television and related educational networks -- the last bastion of diverse, local, educational and commercial-free TV -- by not updating systems for the 21st century.

To accomplish this goal, Comcast has embarked on a litigation strategy to not only erode the power of municipalities to determine how cable service should be used to serve their communities, but also to deprive local public cable systems of new technology needed to participate as broadcasters in the emerging high-speed broadband era.

The suit is but the latest political maneuver by cable companies to have the courts support the industry's "First Amendment rights" as paramount over the public's rights.

Though not surprising, the industry giant is citing the First Amendment as a justification to argue that its program offerings -- its speech -- would be harmed by satisfying requests by municipalities to upgrade and enlarge existing public access networks.

The cable giant has sued the city of San Jose, Calif., to prevent a possible termination of its cable franchise. The dispute arose because Comcast is opposed to the city's request, as part of the franchise transfer from AT&T to Comcast, that the city receive access to a set of modern telecommunications facilities.

These public interest facilities include an institutional network connecting city buildings and schools, and up to six new public-access channels. This is hardly a surprising, nor an unreasonable request, arising in the hub of tech-savvy Silicon Valley. Moreover, many nearby cities have been aggressive in demanding that cable franchises fulfill their basic public-interest obligations in the emerging broadband era.

In its suit, however, Comcast asked the U.S. District Court to declare the city's requests illegal, and also objected to the appeals process that San Jose has established for the formal franchise renewal proceedings (in which a third-party officer will hear arguments from both sides and then make recommendations to the city council). A hearing on Comcast's suit is scheduled for August 13 (see Comcast Legal Memo).

At the core of this case are key issues that involve the future of free online expression and the role that local governments can play to ensure that communities receive the benefits of advanced digital communications networks.

The suit is but the latest political maneuver by cable companies over the last several decades to have the courts (or Congress and the FCC) support the industry's "First Amendment rights" as paramount over the public's rights. Or, as Comcast told the court, "San Jose has caused... irreparable harm to the First Amendment, due process, and other rights of Comcast." San Jose, according to the cable giant, is trying to "force Comcast to provide an excessive and unlawful package of public benefits in exchange for the right to continue to speak in the city."

Comcast is using a specious First Amendment argument as a weapon, hoping that the courts will foolishly confuse the entertainment conglomerate's bundle of programming channels as the equivalent of a serious news gathering operation worthy of greater Constitutional protection. They are deliberately confusing commercial speech and political speech, such as that by *bona fide* news gathering organizations.

The case is of enormous importance in that it reveals the cable industry's political goals for broadband. They clearly want to limit the ability of local government to use the franchise renewal process to require that some portion of broadband networks serve the interests of the public.

It's time for the public to oppose industry efforts to redefine how cable is regulated in the public interest.

Such give-and-take is hardly unique to the cable industry. Governments at every level typically offer all kinds of carrots to lure new businesses and similarly ask for things in return when renegotiating contracts. Cable franchise contracts typically last a decade. In exchange for using the public streets and other city-based facilities, cable companies usually agree to support some form of public service broadcasting to a community.

In San Jose, the city engaged experts to help develop a plan that would ensure the public would benefit from recent advances in cable broadband systems. For example, the city wants 10 percent of the bandwidth of the cable system set aside for public use, including two-way video, voice and high-speed data communications.

Comcast is also opposed to maintaining the channel location of the city's public, educational and governmental channels, claiming that this will have "an adverse impact on Comcast's editorial decisions about what programming to carry on its system, and in what order those channels will be presented."

Comcast's attack on local franchising -- what one city attorney described as "bullying tactics" -- is part of a larger industry effort to eviscerate any public interest requirements that reflect the changing nature of broadband cable. Now that local systems can provide both high-speed Internet access and hundreds of digital channels, communities correctly seek to secure franchise terms that go beyond antiquated agreements that merely involve a few public-access channels.

Comcast and the cable industry already secured a huge victory under FCC Chairman Michael Powell, when in March 2002 a new policy was approved for "cable modem service" that strips away safeguards ensuring that local governments, Internet service providers and the public have reasonable access to cable's broadband pipeline.

Now it's time for the public to focus on cable's plans to expand their local monopolies to include broadband Internet access, and to oppose industry efforts to redefine how cable is regulated in the public interest. Not surprisingly, Comcast has been adding heavyweight lobbyists to its political operation, as it moves against cities and others. For example, it recently hired Lorine D. Card, the sister-in-law of White House Chief of Staff Andrew Card, as yet another lobbyist.

The San Jose case is critical because, as is often the case in Silicon Valley, trends that are set here will ripple across the country.

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Office of the Vice Mayor

From the desk of Henrietta Davis
Vice Mayor

To: City Councillors, City Manager Robert W. Healy

CC:

From: Henrietta Davis

Date: 7/16/2003

Re: Comcast's legal attempts to limit public access television

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Please review the attached information regarding Comcast's legal suit against the City of San Jose, California seeking to seriously impact public access television.

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Communications and Reports from City Officers #3

A communication was received from Vice Mayor Henrietta Davis, transmitting information on Comcast's lawsuit to attempt to limit public access television in other jurisdictions.

In City Council August 4, 2003

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