

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA CABLE COMMUNICATIONS BOARD

In the Matter of Northern Cablevision  
FACT  
of Minneapolis, Inc.'s Application for  
Certification of the Minneapolis Coble  
RECOMMENDATIONS  
Communications Franchise.

FINDINGS OF  
CONCLUSIONS,  
AND MEMORANDUM

The above-entitled matter came on for hearing before State Hearing Examiner George A. Beck on July 14, 1980, at 9:30 a.m. in Courtroom 657 of the Hennepin County Government Center, in the City of Minneapolis, Minnesota.

Testimony was heard on 20 additional days and concluded on August 18, 1980.

Sequential written briefs were submitted by the parties, the last of which was submitted on December 23, 1980, on which date the record closed.

Christopher J. Dietzen, Esq. and James P. Miley, Esq. of the firm of Larkin, Hoffman, Daly & Lindgren, Ltd., 1500 Northwestern Financial Center,

7900 Xerxes Avenue South, Minneapolis, Minnesota 55431, appeared representing

the applicant, Northern Cablevision of Minneapolis, Inc.; Robert J. Alf ton,

City Attorney and J. David Abramson, Assistant City Attorney, A-1700 Hennepin

County Government Center, Minneapolis, Minnesota 55487, appeared on behalf of

the City of Minneapolis; Larry B. Leventhal, Esq. and Daniel Tyson, Esq., 412

Produce Bank Building, 100 North Seventh Street, Minneapolis, Minnesota 55403,

appeared representing die Committee for Open Media, Inc.; Erica Jacobson,

Special Assistant Attorney General, and Brad P. Engdahl, Special Assistant

Attorney General, 515 Transportation Building, Saint Raul, Minnesota 55155,

appeared on behalf of the Staff of the Minnesota Cable Communications board;

Wayne G. Popham, Esq., Michael O. Freeman, Esq., David A. Jones, Esq., and

Lee E. Sheehy, Esq. of the firm of Popham, Haik, Schnobrich, Kaufman and Doty,

Ltd., 4344 IDS center, Minneapolis, Minnesota 55402, appeared representing Minneapolis Cablesystems, Ltd.; and Doter H. Hitch, Esq. and Stephanie J. Willbanks, Esq. of the firm of Henson & Efron, P.A., 1200 Title Insurance Building, Minneapolis, Minnesota 55401, appeared on behalf of American Cable-  
vision of Minneapolis, Inc.

Forty witnesses testified at the hearing of this matter. One hundred and sixty-five written exhibits were received into the record. An exhibit list is attached to this Report.

This Report is a recommendation, not a final decision. The Minnesota Cable Communications Board will make the final decision after a review of the record. The Board may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Please take notice that, pursuant to Minn. Stat. 15.0421 (1980), the final decision of the Minnesota Cable Communications Board shall not be made until this Report has been made

available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Minnesota Cable Communications Board. 4 MCAR 4.063 A. provides that parties adversely affected by this Report of the Hearing Examiner shall have 20 days from the date of service of the Report to file exceptions with the Board and request an opportunity to present argument to the majority of the Board.

#### STATEMENT OF ISSUES

The ultimate question to be decided in this contested case proceeding is whether or not a Certificate of Confirmation should be granted to Northern Cablevision of Minneapolis, Inc. ("Northern"), a subsidiary of Storer Broadcasting Co., which would confirm a franchise granted to Northern by the City of Minneapolis to construct and operate a cable communications system within that City. Nine issues were raised and argued in this case:

- (1) Does the franchise ordinance require that the VHF spectrum be used for at least one of the noncommercial public access channels?
- (2) Does the franchise ordinance provide that noncommercial public access channels are available for use by the general public on a first come, nondiscriminatory basis?
- (3) Does the franchise ordinance contain the "80% formula" contained in rule to determine when additional access channels must be provided?
- (4) Does the franchise ordinance contain a provision requiring the franchisee to establish operating rules for the access channels?
- (5) Must the franchise ordinance contain a provision that need for minimum equipment be determined by subscriber petition?
- (6) Does the franchise ordinance contain a provision designating the standard VHF Channel 6 for uniform regional channel usage?
- (7) Does the franchise ordinance contain statements that the franchisee's technical ability, financial condition, legal qualification, character, and plans for constructing and operating the cable system were considered, found adequate and feasible and approved in a full public proceeding affording reasonable notice and a reasonable opportunity to be heard?

(8) Did Northern make substantive material amendments to its application contrary to the provisions of the Invitation for Applications issued by the City of Minneapolis?

(9) Was the ordinance granting a franchise to Northern enacted in compliance with the Minneapolis City Charter?

Based upon all of the testimony, exhibits, and briefs filed herein, the Hearing Examiner makes the following:

#### FINDINGS OF FACT

##### The-Franchising Process

1. By a resolution approved December 22, 1978, the City Council of the City of Minneapolis established a Citizens Advisory committee on Cable Communications, consisting of nine members. The Committee was charged with

studying cable communications and reporting on the needs of the residents of Minneapolis in that regard. (Ex. 1, p. 4)

2. Et, letter dated January 9, 1979, the Minnesota Cable Communications Board (MCCB) staff sent to the City at its request: a franchising kit it had assembled for use by cities engaged in the process of granting cable television franchises. Tie kit included a sample franchise ordinance. The letter pointed out that Board Rule 4.1.11 describes the franchising procedure, and Board Rule 4.1.21 discusses the minimum state standards to be embodied in all franchise ordinances. (Ex. 2; Tr. 36) The franchising kit stated that a public meeting to consider applications and award the franchise had to be held 27 days prior to the introduction of the franchise ordinance. (Ex. 3; Tr. 39) A checklist provided with the kit listed the minimum standards to be included in a franchise ordinance and indicated that statements of (1) consideration of franchisee's technical ability, financial condition, legal qualification and character, and (2) consideration of franchisee's plans for construction and operation including area to be served, had to be included in the ordinance. (Tr. 42; Ex. 5)

3. The franchising kit was explained to the Citizens; Advisory Committee by MCCB staff member Anne Davis at a meeting on February 7, 1979. (Tr. 40) At this meeting, Ms. Davis explained the procedures and practices that franchising authorities must follow before a franchise may be approved by the MCCB. She advised the Committee that the City must conduct a public hearing affording reasonable notice and reasonable opportunity for all applicants for the franchise to be heard at least 27 days before introduction of the franchise ordinance. (Ex. 1, p. 3; 'ft. 34)

4. Li February or March of 1.979, the City contacted the Cable Television Information Center (CTIC) of Washington, D.C. to serve as a consultant to the City during the franchising process. CTIC is a nonprofit organization established in 1972, which provides expert advice concerning cable communications and the franchising process to municipalities across the nation.

(Mc. 569-70) It provided services to the City of Minneapolis through December 31, 1979. (Tr. 579; Ex. 84) CTIC developed the Invitation for Applications, a document issued by the City which requested information of applicants for the cable franchise and served as a basis for evaluation of the applicants' proposals. (It. 585) IC also prepared two reports for the City which evaluated the applications. (Exs. 21, 38) In addition, 'the City contracted with a second consultant to critique the CTIC reports. (It. 49)

5. On March 9, 1979, the Minneapolis City Council passed Resolution 79R-088 which approved the proposal that the City of Minneapolis constitute a cable service territory. (Ex. 173) By a written memorandum dated April 11, 1979, the Cable Board staff recommended to the Board that it approve a cable service territory consisting of the corporate limits of the City of Minneapolis. (Ex. 174)

6. The cable communications franchise was initially considered before the Standing Committee on Ways and means/Budget of the Minneapolis City Council. All testimony from the public is taken before committees of the Minneapolis City Council, not before the full Council itself. (Tr. 45) A special meeting of the Ways and Means/Budget Committee was held on May 3, 1979, at which time

CTIC presented a draft of an Invitation for Applications and a draft franchise ordinance which it had prepared. (It. 46; Ex. 8) Notice of this meeting was published in Finance and Commerce, a legal newspaper published in Minneapolis, on April 28, 1979, in the "Meetings" column. (Ex. 7)

7. On May 4, 1979, the Committee on Ways and Means/Budget met to receive public comment on the proposed Invitation for Applications and the draft ordinance. (Ex. 9; Tr. 47) Notice of this public hearing was published in Finance and Commerce on April 28, 1979. (Ex. 6; Tr. 43) Twelve members of the public spoke at the hearing, including representatives of the four future applicants and Jim Malec, Executive Director of University Student Telecommunications Corporation (USTC), on behalf of University Community Video. (Tr. 2023, 2027; Ex. 9)

8. A special meeting of the Ways and Means/Budget Committee was held on May 8, 1979, to discuss proposed changes to the draft franchise ordinance and the Invitation for Applications as a result of comments made at the hearings of May 3 and May 4, 1979. (Ex. 10; Tr. 50) The Committee met again on May 17, 1979, for the purpose of receiving further comment on and revising the Invitation for Applications and the draft ordinance. (It. 51) Public comments were taken from the applicants at this meeting. (El. 11) The Committee adopted a number of amendments to the Invitation for Applications at its meeting on May 22, 1979, and heard one public comment. (El. 12; Tr. 52) The Invitation for Application was approved as amended by the Committee on May 24, 1979, and the Committee also approved proceeding with the solicitation of applications. (It. 54; Ex. 13, p. 3)

9. By letter dated May 17, 1979, the Cable Board staff offered suggestions to the City based upon its review of the Minneapolis draft cable franchise ordinance for compliance with state franchise standards. (Ex. 86) None of the suggestions involved the issues raised by the staff in this contested case proceeding.

10. The full Minneapolis City Council adopted the Invitation for Applica-

tions on May 25, 1979, and passed a resolution authorizing solicitation of applications for a cable communications franchise. (It. 55; Ex. 14; Ex. 15)

A copy of the franchise ordinance drafted by CTIC was attached to each Invitation for Applications to permit the applicants to understand the City's intended regulatory climate. (fr. 66, 2807) The Invitation for Applications set out the minimum performance and service requirements for a cable system and required submission of a large amount of data on forms lettered A through N.. (Ex. 17) It provided that each applicant was required to submit 50 copies of its proposal together with a filing fee in the amount of \$10,000. The proposals were required to be filed with the Minneapolis City Clerk prior to 2:00 p.m. on July 20, 1979. (Ex. 17, p. 1)

11. Under the heading "Amendment to Application" in the Invitation for Applications, the following paragraph appeared:

Substantive amendments to proposals will not be considered except to acknowledge involuntary changes such as a change in ownership due to death. Correction of inadvertent errors submitted prior to the filing deadline will be considered. Correction of errors submitted after the filing date may be considered at the discretion of the city or its consultant, if the applicant submits with its correction sufficient information to prove

that the error is inadvertent. Additional information or data may be requested by the city or its consultant if in their judgment this would aid in preparing a fair and accurate analysis.

Under the heading, "Cable Communications Ordinance", the Invitation stated that, "The ordinance will incorporate the successful bidder's proposal by, reference." (Ex. 17, p. 3, pp. 4-5; Tr. 59)

12. On June 1, 1979, the Ways and Means/Budget Committee approved a proposed franchise ordinance for distribution. (Ex. 16 Tr. 57) The full City Council approved distribution of the draft franchise ordinance on June 8, 1979. (Ex. 19; Tr. 67) The draft ordinance contained blanks for insertion of the name of the cable communications company to be selected by the City and a blank "Addendum C" for the addition of exhibits from the winning applicant's proposal. (Ex. 18; Tr. 65) An "Addendum A" attached to the ordinance consisted of an ordinance dealing with rates, and an "Addendum B" contained a general statement of the City's policies in regard to cable communication service. (Ex. 18) By a letter dated June 21, 1979, the City staff mailed the draft of the ordinance to the Cable Board staff and solicited their comments. (A<. 98; Tr. 1192, 1702)

#### Events Surrounding the Filing of the Applications

13. Northern Cablevision's application was assembled and printed in Florida. Ps copy of the three-volume Northern proposal was sent to Minneapolis prior to July 19, 1979, to be reviewed for errors. (Tr. 1413) Northern representative Tom Alexander arrived in Minneapolis on July 18, 1979, to assist with the final details concerning the filing of Northern's application. (Mi. 2392) In the late afternoon of July 18, NO. Alexander worked with Northern lobbyist Jim Erickson at the law offices of Larkin, Hoffman, Daly & Lindgren in Bloomington to correct typographical errors in the financial statements or "pro formas" contained in the application. (It. 2397, 2499) Mr. Erickson spotted some other typographical errors, including the misspelling of the City Council president's name on the letter at the front of

the application. (Tr. 3357) Mr. Erickson also prepared some written material to be inserted in the pro formas consisting of a paragraph setting forth the basis for the rate assumptions. (Tr. 2481, 3357)

14. A three-page "cable Television Summary", which was inserted in the front of the Northern application, was prepared in Minneapolis. (Ex. 91) The draft of the summary was prepared in a meeting on July 17, 1979, and delivered to a printing company for typesetting on the morning of July 18. The typeset galley was then picked up from the printer on the evening of July 18 and reviewed at a meeting that evening by John Cairns, a Northern lobbyist, Jim Erickson and Tom Alexander. Some wording changes were made and the summary was then returned to the printer on the morning of July 19. (Tr. 1047-9) The summary was then picked up from the printer on the morning of July 20, 1979 and taken to City Hall where it was inserted into all copies of the Northern proposal in the Assistant City Clerk's office. (It. 1055, 3312, 3388)

15. Fifty copies of Northern's application were flown from Tampa, Florida to Minneapolis on the afternoon of July 19, 1979. Northern representative Beverly Land flew to Minneapolis in the same airplane and had the original of

the application with a certified check in her possession.  
(It. 1255, 1257)

The airplane arrived in Minneapolis at mid-afternoon where it was met by Tom Alexander. (It. 2404) The Northern applications were transported to the Minneapolis City Hall in a van accompanied by Alexander and land.

(Tr. 1256-7, 2405-6) The van arrived at City Hall later in the afternoon and the applications were unloaded and placed in Room 301, near the City Council offices, a room which Northern had requested in order to permit the addition of pages with typographical changes to the application.

(It. 1050, 1457-8, 1476, 2406-7, 3309) Several people working for Northern arrived at Room 301 between 5:00 p.m. and 6:00 p.m. and they began collating the materials to be inserted in the Northern applications. (Tr. 1459, 2407, 3319-20) The collating was completed shortly after 7:00 p.m. (Tr. 1053, 3111, 3319), and the Northern applications were moved to a locked room in the City Clerk's office.  
(at. 1050)

16. At approximately 10:00 a.m. on July 19, American Cablevision ("ATC") representative Scott Greenhill talked to City Council Aide Carolyn Anderson and told her that the ATC applications might be delivered to City Hall later in the day, but that she (Greenhill) would contact Anderson later to confirm the delivery. (Tr. 1458, 3484) At approximately 3:20 p.m. that afternoon, Greenhill talked to Air Courier International and told them that if they could not deliver the ATC applications by 4:30 p.m. that they should not be delivered until 9:00 a.m. on the following morning. ('Pr. 3245)  
Greenhill then called Anderson and advised her that the ATC applications would be delivered on the morning of July 20. (It. 1458, 3185, 3246)

17. Kathy Friedman, a legal assistant with John Cairns' law firm, was told to report to City Hall on the afternoon of July 19 to replace some of the pages in the Northern application. (It. 3331-2) She arrived at City Hall at approximately 4:30 p.m. and proceeded to an open room on the third floor, which was Room 321. Since there was no one in the room and no applications,

she proceeded to wait. (Tr. 3333) At approximately 5:00 p.m., two delivery-men arrived and began unloading boxes in the room. (Tr. 3195, 3334) She signed a receipt for the delivery. (Tr. 3335; Ex. 163) Friedman then proceeded to open the boxes and lift the sealed manila envelopes out of the boxes. (it. 2416)

18. After a visit to the Larkin, Hoffman office in the IDS Center, Tom Alexander returned to City Hall at approximately 5:15 p.m. and reported to Room 301 to observe the progress of the Northern collaters. (Tr. 2412) Shortly thereafter, he was walking down the hallway and observed Kathy Friedman in Room 321. (Tr. 2411-3) Alexander asked Friedman what firm she was with and she replied that she was working for Northern Cablevision. (Tr. 2414-5) Alexander then told her that what she was working on was not the Northern applications. Alexander then opened one of the manila envelopes to identify the proposal. (Mr. 3336-7) The outside of the manila envelopes were marked with the legend "Coble Coumunication Proposal", but did not identify the applicant. (Ex. 164; Tr. 3458) The proposal inicated it was that of American Cablevision. (It. 2418) Alexander then directed Friedman to report to Room 301. (Tr. 2419) Alexander then proceeded to pick up the proposal that he had opened and, after unsuccessfully checking to see if he could find

Carolyn Anderson, left City Hall and took the ATC application to the Larkin, Hoffman office in the IDS Center where he arrived at approximately 6:00 p.m. (It. 2421, 2424)

19. Upon his arriving, a secretary advised Alexander that Land and Erickson were still meeting with a reporter in the conference room. (Tr. 2432) Alexander then placed the ATC application on a desk in an office, walked to the door of the conference room, knocked and asked to see Beverly Land. (Tr. 1258-9, 2435) Alexander advised Land that he had an ATC proposal in his possession. (TY. 1259) Land told him that this was a stupid thing to do and she then summoned Erickson from the conference room. (TR. 3351) She then advised Erickson of the occurrence and they told Alexander that the application would have to be returned. Land was very upset at this occurrence. (It. 1050, 1260-1, 1416, 2438, 3355) Alexander did open the first volume of the proposal to read the cover letter which indicated that the proposal was submitted by ATC. (It. 2559, 2845; Ex. 165A)

20. Sometime after 5:30 p.m., City Council Aide Carolyn Anderson noticed that there was a light on in Room 321 in City Hall. (Tr. 1478) She entered the room and found the ATC applications, which had been unpacked from the boxes. (Tr. 460) She proceeded to make two quick counts of the number of ATC applications and came up with varying results. (Tr. 1461) She then returned to her office and unsuccessfully tried to reach Scott Greenhill to advise her that the ATC applications had arrived. (Tr. 1461)

21. Because Northern representatives were the only other people on the floor, she then called John Cairns to ask if he knew anything about the possibility of an application being missing. (It. 1461-2) Cairns advised her that he would check on it and he then proceeded to the Larkin, Hoffman office from his office in the IDS Center where Jim Erickson advised him that Tom Alexander had taken an ATC proposal. (Tr. 2845) As he was leaving City Hall at approximately 6:00 p.m. on July 19, Alderman Walter Rockenstein talked briefly to Carolyn Anderson and she advised him that the ATC proposals had been mis-

delivered, that she thought one of the proposals might be missing and that she was attempting to locate it. (Tr. 1572) After Rockenstein had left, Cairns called Anderson back, advised her that Alexander had a copy of the ATC proposal and stated that it would be returned. (Tr. 1464, 1495, 2852)

22. Anderson subsequently telephoned Andy Kozak, an ATC representative, and told him that a representative of Northern had signed for receipt of the ATC applications and that she believed that they had taken a look at an ATC application. (Tr. 1470, 3411) Kozak agreed to come down to City Hall and help Anderson secure the ATC proposals. (Tr. 1465) A representative of Northern then came into Anderson's office and advised her that the ATC application had been returned to Room 321. (It. 1469, 3365)

23. Andy Kozak arrived at City Hall at approximately 7:40 p.m. and met Anderson in the hallway on the third floor. (Tr. 1467, 3408-9; Ex. 118) Kozak and Anderson proceeded to count the proposals and found that there were 50 copies. (It. 1466, 3410-1) They then moved the ATC proposals to a locked room in the City Clerk's office. Anderson told Kozak that she thought some of the Northern people may have seen an ATC proposal, but she did not indicate to

Kozak how long the proposal had been missing (It. 1471), or that the proposal had left the building. (Dr. 3423)

24. Anderson finally reached Scott Greenhill by telephone at approximately 10:00 p.m. that evening and told her that the ATC proposals had arrived, that they had been received by someone from Northern and that representatives of Northern had probably looked at one of them. (It. 1471)

Anderson also told her that Andrew Kozak had come down to City Hall to secure the proposals and that Anderson had in her file cabinet what she believed was ATC's certified check for \$10,000. (Tr. 3196, 3199) Greenhill was concerned about the proposal arriving early because she thought it might be possible that the application would not be accepted by the City for failure to follow the proper delivery procedures. (Tr. 1472, 3264)

25. On the morning of July 20, Anderson talked to Alderman Rockenstein again and told him that the ATC proposal had been returned, that Northern and ATC's bids had been locked up the previous evening and that ATC had been informed that its proposal had been seen by a Northern employee. Anderson also told Alderman Rockenstein that the proposal had been taken from the building. (Tr. 1473, 1503, 1575, 1597)

26. Anderson also talked to Scott Greenhill on the morning of July 20, and they discussed whether or not the Northern employee could have communicated the contents of the ATC proposal to someone in a position of authority with Northern who could order that changes be made in the Northern proposal. (Mi. 3200) Anderson told Greenhill that she thought this was unlikely. (it. 3200) Anderson believed that no changes were made by Northern in its proposal as a result of this occurrence because the proposal was missing for a maximum of two hours (It. 1474), because the proposals are lengthy and their sections intertwined (Tr. 1516) and because the Northern proposals had been locked in the Assistant City Clerk's office overnight. (Tr. 1050, 1474, 3386) Greenhill subsequently reviewed the Northern proposal with an eye toward spotting any changes that might have been made as a result of reviewing

the ATC proposal. (Tr. 3274) ATC then decided not to pursue the matter or raise any objections during the franchise process because of the events surrounding the delivery of their applications. (Tr. 1475, 3266, 3274)

27. A comparison of a copy of the Northern application retained by the printer in Florida (Tr. 1752) with the original application filed with the City Clerk on July 20, 1979, and with a certified copy filed on that date does not disclose any material or substantive changes in the Northern proposal which could be connected with the removal of the ATC application from City Hall. (Exs. 54, 122, 166, 180; Tr. 1263, 2452, 3285, 3380, 3477)

28. Throughout the franchising process, the debate both among City Council members and between applicants was intense. Applicants raised issues and made complaints concerning each other, including statements and counterstatements about their strengths and weaknesses. (Tr. 1578, 3467; Exs. 156-158)

The incident concerning the misdelivery of the ATC proposals and the access to the proposal by Northern was not raised by ATC or any other applicant prior to the award of the franchise with two exceptions. (Tr. 1580)

29. On September 26, 1979, Minneapolis Cablesystems lobbyist Wayne Popham met with Alderman Rockenstein and told him that one of the ATC applications

was missing before the filing on July 20, that Northern had seen it, but that Carolyn Anderson had not told anyone about it. (Tr. 1576, 3468) Popham mentioned the incident because he was concerned that Anderson and the City staff might not be impartial. (Tr. 3470, 3482) Rockenstein told Popham that he thought he recalled that Anderson had mentioned the incident to him earlier. (Tr. 3471) Popham had learned of the incident a couple of weeks before his meeting with Rockenstein from his fellow lobbyist, William McGrann. (Tr. 3465-6) Popham had inferred from what McGrann had told him that the ATC application had left City Hall but believed, as did McGrann, that the application had been missing from 10:30 a.m. to 11:00 a.m. on July 20, 1979. (Tr. 3465-6, 3475) McGrann also recounted the incident in a December 13, 1979 letter to Mayor Albert Hofstede in which he urged the Mayor to veto the franchise ordinance. (Ex. 62)

30. (A) July 20, 1979, applications were received by the City Clerk from four cable companies, Northern Cablevision of Minneapolis, to. (a subsidiary of Storer Broadcasting Co.); Minneapolis Cablesystems, Inc. (affiliated with Canadian Cablesystems Limited); Warner Cable Corp. (a subsidiary of Warner Communications, Inc.) and American Cablevision of Minneapolis (a subsidiary of American Television and Communications Corporation). (IT. 68) (Throughout these proceedings, American Cablevision has been identified by, its parent's initials, ATC.) After receipt of the applications, copies were sent to CTIC, all City Council members, and to the Municipal Information library. (Tr. 69)

A member of the Cable Board staff was present at the filing to receive a copy of each application. (Tr. 3512) The applications were lengthy, detailed documents and contained substantial differences when compared to each other. (Exs. 54A, 54B, 54C; Exs. 165A, 165B; Tr. 271, 774-5)

The Franchising Process

31. On August 28, 1979, CTIC submitted to the City its preliminary report of an evaluation of the cable communications proposals submitted to the City by the four applicants. (Ex. 21; Tr. 70, 593) The City Council had autho-

rized a contract with CTIC for the evaluation of proposals received by the City in late June of 1979. (Tr. 68; Ex. 84) The report addressed the areas of organization structure and availability of funds for construction, economic and financial analysis, engineering and technical analysis, and services. (Tr. 72; EX. 21) This preliminary report was distributed to the City Council and was available to the public upon request. (Tr. 73) It raised a number of questions to be answered by the applicants. (Tr. 596)

32. In mid-September of 1979, the City staff conducted a survey to determine past performance of each of the applicants by contacting city officials in two cities where each applicant owned a cable TV franchise. (Tr. 528, 374) The results were recorded on questionnaires which were not published in any manner, but which were available to the public. (Ex. 65; Tr. 374) The results of the survey were communicated to the City Council members orally. (Tr. 535)

33. Public hearings in regard to the cable television franchise were scheduled before the Ways and Means/Budget Committee for the dates of September 12, 13 and 20, of 1979. (Ex. 20) The City prepared a written notice of

the three meetings dated September 4, 1979, which announced that the September 12 and 13 hearings would consist of the presentation of proposals from the four applicants and questions from the City Council, and that the September 20 hearing would be held to hear from groups and individuals from the public interested in commenting on the proposals. (Tr., 74; EX. 22) This written notice was mailed to a mailing list kept by the City consisting of persons and groups interested in cable TV and Minneapolis neighborhood groups. (Tr. 75-7, 473; Ex. 23) Notice of the September 12 and September 13 hearings was also published in the "Meetings" column of Finance and Commerce on September 11, 12, and September 13 of 1979. (It. 79-80, 82; Ex. 24; Ex. 25; Ex. 27)

34. Each of the public hearings on September 12, -And September 13 lasted approximately four hours and was attended by in excess of 100 people, which filled the City Council Chambers. (at. 80, 83; Ex 26; Ex. 28) how can Cablevision and Warner made presentations on September 12, and Minneapolis Cablesystems and Northern Cablevision presented their proposals on September 13. (Exs. 113, 114) No public testimony was taken at either hearing. (Tr. 84, 2029)

35. Notice of the September 20, 1979 hearing before the Ways and Means/Budget Committee, which began at 8:00 p.m., was published in the "Meetings" column of Finance and Commerce on September 15 and September 19 of 1979. (at. 85; Ex. 29; Ex. 30) TWenty-six people spoke during the hearing. (it. 87; Ex. 31) Some of the comments applied generally to all applicants, while others spoke in favor of specific applicants. (It. 2233; Ex. 31) In addition, several persons submitted written comments. (Exs;. 32-37; tr. 88) Jim Malec's oral comments on behalf of Metropolitan Public Interest Coble were interrupted by the City Council President after approximately seven minutes and he was requested to submit his written testimony. (Ex. 35; It. 2037-9) Others submitting oral and written comments were Sallie Fischer, General Manager of University Community Video (Exs. 32, 126; It. 1869, 1883), and the

University of Minnesota (Ex. 34) . The written comments from the University referred in part to technical, feasibility, and performance standards. (Tr. 120)

36. CTIC prepared a supplemental report dated September 24, 1979, evaluating the four applications submitted in light of responses made by the applicants. (Ex. 38) The report again discussed the areas of organizational structure and availability of funds for construction, economic and financial analysis, engineering and technical analysis, and services. (Ex. 38, p. ii; It. 122) CTIC stated its conclusion that, "In a very real sense, the city would be well served by accepting any of the four proposals." (Ex. 38, p. 22)

37. The supplemental report was orally presented to the Committee on Ways and Means/Budget on September 26, 1979, by David Korte, Vice-President and regional director of CTIC. (Tr. 123, 571, 635; Ex. 39) Mr. Korte made some oral modifications of the supplemental report at the Committee meeting, including an announcement of a change in Northern's calculation of annual average net income over the 10-year period, from a loss of \$247,000, to a profit of \$586,000. (Ex. 39, p. 7; Tr. 123) (See, Finding of Fact-- No. 67.) Korte stated that this change made Northern equal in status with Warner in the area

or subscriber rate stability which was an improvement for Northern from the ranking in the September 24, 1979 supplemental report. (Ex. 38, p. 23; Ex. 39, In 7; It. 829) None of the other applicants objected to Northern's proposed changes to its financial statements. (Tr 1558) Following

Mr. Korte's presentation, the Ways and Means/budget Committee voted to award the Minneapolis cable 'IV franchise to Northern Cablevision on a vote of 3

yeas, 2 declining to vote and 1 absent. (Ex. 39, p. 8)

38. The cable franchise matter was then referred to the full Minneapolis

City Council and on September 28, 1979, after a debate among the anderaen

(Ex. 169) , the full Council voted to adopt a resolution designating Minneapo-

lis Cablesystems as the recipient of a cable communications franchise by a

final vote of 8 to 5. (Ex. 40, 149; Mi. 125, 2323) The resolution also

authorized City officials "to negotiate a final agreement with Minneapolis

Cablesystems leading to the enactment of the franchise ordinance, subject to

final approval by Minneapolis Cablesystems and the City Council." (Ex. 87)

39. It, a letter dated October 1, 1979, the Cable Board staff advised the

City that it had reviewed the third draft of the franchise ordinance dated

June 8, 1979, and offered its comments. The staff stated that its review did

not include portions of the ordinance which would be negotiated after the

award of the franchise and requested another review of the ordinance prior to

final adoption. (Ex. 85; It. 859 lo was the case in earlier comments, the

start did not raise in this letter any of the matters at issue in this con-

tested case proceeding. (it. 1196, 1704)

40. On October 12, 1979, at a regular meeting of the City Council, seven

aldermen gave notice of intent to introduce, at the next regular meeting of

the City Council, an ordinance regulating cable communications and granting a

franchise. (Ex. 41)

41. On October 26, 1979, pursuant to notice, a document entitled, 'An

Ordinance Granting a Franchise to Minneapolis Cablesystems, Ltd., its succes-

sors or assigns, to own and operate and maintain a cable television system in

Minneapolis, Minnesota, setting forth conditions accompanying the (grant of franchise, and providing for the regulation and use of said system." was given its first reading at a City Council meeting and referred to the Committee on Ways and Means/Budget. (Exs. 42, 43, 152; Tr. 127, 2239) The name of Minneapolis Cablesystems was filled in throughout this draft ordinance, however, the exhibits to be incorporated from the successful applicant's proposal were not included. (it. 128, 272, 2814, 2334-5) The last page of the draft ordinance read "ADDENDUM C: Exhibits [Forthcoming] ". (Ex. 43) This ordinance was the same as that draft dated June 8, 1979, except that the name of Minneapolis Cablesystems was inserted throughout. (Tr. 2920) Both the June 8, 1979 draft and the October 26, 1979 draft of the ordinance contained a section which generally incorporated the company's entire application by reference. (Ex. 43, p. 6, SDUDJUDJK 7U

42. On November 6, 1979, the City Attorney advised the Committee on Ways and Means/Budget that, based upon negotiations with Minneapolis Cablesystems, he was in the process of putting together a final draft of the franchise ordinance and he suggested that the Committee set a public hearing for its next

meeting to obtain public comment on the proposed (changes. 44, p. 1; Tr. 130)

43. A copy of the draft ordinance as revised by the City Attorney was mailed to the Coble Board staff with a letter dated November 15, 1979. A text which delineated the changes from the June 8, 1979 draft of the ordinance was also included. Comments of the Coble Board staff were solicited. (Ex. 103; 1706)

44. At the November 19, 1979 meeting of the Ways and Means/Budget Committee, the City Attorney presented the revised cable franchise ordinance and explained the changes. (Tr. 2252; Ex. 45, pp. 11-12; Ex. 161) Notice of the November 19 meeting was published in the "Meetings" column of Finance and Commerce on November 17, 1979. (Ex. 66; Tr. 375) The revisions to the franchise ordinance suggested by the City Attorney dealt with matters such as letters of credit, bonding authority, the use of access channels, and other matters. (Tr. 250, 278, 280, 2809; Ex. 46) Public testimony was taken at the hearing and four people spoke, including Jim Malec, who spoke, as did others, specifically about the Minneapolis Cablesystems proposal and also generally about the draft ordinance. (Tr. 132, 2041; Ex. 45, p. 12) The Committee then voted unanimously to substitute the ordinance as revised by the City Attorney for the ordinance as originally introduced and also passed a motion to postpone further action on the ordinance until December 11, 1979. (Ex. 45, pp. 12-13; It. 143)

45. At a meeting of the full City Council on November 21, 1979, Council members again engaged in a debate concerning cable TV (Ex. 170), following which a motion to substitute the name of Northern Cablevision for that of Minneapolis Cablesystems in the cable communications ordinance, and to substitute Northern's proposal for Minneapolis Cablesystems' proposal, passed by vote of 8 to 5. (Exs. 48, 49; Tr. 266, 2256) The City Council also voted to discharge the Ways and Means/Budget Committee from further consideration of the cable franchise ordinance. (Ex. 47; Tr. 135, 2258) Alderman Rockenstein

gave notice of intent that at the next regular meeting of the Council he would move to rescind the resolution designating Minneapolis Cablesystems as the franchisee which was passed on September 28, 1979. (Ex. 48) The matter of cable television was then postponed to the next regular meeting of the City Council on December 11, 1979. (Exs. 48, 150; Tr. 136)

46. Et, a letter dated November 29, 1979 addressed to Alice Rainville, Chair of the Ways and Means/Budget Committee and Louis DeMars, President of the City Council, Jim Malec requested that a public hearing be held because, "There are substantive issues specific to this new ordinance which were not pertinent to the previous ordinance." (Ex. 68; Tr. 1052, 2051, 2780-1)

Alderman Rainville replied in a letter dated December 5, 1979, and solicited his written comments concerning the ordinance naming Northern Cablevision and invited him to attend the meeting of the Ways and Means/Budget Committee on December 11, 1979. (Ex. 69) Rainville's letter was drafted by the City staff (Tr. 397-8) and was written after obtaining the opinion of the City Attorney that another public hearing was not required under the MCCB rules. (It. 2934; Ex. 159)

Private Meetings During the Franchising Process

47. On November 29, 1979, a meeting was held at University Community Video between Jim Malec and Sallie Fischer and Northern officials, including Beverly Land, John Eddy and Rod Warner. (It. 1374, 1901, 2055) Land had con-  
tacted Malec to set up the meeting. (It. 1903) The purpose of the meeting was to discuss Malec and Fischer's objections to Northern's public access policies. Both of them supported Minneapolis Cablesystems for the cable fran-  
chise and opposed Northern. (Tr. 1885, 1949-50, 2651, 2666) The meeting lasted approximately one hour and began by Fischer and Malec presenting their concerns. (Tr. 2700) They discussed the prohibition on live programming, the adequacy of hours for access, die fees for production and playback and the adequacy of the equipment provided by Northern. (Tr. 1905-8, 1910; Ex. 129)

48. The Northern representatives indicated to Malec and Fischer at this November 29 meeting that changes could be made in regard to the access prob-  
lems which were raised, but that this could not be done until after the final award of the franchise. (Tr. 1906-10, 3740, 3742) 'ale manner in which changes could be made was not specified. (It. 1907) Jim Malec asked Beverly Land if those changes could be specified in a letter (Ai. 1912), but Land told Malec and Fischer that she could not provide a letter since it might consti-  
tute a change in the Northern proposal. (It. 1559, 2062; Ex. 130) fond did tell Malec and Fischer that if Northern was awarded the franchise, they would sit down and talk about access problems, that it would be a simple matter to connect UCV into the institutional network, and that Northern would do every-  
thing it could to make access work. (Tr. 2061, 3656-7, 3689; Ex. 130)

49. Alvin Porte, a former member of the Citizens Advisory Committee, con-  
tacted Alderman Judy Corrao to schedule a meeting concerning the award of the cable communications franchise. The meeting took place on December 5, 1979. (Tr. 2129, 2149) W. Porte also solicited the attendance of State Senator Allan Spear, State Representative Lee Greenfield and his wife, Marsha, and

Kathleen O'Brien, Chair of the 57th District DFL. Alderman Corrao's aide, Rolf C. Hanson, was also present at the meeting which began at about 5:15 p.m. and lasted for approximately one and one-half hours. (Tr. 2151, 3102) The purpose of the meeting was to convince Alderman Corrao to change her vote from Northern Cablevision to Minneapolis Cablesystems or failing that to postpone the vote until 1980. (TV. 3091, 3149, 3543, 3743; Ex. 142) Porte, Spear and the Greenfields were supporters of Minneapolis Cablesystems. (Tr. 2184)

50. The basis of the discussion was a list of important points of difference between the proposals of Minneapolis Cablesystems and Northern Cablevision which was prepared by PA-. Porte and included such subheadings as parent company- experience rates, system design, local management, investment, programming, use of Minneapolis work force, institutional networking and technical differences. (Ex. 139) Approximately half way through this December 5 meeting, the subject of community access was discussed for a period of about ten minutes. (Tr. 2288, 3086, 3101, 3120-21)

51. Participants Spear, O'Brien and the Greenfields suggested to Alderman Corrao that the Northern proposal was deficient in regard to public access in that fees were charged, the access and broadcast hours were too limited, the facilities and staffing were inadequate and in that Northern proposed to not

permit live programming. (Tr. 2155, 3069, 3144, 3576) There was also a discussion of Northern's proposal to carry four religious channels (Tr. 2155, 3008) and a discussion of whether or not Northern would use local labor in the construction of the system. (Tr. 2155, 3599)

52. Li regard to the public access issues, Alderman Corrao acknowledged that there were problems and told the participants that, based upon her discussions with people at Northern, the public access package would be improved subsequent to the passage of the ordinance and that the improvements would reflect the concerns of the participants and would meet the needs of the community. (Tr. 2157, 2-162, 2174, 2176, 2216, 3069, 3083, 3146, 3584; Ex. 140) She told the group that Northern would provide public access equal to that of the other proposals. (In. 3069, 3101) Alderman Corrao stated that these changes would have to be accomplished by the City Council after the final franchise ordinance was passed and the franchise awarded, and with the agreement of the franchisee. (Tr. 2276, 3159-60, 3536, 3744)

53. (hi December 6, 1979, another meeting occurred at Alderman Corrao's office with Alderman Corrao, her aide Rolf Hanson, Jim Malec and Reverend Brian Peterson, Pastor of Walker United Methodist Church. (Tr. 3023, 3028) The purpose of the meeting was to discuss a nonprofit access corporation. (Tr. 2065, 3608) Malec had prepared a written memorandum for the meeting which recommended that if Northern received the franchise, that the operation of seven access channels be turned over to a nonprofit community access corporation along with equipment, staff and an operating budget. (Exs. 88, 135) The participants discussed Northern's proposed prohibition against live programming, and fees for access use. (Tr. 2068, 3548) Corrao advised the participants that she understood there were problems with those items, but that she believed that Northern would be agreeable to a change subsequent to passage of the final ordinance and that she would work with the other aldermen to see that such amendments were made. (Tr. 2712-3, 3048, 3776, 3795) The meeting lasted less than one hour. (it. 2706)

54. Sometime in early December of 1979, a meeting occurred between Jim Malec, James Erickson, Beverly Land and Rolf Hanson at the Larkin, Hoffman law offices in the IDS Center. (Tr. 3734, 3739) The subject discussed was Malec's proposal for a nonprofit community access corporation. (Tr. 3735) The meeting lasted approximately one to one and one-half hours- (Mr. 2720) Beverly Land stated that Northern wanted to make access work; however, no specific commitment was made by Northern to a nonprofit access corporation. (Tr. 2722, 2739) Malec subsequently sent a written memorandum dated December 7, 1979 to all members of the City Council which recommended the establishment of a nonprofit community access corporation (Ex. 89) and talked to individual Council members concerning the matter. (Tr. 2054) The Franchising Process

55. by, a December 3, 1979 letter, the City Attorney advised the Cable Board staff that the name of Northern Cablevision had been substituted as the franchisee and that the final vote would occur on December 14, 1979. The letter solicited comment from the staff regarding the Northern proposal as it related to Board rules. (Ex. 96; Tr. 1707) Ann Davis of the staff called the

City Attorney's office on December 12, 1979, and stated that she had reviewed the Northern proposal and found nothing conflicting with state standards.

(Ex. 97; Tr. 1174)

56. The matter of cable television appeared on the agenda of the Committee on Ways and Means/Budget on December 11, 1979, as an information matter only since the Committee had been previously discharged from considering the cable franchise ordinance. (Tr. 260) An information matter normally means that a staff person is presenting information to the Committee, but there would not be an opportunity for public comment. (Tr. 2260) The notice of this meeting in the "Meetings" column of Finance and Commerce did not mention the subject of cable television. (Ex. 67; Tr. 376, 2841) The City Attorney passed out copies of the ordinance with Northern Cablevision's name and advised the Committee that there were no major changes between this ordinance and the one written for Minneapolis Cablesystems, but that Northern's rate schedule was inserted and other pertinent changes were made. (Ex. 50, p. 14; 'Di. 139, 2347, 2810-2811, 2930)

57. Between November 21, 1979 and December 14, 1979, neither the City Council nor any Committee thereof held any hearing at which public testimony could have been taken concerning the cable matter. (Tr. 258, 2258)

58. Several members of the public testified during this contested case hearing that they had specific objections to certain portions of Northern's proposal. Testimony was heard that Northern's proposal was inadequate or inferior in terms of community access (Tr. 450-1, 458, 467, 512, 2110-1), affirmative action (Tr. 466, 481), and the cost of Northern's proposed home security system. (Tr. 506, 508) Six of the witnesses stated that they would have attended a public hearing devoted to the merits of Northern Cablevision's proposal after Northern had been designated franchisee, had such a hearing been held. (Tr. 454, 463, 475, 495, 510, 2111)

59. Prior to the Council vote on December 14, 1979 (Tr. 2070), Jim Malec talked briefly with Northern lobbyist Jim Erickson in the hallway outside the

City Council Chambers and Erickson told Malec that Northern would meet or exceed anything in the Minneapolis Cablesystems' proposal regarding community access.

60. (At December 14, 1979, after debate among Council members concerning the cable franchise (Ex. 171), the full City Council voted to pass Ordinance 79 or 263 which was entitled, "An Ordinance Granting a Franchise to Northern Cablevision of Minneapolis, Inc., a Minnesota Corporation, its successors or assigns, to own and operate and maintain at cable communication system in Minneapolis, Minnesota, setting forth conditions accompanying the grant of the franchise, and providing for the regulation and use of said system."

(Tr. 2323; Ex. 53) The ordinance included the relevant portions of Northern's application as an exhibit (Tr. 2353; Ex 53, Art. I Sec. 2, o. Sec. 5) and incorporated seven documents submitted by Northern subsequent to the filing of its application. (Tr. 188, 325) The Council also passed Resolution 79-R-556 on December 14, 1979, which provided that all clarifying documents submitted by all of the applicants subsequent to July 20, 1979, be accepted and become a part of their respective applications. (Exs. 51, 151; Ex" 52) Although the City council did not pass Jim Malec's amendment to create a nonprofit access

corporation, it did make an amendment to the franchise ordinance reserving to

the City the right to determine how access would be administered.  
(Ex. 5 3,

Art. III, Sec. Id.; Tr. 875-76)

#### Changes and Clarifications in Northern's Application

61. The City staff relied upon David Norte, Vice President and Regional Director of CTIC, to advise the City as to whether or not changes proposed by the applicants subsequent to July 20, 1979, were substantive amendments which would violate the provisions of the invitation for applications. (Tr. 607)

(See, Finding of Fact No. 11.) Norte had recommended a prohibition against substantive amendments in order to prevent a cycle of bids and counterbids.

(Tr. 316; Ex. 52, Tab 24) All of the applicants submitted proposed changes

which were reviewed by Norte. (Ex. 52; Tr. 538, 2894) Al. Norte interpreted

a substantive amendment to be a change in a proposal that would have a material effect on CTIC's evaluation or the City's consideration of the proposal.

(It. 795) Tie changes proposed by Northern Cablevision are discussed below.

62. Northern sent to the City a letter dated August 7, 1979, in which they corrected several numerical typographical errors in Form G, the pro forma section of their proposal. (Ex. 52, Tab 35) VW. Norte found these to be inadvertent errors and recommended that the City accept the correction.

(It. 615; Ex. 52, Tab 24)

63. By letter dated August 23, 1979 to the City, Northern submitted five changes in its application, including three typographical errors.

Northern requested a change at Form J, page 5 of 7, to include AM radio station KUOM.

Northern stated that they were "aware of the desire to have this AM station included. Apparently, when the FM list was prepared, the AM portion was overlooked."

Northern also requested a change at Form I, page 11 of 17, where

only Northwestern Hospital was listed to be included on the institutional network.

Northern sought to include every Minneapolis hospital and stated that,

"The extent of the network (96 miles) was designed to connect these institu-

tions and their omission was an oversight." (Ex. 52, Tab 28)  
Mr. Norte recommended that the City accept all of these corrections since they did not impact his evaluation of the applications. (Ex. 52, Tab 20; It. 619, 826) In regard to the addition of AM radio station KUOM, Mr. Norte did state that, "We find no basis within Northern's original submission to conclude that the exclusion of this signal from its total radio service package was 'inadvertent.'" (Ex. 52, Tab 20; It. 815) Because the change did not impact CTIC's evaluation except as to the total number of radio signals, Mr. Norte recommended, however, that it was appropriate to accept the change. (Ex. 52, Tab 20)

64. Northern also sent a second letter dated August 23, 1979 to the City Staff which responded to seven questions raised by the staff at a meeting on August 7. Mr. Norte classified this submission as clarifications of the application which were requested by the City. (Tr. 622)

65. By a letter dated September 12, 1979, Northern submitted to CTIC answers to questions raised by CTIC in its first report to the City. Northern's comments covered 26 different sections in its application. (Ex. 52, Tab 19) In regard to live public access programming, Northern stated

that it would permit live programming if the City Council agreed that this was permissible under state rules. (Ex. 52, Tab 19, p. 6; Tr. 1351-53) Mr. Forte judged these to be clarifications and recommended that they be accepted by the City. (Tr. 625)

66. In a letter dated September 1a, 1979 to the City staff, Northern, responding to a telephone inquiry by VW. Korte, stated that the three mobile production facilities would have access priority. (Ex. 52, Tab 50) Mr. Korte judged this to be a clarification and recommended that the City accept it. (Tr. 607, 628, 824)

67. (At September 25, 1979, Mr. Korte participated in a conference telephone call which included a (TIC financial analyst and representatives of Northern, including Tom Alexander, Gene Gothrup and Jim Erickson. They discussed Northern's financial projection which showed an average loss of \$247,000 per year over the 10-year period. Northern requested that changes be accepted altering the depreciation and interest items which would then result in an average net income of \$586,000 per year. (Tr. 630) Mr. Korte recommended that these financial changes be accepted by the City because they resulted in no material change in the evaluation. (Tr. 637) Because of the initial vote in favor of Minneapolis Cablesystems on September 28, 1979, these changes were not put in writing until a December 13, 1979 letter from Northern to the City. (Tr. 639; Ex. 52, Tab 3)

68. A December 14, 1979 letter from Northern to the City stated that leased access would be added as a priority service on the universal service, to share a channel with religious access; and that, as announced at the public hearing on September 20 and 26, 1979 (Tr. 1527, Northern would carry local broadcast channels 9 and 11 on the same numerical cable channels; and that there would be no charge for production time, channel time or playback of pre-recorded programming on any of the dedicated access channels other than public or leased access. (EX. 52, tab 2; Tr. 333, 336, 645, 808, 1365) Mr. Korte was first advised of these changes in a conversation with the City Attorney's

Office when the final ordinance was being drafted. (Tr. 645) Mr. Korte recommended that these changes be accepted by the City. (Mr. 646, 815, 819)

69. After reviewing each of NO. Korte's recommendations, the City staff and the City Attorney agreed with Mr. Korte and concluded that none of the changes, additions, or clarifications constituted substantive amendments by Northern Cablevision. They also reached the same conclusion in regard to changes, additions, or clarifications submitted by each of the three other applicants. (Tr. 319, 337, 610, 612)  
The Franchising Process

70. Northern Cablevision accepted the Minneapolis franchise on January 2, 1980. (Tr. 186) By letter dated January 7, 1980, the City Attorney mailed to the Executive Director of the Cable Board staff a certified copy of the Minneapolis Cable Communications Franchise Ordinance. (Exs. 56, 105) By letter dated January 15, 1980, the Executive Director acknowledged receipt of the ordinance and advised the City that it had completed its obligation with respect to initial franchising and that the staff awaited the application for certification from Northern Cablevision. (Exs. 57, 106; Tr. 196)  
Because the

ordinance filed by the City was not completely legible, the staff did not begin its review until January 31, 1980, at which time it received Northern Cablevision's application for a Certificate of Confirmation. (Tr. 1095-6; Ex. 107)

71. La a letter dated January 15, 1980 to Alderman Alice Rainville, Beverly land of Northern Cablevision proposed an amendment to the franchise ordinance to change the number of religious channels to one and to eliminate the one-time access equipment training charge. (Ex. 64; Tr. 1409) In a June 16, 1980 letter from Land to Rainville, Northern offered to improve its Minneapolis system by adding 15 more video channels, two additional universal service channels, more access channels, and other improvements. (Ex. 117; Tr. 1438)

72. On January 31, 1980, Northern filed an application with the MCCB for a regular Certificate of Confirmation for the Minneapolis franchise. (Ex. 107) The Cable Board staff continued to request further documentation from Northern after January 31, 1980. (Ex. 92; 'Tr . 1146) By the end of February 1979, the staff had all the documents necessary for a final review (tr. 1736-7), having received the seven incorporated letters relating to changes or clarifications from Northern by letter dated February 28, 1980. (TV. 3 513) None of the six issues raised by the staff in this case relate to any of these seven letters. (Tr. 1210)

73. After conducting its review, the Cable Board staff prepared a memorandum dated April 4 1980, which raised 15 questions concerning the ordinance. The staff, the City and Northern met on April 17, 1980, to discuss the memorandum. The City and Northern filed further written responses with die Board staff on April 22, 1980. A second meeting was held on April 24, 1980. in a May 1,, 1980 memorandum to the Cable Board, the staff stated that six of the questions raised remained unresolved and recommended that certification be temporarily withheld. The staff also stated that it: was aware of possible procedural questions related to public hearing and the incorporation of sub-

stantive amendments into proposals. (Ex. 60; TY. 1180) These procedural concerns were not of concern to the staff prior to April of 1980. (Tr. 1181-2; Exs. 58, 93, 94, 95) The Cable Board has never before required a second hearing for public testimony during a municipal franchise process. (Ex. 58; tr. 1133) The instant case is the first franchise procedure which has been contested. (Tr. 1134, 1728)

74. May 6 1980, the Committee for Open Media, Inc. (COM) filed a petition with the Cable Board asking that the Board either deny Northern's application for a Certificate of Confirmation or certify the matter as being substantially contested and commence a contested case proceeding. On May 9, 1980, the Cable Board voted to commence a contested case proceeding. Its Notice of and Order for Hearing was issued on May 13, 1980, naming Northern Cablevision, the City of Minneapolis, and COM as parties. The Notice set the initial hearing date for June 16, 1980. The hearing was continued until July 14, 1980 at the request of the objectors in order to allow time for the completion of discovery and other preparation for the hearing. The staff of the Cable Board was granted party status by Order of the hearing Examiner dated

June 9, 1980. By an order dated June 16, 1980, the petitions of Minneapolis

Cablesystems and American Cablevision to intervene as parties were granted.

issues Raised by MCCB Staff

75. The Northern proposal offers to provide cable television service in two different service tiers, a "full service" package and a "universal service" offering. The full service package is composed of 40 channels including 11 channels reserved for community access and designated to be used for government, educational, religious, library, fine arts, regional, and leased access. The monthly fee proposed for the full service package is \$5.95.

(Ex. 54, Vol. II, Form J; Ex. 91) In order to receive all of the channels, a piece of equipment called a converter is needed to convert the incoming signals so that they can be deciphered by an ordinary television set.

(Tr. 1551) If the converter is not purchased by the subscriber, it can be

rented for a charge of \$1.50 per month. Three channels are reserved for premium entertainment services, featuring movies and sporting events which would require an additional monthly fee ranging from \$3.95 to \$6.95.

(Ex. 54, Vol. II, Form J; Ex. 91)

76. The other service tier is a "universal service" offering consisting of the five community access channels carried on channels 7, 8, 10, 12 and 13; namely, government, public, educational, religious, and regional access.

After a one-time only installation charge of \$24.95, there is no monthly fee for the universal service offering. No converter is necessary for this

service tier. (Ex. 54, Vol. IT, Form J, p. 1b of 7; Ex. 91)

77. 4 MCAR 5 4.121 is entitled "Franchise Standards", and states that "a Certificate of Confirmation will be issued only if the franchise ordinance

contains recitations and provisions consistent with" the requirements contained in the rule.

78. 4 MCAR 4.121 H. provides as follows:

H. A provision establishing the minimum number of public, educational, governmental and leased access channels that the franchisee shall make available.

1. For each system served by a single headend that:

is located in the Twin Cities metropolitan area; or is located in a franchise territory having a 'population of 15,000 or more persons, or serves 3,500 or more subscribers.

a. The provision shall require that the franchisee shall, to the extent of the system's available channel capacity, provide to each of its subscribers who receive all, or any part of, the total services offered on the system, reception on at least one specially designated noncommercial public access channel available for use by the general public on a first come, nondiscriminatory basis; at least one specially designated access channel for use by local educational authorities; at least one specially designated access channel for local government use; and at least one specially designated access channel available for lease on a first come, nondiscriminatory basis by commercial and noncommercial users. The VHF spectrum shall be used for at least one of the specially designated noncommercial public access channels required in this subdivision. The provision shall require that no charges shall be made for channel time or playback of

spe- prerecorded programming on at least one of the  
channels cially designated noncommercial public access  
that required by this subdivision provided, however,  
as- personnel, equipment, and production costs may be  
costs sessed for live studio presentations exceeding rive  
channels minutes in length. Charges for such production  
the and any fees for use of other public access  
access. shall be consistent with the goal of affording  
public a low-cost means of television  
(Emphasis added.)

79. In Northern Cablevision's 40-channel, full-service offering, the non-commercial public access channel which is required by rule is designated to appear on numerical channel number 20. (Ex. 54, Vol. In, form J, Page 3 of 7 and 5 of 7, Full Service; Ex. 53, Addendum A, p. 6; Ex. 91; Tr. 382) The VHF spectrum covers the frequency allocation from 40 megahertz to 350 megahertz. (TY. 406; Ex. 73) Northern's channel 20 would be located at 193.25 megahertz, which is the same frequency at which broadcast channel IC, is received on a standard receiver without a converter. (Tr. 407, 1231) The "VHF channels" are commonly thought to be broadcast channels 2 through 13. (TR. 654, 1104, 1215, 2009, 2038) Broadcast channels 2 through 6 are between the frequencies of 54 to 88 megahertz and broadcast channels 7 through 13 are between the frequencies of 174 and 216 megahertz. (Ex. 73) Should a subscriber purchase the full-service package without a converter, then the public access channel would be received on channel 10. (It. 414-5, 1107) Northern believes that the use of the full service package without a converter would be unauthorized. (Tr. 205, 1282-83) The use of the full service package without a converter would allow the viewer to receive only 12 channels and with Poor reception. (TY. 424, 656, 1285) With the use of a converter, the public access channel will be received on cable channel 20. (It. 1107)

80. Northern's offering (AK. 54, Vol. II, Form K, p. 5j of 5) and the franchise ordinance (Ex. 53, Addendum A, Exhibit A, Form K, p. 5j of 5) provide that:

hi accordance with Northern's access Rules and Regulations, the Company will schedule all public access cablecasts on a non-discriminatory, first-come, first-serve basis. 1. public access cablecasts will be shown Monday through Friday, between the hours of 6:00 p.m. and 12:00 midnight. On weekends between 3:00 p.m. and 10:00 p.m.

The proposal and the ordinance state that the public access production facilities can be reserved from Monday through Friday between 9:00 a.m. and 8:30 p.m. and on weekends upon a minimum notice of 36 hours. (Ex. 54, Vol. II, Form K, p. 5f of 5; Ex. 53, Addendum A, Exhibit A, Form K, p. 5f of 5)

81. Northern Included specific access hours in its application because the invitation for Applications called for operating rules for public access. (Tr. 1287; Ex. 17, Appendix, Form K, p. 5 of 5) Such operating rules are not required to be filed with the Cable Board until 90 days after access channels are put into use. (Tr. 1236, 1290; 4 WAR 4.121 H.4.) Had Northern not listed any hours in its application then there would have been no staff objection. (Tr. 1236) The franchise ordinance provides that the City has reserved the right to promulgate additional regulations and that, "as City reserves the right to determine how the access channels will be administered." (Ex. 53, Art. III, Sec. Id; St. 209)

82. 4 MCAR sec. 4.121 H.a. provides, in part, as follows:

The Provision shall require that whenever the specially designated noncommercial public access channel, the specially designated educational access channel, the specially designated local government access channel, or the specially designated leased access channel required in 4 MCAR 4.121 H.1.a. , b., and c. of this rule or the specially designated access channel required in 4 MCAR sec 4.121 H.2.a. , of this Rule is in use during 80 percent of the weekdays (Monday-Friday) , for 80 percent of the time during any consecutive 3 hour period for six weeks running, and there is demand for use of an additional channel for the same purpose, the system shall then have six months in which to provide a new specially designated access channel for the same purpose, provided that provision of such additional channel or channels shall not require the cable system to install converters. . . .

83. The franchise ordinance does not contain the 80% formula required by

rule. (it. 383) The provision was not included in the ordinance based upon

the advice of David Korte of CTIC who had concluded that a recent U.S. Supreme

Court case FCC v. Midwest Video Corporation, 440 U.S. 689 (1979) See f.n. 19)

raised a question as to the constitutionality of the 80% provision. (Tr. 211,

667, 1288) The Northern proposal provides for a total of 11 channels to be

used for access purposes, including two educational channels. Only five of

these channels are designated for the uses specified in the above cited rule,

however. (Ex. 91) The Northern proposal states that the "dedicated" uses for

access channels are not a limiting factor and that Northern will accommodate

access channels as needed. (Ex. 54, Vol. II, Form L, P. 5 of 37; Tr. 1633)

84. 4 MCAR 4.121 H.4. provides that:

The provision shall also require that the franchisee shall

establish rules pertaining to the administration of the specially designated noncommercial public access channel, the specially

designated educational access channel, and the specially

designated leased access channel required in 4 MCAR sec. 4.121

H.1.a., b., and c. of this Rule or in the specially

designated access channel required in 4 MCAR 4.121 H.2.a. of this

Rule. The rules shall be consistent with the requirements of the

Federal Communications Commission rules and regulations relating

to operating rules for access channels. The operating rules

established by the franchisee governing the specially

designated noncommercial public access channel, the specially

designated educational access channel, and the specially designated

leased access channel required in 4 MCAR 4.121 H.1.a., b. and c.

of this Rule or the specially designated access channel required

in 4 MCAR 4.121 H.2.a., of this Rule shall be filed with

the Minnesota Cable Communications Board within 90 days after

any such channels are put into use. (Emphasis added.)

85. There is no provision in the franchise ordinance which specifically

requires the franchisee to establish operating rules for the access channels.

(it. 1115) The ordinance does itself contain operating rules for the public

access channel (Ex. 53, Addendum A, Ex. A, Form K, p. 5a-5p; of 5) Operating

rules for public access, educational access and an explanation of leased ac-

cess were set out in Northern's proposal because the invitation for Applica-

tions so required. (Ex. 54, Vol. II, Form K, P. 5q-5u of 5; Tr. 1289) The

operating rules for educational access and the explanation of leased access

were not stated in the franchise ordinance but were included only insofar as

the ordinance incorporates by reference the entire Proposal or offering of

Northern Cablevision. (Ex. 53, Art. I, Sec. 5) The ordinance provides that

the franchisee may promulgate rules governing its business (Ex. 53, Art. II,

sec. 10), and that the City may promulgate rules concerning how the access

channels will be administered. (Ex. 53, Art. III, Sec. 1; Tr. 1291)

86. 4 MCAR 4.121 1. provides, in part, as follows:

I. A provision establishing the minimum equipment that the franchisee shall make available for public use.

1. For each system served by a single headend that: is located in the Twin Cities metropolitan area or is located in a franchise territory having a population of 15,000 or more persons; or serves 3,500 or more subscribers.

a. The provision shall require that the franchisee shall make readily available for public use at least the minimal equipment necessary for the production of programming and playback of prerecorded noncommercial programs for the specially designated public access channel required by 4 MCAR 4.121 H.1.a. of this Rule. The franchisee shall also make readily available, upon need being shown, the minimum equipment necessary to make it possible to record programs at remote locations with battery operated portable equipment. Need within the meaning of this Rule shall be determined by subscriber petition. The petition must contain the signatures of at least 10 percent of the subscribers of the system, but in no case more than 500 nor fewer than 100 signatures.

87. The franchise ordinance does not contain language which would allow

the use of a subscriber petition to show need for public access equipment.

(Tr. r. 387, 1117) The franchise ordinance requires Northern to provide six

fully equipped access studios, a 27-foot mobile van or "studio on wheels", two

mini-vans and portable video equipment. (Ex. 53, Addendum A, Sec. 1.K.;

Tr. 1292-5) 'This equipment exceeds the minimum necessary for the production

of programming and the playback of programs for the public access channel.

(Tr. 67; Ex. 60, p. 3) Generally, public access video equipment has an aver-

age life of five to eight years. (Tr. 1935-6)

88. 4 MCAR 4.169 provides as follows:

The Board hereby requires that all franchises for cable communications systems franchised in whole or in part within the 'Twin

Cities metropolitan area shall contain a provision designating

the standard VHF Channel 6. for uniform regional channel usage;

provided, however, that until the regional channel becomes

operational, the designated VHF Channel 6 may be utilized by the cable communications company as it deems appropriate.

Subject

to approval of the municipality concerned, such designated regional channel may be shared with the government access

channel

as may be required until such time as the municipality requests

a separate channel or until combined usage of the channel expands to such point as it is in use during 80% of the

time between 8:00 a.m. and 10:00 p.m. during any consecutive six-

week period. Use of time on the regional channel or channels shall

be made available without charge. (Emphasis added.)

89. The franchise ordinance provides that the regional channel will ap-

pear on channel 6 in Northern's 40-channel, full-service offering. (Ex. 53,

Addendum A, Sec. 1.g.II.; Tr. 222) In the universal service offering, the

regional channel is designated as channel 13. (Ex. 53, Addendum A, Sec.

1.g.1.; Tr. 418) The regional channel was placed on channel 13 in the univer-

sal offering because, given existing technology at the time of filing of the

application, placing in on one of the channels from 7 through 13 allowed five access channels while placing it on one of the channels from 2 through 6 would allow only two access channels. (TY. 219, 419, 1296) A uniform regional channel promotes subscriber awareness of its existence and allows effective regional publicity. (Tr. 671-2, 962, 1118, 1937) Regional channel 6 is not yet operational in the Twin Cities metropolitan area. (Tr. 220, 1119)

90. The staff-generated issues relating to the 80% formula, the operating rules, and the petition for equipment all relate to the language of the franchise ordinance without regard to the portions of Northern's application which were included as an Addendum. The three drafts of the franchise ordinance supplied to the staff during 1979 contained the same language or lack thereof in regard to these issues as did the final ordinance. The other three staff issues relate to portions of Northern's application as it was filed with the city on July 20, 1979, and not to the seven letters of changes or clarifications made subsequent to the filing. (TY. 1210) The Cable Board staff did not know which portions of the application were incorporated, into the ordinance until 1980.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

#### CONCLUSIONS

1. The Minnesota Cable Communications Board and the Hearing Examiner have jurisdiction in this matter, except as hereinafter specifically noted, pursuant to Minn. Stat. sec. 238.05, 238.06, 238.09 (1978); Minn. Stat. 15.052 (1978) and 4 MCAR 4.063, 4.064, and 4.076 (1978 DJ.).

2. The Notice of Hearing was proper in all respects and all relevant substantive and procedural requirements of law or rule have been fulfilled by the MCCB.

Pursuant to 9 MCAR sec. 2.217 C.5., the burden of proof in this proceeding is on the applicant, Northern Cablevision of Minneapolis, Inc.

4. Pursuant to Minn. Stat. 238.09, subd. 1 and 6 no cable communications franchise shall be effective or become operational until a Certificate of Compliance has been issued to the franchisee by the MCCB.

5. 4 MCAR 4.099 requires that a Certificate of Compliance may be issued only upon compliance with 4 MCAR 4.111 and 4.121.

6. That the Minneapolis Cable Communications Franchise Ordinance does comply with 4 NEAR 4.121 H.1.a. where it requires a public access channel to be placed in the VHF spectrum.

7. That the Minneapolis Cable Communications Franchise Ordinance does comply with 4 YEAR 4.121 H.1.a. where it requires that a public access channel be available for use by the general public on a first come, nondiscriminatory basis.

8. That the Minneapolis Cable Communications Franchise Ordinance does not comply with 4 MCAR 4.121 H.3. in regard to the "80 percent" provision.

9. That the Minneapolis Cable Communications Franchise Ordinance does not comply with 4 MCAR 4.121 H.4. which requires a provision concerning access channel operating rules.

10. That the Minneapolis Cable Communications Franchise Ordinance does not comply, with 4 MCAR 4.121 1.1.a. which requires a provision in regard to a subscriber petition.

11. That the Minneapolis Cable Communications Franchise Ordinance does not comply, with 4 MCAR sec. 4.169 which requires a provision designating channel 6 as a regional channel.

12. That the Minneapolis Cable Communications Franchise Ordinance and the Minneapolis franchise process complied with 4 MCAR sec 4.121 A.1. and 2. which requires a provision dealing with public hearings.

13. That the Minneapolis franchise process and the Invitation for Applications issued by the City complied with 4 MCAR sec. 4.111 C.1. and 2.a. in regard to setting out criteria and priorities and a closing date.

14. That the City allowed the applicant to make a substantive amendment to its application subsequent to its filing, in regard to the change in applicant's financial projections, contrary to the provisions of the Invitation for Applications.

15. That the City of Minneapolis did not act in an unreasonable, arbitrary or capricious manner in judging what changes to the applications were proper and consistent with the Invitations for Applications.

16. That no substantive amendment occurred to Northern Cablevision's application as the result of any oral statements by Northern officials to either City Council members or members of the public prior to the final award of the franchise.

17. That no substantive amendment occurred to Northern Cablevision's application due to the removal of an ATC application from City Hall by a Northern agent prior to the filing deadline.

18. That the Minneapolis Cable Communications Franchise Ordinance was enacted in compliance with the Minneapolis City Charter.

19. That the Minneapolis Cable Communications Franchise Ordinance does not comply with 4 MCAR sec. 4.111 G. which requires that a franchise be granted by ordinance.

20. That the above Conclusions are made for the reasons set out in the Memorandum attached hereto which is incorporated herein by reference.

21. That any Findings of Fact herein which are more properly termed Con-

clusions, and any Conclusions which are more properly termed Findings of Fact are hereby adopted as such.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

#### RECOMMENDATION

It is respectfully recommended to the Minnesota Cable Communications

Board:

1. That the Board issue an order granting a Certificate of Confirmation to Northern Cablevision of Minneapolis, Inc. to construct and operate a cable communications system within the City of Minneapolis upon the amendment of the

Minneapolis Cable Communications Franchise Ordinance to correct the violations

of rule cited in Conclusions No. 8, 9, 10, and 11.

2. That The board reconsider, hosed upon the full record of this con-  
tested case proceeding, its assertion of jurisdiction in its Order of  
July 15,  
1980, insofar as that Order might be interpreted to assert- jurisdiction  
over

(1) whether or not changes and additions to the applications constituted sub-

stantive amendments in violation of the City's Invitation for  
Applications,

and (2) whether or not the Minneapolis Cable communications Franchise  
Ordi-

nance was enacted in compliance with the Minneapolis City Charter.

Dated: January 22, 1981.

GEORGE A. BECK  
State Hearing Examiner

#### NOTICE

Pursuant to Minn. Stat. 15.0422, subd. 1 (1980), the agency is  
required

to serve its final decision upon each party and the hearing examiner by  
first

class mail.



## Introduction

This Memorandum will set out and discuss the reason-, for the Conclusions

arrived at and the Recommendation made in this contested case. The issues are

discussed in the Memorandum in the same order in which they appear in the

Statement of Issues and the Conclusions.

### The Six Issues Raised by the MCCB Staff

Li its application, Northern proposed to place its public access channel

on numerical cable channel 20. The applicable rule requires that this public

access channel be placed on the "VHF spectrum". There is no dispute in this

record that the frequency of Northern's proposed channel 20, namely 193.25

megahertz, is located within the technical engineering definition of the VHF

spectrum. That spectrum runs from 40 megahertz to 350 megahertz.

Northern,

therefore, appears to comply with the plain meaning of the rule.

Also, if

this rule is interpreted to mean that Northern must place its public access

channel on a "VHF channel" as defined by megahertz, then Northern would also

be in compliance since its proposed cable channel 20 will appear on the same

frequency as broadcast channel 10 which is commonly thought of as a VHF chan-

nel.

The staff believes, however, that the intent of this rule is that the pub-

lic access channel must be placed on one of what is commonly thought of as the

"VHF channels", namely channels 2 through 13. According to testimony in this

proceeding, the purpose of using a "VHF channel" is to keep the public access

channel on a number in close proximity to channels that viewers are currently

accustomed to view and thereby promote use of the public,, access channel.

Northern has suggested that the original purpose of the rule was to keep the

public access channel on one of the 11 channels available since at the time

the rule was written, converters were not generally in use.

The problem with the staff interpretation is that it ignores the language

of the rule. The staff argument essentially is that the public access channel must appear on numerical channels 2 through 13, whether or not these appear in the VHF spectrum or not. The staff states at page 8 of its brief that "whether the frequency of channel 20 is within the technical engineering definition of the VHF spectrum is not material". The policy of keeping the public access channel on a familiar channel number may well have some value with the advent of cable television in a particular community. It should be noted, however, that Northern's offering proposes that attractive offerings such as premium movies, sports programming, religious programming, fine arts access and others will appear on numerical channels higher than 13. One witness cited the current lack of viewer acceptance of channel 17; however, this channel is not located on the VHF spectrum and cannot simply be punched up on a converter as will be the case with cable television service. It would appear likely that a 40 or more channel system cannot be meaningfully compared to the existing broadcast TV situation in the City of Minneapolis in terms of viewer preference for a few channels.

Whatever the merits of the policy advanced by the staff that Policy has

been implemented in rule. The rule simply requires that the public access

Channel appear within the VHF spectrum and within any objective meaning of the

phrase Northern complies as its offering stands. A rule may not be rewritten

in the course of a contested case proceeding to reflect a different meaning no

matter how benign the policy or how accurate is the alleged but unstated in-

tent advanced by the proponent. [See the discussion of the Monk and McKee

cases, infra. The rule of construction codified at Minn. Stat. 645.16 ap-

plies here:

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

,There is no reasonable way that the applicants could have had notice of the

staff interpretation of this rule. The matter was not raised during the 1979

franchising process. The staff's interpretation of the rule must be adopted

pursuant to the rulemaking procedures of the Administrative Procedure Act be-

fore it can be legally enforced as a legislative rule.

It is found that on the record as it currently stands that Northern in-

tends to present the public access channel on cable channel 20. In a brief segment of his testimony, Northern's engineer, Warren Braun, did in fact tes-

tily that the converters will be activated in the system so that when the

cable channel 10 is punched on a converter, the public access channel will be

received It, the subscriber. Unfortunately, Me. Braun's testimony in this re-

gard was not extensive and would not seem to be completely consistent with

Northern's application. It is not clear, for instance, why, if Northern's

intent in regard to activation of the channels was as Mr. Braun testified,

Northern would have needed to announce a change in the channel assignment of local broadcast stations KMSP and WTCN. If Mr. Braun's testimony reflects

Northern's original intent, it would seem that those channels which were

originally assigned numerical channels of 19 and 21 would automatically be

punched up at 9 and 11, and Northern might so have announced. It is also un-

clear why the 40 channels could not simply be listed as they would be punched

up numerically by a cable subscriber on his or her converter. Also unresolved

is the question of what numbers would have to be punched by the subscriber in

order to obtain the offerings which Northern has labeled numerical channels 7

through 16 in its application. Additionally, in explaining the proposed uni-

versal service in its application, Northern notes that the five access channel

allocations (channel 7, 8, 10, 12 and 13) "do not correspond to converter

identified access channels on the deluxe cable service of 40 channels". This

explanation seems consistent with an intent to have the access channels appear

on differently numbered channels in the full-service package. (Ex. 54; Vol.

II, Form J, P. 1b of 7 Northern has failed to prove it, a preponderance of

one evidence that the franchise ordinance as it stands has placed the public

access channel in the full service 40 channel package on channel 10 as that

channel will be selected by a subscriber.

In addition to the requirement concerning the USE? Of the VHF spectrum,

rule section 4.121 H.1.a. also requires that the public access be available

"for use by the general public on a first come, nondiscriminatory basis;". 'the franchise ordinance contains language affirming Northern's intent to do This using the terms contained in the rule. The franchise ordinance also contains, however, specific hours for the use of production facilities to produce public access programs (9:00 a.m. through 8:30 p.m. weekdays and weekend hours by arrangement). The cable casting of the programs is limited to 6:00 p.m. to 12:00 p.m. -on weekdays and 3:00 p.m. to 10:00 p.m.. on weekends. The Cable Board staff and COM believe that these hours are restrictive and therefore violate the rule. Testimony at the hearing indicated that there are groups of people who are daytime viewers only who would not be able to view public access under the hours proposed in the ordinance.

The Board is subject to the general statutory directive contained in Minn. Stat. 238.05, subd. 9, that the Board shall ensure that minorities and all other groups have the fullest access to cable communications at all levels. The staff has suggested that the intent of this rule is to permit close to unlimited operating hours in the case of metropolitan systems because 4 MCAR sec. 4.121 H.2., which applies to smaller cable systems, allows the public access channel to be shared with other uses, while the rule in question does not. The staff has not contended, however, that restrictive hours are prohibited but only that the hours suggested by Northern are too restrictive.

A comparison of the rule which applies to smaller cablesystems with the applicable rule in this case might permit one to conclude that it was assumed at the time of adoption that public access would enjoy a higher utilization in the larger systems. Neither an examination of 4.121 H.1.a. or a comparison of it with the rule applicable to smaller cablesystems gives the reader any guidance as to the appropriate number of access hours, however. In fact, the procedure envisioned under the rules is that operating rules would not be submitted until 90 days after the channels were put into use and would have to be included in the franchise ordinance. In this case, the City of Minneapolis determined that operating rules should be included in the application and in

the final ordinance. The City is, of course, free to require that the matter be dealt with in ordinance.

The staff is again, in this instance, attempting to enforce a policy which has not been adopted by rule. The above cited rule of statutory construction is again applicable. The rule requires only that the channel be available for use on a nondiscriminatory basis. It gives no notice to an applicant of what number of hours the Cable Board staff might deem sufficient. The staff's interpretation must be first adopted as a rule prior to enforcement. Should the operating hours in question prove to be insufficient, as the City's consultant from CTIC thought they might very well be, the City has specifically reserved the right in the franchise ordinance to determine how access will be administered in the City of Minneapolis. This language should permit the City to encourage amendment of the ordinance as the need develops.

The Cable Board rules also require that, in the case of four of the access channels namely public access, educational access, local government and leased access, the franchise must contain a provision that when such a channel is in use during 80% of the weekdays for 80% of the time during any consecutive

three hour period for six weeks running, and there is demand for an additional channel, then it must be provided within six months. This requirement was not placed in the franchise ordinance. The applicant points out that it has provided a total of 11 access channels out of the 40 offered in its full-service package. It suggests that this is far in excess of what would be provided had the language of the rule been included in the franchise ordinance. Northern believes that the requirement in the rule, which was written at a time when cable systems included only 20 channels, is now outdated. The applicant points out that it is not prevented from switching the use of one of the 11 access channels to either public, educational, leased or local government if demand so required.

The advantage which the rule assures to the Public is that it gives a guarantee that when a greater demand for one of the four access channels cited exists, the cable company must meet that demand. By not including this language within the franchise ordinance, users and viewers of these channels must depend upon the goodwill of the cable company. Although it may be possible for Northern to redesignate one of the access channels, it is not required to do so under the terms of the ordinance as it exists. Although Northern points out that in theory under the terms of the rule all channels could end up as access channels, this would not appear to be a serious practical problem given the number of channels proposed in this franchise and the number of channels which Northern has offered to supply subsequent to the award of the franchise.

The City was agreeable to not including the "80%" requirement within the franchise ordinance based upon the advice of its consultant, David Korte of CTIC. Mr. Korte suggested that a footnote in the case of FCC v. Midwest Video Corp., 440 U.S. 689, 709, 59 L.Ed.2d 692, 707, 99 S.Ct. 1435 n. 19 (1979) suggested that access rules such as the one in question might violate the First Amendment rights of cable operators. The case was ultimately decided on ju-

isdictional grounds, however, and no case has been advanced which specifically makes a constitutional decision in this regard. At any rate, the Cable Board's rule, which has the full force and effect of law, is in force until it is declared unconstitutional. Even had the United States Supreme Court made a decision directly on point, neither the City nor the applicant can unilaterally choose not to comply with a Board rule based upon its interpretation of a court ruling. The appropriate procedure for an applicant might well be to request a variance or to petition for modification of the rule in question. Noncompliance is not, however, an option; the clear wording of the rule must be followed.

Cable Board Rule 4.121 H.4. requires that the franchise ordinance specifically state that the franchisee shall establish operating rules in regard to three channels, namely the public access, the educational access and the leased access channels. The Minneapolis franchise ordinance does not contain this mandate. The applicant argues that this requirement is moot since the franchise ordinance contains the operating rules for the public access channel, thereby negating any requirement that such rules be adopted. If the state rule referred only to the public access channel, Northern's point would be well taken. It would appear that there would be more protection to the

users and viewers of the access channel to have those rules set out in the ordinance rather than allowing the cable company to draw up, rules at a later date. Furthermore, as the applicant points out, 4 MCAR'4.121 a franchise ordinance to contain only "recitations and provisions consistent with the following requirements:" (emphasis added) . The objectors have suggested that including the language required by the rule helps promote public understanding in the sense that the public would be aware that operating rules should be in existence. The placing of the rules in the ordinance, however, to the extent that access users would even refer to the ordinance, would seem to be as satisfactory in terms of public understanding.

The rule requires, however, that the franchisee establish operating rules for the educational access and the leased access channel also. These rules are not included in the Minneapolis franchise ordinance except insofar as they are incorporated by reference. Northern's mootness argument cannot be extended to information which is incorporated by reference. Additionally, the explanation of leased access in the application does not amount to "operating rules" within the meaning of the Cable Board rule. The protection which is offered by the rule in question is that with a specific requirement placed in the franchise ordinance, the cable company can then be required to adopt rules for each of the three channels in question. As the franchise ordinance now stands, that advantage is missing. Northern suggest, -, that the fact that the cable company is allowed to promulgate rules under the terms of the franchise ordinance and the fact that the City has specifically reserved the right in the ordinance to determine the administration of the access channels provides a safe substitute for the provision called for by the state rule. These provisions do not, however, provide the same specific guarantees to the public as does the Cable Board rule, which if implemented mandates the cable company to establish rules for the administration of the public access channel, the educational access channel and the leased access channel.

4 MCAR 4.121 I initially requires that the franchise ordinance state

the minimum equipment that the franchisee shall make available for public use. Northern has complied with this initial requirement and the record supports the conclusion that the equipment provided is in excess of the minimum necessary. The rule goes on to provide, however, That the franchise language must require the franchisee to make available the minimal equipment for programming and playback of public access, as well as the minimum battery operated portable equipment necessary. The rule provides that what minimal equipment is necessary is to be determined by a subscriber petition. The Minneapolis ordinance does not contain any language mentioning the petition procedure for minimum equipment.

Northern argues that the rule as properly constructed does not require recitation of the subscriber petition procedure, but merely requires the ordinance to state that the franchisee shall make the minimal equipment necessary available. The applicant points out that the "provision shall require" language appears only at the beginning of the paragraph, but not in the second, third or fourth sentences. The third and fourth sentences discuss the subscriber petition.

Whether or not a recitation of the subscriber petition procedure is required to be in the ordinance, Northern apparently also questions the need for the procedure at all. It suggests that the minimum equipment specified in the ordinance must be maintained by Northern for the 15-year life of the franchise. The applicant also expressed concern with the practical problems associated with a petition procedure in that at some point, upon the presentation of a petition with which the company does not agree, someone will have to make a decision as to what is the "minimum necessary". The staff and the objectors have pointed out that equipment does wear out and become obsolete in light of advancing technology. The petition procedure in the rule guarantees minimum equipment rather than simply necessitating reliance upon the cable company. The staff and objectors suggest that the cable company should not be the sole judge of what is minimum equipment and that that was not intended since the rule specifically provides that the need is determined by petition.

A fair construction of 4.121 I.I.a. in its entirety commingles the conclusion that the rights of the subscribers embodied in the petition procedure must be explained in the franchise ordinance. The first paragraph of 4 sec.4.121 is, of course, also applicable to the rule subsection in question and provides that the ordinance contain "recitations and provisions consistent with the following requirements:". The ordinance provision concerning minimum equipment will not effectuate the intent of the rule subsection if it does not mention the petition procedure. The ordinance itself will obviously be more available to subscribers than the State Cable Board rules and should embody the rights granted under state rules in regard to equipment and how to make requests for equipment. The rule subsection could have been more clearly drafted in order to give better notice to the applicant that a reference must be made to a subscriber petition. However, a fair reading of the subsection as a whole should certainly have raised a question in the mind of the applicant and the city as to whether or not that language must be included. It

does appear clear that the petition procedure does not apply just to battery operated portable equipment, but applies to all of the equipment necessary for public access. Accordingly, it is concluded that the ordinance as it stands does not comply with the rule.

4 MCAR 4.169 requires that all franchises in the Twin Cities area contain a provision designating standard VHF channel 6 for uniform regional channel usage. Although Northern does so in its 40-channel, full-service package, its proposal provides that in the universal service Offering the regional channel will be channel 13. The uniform regional channel was placed on channel 18 in the universal service offering because it, placing it on the high band channels -7 through 13) five channels could be devoted to access rather than only two if it were placed on the low band (channels 2 through 6)). At the time that the Northern proposal was prepared, it was not possible to segment the universal offering so that both the low band and the high band could be included. At the time of the hearing, however, the state of the art had progressed to the point where special band pass filters can be used to segment the offering and therefore the regional channel could be placed on channel 6 while maintaining five access channels. (It. 435)

Northern argues that this rule requirement is not properly part of the issuance of a certificate of confirmation process since the rule is not cited in 4 MCAR 4.099, which provides that a certificate may be issued "only upon compliance with 4 MCAR 4.111 or 4.113 and 4 MCAR sec. 4.121, . . .". Section 4.169 is however, a duly adopted rule of the Board and therefore has the force and effect of law. Therefore, the Board must enforce the rule. To suggest that it may not do so in the course of the approval of a certificate of confirmation is to ignore the language of 4.169 itself which states that "all franchises" . . . "shall contain" . . . It would also ignore the language of Minn. Stat. 238.05, subd. 2c, which requires the Board to prescribe standards for franchises awarded in the Twin Cities metropolitan area which designate a uniform regional channel. Northern suggests that this particular rule is one which could be complied with at a later date prior to activation of the regional channel. Aside from the practical difficulties of amending an ordinance and altering at a later date the designation of a particular channel, it seems clear that 4.169 is aimed at the franchising process by the use of the words "cable communication systems franchised in whole or in part" rather than focusing on the later amendment of a franchise ordinance.

Northern has also argued that its universal service offering is not a subscriber service and would not, therefore, be subject to rules and regulations of the FCC and the MCCB. There is no monthly fee for the universal service offering. Both the FCC definition of subscriber (FCC Rule 76.5, subpart NN) and the definition of "cable communication system" in Minnesota Statutes at Minn. Stat. sec. 238.02, subd. 3, refer to the receipt of broadcast programming as a component of the definitions. Northern suggests that since no converter is used with the universal service offering aid since this results in a marring of the broadcast signals, the universal service offering would not, therefore, fall within the above cited definitions.

An examination of the statutory definition and of the wording of sec. 4.169

strongly suggests that the rule is intended to apply to the entire cable communication system without excluding any service tiers. Tie legislative history cited by the staff in its brief suggests that the regional channel concept was thought to be important and it would certainly be as important for the universal service viewers as it would be for those subscribing to the full-service package. Tie objectors have pointed out-- that the applicant has made other changes to the universal service offering based on interpretations of Cable Board rules and has referred to the universal service offering as a subscriber service in its application. There would seem to be some inconsistency in the fact that what is described in Northern's application as a "valuable public service" (Ex. 54, Vol. II, Form J, p. 1b of 7) becomes in Northern's brief a service whose viewers "would experience substantial marring of broadcast signals". (App. Brief, p. 11)

Estoppel of Staff Arguments

Northern Cablevision has argued that the Cable Board staff should be estopped from claiming deficiencies in the Minneapolis franchise ordinance because these objections were not raised prior to the passage of the ordinance on December 14, 1979, but were first communicated to Northern and the City in

April of 1980. Three of the issues raised by the staff, namely Questions, 5 and 7 in the May 1, 1980 memorandum (Ex. 60) were objections which relate

solely to the franchise ordinance exclusive of Northern's application. The

other three staff objections, Questions 2, 3A and 9, relate to Northern's proposal as it was incorporated into the franchise ordinance.

The staff first received a copy of the Minneapolis draft ordinance in May of 1979, and the Cable Board staff made suggestions unrelated to the issues in

this case, to the City in writing. The City sent the third draft of the franchise ordinance to the Cable Board staff on June 21, 1979, and requested staff

comments. The staff replied, in writing, on October 1, 1979 and made certain suggestions which were again unrelated to the issues raised in this contested

case proceeding. The fourth draft of the ordinance was forwarded to the Cable

Board staff on November 15, 1979. On December 3, 1979, the City advised the

staff that the Northern proposal would be substituted for that of Minneapolis

Cablesystems and asked for staff comments regarding Northern's application as

it relates to Cable Board rules. The staff had obtained the Northern applica-

tion on July 20, 1979, along with the other applications. On December 12,

1979, the staff called the City and advised that a review of the Northern proposal had uncovered nothing conflicting with state standards.

Although the Board has a general duty to provide advice and assistance to

local governments in regard to cable communications (Minn. Stat. 238.05,

subd. 3), neither the statute nor the rules require the staff to conduct a

review prior to the filing of the final ordinance and the application by the

franchisee for a Certificate of Compliance. It should be noted that the opportunity for the staff to review the Northern proposal with a view

toward compliance with state rules existed effectively only from receipt of the

December 3, 1979 letter from the City until the final vote on December 14.

Although the staff had the Northern application in July of 1979, it would not

have been reasonable to review each of the four lengthy applications in detail

for compliance with state rules. The staff had a greater opportunity to re-

re-

view the franchise ordinance itself and it would, of course, have been prefer- able to raise the three issues related to the ordinance prior to the final decision of the City Council. The City apparently made all of the changes to the ordinance which were suggested by the staff during 1979.

'The conduct of the staff is not such as to permit the application of the doctrine of estoppel. 'The Minnesota Supreme Court indicated in Mesaba Aviation Division v. County of Itasca,, 258 N.W.2d 877, 880-881 (Minn. 1977) that equitable estoppel may lie where a government officer authoritatively makes a specific representation which invites reliance and a consequent change of position occurs which makes it inequitable to retract the representation. The Court also indicated that a question of whether or not the public interest would be frustrated by the application of estoppel must be carefully examined. More recently in Ridgewood Development Company v. State, 294 N.W.2d 288 (Minn. 1980), the Court stated that in order to estop against a government entity a party has a heavy burden of proof to show that the equities are sufficiently great and this would include a showing of improper action or some fault by the government agency. 294 N.W.2d 292-293.

In this case there was no specific representation by the staff for example, that the, 80% formula for determining the need for additional access channels need not be explicitly state] in the ordinance. Nor can it be said- that- Northern or the City changed its position in reliance upon any represen- tation by the staff. It was incumbent upon the City and Northern to review state rules to ensure that the franchise ordinance would be in compliance upon passage. Northern's requires, for the application of the doctrine of estoppel in this situation does not survive the requirements set Out by the court in Ridgewood and Mesaba. An examination of the equities of this situation and the possible injury to Northern over the City would not outweigh the public interest in a careful examination of the franchise ordinance for compliance with Board rules.

#### The Public Hearing Requirement

An issue in this proceeding is whether or not the City and the applicant complied with 4 MCAR 4..121 A.1. and 2. Those provisions read as follows:

4.121 Required contents of franchises. Where a cable com- inunicatons franchise is awarded or renewed after April 1, 1973, except as provided in Minn. Stat. sec 238.09, Subd. . 3, 4, 5, and 9, (1976) , a regular or renewal of a certificate of confirmation will be issued only if the franchise ordinance contains recita- tions and provisions consistent with the following requirements:

A. A statement that:

1. The Franchisee's technical ability, financial con- dition,, legal qualification, and character were considered and approved by the municipality in a full puublic proceeding af- fording reasonable notice and a reasonable opportunity to be heard;

2. the franchisee's plans for constructing and operating the cable communications system, including specific consideration of all sections of the area to be served, were

considered and found adequate and feasible in a full public proceeding affording reasonable notice and a reasonable opportunity to be heard;

'This requirement appears in Chapter 8 of the Cable Board rules, which is a

section addressed to the required contents of franchise ordinances. It does not appear in Chapter 7 of the Cable Board rules, which sets out the procedure

to be followed by a municipality in the franchising process. Contained

within the latter section at 4 MCAR 4.111 F. is a specific requirement for a

public hearing with notice and an opportunity to be heard in regard to all applications for the franchise. This hearing is required to be held at least

27 days prior to the introduction of the franchise ordinance. The parties differ as to the proper interpretation of sec 4.121 A.1. and 2.

COM and the other objectors urge that this rule subsection creates a second

public hearing, to be held after the hearing required by sec. 4.111 F. Northern and the City of Minneapolis argue that the hearing reference in 4.121 A.1.

and 2. is, in fact, the hearing required by sec. 4.111 F. Therefore, the City and

Northern believe that 4.121 A.1. and 2. is essentially a recitation require-

ment which indicates, similar to other requirements in 4.121, language which must appear in the franchise ordinance.

The first page of the Minneapolis Cable Communications Franchise Ordinance

contains the following recitations:

WHEREAS, the City of Minneapolis has, following reasonable notice, conducted a full public hearing, affording all persons reasonable opportunity to be heard, which proceeding was concerned with the analysis and consideration of the technical ability, financial condition, legal qualification and general character of the Company; and

WHEREAS, the City of Minneapolis after such consideration, analysis and deliberation, has approved and found sufficient the technical ability, financial condition, legal qualification and character of said Company; and

, the City of Minneapolis has at public hearings, also considered and analyzed the plans of the Company for the construction and operation of the cable communication system and found the same to be adequate and feasible in view of the needs and requirements of the entire area to be served by the said system. (Ex. 53)

There is no dispute that a public hearing satisfying the requirements of

4.111 F. occurred on September 20, 1979. There is also no dispute that,

subsequent to the designation of Northern as the cable franchisee on November

21 and the vote on the final ordinance on December 14, 1979, there was no pub-

lic hearing with reasonable notice and a reasonable opportunity to be heard in

regard to the designated franchisee.

COM suggests that the reference to a "franchisee" in 4.121 A.1. and 2.

means that the hearing referred to must occur after an applicant is designated

as a franchisee, but before the ordinance is finally enacted. The objectors

also argue that the requirement that certain factors be "considered and ap-

proved" or "considered and found adequate and feasible" implies that these

judgments are to be directed toward a single applicant which has been desig-

nated as franchisee. A more reasonable interpretation, however, is that the

worn "franchisee" was used in this rule subsection since the language was in-

tended to be included in the final ordinance at which time, of course, the

identity of the franchisee, namely the successful applicant named as the cable

company in the final ordinance, would be known. The more reasonable interpre-

tation of a rule is normally- to be preferred. Weissglass Gold Seal Dairy

Corp v. Butz, 369 F.Supp. 632, 636 (S.D.N.Y., 1973).

The interpretation that 4.121 A.1. and 2. is a recitation requirement

referring to the 4.111 F. hearing is bolstered by the past practice of the

Cable Board and its staff in regard to hearings during franchise proceedings.

The staff has never before suggested, and the Board has never before required,

a second public hearing during a franchise process. Throughout the franchise

process, the Cable Board staff indicated that Chapter / of the Cable Board

rules referred to the franchise procedure, while Chapter 8 set out the re-

quired ordinance language. The franchising kiit provided by the Cable Board

staff to the City of Minneapolis described only one hearing; namely, that re-

quired by, 4.111 F. The Cable Board staff checklist used to keep track of

the Minneapolis franchise procedure did not contain a second hearing require-

ment. (Ex. 58) The sample ordinance which the Cable Board staff provided to

the City of Minneapolis contained the same recitation language as was placed

at the, front of the Minneapolis ordinance quoted above, except that the City replaced the word "Franchisee" with the word "Company".

COM argues that the November 19, 1979 hearing constituted a second public hearing for Minneapolis Cablesystems while it was the designated franchisee.

COM concludes from this that the City therefore recognized that a second public hearing was required by the Cable Board rules, and failed to hold one for

Northern only because there was not sufficient time to do so before a new City Council was seated in January of 1980.

The record does not support the conclusion, however, that the November 19 hearing was set up by the City to address the factors set out in 4.121 A.1. and 2.

Although some of the comments on November 19 did happen to be addressed to those general categories, the public hearing was requested by the City Attorney to permit public

comment on the changes in the basic cable ordinance which were not necessarily related to the identity of a particular applicant or its proposal.

The Finance and Commerce notice for the November 19 meeting referred only to an ordinance granting a cable TV franchise and not to the designated franchisee.

(Ex. 66)

COM correctly points out that as a practical matter, it was not easy for members of the public to comment on all of the factors mentioned in sec. 4.121

A.1. and 2. at the September 20, 1979 hearing. The reason for this is that there were four applicants. The Minneapolis franchise process is apparently

the first in Minnesota where there was more than one applicant, and is the first Certificate of Confirmation to be contested. The record supports the

conclusion, however, that there was an opportunity for those present at the September 20, 1979 hearing to address technical ability, financial condition,

legal qualification, general character and the plans for construction and operation of each applicant. Some speakers at the hearing did, in fact,

address themselves to these categories in regard to specific applicants. However, because of the fact that there were four applicants, some of the

speakers at the hearing felt that they could only adequately, give general comment,

merits. The question to be resolved in this contested case proceeding, however, is whether or not the Cable Board rules were complied with, not whether the best possible hearing procedure was followed. This record supports the conclusion that a second hearing, after a preliminary designation of a franchisee, would have permitted more complete public input into the decision-making process. The record also supports the conclusion, however, that the applicant and the City did comply with the Cable Board rules in regard to hearing procedure as they presently stand and as reasonably interpreted.

Although an agency may properly interpret its existing rules in a contested case proceeding, when that interpretation proceeds to what is in reality the establishment of a new requirement such as a second public hearing, then the agency must accomplish this through a rulemaking proceeding conducted pursuant to Minn. Stat. 15.0411 through 15.0417 and 15.052. *McKee v. Likens*, 261 N.W. 2d 566 (Minn. 1977) ; *Johnson Brothers Wholesale Liquor Company v. Novak*, 295 N.W.2d 238 (Minn. 1980). Generally, an agency is precluded from a substantial reinterpretation of a rule in an adjudicatory proceeding. *Bell Aerospace Co. v NLRB*, 375 F.2d 485, 494 (1973) aff'd in part, rev'd in part, 416 U.S. 267, 40 L.Ed.2d 134, 94 S.Ct. 1757 (1974). Tie

application of a new procedural hearing requirement. in the course of a con-

case proceeding which had not been previously announced and which was

not therefore followed in a municipal franchising process would not square

with the holding of our Supreme Court in *Monk and Excelsior, Inc. v. Minnesota*

*State Board of Health*, 225 N.W.2d 821, 825 (Minn. 1975), where the court

stated that:

A person dealing with the department is entitled to proper notice of what regulations are being promulgated and are applicable to him. The purpose of the Administrative Procedure Act is to ensure that we have a government of law and not of men. Under that Act, administrative officials are not permitted to act on mere whim, nor their own impulse, however well intentioned they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations.

In its brief, the objectors suggest that aside from the requirements set

out in the Cable Board rules as to procedure, there may be a due process right

under the Fourteenth Amendment which might support a second hearing require-

ment. The objectors have offered no specific legal authority for the proposi-

tion that their interest in the cable franchising process would constitute a

specific liberty or property interest protected by the Fourteenth Amendment.

Generally, a property interest protected to, the due process clause must be

based upon a legitimate claim of entitlement and not just a unilateral expect-

tation. *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed. 548, 561, 92

S.Ct. 2701 (1972). Even if this could be shown, it is not likely that the

procedural process set out in Cable Board rules could be shown to not meet the

constitutional due process standard. Kletschka v.. LeSueur County Board of

Commissioners 277 N.W.2d 404, 405 (Minn. 1979). Additionally, it is usually

held that when a decisionmaker is acting in a legislative capacity, a lesser

standard in regard to due process is required. Barton Contracting Company,

Inc. v. City of Afton, 268 N.W.2d 712, 715-16 (Minn. 1978); see also, City of

New Brighton v. Metropolitan Council, 237 N.W.2d 620, 625 (Minn. 1975).

Although it is concluded above that the Cable Board way well wish to con-

sider an amendment to its rules to permit or require a second hearing in the

case of multiple applicants, it should be emphasized that the factors set out

in 4.121 A.1. and 2. were considered in the course of the Minneapolis fran-

chise process and not only at the September 20, 1979 public hearing. The sec-

tions and forms set out in the Invitation for Applications and accordingly, in

the applications themselves, dealt with the categories cited in the rule. The

preliminary and supplemental reports from CTIC also spoke to these items. The

categories in the rule were addressed at the hearings on September 12, 13 and

20 of 1979. The City Council engaged in debate involving these issues on

September 28, November 21 and December 14 of 1979. If a general conclusion must be made, it is that the City conducted its franchise process in a funda-

mentally fair manner and in compliance with the mini-mum requirements of the

state procedural rules.

Substantive Amendments - The Seven Letters

Testimony was taken at the hearing in regard to three separate sets of factual circumstances which related to the broader issue of whether or not

substantive material amendments were made to Northern's application contrary to one provisions of the Invitation for Applications issued by the City. first, it. was suggested by the objectors that the seven letters which announced changes to Northern's application and which were subsequently incorporated into the application and the franchise ordinance made substantive amendments Secondly, it was argued that certain oral promises as to action to be taken by the applicant subsequent to the enactment- of the franchise ordinance were made prior to the final vote and that these promises in effect constituted substantive amendments of the application. Thirdly, a large amount of testimony was taken in regard to the removal and return of an ATC application from City Hall just prior to the filing of the proposals on July

20, 1979. It was suggested that this incident gave rise to a substantive change in Northern's application.

The language of the Invitation for Applications which governs changes to the proposal subsequent to their filing is set out at Finding of Fact No.. 11.

it provides that no Substantive amendments can be made, that correction of inadvertent errors would be allowed and that the City could request additional information or data in regard to the applications. All of the applicants had input into the language of the Invitation for Applications. Each of the applicants, including objectors Minneapolis Cablesystems and American Cablevision (Ex.. 52, 'Tab 4, 8, 11, 12, 22 and 23) submitted clarifications and inadvertent errors. All of these submissions were judged by the City's consultant and by one City to be in compliance with the Invitation for Applications. The process set up and employed by the City to judge the clarification is and submission of inadvertent errors was uniformly applied as to all of the applicants.

The test employed by Mt. Norte in determining whether or not an applicant was proposing a substantive amendment was to ask whether or not the change or

clarification would have a material effect on his or the City's evaluation of the proposal. This test is consistent with the reason advanced by NO. Norte for originally suggesting a prohibition against substantive amendments, namely to prevent a cycle of bids and counterbids among the applicants in order to gain a competitive advantage. Objectors Minneapolis Cablesystems and American Cablevision state in their brief at page 30 that no prejudice would result to other applicants from allowing changes which do not affect the choice of which applicant receives the franchise.

The objectors have acknowledged that the selection of a cable TV franchise is not a strict competitive bidding process. Had the Legislature intended to, it could have placed this process under the Uniform Municipal Contract Law, Minn. Stat. 471.345. Normally, the components of a competitive bid include definite plans and specifications in the request for bids, a definite offer by the bidder without further negotiation, no material change permitted in the bid once submitted, and the right to reject the bid should it fail to conform to the plans and specifications. Collier Sty of St. Paul, 26 N.W.2d 835, 840 (Minn. 1947).

The objectors suggest, however, that what was intended in selecting a franchisee is a modified competitive bid process. They point to the elements of the process such as minimum requirements, a standard format, a closing

date sealed bids and the right to reject applicants as indicative of a bid

process. It is clear, however, that the process set up in state rules and in

the Invitation for Applications was not a competitive bidding process in the legal sense. The specification of criteria and priorities in the Invitation

is not the same thing as setting out plans and specifications in a bid. The

applicants determined the content of their proposal within the broad criteria

set out by the City. A strict bid process would ignore and not take advantage of the technologically innovative nature of the cable television industry.

Although the word "bid" was used by people involved in the process as well as in the some of the documents, it was not used as a term of art and reference

was more often made to "proposals" or "applications".

The fact that a competitive bidding process was not required to be fol-

lowed by the City does not mean that the City was free to conduct the process

in any manner it deemed appropriate or without review. The proper standard of

review is set out in *Griswold v. Ramsey County*, 65 N.W.2d, 647, 652 (1954) ,

wherein the court stated as follows:

Clearly, whatever method is adopted in the letting of public contracts, such method may not, contrary to the public welfare, be pursued in an unreasonable, arbitrary, or capricious manner since the taxpayers entitled to rely for their protection upon the safeguards which are innerent in whatever method is employed.

The above-cited case also makes it plain that a municipality is not required

to employ a competitive bidding procedure unless a statute or its city charter

specifically so requires. See also, R.E. Short Company v. City of Minneapolis

115, 269 N.W.2d 331, 342 n. 11 (1978).

The objectors have suggested that substantive amendments occurred to the

Northern application in the revision of its income statement., in the redesign-

nation of channels 19 and 21, in the addition of leased access to channel 12,

in the deletion of charges for channel time or playback on the public access

channel, and in the addition of radio station KUOM to the proposal. 'The

changes as to leased access and charges were essentially made in order to com-

ply with Cable Board rules. Only one of these changes can reasonably be said

to have possibly affected the City's consideration of Northern's proposal and,

therefore, resulted in prejudice to other applicants; that is the amendment

permitted to Northern's financial statements as set out in the December 13,

1979 letter. (Ex. 52, Tab 3)

CTIC's supplemental report had indicated that Northern might be in a posi-

tion to make a case for rate increases based upon the condition of the finan-

cial statements which it had submitted. The income statement showed an

average loss of \$247,000 per year over a 10-year period. This was amended to

show an average net income of \$586,000 per year over the same time period.

this change was announced orally to the Committee on Ways and Means/Budget on

September 26, 1979, by David Korte. Korte also advised the Committee that

although Northern was ranked last in CrIC's supplemental report dated Septem-

ber 24, 1979, this change would tie Northern with Warner in second place with

American Cablevision and Minneapolis Cablesystems being tied for first. Sub-

scriber rate stability was one of six areas ranked by CTIC. It was not

intended that each area ranked was to be viewed as equally important or that these were the only areas which the City ought to consider.

Mr. Korte's testimony was that this amendments did not result in any material change in his or the City's evaluation of the Northern proposal. Given the- necessarily speculative nature of financial projections, Mr. Korte believed that a change in any of the financial projections would not be significant enough to create a competitive advantage as to the ultimate choice of a franchisee. His view is supported by the fact that none of the three other applicants protested the amendment to Northern's pro formas at the time it was announced in September of 1979. In the opinion of the Hearing Examiner, however, it cannot reasonably be concluded that the change to Northern's financial statements is not substantive within the language of the Invitation for Applications. It also must be concluded that this amendment affected CTIC's evaluation of Northern's application. Mr. Korte, in fact, improved Northern's ranking in his supplemental report as result of the change. Although it would likely be impossible to prove that one factor would affect the outcome, it is certainly possible that this improvement in Northern's ranking which was announced at the Committee meeting at which the first vote took place in regard to the cable franchise, may have affected the evaluation by the City Council in a material way. That initial vote by the Committee was in favor of Northern Cablevision.

The significance of this conclusion in regard to a substantive amendment by the Hearing Examiner is simply that, had he been in the place of the City's consultant or the City staff or the City Council, this amendment would not have been permitted since it would not appear to be consistent with the language of the Invitation for Applications or with the test employed by Mr. Korte in making judgments on clarifications; and inadvertent errors. The Cable Board rules, however, do not reach to whether or not a municipality's judgment as to changes submitted was perfect. 'The rules only structure the

process. It is specifically concluded that the franchise ordinance and the franchise process did not violate 4 MCAR 4.111 C.2. which requires that the City list in its Invitation for Applications the criteria and priorities developed to review the applications. The record supports the conclusion that the City complied with this rule. Likewise, the City complied with 4 MCAR sec. 4.111 C.3.a. which requires a closing date for the submission of applications to be set out in the Invitation for Applications.

It is respectfully recommended to the Board that it review its preliminary determination of jurisdiction over the issue of whether or not substantive amendments were made to Northern's application as set out in the Board's order dated July 15, 1980. There can be no doubt that the Board has jurisdiction and authority to ensure compliance with the two above cited rules. The Board has, however, not promulgated a rule which would give a municipality guidance as to the proper procedure to be followed and the criteria to be considered in permitting changes to an application subsequent to its filing. The Board must announce such policy in rule and cannot rely on general statutory language or legislative history since they do not give notice to participants in the process of the procedure to be followed. (See, Yank and Johnson Brothers cases, supra.) Neither the rule in regard to priorities and criteria or in regard to

a closing date provides a logical connection to the regulation of the  
proce-  
duce to be followed for amendments of the application.

The jurisdiction for making a decision as to amendments should  
properly be  
with the City. There is no need for justification for second-guessing  
the  
franchisee and the franchisee on each change made from the application  
to the  
final franchise ordinance. Obviously, since a 15-year contract  
is being  
entered into, there is a need to clarify and amend the proposal  
during the  
franchise process. These decisions are not of such magnitude nor so  
technical  
as to justify a second review by the State Cable Board. Since the  
City and  
its consultant constructed the criteria for judging amendments, they  
should  
properly have jurisdiction to make those judgments in the best  
interests of  
the City and its citizens. Again, this is not to say that the City's  
behavior  
is not subject to review. Should the City conduct this process in  
a manner  
which is unreasonable, arbitrary or capricious, it is then subject to  
a court  
review, the same as any other public contract. Should the State Cable  
Board  
promulgate a rule giving guidance to and asserting regulation over the  
amend-  
ment procedure, municipalities would then be subject to such  
review. The  
record herein supports the conclusion that the City acted in a  
responsible and  
reasonable manner in making judgments on whether or not the changes  
made to  
the applications were proper. Changes which benefited the City and  
the cable  
subscribers were accepted from all applicants. The record does not  
disclose  
any complaint as to the changes on behalf of an applicant until after  
the vote  
on the final franchise.

Substantive Amendments - Oral Statements

it second set of facts which was considered under the general  
issue of  
whether or not substantive amendments were permitted to Northern's  
application  
subsequent to its filing concerned several meetings held in late  
November and  
early December of 1979. The objectors contend that Northern made  
explicit  
oral assurances to a City Council member and to community members of  
specific  
changes in its application to be accomplished after the final award  
of the

franchise. The Findings of Fact at Nos. 47-54 set out the events that occurred. These Findings in regard to the meetings and in regard to the events concerning the missing application are based upon an evaluation of the demeanor of the witnesses, a consideration of the potential bias or motivation of the witnesses who testified, and with attention given to the specificity or the general nature of the testimony, given. A comparison was made of the recollections of the various witnesses in regard to the same event and of the oral testimony with written exhibits. All the testimony was weighed and the Findings of Fact represent a determination as to which testimony was most credible and what facts were proved by a preponderance of the evidence.

The objectors contended that Northern officials explicitly promised future substantive changes to its proposal in order to obtain and retain support of City Council members and influential members of the public. (Brief of Minneapolis Cablesystems and American Cablevision, p. 43) They claim that this is tantamount to a written amendment of the application before the final franchise vote and is, therefore, impermissible. As the Findings of Fact indicate, the record does not support the objectors' allegations. Tie statements

statements about changes which could be made subsequent to the passage of the franchise ordinance. There were no promises of a specific modification of any portion of the Northern proposal. Evidence in regard to the November 29, 1979 meeting makes it plain that the Northern officials were aware that their proposal could not be changed and were not making promises except in general terms such as indicating that Northern was committed to making access work and that it would consider changes in regard to public - access after the final award of the franchise. The testimony of participants in the meetings, which was often prefaced with "my understanding . . ." or "my impression (Vt. 1911, 3031) as opposed to a specific recall of conversation, makes it clear that the statements were general in nature.

Even had specific promises had been made to members of the public, it is not clear what legal effect this would have. In the case of Jim Malec and Sallie Fischer, who were consistent in their opposition to Northern's application, it cannot logically be argued that Northern made specific promises to gain their support. The meetings with Fischer and Malec occurred subsequent to November 21, 1979, which was the date on which the City Council voted to award the franchise to Northern Cablevision instead of Minneapolis Cable-systems. Although Northern requested the support of Malec and Fischer in late November and early December of 1979, it was not in the position of having to promise them anything in order to obtain their support with a view toward influencing the City Council vote. There is no evidence to indicate that Fischer or Malec repeated any of the statements by Northern officials to City Council members. It is unlikely that they would have done so given their support for Minneapolis Cablesystems.

In order to have legal relevance, specific oral promises by the applicant would have had to be directed to the decisionmaker; namely, a member of the City Council. The most that can be concluded from the evidence in this record is that Alderman Corrao believed that Northern was disposed to consider changes to its access package subsequent to the final vote on the franchise in

light of the objections which had been made. 'There seems to have been no doubt in the mind of any of the participants in the meetings that these changes would require the consent of both the franchisor and the franchisee and subsequent City Council action. There is no direct evidence in the record of Northern officials making specific promises in regard to its offering to Alderman Corrao before December 5, 1979. It is clear that such promises need not have been made in order to gain the support of Alderman Corrao since she supported Northern from September 28, 1979 through the final vote on December 14, 1979. 'Mere is, of course, nothing improper or violative of Board rules for a City Council member to promise to pursue her constituents' concerns through the City Council.

The absence of specific promises is supported by the fact that no one left any of these meetings thinking that they had won any enforceable concessions in regard to changes which might be made in the Northern proposal. The objections point to the January 15, 1980 letter from Northern to the City as evidence of the tangible results of the oral promises made in late November and early December of 1979. In that letter, Northern states that it would be

Agreable to deleting an equipment training fee and to dropping two of the religious channels from its proposal. The letter is more probative for what

it does not mention, however. There is no mention of any changes in regard to

the topics which the meeting participants testified were important topics of

conversation, such as live programming, limited access and broadcast hours,

inadequate, facilities and staffing and fees other than the training fee.

#### Substantive Amendments - The Missing Application

The largest amount of testimony taken in this contested case proceeding related to the third set of facts considered Under the general issue of whether or not" substantive changes occurred in Northern's application. The events which comprise the removal and return of an ATC application from City Hall prior to the filing deadline are set out in the Findings of Fact at Nos. 13-30. The objectors alleged that a change was made in Northern's application as a result of having viewed the ATC application before the filing deadline, thereby enabling Northern to gain a competitive advantage.

Three copies of Northern's proposal were introduced, including a copy which had been kept by the printer in Florida, the original copy which had been filed with the City Clerk on July 20, 1979, and a certified copy of the original also filed with the City Clerk on July 20, 1979. These exhibits received the most careful scrutiny by the parties to determine what changes had been made subsequent to the proposal arriving in Minneapolis.

This resulted in a stipulation setting out these changes. (Ex. 180) The testimony of 14 witnesses and thorough cross-examination resulted in a careful exploration of the events surrounding this occurrence. The applicant has shown by a preponderance of the evidence that no substantive change occurred to its application as a result of the removal of the ATC proposal from City Hall. Most of the changes made to Northern's proposal after it arrived in Minneapolis were typo-

graphical in nature. The most significant change which the objectors could point to was a change in the cover letter which added the specific number of movie options and gave their names.

The facts demonstrate that the opening of the ATC proposal before its filing was a mistake which was occasioned by the misdelivery, of the ATC bids by ATC's agent. It must be concluded that Tom Alexander exercised poor judgment in removing the ATC proposal from City Hall. Other Northern representatives took immediate steps to rectify the situation, however, by having the proposal returned when the situation was presented to them. The ATC proposal was missing from City Hall for a period of less than two hours.

In its brief, Minneapolis Cablesystems and American Cablevision now state that whether or not there were any changes to Northern's application is irrelevant. They allege that the facts of the situation constitute criminal theft within the meaning of Minn. Stat. 609.52, subd. 2, and that because of this, the Cable Board is precluded from confirming this franchise because of Minn. Stat. 238.09, subd. 8. It cannot be too strongly stated that a determination of criminal theft in regard to any individual is a matter which our system of justice commits to courts of law. It is not a matter which is committed to administrative tribunals which intentionally do not employ strict standards as to the use of hearsay and lack other due process guarantees found

in the criminal process. It is certainly not clear that sufficient competent evidence was presented in this proceeding which would justify a conviction for criminal theft. At any rate, there does not appear to be any reasonable basis to impute Alexander's actions to Northern as an applicant in this franchise process, especially given the actions taken by Northern officials to return the application.

The record does not support the allegations contained in the objectors' brief that the City through Carolyn Anderson and Alderman Rockenstein somehow attempted to cover up the removal of the application. The objectors suggest that Alderman Rockenstein and perhaps Carolyn Anderson favored Northern and that this was the motive for their actions. The evidence indicates, however, that Alderman Rockenstein had no preference as to who should receive the franchise until late September of 1979. (Tr. 3471) The same is true as to Carolyn Anderson. (Tr. 1521)

The evidence shows that both ATC and Minneapolis Cablesystems had substantially all of the facts concerning this incident prior to December 14, 1979. Although it appears that Carolyn Anderson did not relate the fact that the application had left the premises of City Hall to Scott Greenhill, Minneapolis Cablesystems' lobbyists, Wayne Popham and William McGrann, were aware of this fact prior to the final vote on the franchise ordinance. Although the objecting competitors claim that they took no action because of a lack of information, the record supports the conclusion that they simply did not regard the incident as significant enough to pursue. They made no appeal to the City as a result of the incident or initially to the MCAR until their later intervention in this contested case proceeding.

Minn. Stat. 238.09, subd. 8, reads in part that "no confirmation under this section shall preclude invalidation of any franchise illegally obtained". The objectors suggest that this provides authority to the Cable Board to not certify a franchise if it determines that the applicant has violated a criminal statute. As has been indicated, the misguided conduct of

one employee does not necessarily reflect upon the applicant's character.

The plain meaning of this statutory provision, however, is that once a certificate of confirmation has been issued, it may be invalidated at a later time upon a determination of an illegality in the process. Given the legislative history, this provision would seem to be pointed toward the discovery of bribery or extortion in the awarding of a franchise. This would seem to be the sense of the phrase "any franchise illegally obtained". It cannot be seriously contended that the removal of the application, even if it constituted theft, resulted in Northern obtaining the franchise.

Northern has suggested that certain legal defenses such as laches, waiver or untimely objection should apply against the objecting competitors since they have not been diligent in asserting their rights. This proceeding, however, involves a determination by the Cable Board as to compliance with state rules and is not concerned just with the assertion of rights by individual parties.

It must be concluded that no substantive change to Northern's application occurred as a result of the removal of the Alt application. It is also clear that there was no violation of Cable Board rules governing the setting of

criteria and priorities in the invitation for applications or the setting the closing date as a result of this incident. Although the Cable Board has authority to scrutinize the process for compliance with those particular rules, no violation appears as a result of this factual occurrence.

Compliance With The City Charter

The final issue argued in this contested case proceeding is whether or not

the cable communications franchise ordinance was enacted in compliance with

the Minneapolis City Charter. Chapter 4 of the Minneapolis City Charter con-

tains the following section:

Section 9. Ordinances and Resolutions--how passed. All ordinances and resolutions of the City Council shall be passed by an affirmative vote of a majority of all the members of the City Council, by ayes and nays which shall be entered in the records of the Council. No ordinance shall be passed at the same session or at any session occurring less than one (1) week after the session at which it shall have had its first (1st) reading, of the Council at which it shall have been presented except by the unanimous consent of all the members present which shall be noted in the record, but this shall not preclude the passage of ordinances reported by any committee of the Council to whom the subject of such ordinance shall have been referred at any previous session. When approved, they shall be recorded by the City Clerk in books provided for that purpose, and before they shall be in force they shall be published in the official paper of the city. (Ex. 59)

Essentially, the above-quoted provision requires that an ordinance must re-

ceive its first reading at least one week before its final passage.

As the Findings of Fact indicate, the drafting of the franchise ordinance

began early in 1979. The June 8, 1979 draft (Ex. 18) set out the regulatory

framework and contained blanks for the name of the winning cable company and

for the insertion of portions of its proposal. Subsequent to the designation

of Minneapolis Cablesystems as the franchisee by a resolution on September 28,

1979, notice of intent to introduce a cable communications ordinance was given

by seven aldermen on October 12, 1979. Ai ordinance received its first

reading on October 26, 1979. (Exs. 42, 43) This ordinance contained the same

language as the June 8, 1979 draft, except that the name of Minneapolis Cable-

systems had been inserted. The pertinent parts of the proposal of Minneapolis

Cablesystems were not inserted into the ordinance as it appeared on October

26, 1979. On November 21, 1979, a motion was made to substitute the name of

Northern Cablevision for that of Minneapolis Cablesystems and that motion

passed. On December 14, 1979, the final ordinance which named Northern Cable-

vision as the franchisee and incorporated pertinent portions of its proposal

was adopted. (Ex. 53)

Northern and the City contend that the ordinance passed on December 14,

1979 received its first reading on October 26, 1979 and, therefore, complies

with the City Charter. They contend that the title and subject matter of the

ordinance in; a cable communications franchise and that the amendment of the

ordinance by substituting Northern Cablevision as the franchisee was per-

missible under the City Charter and Minnesota case law. The objectors contend

that the substitution of a new franchisee and a new proposal constitutes so

substantial a change in the ordinance that the ordinance passed on December 14

cannot be said to be the same as that which received a reading on October 26, 1979.

In the State of Minnesota, a municipal ordinance is generally presumed to

be valid. In a Town of Burnsville v. City of Bloomington, 128 N.W.2d 97, 103

1964) , the court stated the rule as follows:

In the absence of affirmative evidence to the contrary, it will be presumed that an ordinance is regularly and legally enacted. Ordinances, like statutes, are presumed to be valid and are not to be set aside by the courts unless their invalidity is clearly established by the evidence.

A similar presumption is contained in the Minneapolis City Charter itself at

Section 10 of Chapter 4:

Section 10. Copy of Record of Ordinance--Prima Facie Evidence--Compilation of Ordinances--judicial Notice. A copy of the record of any ordinance or resolution heretofore passed and recorded or that may hereafter be passed, certified by the Clerk and verified by the seal of the city, any copy thereof published in the official paper of the city, or printed in the books containing the official proceedings of the City Council, or published in any compilation of ordinances made under direction of the City Council, shall be prima facie evidence of the contents of such ordinances and of the regularity and legality, of all proceedings relating to the adoption and approval thereof, and shall be admitted as evidence in any Court in this State without further proof.

In all actions, prosecutions and proceedings of every kind before the Municipal Court of Hennepin County, such Court shall

take judicial notice of all ordinances of the said city and it shall not be necessary to plead or prove such ordinances in said Municipal Court. (As amended 3-29-68). (a<. 59)

The burden of demonstrating an irregularity in the adoption of the ordinance is then, upon the objectors. (See also, City of Duluth v. Krupp, 46 Minn.

435, 49 N.W. 235, 236 (1891))

A consideration of the titles attached to various drafts of the ordinance

in the course of the franchise process may shed some light upon the alderman's

intent or upon the question of what notice was given as to the subject matter

of the ordinance at different points in the process. The title of the June 8,

1979 draft was "Cable Communication Franchise Ordinance for the City of Minne-

apolis, Minnesota". (Ex. 18) The October 12 notice of intent to introduce an

ordinance referred to "an ordinance regulating cable communications and

granting a franchise". (Ex. 41) The ordinance read on October 26 was en-

titled, "An Ordinance Granting Franchise to Minneapolis Cablesystems, Limited,

its successors or assigns, to own and operate and maintain a cable television

system in Minneapolis, Minnesota, . . .". The November 21 motion to substi-

tute referred to a "cable communications ordinance" (Ex. 48) and on that date,

the Ways and Means/Budget Committee was discharged from consideration from "an

ordinance granting a franchise for a cable television system'. (Ex. 47) The

June 8, the October 26 and the December 14 drafts all recited at Article 1,

Section I that "this ordinance shall be known and any be cited as the 'Minne-

apolis Cable Communications Franchise.

It appears that the notice that was generally being given through the use

of a title was that the subject matter of the ordinance was a cable communica-

tions franchise. It is clear, however, that even had one title been used

throughout the process, this is not determinative of compliance with the city Charter.

lie objectors assert that there were substantial changes between the ordi-

nance naming Minneapolis Cablesystems and that naming Northern, and that if a

substantial change does occur to an ordinance between the first reading and

the final passage, that ordinance is invalid. The objectors cite the cases of

Gillman v. Newark, 73 N.J. Super. 562, 180 A.2d 365, 369 (1962), Anne Arundel

County v. Moushabek 306 A.2d 517, 522 (Md. App. 1973) , and Tennent v. City of

Seattle, 83 Wash. 108, 145 P. 83 (1914) , as authority for this legal proposition. As indicated at Finding of Fact No. 30, the proposals of Northern and

Minneapolis Cablesystems contain differences as to rate schedules, as to the

number and utilization of channels, as to technology and as to other matters.

As the City's analysis in its brief points out, however-, the Gillman and

Moushabek cases both arose in municipal subdivisions governed by a statutory

or county charter provision which specifically prohibited substantial changes. No such prohibition appears in the Minneapolis City Charter. In the

Tennent case the Seattle City Charter contained a provision that an ordinance

could not be passed at the meeting in which it was introduced. The Court

stated in that case:

We do not, of course, intend to deny the power of the council to amend an ordinance properly introduced, and pass it at the meeting at which it is amended. This can be done where the

amendment is in matter of form, where the addition of new matter does not alter the effect and scope of the ordinance; but it does not permit the substitution of an entirely new and different ordinance for the one originally introduced, nor does it sanction the gross attempt at subterfuge practiced in this instance. 145 P. at 85.

Although the City suggests that a substantial amendment can be made in the

absence of a statutory or charter provision to the contrary, the first reading requirement contained in the City Charter would be easily defeated and

rendered meaningless if the ordinance which received a first reading was com-

pletely different than that which was finally passed. The same fundamental

"substantial change" analysis is often made in terms of whether or not an

amendment made between readings of a bill or an ordinance are germane to the

text of the bill or ordinance. (I Sutherland, Statutory Construction, 10.04, 4th Ed.) Our Supreme Court in Sverkerson v. City of Minneapolis, 204

Minn. 333, 283 N.W. 555, 558 (1939), defined germane as having a "sufficiently

close connection in subject matter to sustain the amendment". Other courts

have defined germane as "the tendency of the provision to promote the object

and purpose of the act to which it belongs". Giebelhausen v. Daley, 407 Ill.

25, 95 N.E.2d 84, 94-95 (1950) In Biltmore Hotel Court v. City of Berry Hill,

216 Tenn. 62, 390 S.W.2d 223 (1965), the court stated that:

What constitutes a material or substantial change in an ordinance between the date of its first and final enactment is de-

pendent upon the circumstances of each case. If nothing new  
is added to it, or if what is taken from it does not render it  
mis- leading in its fundamental content when passed, such  
alteration will not be so material or substantial as to characterize  
the ordinance in its final order a different instrument from that  
introduced. . . . 390 S.W.2d at 226 (Quoting from Farnsley v  
Henderson, 240 S.W.2d 82, 84 (Ky.)

the Tennessee court later concluded in Metropolitan Government of Nashville Mitchell, 539 S.W.2d 20, 22 (Tenn. 1976) that substantial and material changes

may be mid,-? in particular provisions of an ordinance between the first and

final readings so long as "such changes are germane to and within the scope of

the original subject of the ordinance as expressed in its title or, if it has

no title, in the ordinance as it appeared at the time of its first reading and

passage".

Ili analysis of the policy underlying the first- reading requirement is

instructive in determining whether or not a substantial change occurred or

whether the amendment of the ordinance was germane. The Minnesota Supreme

Court has interpreted the first reading requirement in the Minneapolis Charter

in the case of Minnesota v. Priester, 43 Minn. 373, 45 N.W. 712 (1890) where

the Court stated that:

It is to prevent over-hasty passage of ordinances, and to secure to the aldermen who my desire to consider a proposed ordinance before Laing called on Lo vote upon its passage an opportunity to examine it. In other words, it is to prevent an ordinance being introduced and forced to vote on its passage without giving the members of the council time to be prepared to vote intelligently. 45 N.W. 712.

See also, 5 McQuillin, Municipal Corporations, sec. 16.30 (3rd Ed. 1969).

Alderman Kaplan testified in this proceeding that the purpose of the require-

ment was to give an alderman notice of a proposed change, to allow him to con-

tact people in his ward and to generate opinion, and to keep a controversial

matter from passing without notice. These policies were not frustrated by the

manner of passage of the Minneapolis Cable Communications ordinance. The

first reading requirement is essentially a notice requirement and there is no

doubt that all of the interested parties had notice of the subject matter of

the ordinance before and after amendment. All of the applicants' proposals had been available to the City Council and to the public since July of 1980.

Alderman Kaplan testified that he had personally reviewed all of the pro-

posals. (Tr. 2242) The series of meetings described in the Findings of Fact

which occurred between members of the public, officials of Northern and City

Council members in late November and early December of 1979, attest to the

fact that involved members of the public had actual notice of the contents of

the ordinance and of Northern's proposal in advance of the final vote on

December 14, 1979.

All participants in the process understood since mid-1979 that the winning

applicant's proposal was to be inserted in the final ordinance. The Council members were informed about the franchise issue; had a chance to study the

matter and had certainly had contact with their constituents. It cannot be

argued that the cable communications ordinance was passed without anyone

having notice of what was indeed a controversial issue. It is concluded,

therefore, that the amendment to the cable communications ordinance to substi-

tute a different applicant and a portion of its proposal is not so substantial

as to violate the first reading requirement contained in the City Charter.

'The amendment is germane in the sense of not changing the original purpose of

the ordinance; neither does it render the ordinance misleading in its funda-

mental content. The amendment was within the scope of the original subject of

the ordinance which related to the award of a cable communications franchise to one of four applicants.

The objectors have also asserted in their brief that the rate ordinance received no first reading and is, therefore, invalid. The rate ordinance was assigned a separate ordinance number by the City Clerk subsequent to the passage of the main franchise ordinance on December 14, 1979. The rate ordinance

attached to the main franchise ordinance as an addendum on both October 26, 1979 and December 14 1979. It would appear that the

City Council voted upon the addendum to the Minneapolis cable communications franchise ordinance when it voted on the main ordinance on December 14, 1979. The objectors have riot sustained their burden as to the invalidity of the ordinance, nor have they overcome the presumption of validity of the franchise ordinance itself.

In its order of July 15, 1980, the Cable Board asserted jurisdiction over the above-discussed issue by reference to 4 MCAR 4.111 G., which provides that, "The franchise shall be granted by ordinance . . .". A reasonable construction of this rule is that the Cable Board, in the course of its rule-making function, determined that an ordinance, as opposed to a contract, is the proper form for awarding a cable franchise. The objectors

have suggested that a review for compliance with the City Charter is "implicit" in this rule or in the act of certification. The Board is, however,

obligated to announce the nature and scope of its review. (See, Minn. Stat. sec 238.05, subd. 2(a) and (b) Such a policy of review of an ordinance for compliance with a City Charter would be a rule within the meaning of Minn. Stat. sec. 15.0411, subd. 3, since it would be a 'agency statement of general applicability and future

effect, made to implement or make specific the law enforced or administered. (See, Monk and Excelsior, Inc. v. State Board of Health, 225

N.W.2d 821 (Minn. 1975) It is clear that the courts do have jurisdiction over the question of whether or not a municipality's ordinance complies with its City Charter. Almquist v. City of Biwabik, 28 N.W.2d 744 , 745 (1947) The

issue is one which is within the expertise of a court of law.  
It is also an issue which might well be raised in the absence of any other challenge to the award of a cable franchise. It is therefore respectfully recommended that the Board reconsider its assertion of jurisdiction in regard to this issue.

Summary

The legislative charge given to the Cable Board at Minn. Stat. 238.01 is

lengthy and diverse. The Legislature stated in part that:

While said operations must be subject to state oversight, they also must be protected from undue restraint and regulation so as to assure development of cable systems with optimum technology and maximum penetration in this state as rapidly as economically and technically feasible;

The Legislature stated that the Board was to develop a cable communica-

tions policy and "to promote the rapid development of the cable communications

industry responsive to community and public interest Accordingly,

authority was given to the Board:

to review the suitability to [sic] practice for franchising to set for cable communication systems and franchise practices . . .

It is clear that the statutory duties of the Cable Board do not include a de novo review of the award of the cable communications franchises by municipalities. The legislative intent appears to be that the Board set the parameters of the franchise process and to ensure that those procedural requirements are complied with through its authority to deny a certificate of confirmation. It was not intended that the Board redetermine the question of which applicant should receive a franchise or redetermine the municipalities' evaluation of the individual applications. Although the Board is mandated to require that a municipality list its criteria and priorities, it is not empowered, as was urged by the objecting competitors, to redetermine whether or

nor an applicant's affirmative action plan or its demonstrated experience was adequate or proper or whether the municipality's investigation into those areas was sufficiently vigorous.

'There commination of the Hearing Examiner, based upon a careful consideration of this lengthy and detailed record, is that the Cable Board issue a Certificate of Confirmation to the applicant subsequent to amendment of the Minneapolis Franchise Ordinance to comply with the four rules violations which were cited in the Conclusions. None of these violations constitute a serious breach of the Chapter 8 standards. In some cases, the ordinance as it stands contains requirements comparable to the requirement of the state rules such as the inclusion in the ordinance of public access operating rules and the requirement of certain specified equipment for public access use. The violations can accurately be termed technical violations. They are, nonetheless, violations of legislative rules which the Board must enforce. Because it regulates an industry with rapidly developing technology, the Board has a greater than normal duty to examine its rules to ensure that needed amendments are made.

Neither the applicant nor the City violated the rules of the Cable Board bad faith. There was certainly no "severe attempt to undermine the rules of the Minnesota Cable Communications Board". (COM Brief, p. 120 Tie Findings of Fact indicate that the City staff %,as in continual contact with the Cable Board staff. the, City requested review of various revisions of the Cable ordinance and implemented the suggestions of the Cable Board staff to bring the ordinance into compliance with state rules. The cable Board staff did not ascertain the four violations found herein during 1979; but rather during its review of the ordinance subsequent to passage in 1980. The appli- cant has expressed in this record a willingness to seek an amendment of the ordinance upon a determination that it violates Cable Board rules. The Cable board has authority not only to issue an order confirming or denying a certificate of confirmation, but also to issue "any necessary and appropriate order ". (See, Minn. Stat. 238.06, subd. 1) The Board would, of course, have to specifically approve the language of the amendments after their passage. (See, 4 MCAR 4.136) The Board's insistence upon strict compliance with its rules will set an appropriate regulatory precedent.

lative history leading to the creation of the Cable Board and the enactment of Minn. Stat. S 238.01-238.17. It is clear that the legislature was concerned that public hearings be a part of the municipal franchise process and that competition should be encouraged among cable companies to the benefit of the municipality. those goals were achieved in the Minneapolis franchise process. The Findings of Fact demonstrate the exhaustive nature of that process stretching over the entire calendar year of 1979 and including numerous committee and council meetings, intense debate among the public and at the City Council, several public hearings and substantial public input into the final decision by the City Council. Although the hearing process might well be improved by the addition of a public hearing solely for the purpose of addressing the merits of the application of a preliminary selection of the franchisee, the Minneapolis process complied with existing Cable Board rules and was not unfair or arbitrary. Aside from the four technical violations of rules noted herein and despite intense scrutiny in the course of this contested case proceeding, no violations have been uncovered or allegations substantiated which should preclude the applicant from obtaining a certificate of confirmation. The applicant has shown by a preponderance of the evidence that, upon amendment of the Minneapolis ordinance to conform with the four rule subsections indicated, it is entitled to a certificate of confirmation.

G.A.B.