

William P. O'Brien
Civil Division Director



Research Ordinance Commission INTEROFFICE MEMO

Brian K. Newman
Director

To: Councilman Jim King, District 10

From: Bill Warner, Staff Attorney
Research Ordinance Commission
Jefferson County Attorney's Office

Date: October 31, 2005

About: Insight Communications, Inc.
Sale or merger

You have asked for information about the sale or merger of Insight Communications Company, Inc. [hereafter, Insight Communications"]. We are pleased to provide the following:

Executive Summary

1. Our research indicates that the series of transactions involving Insight Communications, Insight Acquisition Corporation [hereafter, "Insight Acquisition"], and the Carlyle Group [hereafter "Carlyle"] which involved Insight Communications' "going private" clearly involve a "sale, merger, or transfer" of Insight Communications such as to trigger the application of Metro Government ordinances requiring Insight Communications to seek Metro Government approval of the corporate entity which evolved from these transaction[s].
2. From the information presently available to us concerning the transactions at issue, we believe that it should be presumed that (a) Insight Acquisition, or Carlyle, or both, have obtained an equity position in Insight Communications together with a likely change of control, or (b) that Carlyle's \$600 million payout in connection with the transactions has created a debt load for Insight Communications which could affect that company's level of service. Either eventuality requires Metro Government review and approval under its ordinances.
3. Since Insight Communications has elected not to file an FCC Form 394, there is no time limitation for approval or comment applicable to Metro Government under 47 C.F.R. § 76.502, or under any other statute or regulation.

4. Under the Metro Code of Ordinances, and existing case law, the information which Metro Government may obtain from Insight Communications concerning the transactions at issue is limited to (a) organizational and financial information to aid in a determination of the financial stability of the successor entity, and (b) operational

information relevant to a determination of the surviving entity's ability to perform the terms of its Metro Louisville CATV franchise for its remaining term.

5. Except for certain First Amendment-sensitive issues, there is no legal limitation on the issues Metro Government may raise with Insight Communications in the course of Metro Government's reaching a determination as to whether or not to approve the surviving entity to continue the franchise.

6. As Bill O'Brien advised the caucus meeting October 27, we believe that the Administration has the primary responsibility for dealing with Insight Communications concerning these issues, but the Metro Council has oversight authority as well as authority under LMCO 116.37(G) to terminate Insight Communication's franchise. Mr. O'Brien also recommended that the Council work with the Mayor's Office on these issues.

7. While Insight Communications, as noted, has made no formal request for approval of the transactions at issue¹, we've located, and attached to this memorandum, a copy of an article, "Cable Franchise Transfer Requests: A Practical Guide to Community Responses," by Jon Kreucher, which we believe includes an excellent roadmap for designing and carrying out a programmed Metro Government response.²

Analysis of the transactions by and between the current franchisee, Insight Communications Company, Inc., Insight Acquisition Corporation, and the Carlyle Group.

The series of transactions was for the purpose of enabling the primary corporation, and the Metro cable franchisee, Insight Communications to "go private", that is by buying out all the public shareholders, leaving the remaining entity in private hands. This was accomplished by consummating a *merger* agreement [emphasis ours], under the terms of which Insight Communications was essentially sold to Insight Acquisition which then was merged back into Insight Communications.³ Following the

¹ Insight Communications has in fact taken the position that no approvals are needed; see letter dated October 6, 2005 from Insight's counsel, Laurence J. Zielke to Asst. County Attorney William T. Warner, a copy of which is attached to this memorandum.

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³ International Municipal Lawyer's Association e-News, June 22, 2005

3

merger, Insight Communications is the surviving entity, becoming a “.... *privately-held company owned by [The] Carlyle [Group] and the Continuing Investors*.”⁴ [emphasis ours] Financing for the shareholder buyout was provided by the Carlyle Group, a Washington D.C. area investment consortium.⁵

The press release indicates that, prior to the merger, Insight insiders [“continuing investors”] owned 14% of the equity and “62% of the aggregate voting power” of Insight Communications. SEC form 13D, Report of Acquisition by Large Shareholders, filed by Insight Communications March 6, 2005, contains a statement to the effect that “ it is *contemplated* that Insight would issue a *new* class of supervoting stock to [insiders and continuing investors] to ensure that they effectively retain control of Insight ...” [emphasis ours]⁶

The 13D filing does state, at page 2, Exhibit 7.03, that the merger transaction would be structured so as not to constitute a “transfer of control” under described partnership and credit agreements.⁷ However, exhibit 7.04, page 2 of the 13D qualifies that commitment, such as it is, to the point of virtual extinction where it states:

“Statements in this release represent the parties’ current intentions, plans, expectations, and beliefs, and involve risks and uncertainties that could cause actual events *to differ materially from the events described in this release*” [emphasis ours]

Legal status of Insight’s current franchise[s]

Insight is operating under three separate ordinances: (1) Ordinance 32, Series 1994, adopted December 20, 1994 by the Jefferson County Fiscal Court [hereafter referred to as the “County Ordinance”] which granted Insight’s predecessor company a fifteen-year CATV franchise for all unincorporated areas in Jefferson County; (2) Ordinance 76, Series 1998, effective May 12, 1998 in the former City of Louisville [hereafter referred to as the “City Ordinance”]; and (3) Sections 116.01 - 116.51 and 116.99 of the Louisville/Jefferson County Metro Government Code of Ordinances [“LMCO”] effective January 6, 2003 upon merger of the former City of Louisville and

¹ See Insight Press Release dated July 29, 2005 [copy attached].

⁴ See Insight Communications Proxy Statement, Form 14A, filed August 19, 2005, pages 8-9. The “continuing investors” are the founders of Insight, together with their relatives and affiliated trusts all of who will be co-owners of the surviving corporation; see Proxy Statement, pages 8 and 25-26. **Note:** All of the Insight SEC filings which are referred to in this memorandum can be found at Insight’s web page: **www.insight-com.com > Investor Relations > SEC Filings**

⁵ Carlyle is to contribute \$600+ million toward the purchase of stock owned by public shareholders; see Proxy Statement, page 27.

⁶ See Form 13D, page 9.

⁷ There is no mention in this representation of any of Insight’s franchise agreements.

Jefferson County.⁸

Government approvals involved

Federal

Insight has taken the position that FCC approval is not required for the described transactions involving Insight Communications, Insight Acquisition, and the Carlyle Group. Accordingly, Insight has not filed with the FCC, nor served Metro Government with FCC Form 394 required by 47 CFR § 76.502 [copy attached] which requires notice to a local franchise authority; as well as that the local authority “act upon” an application - that is, exercise its contact rights to question or approve a sale, assignment, or transfer of control - within 120 days of service of the Form 394 on the authority.⁹

Whether or not Insight chooses to seek federal approval of the transactions at issue, or not, is irrelevant to the plain requirements of the Metro ordinances cited above. Federal CATV regulation has carved out a permissible zone for local regulation, which clearly encompasses the requirements of the cited metro ordinances.¹⁰ These requirements, such as review and approval of transactions which involve the organization of franchisees, are clearly independent of federal regulation.

State

There are no state statutes or regulations which affect the issues addressed in this memorandum.

Metro

⁸ Under KRS 67C.123(3), both the City and County CATV franchises “carried over” into the new government as fully binding on both Insight and the new Metro Government. Under KRS 67C.115(1)(a), former Jefferson County Code Sections 116.01 - 116.51 and 116.99 was recodified as LMCO 116.01 - 116.51 and 116.99, and became effective for the new Metro Government.

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¹ Accordingly, it is our opinion that, except for the application of various general equitable limitations such as laches, there are no time limits running on Metro Government’s entitlement to exercise its rights to review and approve the transactions at issue.

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¹ See, e.g, Charter Communications, Inc. v. County of Santa Cruz, D.C. N.D. Calif, 2001, 133 F. Supp. 2d 1184.

Section 41 of both the City and County ordinances as well as LMCO 116.20(E) and 116.37(A) and (B)¹¹ require approval by the franchising authority, now Metro Government, where the franchise is assigned or transferred or, in the case of the metro ordinance, where the “right of control of any franchisee is acquired, disposed of, or transferred”¹²

By definition, there is a strong presumption that a “merger” of one company with another, as Insight has described the transactions at issue in at least one document, involves a “transfer of control.” Insight argues that this is not the case, and that the transactions will be designed to assure that “control” of the franchisee, Insight Communications, will not change. At the least, the issue is not clear. We believe that a reasonable construction of the cited sections of all three local ordinances is that they are designed to address, and redress, this lack of clarity. Further, their purpose is clearly to give Metro Government the right to ask for, and receive information about transactions involving franchisee corporate organization and governance which could arguably affect the franchisee’s ability to perform the services called for under the terms of the franchise.

Serious questions remain as to where the Carlyle Group has ended up, or will end up, when the dust settles from all the varied and complex transactions described in the SEC filings involved. As noted, Carlyle is putting over \$600 million into the deal. Assuming that Carlyle is not giving its money away, there are two other possibilities, or a combination thereof. One, that Carlyle is assuming some kind of equity position in the surviving entity, and the second is that Carlyle is, or is going to be, a creditor of the new entity.

In the first instance, an equity position in a business corporation presumes a transfer of some element of control - or a detailed, verified explanation as to why it does not. In the second instance, the assumption of this level of debt could very well - as it demonstrably has in other “going private” situations - impair the corporation’s ability to perform its service agreements.¹³

In either instance, or a combination of both, the three ordinances clearly entitle Metro Government to review and approve the transactions at issue involving Insight

¹¹ Both the City and the County ordinances squarely encompass and adopt the applicable provisions of LMCO 116.01, et. seq.; see Section 5(3) of the County ordinance [“This franchise agreement is subject to and shall be governed by any other applicable provision of ... local law”]; and Section 5(1) of the City ordinance [Operator shall not be excused from complying with the requirements of this ordinance, or any subsequently adopted amendments to this ordinance]

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¹³ LMCO 116.37(A) states explicitly that “A merger or consolidation shall be deemed a transfer or assignment.”

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¹³ See LMCO 116.37(B)(1)(b) and (c) which requires the new entity to “establish to the satisfaction of the Metro Government” its financial viability and its ability “ ... to maintain and operate the cable communications system for the remaining term of the franchise.”

Communications.

There are also persistent, but unverified, reports that Insight Communications has a current agreement with another major cable company, Comcast wherein Comcast is entitled to purchase ½ of Insight's business, including Insight's Metro Louisville franchise. There are two factors which make these reports credible, as well as important for the issues under discussion in this memorandum. First, Insight Communications already has what it calls a "50/50 partnership" with Comcast in several in Kentucky and three other contiguous states.¹⁴

Second, selling or trading off assets is a very frequent strategy used by corporations in "going private" in order to pay off debt created by the acquisition of publicly-held stock

Finally, LMCO 116.37(C) requires the new entity, whatever it may be, and if approved, to execute a new agreement with the Metro Government, essentially on terms acceptable to the Metro Government.

Information which Metro Government is entitled to receive

LMCO 116.37(B)(1) sets out the kinds of information Metro Government is entitled to ask for, about the principals of the successor entity, and especially about its organizational and financial ability to perform the franchise. In addition, that section necessarily implies that Metro Government is entitled to a collateral level of information sufficient to clarify and verify the primary information explicitly spelled out in the ordinance.

Beyond these categories of information, it is doubtful that metro Government can compel Insight Communications to furnish other information, unless the request is clearly relevant to the areas of oversight.¹⁵ This is not to say that LMCO 116.37(B)(1) limits the issues the Metro Government may raise in connection with an approval process, which is discussed in paragraph 5 of this memorandum, immediately following.

Issues which may be considered by Metro Government

As noted under paragraph 4, above, the primary issues in the approval process involve the management of the new entity, its financial stability, and its ability to perform the franchise. It is our opinion, however, that this does not in any way preclude the introduction of whatever issues may be "on the table" or otherwise apparent to Metro

¹⁴ See Press Release dated July 29, 2005, page 2.

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¹ See Charter Communications, Inc. v. County of Santa Cruz, cited above at note 8, at 133 F. Supp 2d 1209-1211.

Government at the time approval is being reviewed.¹⁶ There are two reasons for this:

First, most if not all these issues are likely to be related to the service being provided by the franchisee, and thus arguably relevant to the determination required under LMCO 116.37(B)(1)(c).¹⁷ Second, and probably most important, the approval process clearly involves an element of subjective discretion on the part of Metro Government which can be used to gain Insight Communications' consideration of issues which may arguably be collateral or marginally relevant to the primary organizational and fiscal issues.

Enclosures

! Letter dated October 6, 2005 from Laurence J. Zielke to William T. Warner

!“Cable Franchise Transfer Requests”, article by Jon Kreucher

! Insight Press Release dated July 29, 2005

! 47 C.F.R. § 76.502 - Time limits applicable to franchise authority seeking consideration of transfer applications

¹⁶ Such as the current issue over reassigning GLTV Channel 24.

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¹ Treatment of some issues may be limited or even proscribed under the First Amendment; see, e.g., Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001); and The Putnam Pit, Inc. v. City of Cookeville, 6th Circ. 2000, 221 F.3d, 834.