DOCKET NO. HHD-CV-12-6034434-S	:	**SUPERIOR COURT**
SOUND VIEW COMMUNITY MEDIA, INC.	:	**JUDICIAL DISTRICT OF HARTFORD**
VS.	:	**AT HARTFORD**
CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY (PURA)	:	**JUNE 10, 2013**

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SUPPLEMENTAL MEMORANDUM IN RESPONSE TO DEFENDANT'S REPLY MEMORANDUM DATED MAY 24, 2013

Preliminary Statement

The Defendant (PURA)'s Reply Memorandum[1] argues for only the "rational basis" test and against the Plaintiff's (Sound View's) assertion that a "compelling state interest" is needed to support the legislature's enactment of Public Act 08-159. Plaintiff's previously filed memoranda focused primarily on the fact that Public Act 08-159 does not meet even the "rational basis" test. Sound View now welcomes the opportunity to provide the Court with additional argument and explanation as to why stricter scrutiny is triggered, and why a "compelling state interest" is required by the Defendant for the successful defense of Public Act 08-159. In particular, Sound View will show from the record that Public Act 08-159 is not "content neutral" as the Defendant claims.

[1] The Reply Memorandum filed by the Defendant PURA dated May 24, 2013 will be referred to as "Defendant PURA's Reply Memorandum" throughout this Supplemental Memorandum of the Plaintiff, Sound View Community Media, Inc.

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Second, the Defendant PURA's Reply Brief continues a desperate argument that the local cable advisory council still has legal existence. In its previous memoranda, Plaintiff Sound View zeroed in on legal developments subsequent to the enactment of Public Act 08-159 that led to the legal cessation of the local cable advisory council. On the record[2] the Defendant PURA even admitted "the cessation of the legal existence of the Advisory Council."[3] The local advisory council is a critical component of the Act's enforcement mechanism and its legal cessation deals a fatal blow to the applicability of Public Act 08-159. Defendant PURA cannot avoid the fact that only holders of certificates of video franchise authority (CVFAs) now operate within the Bridgeport Area Franchise,[4] a legal situation that causes the State-wide Video Advisory Council to supplant the local advisory council.

Therefore, the Plaintiff, Sound View, hereby supplements the arguments it made previously in its Memoranda dated April 15, 2013 and May 24, 2013. This supplemental memorandum first will show from the record that Sound View's First Amendment rights of freedom of speech have been frustrated in a non-content neutral manner by Public Act 08-159. Sound View then will counter each attempt made in the

[2] Final Decision in PURA Docket No. 11-07-09 dated February 1, 2012, page 4. Sound View Exhibit 14.

[3] See Sound view's Memorandum dated May 24, 2013, page 15, quoting from the Final Decision in PURA Docket No. 11-07-09, page 4.

[4] Reference may be had to the extensive arguments made in Sound View's Memorandum dated April 15, 2013 and Sound View's Reply Memorandum dated May 24, 2013. Holders of CVFAs have no legal obligation or relationship to local cable advisory councils and instead are required to provide support to and interact with a State-Wide Video Advisory Council pursuant to Sec. 16-331i of the Connecticut General Statutes.

Defendant PURA's Reply Memorandum to resuscitate the legal existence of the Area Two Cable Advisory Council.

The Defendant is put to the test of requiring a compelling state interest in imposing Public Act 08-159 because Sound View's First Amendment rights of freedom of speech are implicated. Because Public Act 08-159 fails to meet both the strict scrutiny and rational basis tests, it is unconstitutional.

Plaintiff Sound View first and foremost contends that P.A. 08-159 violates its rights to equal protection under the Fourteenth Amendment to the U.S. Constitution and under Article 1, §§ 1 and 20 of the Connecticut Constitution. While much of the argument in the parties' previously-filed memorandum has been over whether even the "rational basis" test is met, Sound View also has asserted from the beginning that the State must meet the compelling state interest test, in addition to the rational basis test. In its first Memorandum in Support of Plaintiff's Motion for Summary Judgment dated April 15, 2013, Sound View points out that:

> In addition, the State is put to the test of requiring a compelling interest in imposing the legislation because it implicitly involves Sound View's First Amendment rights of freedom of speech as it also frustrates its ability to distribute television programming to several of the cities and towns in the Area Two franchise. [5]

[5] Memorandum in Support of Plaintiff's Motion for Summary Judgment dated April 15, 2013, pages 12-13.

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When a statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard [under which] the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest. Contractor's Supply of Waterbury, LLC v. Commissioner of Environmental Protection, 283 Conn. 86 (2007).

In opposition to Plaintiff's assertion, Defendant PURA's Reply Memorandum recites case law for the proposition that "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral" and therefore permissible even under a "strict scrutiny" test.[6] Defendant PURA may get the law right, but it gets the facts wrong. Defendant PURA has failed to differentiate between fundamental role of a franchise area's "community access provider" or "CAP"[7] (which was Sound View's role) and the role of users of the community access facilities, such as the local government-authorized entities that create programming.

As a CAP Sound View is strictly prohibited by state statute from exercising editorial control over programming, except as to programming that is obscene and except as otherwise allowed by applicable state and federal law.[8] Even then a CAP only may limit "adult" programming by scheduling it at times when

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[6] Defendant PURA's Reply Memorandum, page 4.

[7] Sec. 16-331a, subparagraph (c) of the Connecticut General Statutes provides that a "community access provider" or CAP can be the cable operator, itself, or a "community-based nonprofit organization in a franchise area [that] desires to assume responsibility for community access operations."

[8] Sec. 16-331a, subparagraph (g) of the Connecticut General Statutes provides that "No organization or company providing community access operations shall exercise editorial control over such programming, except as to programming that is obscene

children presumably are less likely to be in the viewing audience.[9] A user or program producer, such as the Orange Government Access Television or "OGAT" committee, however, creates programs and is free to editorialize or promote any point of view it desires. This fundamental difference gets to the heart of why Public Act 08-159 is not content neutral.

It clearly can be discerned from the record of the franchise renewal proceedings in DPUC Docket No. 05-04-09 that Sound View fought for and won the right to have its status as the community access provider (CAP) re-authorized for the renewed franchise term through December 31, 2017.[10] As the CAP, it was required to promote a "content neutral" policy for the franchise area. As the incumbent CAP, Sound View sought to allow all produced programming, including programming produced by the specific local government entities of Orange, Milford and Woodbridge, to be televised and made available to all cable subscribers in all the towns within the Bridgeport Area Franchise. Part of its reasoning was that the small amount of original programming the local governments were producing at the time meant that the same programs were being repeated excessively. Sound View believed that it would be in all the cable subscribers' best interests to allow for a larger variety of original programming, even to the extent of

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and except as otherwise allowed by applicable state and federal law. This subsection shall not be construed to prohibit such organization or company from limiting the hours during which adult programs may be aired. Such organization or company may consult with the advisory council in determining what constitutes an adult program for purposes of this subsection."

[9] Id.

[10] DPUC Docket No. 05-04-09, Final Decision dated November 22, 2006. Sound View Exhibit No. 3.

allowing local government programming specific to one town to be disseminated to adjoining towns within the franchise region. The DPUC agreed. In its Final Decision re-authorizing Sound View as the CAP it found that "Sound View's current reluctance to provide a municipality with a town-specific channel 100% of the time is justified because of excessive repeats."[11]

The corollary of that, however, is programming that a specific local government entity did not produce and control could find its way to the subscribers in its town. As a result, the three local governments who wanted to control what subscribers in their towns could view became very disagreeable with Sound View's plans. They wanted to allow only content and points of view they created to be televised, keeping out content and points of view not within their control.

The testimony of Sol Silverstein, from Orange Government Access Television (OGAT), makes this point very clear. On June 19, 2006, under cross-examination during the hearings in DPUC Docket No. 05-04-09, the following conversation transpired[12]:

> Q. (Clift) If Amity Regional is a regional high school, how does getting involved – how does the Town of Orange in getting involved in wanting it [the government access channel shown in the Town of Orange] to be town specific Orange 24/7 help a regional high school?

[11] Final Decision in DPUC Docket No. 05-04-09, page 27. (Sound View Exhibit No. 3).

[12] The complete record of the proceedings of DPUC Docket No. 05-04-09 has been provide to the Court and stipulated by the parties to be undisputed exhibits for the purposes of their cross-motions for summary judgment. For the convenience of the Court just those pages of the testimony recited are made "Attachment A" to Plaintiff's Supplemental Memorandum

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A. (Silverstein) We're town specific but we show anything regional that affects the Town of Orange. The Amity Regional school system, which is the high school and two junior high schools, affects the Town of Orange. So anything that's related to that we will broadcast or narrowcast, I guess, in this case.

Q. (Clift) The Amity High School affects a town other than Orange, too?

A. (Silverstein) That's right.

Q. (Clift) So wouldn't it make sense that programming emanating from Amity High School would be shown or accessible for more than just the Town of Orange?

A. (Silverstein) It would be accessible to Woodbridge, and we would be very happy to share programming with Bethany also if they so chose.

Q. (Clift) So in that case you would see a value to other than town-specific dissemination?

A. (Silverstein) As long as we control what's shown on our station.

Q. (Clift) So long as you have the control, okay.

A. (Silverstein) We need to decide, not a third-party.

By adopting Public Act 08-159, the Legislature subverted Sound View's status as the CAP for government and educational access programming. The Act instead favors content that is controlled by the local governments themselves in the so-called "town-specific areas." The Act overturned the decision in DPUC Docket 05-04-09 and instead authorizes any town organization, authority, body or official (in the

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Bridgeport franchise area only) to decide for the subscribers in their towns what programming they will have access to on the government and educational access channels. Again, what the subscribers get to see in the town-specific towns is dependent on the local governmental entity's assessment of whether or not the content is of sufficient interest to town viewers. As the testimony by the OGAT representative cited above amply illustrates, a local government entity will favor programming it has created and controls, to the exclusion of any program whose content it has determined not to meet with its approval. This is in stark contrast to Sound View's CAP responsibilities to not make programming decisions based on content, which would have been the case had the Final Decision in DPUC Docket 05-04-09 not been overruled by the Act.

The record indisputably shows that Public Act 08-159 intentionally trumps the Final Decision in DPUC Docket No. 05-04-09 and "imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select."[13] Or to be precise in this case, the Act restricts and imposes penalties on Sound View on account of the programs that Sound View otherwise would allow to be freely disseminated to all government access channel viewers within the Bridgeport franchise area regardless of content. In direct contravention of the CAP status that Sound View was awarded in the Final Decision, Public Act 08-159 restricts Sound View by allowing towns to take local government program scheduling decisions completely away from Sound View and place them in the hands of the specific local government entity that then will exercise programming decisions based on the content of the programming. Public Act

[13] Defendant PURA's Reply Brief, page 4, quoting from Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 114 S. Ct. 2455 (1994).

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08-159 is so punitive, that if Sound View were to refuse to "consent" to this acquisition of authority by a town entity who desires it, Sound View would lose whatever CAP authority remains by the "death penalty" provisions of the Act[14].

The record of the proceedings in DPUC Docket 05-04-09 further make it clear that the controversy between Sound View and the three local government-commissioned entities has never been about whether Sound View would allow locally-produced government access programming to be shown in the towns where they were produced. Sound View has never refused local government access programming to be shown to that specific town's cable subscribers. Such a claim is ridiculous in the extreme and no record exists to support that claim. Yet that has always been the red herring used to whip up opposition to Sound View continuing in its CAP status.

Rather, the actual controversy is about whether the local government television commissions and committees, who incidentally are comprised of the same supernumeraries that comprise the group claiming to be the local advisory council, should have unfettered and complete control over when their programs would be aired, how many times they should be repeated and whether programs not produced by the

[14] Subparagraph (b) of Sec. 16-331ff of the C.G.S. provides that "If a third-party nonprofit provider fails to provide written consent within three days, pursuant to subsection (a) of this section, the Department of Public Utility Control shall, upon a request from a town organization, authority, body or official within the service territory of that third-party nonprofit community access provider serving six municipalities, one of which has a population of more than one hundred thirty thousand, (1) terminate, revoke or rescind such third party nonprofit provider's service agreement to provide public access programming within one hundred eighty days, and (2) reopen the application process to secure a community access provider for each of the towns within the affected service territory. (emphasis added).

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government-commissioned entity should be disseminated and seen by cable subscribers in that entity's town on the government and educational channels, interest in regional E and G programming notwithstanding.

The bottom line is that Public Act 08-159 permits the local government television entities to restrict the dissemination of their government and educational programs to only the cable subscribers in their towns, "keeping out" programs that they, themselves did not create or did not approve. Sound View's freedom of speech rights are implicated because the Act is in direct conflict with its ability to distribute all government and educational access television programs created or provided by all educational and governmental entities within the franchise area to all the cable subscribers.

The restrictions imposed by Public Act 08-159 involve Sound View's First Amendment rights of freedom of speech rights because it frustrates its ability to distribute television programming to several of the cities and towns in the Area Two franchise in subjugation to the content-based decisions made by the local governments through their television committees and commissions. Again, when a statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard [under which] the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest. Contractor's Supply of Waterbury, LLC v. Commissioner of Environmental Protection, 283 Conn. 86 (2007). (Emphasis added.) As there is no compelling state interest shown or offered, Public Act 08-159 is unconstitutional. Also, as has been argued extensively in Plaintiff's previously-filed memoranda, there is no rational basis for Public Act 08-159 as well.

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Notwithstanding the additional arguments made by the Defendant PURA in its Reply Brief, the Area Two Cable Advisory Council has ceased to exist.

Defendant's (PURA's) Reply Memorandum's "up front" argument for the continued legal existence of the group formerly comprising the Area Two Cable Advisory Council is that it "had acted like a cable advisory council that is very much alive."[15] This of course is an extremely weak "bootstrap" argument, and it is telling that Defendant's Counsel wholly ignores and fails to explain the pronouncement of his own client when it stated the following:

> It is a well-established rule of statutory construction that the Legislature is presumed to be aware of existing statues. Board of Public Utilities Commissioners v. Yankee Gas Services, 236 Conn. 287,295 (1996). Therefore, the PURA must assume that the legislature is aware of the provisions of Conn. Gen. Stat. §§16-331ff and 16-331gg. It is also a well-established rule that the Legislature is presumed to be aware of the impact of its actions or inactions on an existing statute. CL&P vs. Texas –Ohio Power, Inc., 243 Conn 635 (1998). Since the passage of these statutes *and the cessation of the existence of the Advisory Council*, the Legislature has had ample opportunity to amend Conn. Gen. Stat. §16-331ff and has failed to do so. The PURA cannot assume that the failure to act was not intentional. Furthermore, the PURA cannot at this time make any determination as to the validity or invalidity of the terms of Conn. Gen. Stat. §§16-331ff and 16-331gg in regards to SVCM. (*Emphasis added.*)[16]

[15] Defendant PURA's Reply Memorandum, page 10.

[16] Sound View Exhibit 14, Decision in PURA Docket No. 11-07-09, page 4.

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Plaintiff is heartened to find that the Defendant PURA's Reply Memorandum at least admits that "the existence of the Area Two Cable Advisory Council is relevant to the applicability and vitality of P.A. 08-159, Section 2, codified as Conn. Gen. Stat. § 16-331gg."[17] Yet incredibly it continues to attribute legal existence to the Area Two Cable Advisory Council because it acts as though it exists. In support of this weak argument, it recites how a group of individuals comprising some of those who used to be members of the local advisory council still accepts $100,000 each year from Cablevision, has acted to defend any attacks on its existence, and has been allowed to defend its existence in the instant case. This argument may be appealing to followers of the philosopher Jean-Paul Sartre,[18] who is famous for the statement "I exist, therefore I am." However, Defendant's argument (and many would argue Sartre's statement) is an empty tautology. Defendant PURA's argument provides the court with nothing to explain the legal basis on which the group of individuals purports to act. In the context of legal argument these assertions are of no help to its cause.

The next argument addressed in Defendant PURA's Reply Memorandum relies on a written statement submitted to PURA in Docket 11-07-09, three years after the enactment of Public Act 08-159, by nine of the area legislators, including two of the Act's co-sponsors (Representative Kim Fawcett and Senator Gayle Slossberg). This letter was submitted in response to Sound View's Petition for a Declaratory Ruling

[17] Defendant PURA's Reply Memorandum, page 9.

[18] Jean-Paul Sartre was a French existentialist philosopher born June 21, 1905, who died April 5, 1980.

on the constitutionality and applicability of the Act. The legislators' submission in that docket, dated September 11, 2011, was composed well after Sound View's challenges to the Act became well-known to them. Incredibly, the legislators claim to have advance knowledge of Cablevision's business strategy to have each of its operating entities apply for CVFAs at the time they drafted Public Act 08-159. This prescience, it is claimed, therefore allowed them to account for the prospect of the legal cessation of the local advisory council and avoid the problem.

This claim frankly smacks of an after-realized "brilliant revelation" that really came about only in hindsight. Plaintiff submits that the credibility of this letter is so weak that on this basis alone it should be disregarded by the Court. However, even if the letter were to be believed for its incredible prescience and prior intimate knowledge of a private corporation's business plans, it still begs the question: Why didn't the legislation then provide for the continued legal existence of the local advisory councils in franchises when there would no longer exist any traditional cable operator (CPCN holder) or any holder of a certificate of cable franchise authority (CCFA) operating within a franchise?

Similarly, Defendant PURA's Reply Brief also claims that Cablevision, now by virtue of statements it made in PURA Docket 11-07-07, has backed away from its former statements that the local advisory councils in both the Bridgeport and Norwalk area franchises no longer had any legal existence.[19] Cablevision's change of position on this issue also no doubt came about once it realized the unintended

[19] See Sound View's Exhibits 20, 21, 22, and 23 that report the statements made by Cablevision representatives at meetings of the then-defunct local advisory councils.

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consequences of the cessation of the local advisory council in the Bridgeport area franchise. It no doubt began to feel uncomfortable that each year it was diverting $100,000 of the subscriber funds from Sound View to a group of individuals now purporting to be what is actually a legally defunct local advisory council.

Defendant PURA's further argument is that the Cablevision entity now operating under a CVFA in the Bridgeport Area franchise was a certified competitive video service provider that was providing service as a community antenna television company pursuant to section 16-331 on October 1, 2007. While there is nothing in the record to support what the legal status of Cablevision of Litchfield, Inc. was on or before October 1, 2007, for the purposes of this argument it does not matter. Plaintiff's argument goes not to the applicability of the law to Cablevision of Litchfield, Inc. Rather, the basis of Sound View's challenge is that the local advisory council, a necessary and critical component of the mechanism of Public Act 08-159, has ceased to exist. There is nothing to suggest, even in the letter from the legislators mentioned above, that the Act addressed the possibility that no holder of a CPCN or CCFA would be operating within the franchise area, thereby causing the legal existence of the local advisory council to cease.

The last attempt by the Defendant PURA to "conjure up" the local advisory council from the dead, is its recitation of Conn. Gen. Stat. § 16-331i, which establishes a "State-wide Video Advisory Council." It states:

> (a) There shall be a State-wide Video Advisory Council, whose membership is made up of one representative from each of the existing advisory councils established pursuant to section 16-331. A certified competitive video service provider shall biannually convene a meeting of said council. No member of the State-wide Video Advisory Council shall be an employee of

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> a community antenna television company or a certified competitive video service provider. For the purpose of this subsection, an employee includes any person working full time or part time or performing any subcontracting or consulting services for a community antenna television company or a certified competitive video service provider.

Defendant argues that this statute presumes that local advisory councils will continue to exist even if service in a franchise area is provided only by holders of CVFAs. What the Defendant PURA glosses over, however, is the word "existing" in the first line of subparagraph (a). To the contrary, the statement that the State-Wide Video Advisory Council membership will be comprised of one member "from each of the existing advisory councils established pursuant to Sec. 16-331" means that the legislature contemplated that a local advisory council may at some point cease to legally exist, as it did in the Bridgeport area franchise. No member should come from the now defunct Area Two Cable Advisory Council to serve as a member of the State-Wide Video Advisory Council. No assertion has been made by the Defendant PURA to the contrary.

Summary and conclusion.

The Plaintiff Sound View has pointed out compelling evidence contained within the undisputed record of the proceedings of DPUC Docket No. 05-04-09 that shows why the enactment of Public Act 08-159 has infringed on Sound View's First Amendment rights. By overturning the Final Decision in DPUC Docket No. 05-04-09, Public Act 08-159 restricts Sound View's former right to disseminate programming to

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all cable subscribers within the franchise area. Public Act 08-159 strips away Sound View's designation as the sole CAP for all public, educational and government access operations in the franchise area by authorizing local government entities take $100,000 of access support funds each year and restrict the dissemination of programming to viewers within its towns based on content-driven policies. This clearly was shown by the testimony of OGAT that it alone would determine what programming shall be seen in its town. Therefore, Public Act 08-159, since it allows programming decisions to be content-based, requires strict scrutiny.

Secondly, the efficacy of Public Act 08-159 is crippled without the continued legal existence of the local advisory council. The Defendant PURA, which previously propounded that the Area Two Cable Advisory Council has legally ceased to exist, now is arguing it does. But this argument is transparent in that it is made now only for the purpose of allowing Public Act 08-159 to continue to visit upon Sound View and upon Sound View alone, a draconian financial burden under threat of a "death penalty" provision if Sound View does not "consent" to terms of this illegal action.

For the reasons given previously in its memoranda filed April 15, 2013 and May 24, 2013, and for the reasons give here in this Supplement Brief, which respond to the Defendant PURA's Reply Memorandum, the Plaintiff Sound View respectfully asks the Court to find in its favor on its Motion for Summary Judgment and to deny the Summary Judgment Motion of the Defendant PURA.

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Respectfully Submitted,

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CERTIFICATION

I hereby certify that a copy of the above was both emailed and mailed first class mail postage prepaid to the following parties, on this 10th day of June, 2013:

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ATTACHMENT "A"

(Excerpt of Testimony from Hearing dated June 19, 2006)
DPUC Docket No. 05-04-09

component of PEG system. His plans include specific cablecasting of educational programming on Channel 78 from Amity Regional High School.

Is OGAT considering expanding its jurisdiction to include educational?

A. (Silverstein) I think we've said that. We think we could do a better job at it.

Q. (Clift) If Amity Regional is a regional high school, how does getting involved -- how does the Town of Orange getting involved in wanting it to be town, specific Orange 24/7 help a regional high school?

A. (Silverstein) We're town specific but we show anything regional that affects the Town of Orange. The Amity Regional school system, which is the high school and two junior high schools, affects the Town of Orange. So anything that's related to that we will broadcast or narrowcast, I guess, in this case.

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A. (Silverstein) As long as we control what's shown on our station.

Q. (Clift) So as long as you have the control, okay.

A. (Silverstein) We need to decide, not a third-party.

MR. CLIFT: I think I'm finished, Commissioner. Thank you.

THE CHAIRPERSON: Thank you, sir.

Mr. Francisconi.

MR. FRANCISCONI: Just one question. Thank you.