IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RCN CORPORATION and RCN TELECOM SERVICES OF PHILADELPHIA, INC., Plaintiffs,	:	CIVIL ACTION
v.	:	
NEWTOWN TOWNSHIP, BUCKS COUNTY, COMMONWEALTH OF PENNSYLVANIA, Defendant.	:	No. 02-CV-9361

MEMORANDUM AND ORDER

J. M. KELLY, J. **FEBRUARY , 2004**

Presently before the Court is a Motion for Summary Judgment filed by Defendant Newtown Township (the "Township"), located in Bucks County, Pennsylvania requesting that judgment as a matter of law be entered in its favor, dismissing the Complaint by which Plaintiffs RCN Corporation and RCN Telecom Services of Philadelphia, Inc. (collectively, "RCN") seek relief under the Cable Communications Policy Act of 1984 (the "Act"), 47 U.S.C. § 545 (2003). In its Complaint, RCN, a cable television operator, seeks, inter alia, modification of the "Non-Exclusive Cable Television Franchise Agreement" (the "Franchise Agreement") it entered into with the Township, the franchising authority, claiming that its provisions are commercially impracticable within the purview of the Act. The Township contends that although the Act authorizes some modifications of franchise agreements, RCN's proposed modifications are beyond the scope of the Act's authority, and RCN effectively seeks to terminate and replace the current Franchise Agreement. For the following

reasons, the Township's Motion for Summary Judgment is **GRANTED**.

I. BACKGROUND

On December 16, 1998, the Township and RCN entered into the Franchise Agreement which granted RCN a 15-year non-exclusive franchise right to construct and maintain a cable television system for the Township.

In August 2001, RCN met with Township officials to verbally request modification of the Franchise Agreement, and on October 16, 2001, RCN submitted its written request to the Township, which included a draft franchise agreement to that effect. (RCN's Compl. Ex. A.) This draft proposes several modifications, including the creation of a regional franchising entity comprised of multiple townships and a larger geographic scope wherein RCN would install and operate a cable television system, in contrast to the purely local system agreed upon in the original Franchise Agreement.[1]

The Township rejected RCN's proposed service area modification, and, in turn, served RCN with a notice of default under the Franchise Agreement. Reacting to RCN's perceived

[1] Thomas K. Steel, Esquire, Vice President and Regulatory Counsel for RCN, addresses this modification in his affidavit: "Specifically, the franchise service area would need to be expanded and enlarged, necessitating a change in the nature and delivery of the service offered." (Pls.' Mem. Opp'n Summ. J. Steel Aff. ¶ 7.)

default, the Township also drew down on RCN's $250,000.00 letter of credit and made a claim against a $100,000.00 performance bond RCN posted pursuant to the Franchise Agreement terms. In a letter to the Township dated December 20, 2001, RCN objected to the notice of default and to the Township's allegation that it was in non-compliance with the Franchise Agreement. (Compl. Ex. E.)

On February 28, 2002, the Township's Board of Supervisors (the "Board") held a public hearing to determine whether RCN breached the Franchise Agreement. On that same day, before the hearing convened, RCN hand-delivered a written request to the Township seeking the same modifications of the Franchise Agreement as set forth in RCN's October 16, 2001 proposal, and restoration of the $250,000.00 letter of credit drawn down by the Township in November 2001. (Compl. Ex. F.) The Board did not address RCN's modification request during that hearing.

On March 14, 2002, the Board issued an opinion stating that RCN committed anticipatory material breach of the Franchise Agreement and entered judgment against RCN for $2,192,000.00 in liquidated damages. (Compl. Ex. G.) On April 12, 2002, RCN appealed the Board's decision to the Bucks County Court of Common Pleas where RCN avers it is currently pending.

Since RCN's request for modification was not addressed at the February 28, 2002 hearing, the Board held a public hearing

addressing that request on August 14, 2002. On August 28, 2002, the Board denied RCN's petition for modification, prompting RCN to file the instant action for declaratory and injunctive relief pursuant to Section 545 of the Act.[2]

RCN contends that the Township's refusal to modify the Franchise Agreement violates Section 545, which permits modification of franchise "facilities or equipment" in the event the agreement provisions become commercially impracticable for the cable operator. See 47 U.S.C. § 545(a)(1)(A). In its Complaint, RCN petitions this Court for a trial de novo, to modify the Franchise Agreement's commercially impracticable provisions, vacate the $2,192,000.00 judgment rendered by the Board, and order the Township to restore RCN's $250,000.00 letter of credit. Further, RCN requests an order staying the Township's claim against the $100,000.00 performance bond and the action in the Bucks County Court of Common Pleas.

In its instant Motion for Summary Judgment, the Township

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[2] Section 545 provides that: "any cable operator whose request for modification under subsection (a) of this section has been denied by a final decision of a franchising authority may obtain modification of such franchise requirements pursuant to the provisions of section 555 of this title." 47 U.S.C. § 545(b)(1).

Section 555 authorizes a cable operator, whose request for modification under Section 545 has been denied by the final determination of a franchising authority, to commence an action in "the district court of the United States for any judicial district in which the cable system is located." 47 U.S.C. § 555(a)(1).

contends that there is no genuine issue of material fact in dispute as RCN's modification request is neither a proper modification request nor an allowable modification under the Act.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, this Court is required, in resolving a motion for summary judgment under Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmoving party's favor. Id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make

a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Chelates Corp. v. Citrate, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

A. The "Modification" Requested

The parties agree that the issue is whether RCN's request for modification of the Franchise Agreement falls within the ambit of Section 545 of the Act.

RCN proposes to establish a regional franchising authority which would be comprised of Newtown Township, the only area covered in the original Franchise Agreement, in addition to the following political bodies: Newtown Borough, Lower Makefield Township, Middletown Township, Northampton Township and Warmister Township. (Compl. Ex. H Ex. 4 Sec. 1 ¶ K (defining "Franchising Authority" within the Proposed Cable Television Franchise Agreement); see also Def.'s Br. Supp. Summ. J. at 7.)[3]

The Township contends that RCN's proposal does not request a modification of "facilities or equipment" or "services," pursuant

[3] Attorney Steel provides guidance as to the modification requested, "RCN proposed to the Township that rather than terminate the cable franchise agreement at issue in this case, RCN might work with a broader base of municipalities to modify the terms of the contract into a regional franchise." (Pls.' Mem. Opp'n Summ. J. Steel Aff. ¶ 5.)

to Section 545 of the Act, and, even if it did, the Township does not have the power or jurisdiction to grant RCN's regional modification request. (Def.'s Reply Br. Supp. Summ. J. at 5.) RCN, however, argues that its modification request seeking the creation of a regional authority and a greater geographic region of service does, in fact, directly pertain to the Franchise Agreement's "facilities or equipment," and "services," and, therefore the modifications are well within the ambit of Section 545 of the Act.

The narrow question before the Court is whether this proposed modification that expands the scope and geographic extent of the region or area initially covered by the Franchise Agreement is a proper modification request relating to "facilities or equipment" or to "services" as permissible under Section 545.

B. Relevant Provisions of the Act

To that end, Section 545 of the Act permits cable operators to seek modification of a franchise agreement when requirements for "facilities or equipment" become commercially impracticable to perform,[4] or when the operator's desired deviation from the

[4] A requirement in a franchise agreement becomes "commercially impracticable," as used in the Act, when:

> any requirement . . . is commercially impracticable for the operator to comply with such requirement as a

contracted service requirements continue to maintain the mix, quality, and level of services.[5] 47 U.S.C. § 545(a)(1).

If a request for modification under Section 545 of the Act has been denied by the final decision of a franchising authority, a cable operator may petition a United States district court for relief under the Act. 47 U.S.C. § 555(a)(1). In this matter, the Board, acting as the franchising authority, issued its final decision when it denied RCN's request for modification and, thus, this Court is authorized to review RCN's modification petition under the Act. See Cablevision Systems Corp. v. Town of East Hampton, 862 F. Supp. 875, 887 (E.D.N.Y. 1994).

The Act permits modification of a franchise agreement only when it relates to "facilities or equipment" or "services." Specifically, Section 545 of the Act provides:

> During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise–
>
> (A) in the case of any such requirement for facilities or equipment, including public, education, or governmental access facilities or equipment, if the
>
> result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

47 U.S.C. § 545(f).

[5] When desired deviations from the service requirements meet this mix, quality, and level of "services" test, the franchise authorities may further impose notice requirements on cable operators before permitting such service changes. 47 U.S.C. § 544(h).

> cable operator demonstrates that (i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability; or
>
> (B) in the case of any such requirement for services, if the cable operator demonstrates that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

47 U.S.C. § 545(a)(1) (emphasis added).

Permissible modifications under the Act are limited as they must initially qualify as modifications of "facilities or equipment" or "services." First, by explaining how "services" and "facilities or equipment" may be regulated, Section 544 of the Act (the "SFE Section") provides an intelligible framework for permissible requirement modifications as contemplated under the Act. Second, as Section 545 follows in succession to the SFE Section and authorizes modification of "services" and "facilities or equipment" requirements, Section 545's use of the terms "services" and "facilities or equipment" should be construed consistent with the framework first laid out by the SFE Section.

While Section 545 does address the grounds for permissible modification of requirements "for services" and "for facilities or equipment," it does not provide for changes that merely involve or relate to such things. The terms "services" and "facilities or equipment" are not defined in the Act, so the Court will employ the doctrine of noscitur a sociis as an aid in its understanding of those terms. See In re Continental

Airlines, 932 F.2d 282, 288 (3d Cir. 1991) (deriving the meaning of an unclear word from words immediately surrounding it). By employing this doctrine, the meaning of ambiguous statutory terms may be derived from the meaning of accompanying terms. Id.

1. "Services" Interpreted

The SFE Section allows a franchise authority to establish requirements for "broad categories of video programming or other services."

The term "services" is not defined within the text of the Act, but definitions of three other terms in Section 522, the Act's definition section, provide guidance. First, the term "cable service," which contains the word "service," is defined as follows:

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
> (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

47 U.S.C. § 522(6). In this definition, a service is something that is communicated to or received from cable subscribers. Second, contained within that definition of "cable service" is the term "video programming" which is defined as the "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). By comparing video programming to a television

broadcast, it seems reasonable that a cable service can be the viewable content of a cable company's transmissions. Third, also found within the Act's definition of "cable service," is the term "other programming service," which is defined as the "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The focus of the service here is that it is information. Since these defined terms all relate to and are used in conjunction with the term "service," and these terms appear to address cable transmission or programming directly, it stands to reason that "services" relate to cable programming. And, in light of the Act's definitions and both the SFE Section's and Section 545's focus on cable communications provided by cable operators through a cable franchise agreement, the term "services" appears to be interchangeably used by the Act with the term "cable services," as defined by Section 522.

Further, the Act's SFE Section forbids franchising authorities from regulating "services" provided by a cable operator, but allows franchising authorities to require that cable operators:

> (1) Provide 30 days' advance notice of any change in channel assignment or in the video programming service provided over any such channel.
> (2) Inform subscribers, via written notice of any change in channel assignment or in the video programming service provided over any such channel.

47 U.S.C. § 544(h). The SFE Section further refers to "services" by stating that a franchise authority may enforce any permitted

franchise requirements “for broad categories of video programming or other services.” 47 U.S.C. § 544(b)(2)(B). The SFE Section is instructive because it makes a bright-line distinction, seemingly guided by First Amendment concerns, in allowing the franchise authority to regulate non-expressive aspects of “services,” -- such as requiring that notice be given about the franchisee’s changes in programming --, while precluding the franchise authority from regulating expressive content of cable services, -- such as criteria that would require the franchisee to tailor program content to reflect the franchise authority’s aesthetic faculties.

Under the framework of the SFE Section, specific regulation of “services” is generally prohibited because it would impose one person’s taste upon another person. A reasonable conclusion would be that the term “services” is the subject matter transmitted between a cable operator and its subscribers.

2. “Facilities or Equipment” Interpreted

The terms “facilities” and “equipment” are not defined in the Act, but a reasonable assumption is that the terms are interrelated since they seemingly are always coupled in various sections of the Act. Specifically, Section 522, the SFE Section and Section 545 refer to the terms collectively as, “facilities or equipment.” Section 545 particularly supports this

interrelation as it sets forth one test, a commercial impracticability test, that applies to a modification of either a "facilities or equipment" requirement by which a franchise authority must allow the modification.[6]

Next, Section 522, the Act's definition section, provides guidance to the meaning of "facilities or equipment." Section 522 defines a "cable system," in relevant part, as a "facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7)(emphasis added). In this context, facilities are structures comprised of equipment that are technologically designed to effectuate the cable programming transmission.

Morever, the SFE Section addresses regulation of "facilities or equipment." The SFE Section allows the franchising authority, here, the Township, to establish and enforce certain requirements for "facilities or equipment." 47 U.S.C. § 544(b)(1)-(2). As discussed in the Services section above, the SFE Section, outlines that a franchise authority may not regulate or set-up

[6] As discussed above, Section 545 employs a different test for a "services" requirement modification, specifically that the "mix, quality, and level of services" remain the same after the modification. 47 U.S.C. § 545(a)(1)(B).

requirements regarding the content of cable programming, but may set requirements for the facilities and equipment by which such programming is transmitted. 47 U.S.C. § 544; see Robert F. Copple, Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles, 44 Fed. Comm. L.J. 1, 86-7 (1991)(discussing the Act's SFE Section). In sum, what the Act does allow a franchise authority to regulate, and in turn, modify, are the intricacies of the physical structures themselves, the "facilities or equipment" through which cable programming is transmitted.

C. Legislative History of The Act

Even with examining the accompanying words, the meanings of the terms "services" and "facilities or equipment" under the Act are not entirely transparent from the text alone, and therefore, this Court looks to the Act's legislative history for additional guidance on the scope of the terms "services" and "facilities or equipment." The parties disagree as to whether this Court should review the legislative history of the Act. The United States Court of Appeals for the Third Circuit has counseled, "it is always appropriate to look to the legislative history to help interpret a statute." Paskel v. Heckler, 768 F.2d 540, 543 (3d Cir. 1985); see generally In re Continental Airlines, 932 F.2d 282, 288 (3d Cir. 1991)(noting that both the legislative history

and the doctrine of noscitur a sociis be employed to clarify ambiguity).

1. "Facilities or Equipment" Examined

The SFE Section distinguishes between impermissible regulation of the expressive components versus permissible regulation of the non-expressive components of a franchise agreement. See 47 U.S.C. § 544; see also Copple, 44 Fed. Comm. L.J. 1, 87 (1991). The Act's legislative history provides some clarity as to the meaning of the terms "facilities or equipment," and is best illustrated through analogy: "facilities or equipment" represent the "hardware" of a cable system while "services," as discussed infra, represent the "software." Copple, 44 Fed. Comm. L.J. 1, 87-8 (1991). "Facilities or equipment" serve as a medium for cable services, just as hardware serves as a medium for data-processing or communication.

Two discussions within the House Report help to explain the scope of "facilities or equipment." First, under a section entitled "Services and Facilities," the House Report explains:

> Many franchise agreements in effect today specify in great detail the type of facilities that a cable operator must construct (e.g. channel capacity, two-way capability, and 'institutional loop' to link libraries and hospitals), as well as the services that the operator must provide (e.g., cable news network, HBO, The Health Channel). . . .

H.R. Rep. No. 98-934, at 26 (1984), reprinted in 1984

U.S.C.C.A.N. 4655, 4663 (emphasis added)[hereinafter House Report].

The second instructive House Report discussion is found under the section entitled "Regulation of Service, Facilities and Equipment." This section further details the scope of "facilities or equipment" subject matter eligible as a permissible modification under the Act:

> Facility and equipment requirements may include requirements which relate to channel capacity; system configuration and capacity, including institutional and subscriber networks; headends, and hubs; two-way capability; addressability; trunk and feeder cable; and any other facility or equipment requirement, which is related to the establishment and operation of a cable system, including microwave facilities, antennae, satellite earth stations, uplinks, studios and production facilities, vans and cameras for PEG use.

House Report at 4705. That the word "facility" is used to describe the physical makeup and capability of its component parts in order to transmit cable programming, it was contemplated that the terms "facilities or equipment" relate to the structural and technological design and capacity of the facility, equipment, and its component parts.

2. "Services" Examined

The SFE Section authorizes regulation of a cable system's structural or physical components while remaining harmonious with First Amendment freedom of expression concerns by limiting regulation of cable programming and services.

First, under the section entitled "Services and Facilities," the House Report explains that, "[m]any franchise agreements in effect today specify in great detail . . . the services that the operator must provide (e.g., cable news network, HBO, The Health Channel)." House Report at 4663. Under the SFE Section of the Act, "services" provided by the cable operator are the content of cable transmissions provided by the cable operator. For example, a franchise authority may bind a cable operator to its offer to provide a category of programming, such as a hearing impaired channel and service. See Tribune-United Cable v. Montgomery County, 784 F.2d 1227, 1229 (4th Cir. 1986). Therefore, "'[s]ervices' could then be characterized as the 'software' of a cable system and would include the actual video programming and other related cable services." Copple, 44 Fed. Comm. L.J. 1, 88 (1991).

IV. CONCLUSION

Despite RCN's characterization of its modification requested under the "services" or "facilities or equipment" provision of Section 545, RCN's modification actually requests an expansion of the scope and geographic extent of the region or area within which the Agreement initially covered. The crux of RCN's request is to effectively broaden the Franchise's service area to be regional in scope, creating a contract for a regional franchise.

RCN mistakenly construes the Act to contemplate such a change as a modification under Section 545.

As discussed in detail above, Section 545 establishes the situational threshold that must be met to justify any modifications. The SFE Section and its counterpart, Section 545, do not contemplate an expansion of the service area from local to regional, as exists in this matter, as constituting a proper modification of the "services" and/or "facilities or equipment" requirements. RCN mistakenly believes that any change that merely touches upon a facility, piece of equipment, or service necessarily falls within the purview of Section 545 of the Act.

After a review of RCN's modification request, this Court finds that there is no genuine issue of material fact as to the nature of RCN's request. Requiring that the Township consent to replacing the purely local system agreed upon in the Franchise Agreement with a broader regional franchising entity comprised of multiple townships over a larger geographic area, is not a modification as contemplated by Section 545 of the Act. RCN's requested expansion is not a proper modification of "facilities or equipment" or "services" requirements within the purview of the Act. Accordingly, the Township's Motion for Summary Judgement is **GRANTED**.

Since we find that RCN's request is not a modification as contemplated by the Act, RCN's remaining requests for declaratory and injunctive relief are moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RCN CORPORATION and RCN TELECOM SERVICES OF PHILADELPHIA, INC., Plaintiffs,	:	CIVIL ACTION
v.	:	
NEWTOWN TOWNSHIP, BUCKS COUNTY, COMMONWEALTH OF PENNSYLVANIA, Defendant.	:	No. 02-CV-9361

O R D E R

AND NOW, this day of February 2004, in consideration of the Summary Judgment Motion filed by Defendant Newtown Township, Bucks County, Commonwealth of Pennsylvania (the "Township") (Doc. No. 10), the Answer and Memorandum of RCN in Opposition to (Doc. Nos. 11 & 12), and the Township's Reply Brief (Doc. No. 13) thereto, it is **ORDERED** that the Township's Motion for Summary Judgment is **GRANTED**.

The Clerk of Court shall enter judgment in favor of Defendant Newtown Township and against Plaintiffs RCN Corporation and RCN Telecom Services of Philadelphia, Inc.

BY THE COURT:

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JAMES McGIRR KELLY, J.