

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-390

TITLE CITY OF LOS ANGELES AND DEPARTMENT OF WATER AND POWER,
Petitioner V. PREFERRED COMMUNICATIONS, INC.

PLACE Washington, D. C.

DATE April 29, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF LOS ANGELES AND DEPART- :

4 MENT OF WATER AND POWER,

5 Petitioner :

6 v. : No. 85-390

7 PREFERRED COMMUNICATIONS, INC. :

8 - - - - -x

9 Washington, D.C.

10 Tuesday, April 29, 1986

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:02 o'clock a.m.

14
15 APPEARANCES:

16 EDWARD J. PEREZ, Assistant City Attorney,
17 Los Angeles, California; on behalf of the
18 Petitioner.

19 HAROLD R. FARROW, Oakland, California; on behalf
20 of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: The Court will hear
3 arguments first this morning in City of Los Angeles
4 against Preferred Communications, Incorporated.

5 Mr. Perez, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF EDWARD J. PEREZ, ESQ.

8 ON BEHALF OF PETITIONER

9 MR. PEREZ: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case is before you today as a result of a
12 decision by the Ninth Circuit Court of Appeals. In that
13 decision the Ninth Circuit held that the City of Los
14 Angeles may not limit access to its public utility
15 poles, public utility ducts, by way of an option
16 process, if space permits further construction.

17 Before I commence argument, Your Honors, I
18 would like to state the key points of my argument and
19 then briefly summarize the facts. This case is really
20 only about digging up streets and hanging coaxial cable
21 on utility poles.

22 Point number two, our process is not unique.
23 It has evolved over two decades' worth of experience, in
24 approximately 7,000 other situations in this country.
25 The proper First Amendment analysis is the third point.

1 We believe it is under the public forum doctrine.

2 The public forum doctrine says that in a
3 non-public forum mode, nondiscriminatory regulations
4 need only be reasonable. Very briefly, Your Honors, the
5 key facts of this case are, the City, pursuant to
6 California state law, requires a cable operator to
7 obtain a franchise.

8 The City awards these franchises through a
9 competitive bid process, and we select only one
10 franchisee. In October of 1982, the City of Los Angeles
11 opened up the South Central area for a competitive bid
12 process. Preferred Communications, the respondent in
13 this case, did not participate in that competitive bid
14 process. Instead, Preferred Communications informally
15 requested that the City grant him a franchise.

16 The City denied that informal request, and
17 Preferred Communications filed a lawsuit in the district
18 court in Los Angeles. They alleged antitrust
19 violations, and they also alleged First Amendment claims.

20 The City of Los Angeles filed a Motion to
21 Dismiss pursuant to Federal Rules of Civil Procedure
22 12-B-6. We allege they failed to state sufficient facts
23 to constitute a claim upon which relief may be granted.

24 The district court dismissed -- granted on
25 motions the district court found there is no

1 constitutional right to construct the cable television
2 system on government property without government
3 permission.

4 Preferred Communications appealed to the Ninth
5 Circuit. The Ninth Circuit sustained the motion with
6 regard to the antitrust claims, but reversed on First
7 Amendment grounds. We then appealed to this Court, and
8 this Court denied our appeal but granted certiorari.

9 The first point, Your Honors, is that we
10 really are dealing with the construction of a cable
11 system. The respondent has raised many issues which may
12 be important and may sometime have to be decided by this
13 Court, but today the only issue is, do they have a
14 constitutional right to construct the system on
15 government property.

16 This is not a case --

17 QUESTION: How does that -- how was it
18 anticipated that the franchisee in this area would have
19 constructed the system? Has it been constructed?

20 MR. PEREZ: Your Honor, that is not in the
21 record. If you would like an answer --

22 QUESTION: Was it going to be on poles, or
23 underground, or both?

24 MR. PEREZ: A combination, Your Honor. What
25 was envisioned was approximately 770 miles of aerial

1 cable and approximately 25 miles of city streets in
2 South Central Los Angeles.

3 QUESTION: And who owns the poles?

4 MR. PEREZ: It's a combination, Your Honor.
5 The telephone company owns some, but the majority, the
6 Department of Water and Power.

7 QUESTION: So, a good share of the system will
8 occupy public property?

9 MR. PEREZ: The majority of the system will be
10 on public property, Your Honor, and if it's not, the
11 fact that it's on city rights of ways, we control the
12 rights of ways so I don't think the fact that a private
13 pole involved really is important in this case.

14 So, this is not a case, Your Honors, where you
15 have to consider cable -- that's not really an issue
16 here. What's at issue is constructing a system for
17 South Central.

18 This is not a case where the Court needs to
19 decide the First Amendment rights of cable. We concede
20 that they have First Amendment rights, so that's not
21 really at issue in this case.

22 This case really isn't, when you stop and look
23 at the situation, a case where you need to decide
24 content regulation. The Ninth Circuit looked at our RFP
25 and our process, and they found that it was not

1 unconstitutional on its face.

2 So, the issue would be, if any, was it applied
3 discriminatorily. Well, it was virtually impossible to
4 do that because Preferred did not participate in our
5 system. So, how could we discriminate against your
6 viewpoint?

7 QUESTION: But you don't -- you are only going
8 to award one license in each area?

9 MR. PEREZ: That's correct, Your Honor.

10 QUESTION: And you're going to tell us pretty
11 soon why that's reasonable?

12 MR. PEREZ: I will tell you in my reasonable
13 arguments exactly why we do what we do, and that it is
14 reasonable.

15 QUESTION: Is that a permanent and final
16 decision, or could you later award similar rights in
17 other areas?

18 MR. PEREZ: Our franchise process envisions --
19 it is not exclusive. However, we would probably not
20 award another application unless it was justified, but
21 that avenue is open. We have a non-exclusive franchise,
22 and our bid process says, if you look at 58-200, it says
23 that in each process you must select the highest
24 responsible bidder.

25 So, in the process you select one, but you can

1 have a subsequent process, and it's up to the applicant
2 who initiates the subsequent process to say yes, the
3 City of Los Angeles, one cable company's not doing it.
4 Give us a chance to do it also.

5 We would then evaluate that second process and
6 make a decision.

7 QUESTION: Mr. Perez, doesn't this case come
8 to us as a result of a 12-B-6 motion?

9 MR. PEREZ: Yes, Your Honor.

10 QUESTION: And don't we have to take the
11 allegations in the complaint as true for purposes of our
12 inquiry?

13 MR. PEREZ: Well, I don't think, Justice
14 O'Connor, that you have to take all the allegations in
15 the complaint as true. There are some -- in our view,
16 conclusions in there that this Court does not have to
17 accept. But even if you did, if you look at the
18 complaint and then you look at the other information
19 that's before this Court, this Court certainly has the
20 right to look at the RFP, our franchise procedure
21 ordinances, the wealth of literature that we refer to in
22 our brief, and make a decision.

23 There's nothing in the complaint that limits
24 the action it took.

25 QUESTION: Well, my concern is that apparently

1 you concede that there are some First Amendment values
2 at stake here, and that there has to be some weighing
3 process which goes on, and faced with the allegations
4 and the complaint that are made, I wonder how that can
5 be done properly in a 12-B-6 motion, frankly.

6 MR. PEREZ: If you were to accept just the
7 allegations in the complaint, Your Honor, I think you
8 would see that at least in our view he did not
9 sufficiently allege content regulation. I mean, that's
10 the dispute, you know --

11 QUESTION: Well, the complaint alleges that
12 the City will award the franchise only to the single
13 company it deems best?

14 MR. PEREZ: That's correct.

15 QUESTION: Which would appear on its face to
16 be some sort of a content based determination.

17 MR. PEREZ: Well, if there is any content
18 considerations incidental to the process, Your Honor,
19 and I would suggest that as this Court held in the
20 Rentgen case, if you look at the predominant intent of
21 the document or the process and really see what the City
22 was trying to do, and in the reasonableness argument I
23 will show you what we were trying to do here, and
24 there's really no allegation --

25 QUESTION: But, isn't that the kind of thing

1 that you go to trial on and let the City prove its
2 interests, and whether those interests are sufficient to
3 overcome the First Amendment interests of the company.

4 MR. PEREZ: The short answer to that, Your
5 Honor, is in this case you don't need to. You can look
6 at the RFP. If this Court wants to take consideration
7 of that, and there's facts in there that this Court can
8 use, utilize to make a determination about a trial.

9 QUESTION: Mr. Perez, what exactly is the
10 standard by which the City would award the franchise?
11 Is it the lowest responsible bidder, as you said, or the
12 best? How is it?

13 MR. PEREZ: It's the highest responsible
14 bidder, Your Honor. And, Justice Rehnquist, what
15 happens is that the overall applicant and all the
16 applicants, we weigh very many, many, many things, not
17 just one thing.

18 You look at the financial responsibility of
19 the applicant, can that applicant build the system, and
20 will that applicant keep it going. Will that applicant
21 -- does that applicant have a technical expertise within
22 which to maintain the system? Will it provide a state
23 of the art system to best serve the interests of the
24 public?

25 QUESTION: Well, is there some room for

1 content and regulation in there, or determination on the
2 basis of content?

3 MR. PEREZ: There are certain areas where I
4 think arguably, someone could allege, as the Ninth
5 Circuit held, the impermissible risk of covert
6 discrimination. We ask for broad categories of
7 programming to see -- or to justify the substantial
8 terminal interest that we believe is present, and that's
9 information diversity.

10 Congress studied that in Cable Act, a very
11 lengthy discussion of that, and found that that was a
12 governmental interest that we should be concerned about.

13 QUESTION: Well, Mr. Perez, the complaint,
14 though, alleges that it is entirely feasible to string
15 another cable on the poles, and that according to the
16 allegations of the complaint it would not be a burden to
17 city owned property to enable another cable to be
18 strung, and serve the same areas of the City that the
19 City wants served.

20 Now, faced with those allegations, how should
21 we on a 12-B-6 motion determine that the City has a
22 sufficient interest to prevail over that?

23 MR. PEREZ: Well, Your Honor, let me get to
24 the reasonableness portion of my argument, and I think
25 I'll address that for you, and I appreciate your

1 concerns and I appreciate the fact that this is a 12-B-6
2 and you want to look at the face of that document and
3 make a determination.

4 But, we would urge you, that number one, you
5 don't have to do that; and number two, the substantial
6 governmental interests that are present outweigh that.
7 You can balance that, and that's what we're talking
8 about here, a balancing process in a reasonable
9 proportion.

10 Let me discuss that with you. We believe we
11 are in a non-public forum category, and in a non-public
12 forum category, absent content regulation which we
13 maintain we have here, we have a reasonableness test as
14 this Court has enunciated in *Cornelius*, *Perry* and
15 *Greenberg*.

16 Now, we believe our process is eminently
17 reasonable for the following reasons, Your Honor. It is
18 well thought out. Over two decades worth of experience,
19 began back in the 1960's when the FCC first saw how
20 cable was starting to grow and they couldn't deal with
21 cable.

22 They had to make a decision and they decided,
23 Your Honor, that local communities know what's best for
24 local communities. They said, local communities, come
25 up with the franchise process. And all across this

1 country, in approximately 7,000 situations they came up
2 with one franchisee only, very, very similar to what we
3 do in Los Angeles.

4 The State of California looked at that when
5 they passed Government Code Section 53066. They thought
6 it through. They came down to the same conclusion.

7 Congress, when they went in its deliberations,
8 years of study, years of compromise, years of
9 compromise, years of negotiation which included the
10 cable industry, as well as cities, as well as public
11 participants, everybody got together. They came out
12 with this result.

13 Now, you can use all the deliberations and all
14 reports, Your Honors, to look at this issue. If you
15 want to stick to the four corners of the complaint there
16 might be a problem, and I appreciate, Justice C'Connor,
17 your concern. But you are not limited to that.

18 This Court has a right to consider the
19 [inaudible] that we would proffer, the RFP, the
20 legislative history in the Cable Act, the legislative
21 history that California went through when they --

22 QUESTION: Well, how does that legislative
23 history, Mr. Perez, bear on the constitutional issue?

24 MR. PEREZ: Well, what it does, Your Honor, is
25 give you some facts to dispute what might be in the

1 complaint that's troubling Justice O'Connor. That's
2 what it does. And it shows the reasonableness.

3 Now, what we have to decide here is what's
4 going to happen to cable in our country. This case is
5 very important, and if we have to go back to trial to
6 prove some of these issues, which we really don't have
7 to because there is ample wealth of information before
8 you, then you're going to have lawsuits all across this
9 country like you're having right now.

10 This case shouldn't be here before you.

11 QUESTION: Well, are you arguing for an
12 "approach it one step at a time" until the whole future,
13 or at least more of the future of cable television has
14 unfolded?

15 MR. PEREZ: Well, clearly, Mr. Chief Justice,
16 because even though we've had two decades worth of
17 experience, it's still changing rapidly and we know that
18 there will be greater changes in a couple of years. We
19 need to work slowly on that, and we in the City of Los
20 Angeles and other cities in this country need to make
21 certain legislative assumptions. We don't always know
22 what's going to happen in the future.

23 Social issues and economic issues are not
24 easily proved by facts, and this Court has acknowledged
25 the fact that local communities can make legislative

1 judgments. We ask you to do that, and I think that
2 might, Justice O'Connor, get you over your concerns
3 about the base of that complaint.

4 QUESTION: Mr. Perez, it will be helpful to me
5 if I understand the status of legislation. Does the
6 California statute authorize a city to limit licensees
7 to a single cable TV company?

8 MR. PEREZ: What Government Code Section
9 5306-C does --

10 QUESTION: Expressing --

11 MR. PEREZ: It says that local governments can
12 grant franchises. It does not say, necessarily,
13 restrict it to one.

14 QUESTION: It does not express and limit you
15 to one?

16 MR. PEREZ: That's right.

17 QUESTION: Does any city in the State of
18 California have a policy different from that of Los
19 Angeles with respect to multiple or dual licensees?

20 MR. PEREZ: If they do I'm unaware of it, Your
21 Honor.

22 QUESTION: Unaware of it?

23 MR. PEREZ: Yes.

24 QUESTION: Is there anything in the federal
25 legislation that would restrict you, assuming the

1 validity of that legislation, to licensing only one
2 cable television company?

3 MR. PEREZ: Well, Section 621 of the Cable Act
4 says that it's up to the discretion of local governments
5 to make a decision to grant one or more. They give us
6 the option.

7 QUESTION: So, you do have the right under the
8 legislation to grant more?

9 MR. PEREZ: As we see it, Your Honor, yes, we
10 do.

11 QUESTION: But you also have the privilege to
12 grant only one under the federal statute?

13 MR. PEREZ: Pardon me, Your Honor?

14 QUESTION: You also have the privilege of
15 granting only one under the federal statute?

16 MR. PEREZ: That's correct.

17 QUESTION: Does the record tell us how many
18 Los Angeles has granted?

19 MR. PEREZ: How many franchises currently, I
20 don't believe so. If the record reflects that there are
21 other franchise areas, it was a scheme to break up Los
22 Angeles into certain geographical areas. I don't think
23 it gives the exact number, but I can furnish that if you
24 would like.

25 QUESTION: Is it a matter of public record?

1 MR. PEREZ: It is a matter of public record,
2 Your Honor.

3 QUESTION: Can you tell us what it is?

4 MR. PEREZ: It's 14 franchise areas in the
5 City of Los Angeles.

6 QUESTION: So, it's conceivable you might be
7 dealing with working different franchisees?

8 MR. PEREZ: That's correct. We could have 14
9 lawsuits also, Your Honor. That's correct.

10 QUESTION: Well, I mean whether you get
11 lawsuits or not, you could have -- each one, they're all
12 allocated separately?

13 MR. PEREZ: Yes, Your Honor. I see your point
14 now. Excuse me.

15 You could have competition, or challengers
16 like Preferred who could come in and wire 14 areas.

17 QUESTION: Well, I mean, forgetting
18 competition, if you have 14 -- 14 separate licensees
19 simultaneously in different areas of the city?

20 MR. PEREZ: That's correct..

21 QUESTION: And you'd only have problems if one
22 wanted to expand into his neighbor's area or something?

23 MR. PEREZ: That's correct, Your Honor.

24 QUESTION: And do you actually have 14
25 licensed --

1 MR. PEREZ: We have 14 granted now, Your Honor.

2 QUESTION: Granted now?

3 MR. PEREZ: Not all are completed.

4 Construction is not completed on all of them.

5 I would like to talk a little bit more about
6 the reasonableness of our process. There are
7 substantial governmental interests that underpin our
8 franchise process and which we feel justifies what we
9 are doing in Los Angeles.

10 There is disruption of the streets and
11 disruption of the back yards and neighborhoods in the
12 City of Los Angeles. When you have a cable company
13 coming in to construct a system or dig up the streets,
14 it causes traffic jams, noise, debris. They go into
15 back yards, residential homes, and they scamper up poles
16 and construct --

17 QUESTION: Mr. Perez.

18 MR. PEREZ: Yes, Your Honor.

19 QUESTION: Excuse me for interrupting you
20 again. But what concerns me is the point that Justice
21 C'Conner had mentioned, and the case comes to us on a
22 10-B-6 motion. Can we consider what you are now arguing?

23 MR. PEREZ: Well, Your Honor, I --

24 QUESTION: Nothing in the record to support
25 it, is there?

1 MR. PEREZ: Well, if the Court does not take
2 into consideration the references of the material that
3 we have in our brief and the other briefs before this
4 Court, there might be some problem with that.

5 QUESTION: In other words, you may very well
6 have a substantial City interest, but do we have the
7 facts before us in order to decide that question?

8 MR. PEREZ: Only if you consider the
9 information that we have referenced in our brief, Your
10 Honor. If you look only at the four corners of the
11 complaint, you probably would not find it.

12 QUESTION: Would that indicate a remand?

13 MR. PEREZ: No, that would not indicate a
14 remand, Your Honor. We urge you strongly to consider
15 our RFP, the studies of the FCC, and there's plenty of
16 information there, the experiences of the 7,000 other
17 systems in this country.

18 And, our system didn't come out of someone's
19 mind all of a sudden. There's constant deliberation
20 between the City of Los Angeles and other cities all the
21 time, and we should be able to utilize the experiences
22 of other cities.

23 QUESTION: Is there anything in the record
24 with respect to whether economics was a factor in
25 deciding to have only one franchisee per area?

1 MR. PEREZ: Economics in which sense, Your
2 Honor? We ask for financial information to make sure
3 that they'll construct the system.

4 QUESTION: Well, no, whether the market would
5 support more than one cable system in an area.

6 MR. PEREZ: Well, that is not in the
7 complaint. That is not in the RFP. But that is again,
8 Your Honors, in all of the literature which this Court
9 may consider if it wishes, to look at the economic
10 theories, the fact that cable -- it costs so much just
11 to start a cable system, the economies of scale would
12 weed out any competition.

13 QUESTION: Well, that may be so. Well, if
14 that's the case it wouldn't hurt you to -- no one would
15 -- a second company wouldn't even want in?

16 MR. PEREZ: Well, a second company might want
17 in for two reasons, Your Honor. Number one, they might
18 not be very smart and they actually think they can't
19 compete. Number two, they might want to get in just to
20 make sure that they have a right to construct and they
21 will approach -- and this is happening across the
22 country -- they'll approach the existing franchisee,
23 perhaps merge, and we'll get a big cash settlement out
24 of it.

25 That is a motivation for competition in many

1 situations, and cable companies across this country are
2 selling out. You've seen this selling out process,
3 which is one consideration the City takes when they
4 regulate cable, is that we try to make sure that this
5 sales differential, the premium that is being paid on to
6 the new cable company is not placed in rates. However,
7 that process, rate regulation, is now being phased out
8 so we probably will not be able to do that again.

9 But we have substantial governmental
10 interests, assuming as we have that cable is a natural
11 monopoly and that there will only be one cable company
12 in there, multiplicity -- pardon me, information
13 diversity is a key issue which was discussed very
14 thoroughly by Congress.

15 In the House report, pages 30 to 38, they
16 balanced the interest, the First Amendment rights of the
17 interest of the cable operator and the viewing
18 subscriber. And viewing subscriber is the paramount
19 person under consideration, as this Court has held in
20 other cases, and that's important.

21 If Preferred Communications wishes to
22 communicate over cable, we're not preventing that. Look
23 at Cleveland. We referenced that in our brief. They
24 have a microwave system in their cable programming,
25 without utilizing government property.

1 Why should we allow Preferred to come in and
2 utilize government property? We should be able to
3 manage our property in the public interest. We acquired
4 that property through eminent domain. We have a
5 fiduciary duty to protect the interest for all citizens,
6 the poor and the rich, and we know that cable companies
7 will not wire the poor areas. They are going to wire
8 the affluent areas.

9 That's another substantial governmental
10 interest in our process. It's a very reasonable
11 process, and this Court, in Perry, says alternative
12 channels are very important.

13 So, in addition we have these access channels
14 for preferred. They really want to speak. They really
15 want to speak over cable. They can get one leased
16 access channel and have the same amount of time as CBS,
17 ABC or NBC.

18 So, that leads me to one question. Is
19 constructing a cable system a First Amendment
20 expression? Do they really want to run the business, or
21 do they want to express themselves over cable?

22 They can do it over cable through the access
23 channel, through microwave. They can have some
24 [inaudible] systems set up, low powered TV. There are
25 many, many ways for them to speak over the media they

1 claim they wish to speak on. We are not preventing
2 them. What we are doing is regulating our right of ways
3 in the public interest.

4 Finally, as I mentioned, we really don't
5 believe a trial is necessary. There is ample
6 information before this Court. We ask this Court not to
7 remand. We ask this Court to reverse the Ninth Circuit.

8 With remand we are going to have lawsuits all
9 across this country. They are unnecessary. I
10 appreciate your concern, Justice O'Connor, but there is
11 ample information before this Court, as this Court
12 recently held in Clark versus Community for Creative
13 Non-Violence which had much less information before this
14 Court than we believe is here today, this Court rendered
15 its decision in a First Amendment case.

16 Thank you very much.

17 CHIEF JUSTICE BURGER: Mr. Farrow.

18 ORAL ARGUMENT OF HAROLD R. FARROW, ESQ.

19 ON BEHALF OF RESPONDENT

20 MR. FARROW: Mr. Chief Justice, Members of the
21 Court:

22 Before I begin by answering some of the
23 questions posed by Mr. Perez, let me deal with one.

24 QUESTION: Mr. Farrow, it is difficult to hear
25 you. Do you think you could raise the podium, or speak

1 up?

2 MR. FARROW: Is that better now?

3 QUESTION: Yes.

4 MR. FARROW: All right. Thank you.

5 Let me deal with one critical question. When
6 Mr. Perez first began, he like all of us do, as we try
7 to phrase the exact question that was answered by the
8 Ninth Circuit, said it right. He said the question was
9 whether or not Preferred was entitled to build its cable
10 system on public utility poles and in public utility
11 context.

12 He didn't say anything about public property
13 at that time. It was only later when he said, he's
14 saying that there is no constitutional right to build on
15 public property.

16 Now, when the Ninth Circuit posed the question
17 it said, you know, is there a right to limit this thing,
18 and it used in there, in its phrase, "public utility
19 facilities and other public properties."

20 Now, that bit of surplusage had been the
21 source of a major amount of confusion, and on the briefs
22 before you. The language is "surplusage," though.

23 In 1956 --

24 QUESTION: What language is "surplusage"?

25 MR. FARROW: Pardon me. The portion of the

1 question posed by the Ninth Circuit when he says, does
2 the City have the right to limit access to public
3 utility facilities and other public property, and "other
4 public property" indicates that we are dealing with a
5 form case in some fashion.

6 That is the confusing part. If I may --

7 QUESTION: Are you going to say it was
8 unnecessary for the Ninth Circuit to phrase it that
9 way? Is that what you mean by "surplusage"?

10 MR. FARROW: Yes, sir. It was surplusage for
11 the Ninth Circuit. They didn't need to add that
12 phrase. If they left that phrase out it would have been
13 more exact for the question produced.

14 If you look at paragraph 8 of the complaint,
15 we carefully allege in there that Preferred, having been
16 formed as a cable company, went through the utilities,
17 the public utilities, privately owned public utilities,
18 and asked for service which is legislatively defined in
19 California as a public utility service, public attachment
20 service that was made available to a class of people.

21 They are a member of the class, public and cable
22 television companies, nothing in there about being
23 franchised or licensed cable television company. The
24 statute says they're entitled to it, and it's available
25 from the public utility as a public utility service.

1 Public utility says that's wonderful, we're in
2 a business providing that, we accept that, we've been
3 doing it for 20 years, but you've got to have a license
4 first.

5 QUESTION: When you say public utility, are
6 you talking about as a public utility owned by the City
7 of Los Angeles?

8 MR. FARROW: No, sir. I'm talking at this
9 stage about Pacific Telephone Company.

10 QUESTION: A privately owned public utility?

11 MR. FARROW: Right, privately owned public
12 utility, all right. It says, you've just got to get a
13 license first. As soon as you've got a license, we will
14 let you on our poles. We will provide you pole
15 attachment service. Better than that, we'll even
16 provide, if you like, we'll provide you channel lease
17 services.

18 QUESTION: What about the streets?

19 MR. FARROW: If I may, the public utility, the
20 telephone company in California, has an easement granted
21 by the State over -- not the City but by the State --
22 over all easements, all public rights of way in its
23 whole operating territory.

24 Now, when it provides this public utility
25 service, the pole attachment service, it provides it

1 with its poles, its conduits, its anchors, its guys and
2 tis easements and rights of way over both public
3 property and over private property, just like it uses
4 all of those things to provide you telephone service, or
5 provide somebody transmission service.

6 These things are in its rate base. It's
7 defined as part of the pole line account by the Uniform
8 Central Accounts which were established by the FCC and
9 adopted by the State of California. It charges money
10 for them. It gets a rate of return for them.

11 And so that, when it is providing this
12 service, it is providing -- now, we're talking about the
13 utility property and not public property.

14 QUESTION: Mr. Farrow.

15 MR. FARROW: Yes, sir.

16 QUESTION: I take it you'd have a different
17 case if the City of Los Angeles owned its own electric
18 and telephone companies?

19 MR. FARROW: No, Your Honor, for this reason.
20 The City does --

21 QUESTION: You have been making that argument,
22 haven't you?

23 MR. FARROW: No.

24 QUESTION: I thought you --

25 MR. FARROW: I haven't finished the argument.

1 Let me touch it. It's due with it, because, you see,
2 there is coincidentally, it happens in Los Angeles and
3 in a few other places that municipally owned power
4 company --

5 QUESTION: You have that in a good many
6 cities. I don't suppose --

7 MR. FARROW: And that power company does own
8 some poles. Most of the poles it owns, 85 to 90 percent
9 of the poles that the City's power company owns are
10 jointly owned with the telephone company, and by
11 contract under the joint pole, Southern California Joint
12 Pole Association, a copy of which has been [inaudible]
13 to this Court, control of the communication space on the
14 power poles is surrendered to the telephone company.

15 And so, when a cable operator goes to the
16 phone company, he gets the right to use the phone
17 company's solely owned poles and all the communications
18 space on the joint poles. But there's still a few poles
19 left there. There are a few poles that only have power
20 on them.

21 You know, you're not conscious of poles until
22 you get into this silly business. When you get out
23 there, as you walk along you'll see there are some poles
24 with the power lines running off the top, and there are
25 no telephone facilities in the communications space.

1 Sometimes, those poles are used, or useful by
2 cable television companies.

3 QUESTION: And those poles are owned by the
4 cities?

5 MR. FARROW: Those are owned by the City, and
6 for 20 years or more the City of Los Angeles has made
7 those poles available to cable television companies for
8 money. They're in the business of providing the same
9 pole attachment service that the telephone provides.
10 They charge money for it, just like the telephone
11 company does. It is a service which the State
12 Legislature has defined as a public utility service.

13 QUESTION: Well, have they made those poles
14 available to multiple franchisees in the same areas?

15 MR. FARROW: Your Honor, I don't know the
16 question -- I don't know the answer to that. I just
17 know that they have never denied use of that to anybody
18 who has been a cable company --

19 QUESTION: Well, they certainly denied it to
20 your client.

21 MR. FARROW: In this area, but not because --
22 not because of the fact that we could use those poles.
23 Let me point out to you that when you go to the
24 telephone company, to show you the difference here, you
25 could get the pole attachment service but you could also

1 get the channel lease service.

2 Under a channel lease service the phone
3 company builds all the distribution plant between your
4 head-in which is on private property, and your customer
5 who is on private property. It builds and owns all of
6 that, and it uses it solely on poles, jointly on poles.
7 Its rights of way on public and private property, and
8 its right any time it wants and needs them pursuant to
9 the joint pole agreement, to buy and use communication
10 poles space on any city municipal pole.

11 Now, if you -- we can do that. That is the
12 most perfect of all leased channel facilities. If you
13 really want to have something other than building your
14 own system, and to talk about a cable company ought to
15 be satisfied, well, these channels, that's the best
16 because you can get as many channels as you want, 100
17 channels.

18 You get them at reasonable rates. You don't
19 have the business of Congress saying to the lessor that
20 he can discriminate based upon a programming content.
21 And you can get all of them. You can get all of those
22 groups.

23 QUESTION: Are you defending the Ninth Circuit
24 opinion in this case, Mr. Farrow?

25 MR. FARROW: Yes, sir, Your Honor. I'm

1 trying, though, to answer the questions that were posed
2 by -- but let me say, just to finish that thought, when
3 you go to the phone company to get that lease-back
4 service, that leased channel service, they say to you
5 once again, we still won't let you have it until you get
6 a license.

7 What we're dealing with in this case, it's not
8 a forum case. We're dealing with a licensing case. The
9 City won't give one license out, because if it limits
10 the licenses it puts a value into them. And Mr. Perez
11 even, inadvertently, I believe, admitted that a moment
12 ago when he spoke of the premium. People are trying to
13 get into the business so they can sell at a premium.

14 What's happened is, if you limit access to the
15 market you build in a false value to the monopolists
16 that you choose, and that is the premium he's talking
17 about, and the cities have discovered that.

18 QUESTION: But now, the court of appeals said
19 that the First Amendment prevented the City from doing
20 this. You're making a bunch of economic arguments, as I
21 understand, that might make some sense to a legislature
22 but I don't see that they bear on the First Amendment at
23 all.

24 MR. FARROW: My point, Mr. Justice, was that
25 we're not dealing with a form case, a public property

1 case. We're dealing only with a simple licensing of
2 speech case, and so that the Ninth Circuit was correct,
3 they cannot limit access. Limiting the access is a
4 discretionless, standardless -- pardon me, standardless
5 denial of the right to speak.

6 QUESTION: Is that because of the way that the
7 bidder or the franchisee is chosen, or do you say that
8 they couldn't limit it no matter how the franchisee is
9 chosen?

10 MR. FARROW: I don't believe, if we were 50 --
11 if we were 30 years ago when we had to use city streets,
12 30 years ago before the dedication of these services by
13 the public utilities, I believe that we would have been
14 in a designated forum and that would have been a test.
15 The O'Brien test would have been the right test.

16 But, because we are not using public property
17 and because it is a simple denial of the franchise to
18 speak, I think we're dealing with --

19 QUESTION: But I thought you said you were
20 using some public poles, a moment ago.

21 MR. FARROW: No, sir.

22 QUESTION: Well, did -- I misunderstood you
23 then, because I thought you said that you would have to
24 use some publicly owned power poles. Now, is that or is
25 that not correct?

1 MR. FARROW: The answer is half true, okay.
2 The question was -- you use those poles of the city,
3 perhaps, perhaps. You don't need them. But you could
4 use those poles solely owned by the City where they have
5 put them into the -- dedicated to the provision of
6 providing a public utility service.

7 If you went to the Department of Water and
8 Power and said, I want electricity for my house, that's
9 all I want, they're going to deliver that by these same
10 poles which are dedicated to the provision of a service
11 which has been legislatively defined as a public utility
12 service. They can't deny you that service. That's what
13 we're saying.

14 So, as --

15 QUESTION: But, you're not a customer going to
16 them and asking them for electricity. You're a cable
17 television company that wants to string a new set of
18 antennas and so forth.

19 MR. FARROW: No, Your Honor. We are a
20 customer going to them and saying, we want the public --
21 we want pole attachment services, and they're saying,
22 you can't have it unless you have a franchise.

23 If you look at the city's franchise, look at
24 what they granted, at the actual grant here, in this
25 case. A week after we filed this complaint they

1 selected a monopolist, and they granted him that. And
2 if you look at what they did, they break the franchise
3 into three parts.

4 There are three parts --

5 QUESTION: What page?

6 MR. FARROW: Let's see, it's in Joint Appendix
7 -- one second -- it would be page 215, "Nature and
8 Extent of the Grant."

9 A, it grants the right to engage in business;
10 B, the right to erect -- to build a plant; C, the right
11 to maintain and operate the plant. And all we wanted
12 was A. They don't give us just A. You've got to take B
13 and C, and you can't get B and C unless you go through
14 the option, pay the money, win the game.

15 QUESTION: Well, Mr. Farrow, do you think the
16 City -- I take it you think the City may not condition
17 the right to run a cable system on a license at all.

18 MR. FARROW: That's right.

19 QUESTION: Franchise at all?

20 MR. FARROW: I believe --

21 QUESTION: You just can't go through that
22 process?

23 MR. FARROW: It is -- we all admit, it is a
24 publishing business.

25 QUESTION: The process is --

1 QUESTION: And I take it you would say that
2 the City couldn't limit the number, even if they said,
3 well, six companies may do so but not seven?

4 MR. FARROW: I think that would be wrong, yes,
5 sir. The chance -- six or seven is, you know, beyond
6 the realm of possibility.

7 QUESTION: Strictly a market --

8 MR. FARROW: But if there were six or seven,
9 because the customers wanted to pay for it.

10 QUESTION: Well, what about the point that --
11 I take it your answer has to -- I guess I know what your
12 answer is.

13 Since they can't license at all, they can't
14 limit the license to one on the first go-around, do you
15 agree that the license that has been issued in these
16 areas is not exclusive?

17 MR. FARROW: If by its terms it says it's not
18 exclusive, and the reason why historically that's so --
19 by the way, there are a number of overlapping --

20 QUESTION: You are saying, they say they are
21 non-exclusive?

22 MR. FARROW: They say by their terms, they are
23 non-exclusive. The only exclusive franchise, well, I
24 know of two that were issued, by the term "exclusive
25 franchise" in California, one was down in Southern

1 California, a town with a name I can't remember, that
2 question of exclusivity that was tried at the lower
3 court, the lower court held it was unconstitutional of
4 the state constitution to be exclusive, and it was --
5 that exclusivity was denied.

6 The other one was surrendered voluntarily by
7 the cable operator. There may be others, but I'm not --

8 QUESTION: I take it that since the public
9 property issue may influence the decision, I take it
10 we'd have to look at every city in the country, at least
11 deciding this case wouldn't decide the cases in other
12 cities? Well, if you win here, it may be that in other
13 cities the lawyer in your position would lose?

14 MR. FARROW: If we win on this point in
15 California, that would settle the issue in California,
16 because we have the California legislature. There is a
17 comparable statute, federal statute, Section 224, 47
18 U.S.C. 224, it is the Federal Code Bill where the feds
19 do the same thing that the State does. It was adopted,
20 I think within a year or so after the adoption of 767.5
21 of the Public Utilities Code in California.

22 It is not the exact, same wording. For
23 example, in California the statute actually spells out
24 the word, identifies the words, "public utility
25 service," whereas the federal doesn't use that --

1 QUESTION: Dcesn't the federal law --

2 MR. FARROW: They put it into the Ccmmcn
3 Carrier section of the Communications Act.

4 QUESTION: Dcesn't the federal law contemplate
5 the issuance of franchises or licenses by lccalities?

6 MR. FARROW: Federal law says only that it can
7 issue cne or more.

8 QUESTION: Well, but that means it anticipates
9 that there will be licenses issued, isn't that right?

10 MR. FARROW: Licenses issued, yes, I guess.

11 QUESTION: Well, then you say that statute
12 must be unconstitutional?

13 MR. FARROW: If -- I have a license, business
14 license as a lawyer. I assume that you're -- you kncw,
15 if it's a --

16 QUESTION: You just told me your case was that
17 the City had nc business issuing a license at all.

18 MR. FARROW: Then I misspoke, and cverspoke.
19 If it's going to use the standard business license where
20 if anybody, you know, where the legislature sets the
21 rules and says that, you know, if you're going to run
22 your business run it by these standards, then that's
23 fine, okay. Then they can require a license. Each cne
24 can come in and have a constituticnal right --

25 QUESTION: You mean, they can -- sc you agree,

1 the City could insist that before you run your cable
2 system you have to get a license from them?

3 MR. FARROW: Yes, if it's an ordinary business
4 license.

5 QUESTION: Ordinary business license, like you
6 have to have some qualifications?

7 MR. FARROW: Yes, sir.

8 QUESTION: So, they can treat you different
9 than a newspaper?

10 MR. FARROW: No, I don't think they can treat
11 me different than somebody else who wants to be a cable
12 operator. They can say, for example, in an ordinary
13 time, place and manner, you can't put yourself on the
14 poles unless you provide insurance, so if the case falls
15 off the pole and hurts some people, you know, that you
16 should have insurance.

17 You know, that's a reasonable legislation.
18 You can say, you know, you shouldn't elect for future
19 customers. You shouldn't steal from your customers.
20 You shouldn't run [inaudible] lights. You know,
21 ordinary, reasonable health, safety and welfare --

22 QUESTION: Well, then, the City could issue
23 one license at the first option and then they could
24 issue another at the next option?

25 MR. FARROW: No, sir. In that case, if

1 they're doing that -- if they're doing that, they're
2 discriminating between would-be publishers, so it's to
3 give one an advantage to get into the market and to get
4 a complete head start while the other one waits, then
5 that's not proper

6 As a matter of fact, the cities use the
7 non-exclusiveness of the license that they issue as a
8 way of controlling the speaker they've got, so --

9 QUESTION: So you think --

10 MR. FARROW: Watch out, I'll bring you
11 competition.

12 QUESTION: They -- in their process they
13 should have some minimum requirements that operators
14 must meet?

15 MR. FARROW: Right.

16 QUESTION: And then anybody who measures up to
17 them ought to have a license?

18 MR. FARROW: That's right.

19 QUESTION: And as many as apply, if they all
20 qualify, meet those minimum standards, there should be
21 that number of licenses issued?

22 MR. FARROW: That's right.

23 QUESTION: Well, what if there are some
24 physical limits to the number of cables that can be
25 strung in the amount of space in the right of way to be

1 occupied?

2 MR. FARROW: The physical limit issue was
3 tried in the Eculder cases, and there [inaudible]
4 distribution plant that in fact demonstrated there was
5 room for at least four, and there were only two trying
6 to deal in business affairs at the time.

7 It could be that, you know, it could be that
8 there is a finite limit to how many people you can put
9 on the pole, but those come in increments of five feet,
10 and an ordered rearrangement for the first cable
11 operator, you have to rebuild some of those poles.

12 QUESTION: Well, if there were physical
13 limitations, do you agree that the City could take that
14 into account --

15 MR. FARROW: Yes, if they could prove --

16 QUESTION: -- in limiting its franchises?

17 MR. FARROW: If they can prove a physical
18 limitation, then we're dealing in a whole other ball
19 game. Then we're dealing with something like
20 broadcast. But, they would have to prove that, that's
21 not so.

22 Basically, here to China you can put cable
23 systems from now on. There's no logical way they could
24 be -- like physical -- like when you run out of space on
25 the poles you go underground.

1 QUESTION: Do you think the City can
2 legitimately consider the economics of this situation in
3 issuing the franchises, or must that be something the
4 City cannot consider?

5 MR. FARROW: No, Your Honor. They have no
6 business in there, no more business in there than they
7 have in running a newspaper. If a man wants to lose
8 money publishing what he believes to be his views, he
9 should have the constitutional right to do so. And if
10 he's mistaken or foolish, then he should have the right
11 to do that, to be a constitutionally foolish publisher.
12 There may be some in business.

13 QUESTION: Mr. Farrow, if you agree, as I
14 think you did, with Justice White that --

15 MR. FARROW: I am sorry, Your Honor. I did
16 not hear you.

17 QUESTION: If you accept the proposition that
18 the license would just impose some standards, health,
19 safety and so forth, on it --

20 MR. FARROW: Yes, sir.

21 QUESTION: What is it in this bid proposal
22 that you describe as unacceptable standards? Why aren't
23 these standards in this proposal acceptable?

24 MR. FARROW: Well, in the RFP, when you come
25 in to apply for it, one of the things that they do is

1 examine your character as an [inaudible] and they also
2 ask you: what your proposed program is.

3 QUESTION: All right.

4 MR. FARROW: I don't think it's any of their
5 business what your proposed program is. But here's a
6 question, question No. 9 on page 143. "Has applicant or
7 any principal ever initiated litigation against a
8 franchising authority, or had a franchising authority
9 initiate litigation against it.

10 You think about that question, and you think
11 about the question they're asking about your proposed
12 programming, you can see the immediate risk of either
13 viewpoint discrimination or individual discrimination.
14 But, you don't even have to guess about it.

15 QUESTION: I don't think that's responsive to
16 my question. I'm not asking you what kind of
17 questions you'd rather they didn't ask you. I'm asking
18 you if there are requirements in the bid proposal that
19 you feel you should not be compelled to comply with.

20 MR. FARROW: Well, then if you turn to page --
21 let's see, 213 of the actual ordinance they did, there
22 is a whole list of programming. For example, in the
23 programming requirements that start, I believe, on page
24 2 -- something or other here, run for four or five pages
25 and specify exactly what these people have to carry in a

1 program.

2 In addition, you find that --

3 QUESTION: Well, one of them was that you have
4 to make, I think two channels available to the City or
5 something like that.

6 MR. FARROW: Oh, yes, you've got to give
7 channels --

8 QUESTION: Do you think the City doesn't have
9 power to do that?

10 MR. FARROW: No, sir. I don't think they have
11 the right to demand any percentage use of your channel
12 capacity, any more than they have the right to use any
13 one of -- you know, one out of every five taxicabs in a
14 fleet of taxicabs.

15 The idea that because you're in a publishing
16 business, they can --

17 QUESTION: Do you think the Federal
18 Communications Commission would not have the power to
19 make a similar requirement?

20 MR. FARROW: Pardon me?

21 QUESTION: Would the Federal Communications
22 Commission have the power to make a similar requirement
23 against the networks?

24 MR. FARROW: I don't believe so. I don't
25 believe so. I don't think it would make any difference

1 which level of government was taking your property away
2 from you. It's a Fifth Amendment taking. And when they
3 take it they ignore, should there be a requirement that
4 you have to give it to --

5 QUESTION: Mr. Farrow, you point out five or
6 six pages there. Do you read one regulation that you
7 are concerned about, and why?

8 MR. FARROW: On page 235, "Inspection of
9 Property and Records. You have, in effect, a Fourth
10 Amendment search here, the power of the city to an
11 operating publisher to come in and inspect all your
12 records about every affair or transaction of your
13 business whenever they choose.

14 That's -- for example on page 237, the section
15 that reads, "Signal Carriers and Channel Allocations."
16 They tell you for three or four pages there what you
17 must carry in the way of programming.

18 On page 245 they require you to spend \$100,000
19 per year for production contract, to give that to some
20 outsider. You know, that's not part of your business.
21 Somebody that is satisfactory to a commission, that they
22 -- that should they set up that they have to prove, we
23 have to make available to this outside production
24 company a line of credit of half a million dollars.

25 In year five you've got to spend another

1 \$250,000 for a broadcast studio for them, and provide
2 another \$250,000 fund to pay community producers after
3 five years, or after year five.

4 There are just a number of those types of
5 things where they're saying the premium, the price, the
6 bribe for the exclusivity, the de facto exclusivity,
7 we're going to give you. This is what the price is.
8 And if we cannot maintain that de facto exclusivity, we
9 can't get all of the --

10 QUESTION: Well, Mr. Farrow, I understood that
11 the allegations of your client's complaint was that they
12 were perfectly ready, willing and able to meet all the
13 requirements, just asking that they be given a franchise.

14 MR. FARROW: Perfectly willing and able to
15 meet all proper police power requirements. Those
16 requirements, we would have argued about.

17 If they believed that that is a proper
18 requirement in order to get a license, let them pass a
19 rule that says, all cable operators must do these
20 things. And then you can either do them, or you can
21 test [inaudible] in the regular way.

22 But, you don't have to risk the right to be a
23 publisher in order to quarrel about it. You see, what
24 happens is, this process traditionally, we talk about
25 is, by saying we're going to do one at a time, it's

1 going to be non-exclusive, and we're going to constantly
2 hang over your head the threat of competition and the
3 threat of non-renewal that control the press, right, and
4 the applicants can't complain about it.

5 You remember, they asked you a while ago, what
6 other franchising, sir, have you ever sued? You sue
7 one, the next time you do to them they're going to
8 remember it and they're going to know about it and
9 you're not going to win that discretionless award of the
10 thing.

11 QUESTION: Well, maybe they don't want to deal
12 with deadbeats. You presumably have to pay a certain
13 percentage for the franchise.

14 MR. FARROW: A bonding requirement might be
15 appropriate, and for any proper fees that are due, or
16 any proper situation, it might well be that they're
17 entitled, and require a bonding requirement.

18 QUESTION: Well, why isn't it perfectly
19 legitimate, if they're expecting a percentage of your
20 revenues as a franchise fee, for them to say, we want to
21 know if you've been in any legal disputes.

22 MR. FARROW: I think that if you -- I think
23 that is an impermissible request to deal with --
24 maintain a control over a publisher, and that kind of
25 request frightens the publisher, the effect of which,

1 what you have is, the form of the press which is moist
2 valuable in this country to report on local government,
3 school councils, city councils, school board, whatever,
4 is frightened to speak out.

5 You know, just as you don't hear CBS doing
6 exposes on the FCC, you don't hear cable companies doing
7 exposes on what's going on down at City Hall. You just
8 don't dare.

9 Your very existence depends upon the continued
10 good will of this franchising authority under this
11 process.

12 QUESTION: But you did apply for -- you did go
13 to the City and say, "Get me a license"?

14 MR. FARROW: Right.

15 QUESTION: What did they say?

16 MR. FARROW: They said --

17 QUESTION: They said no, but why? They must
18 have given you some reason.

19 MR. FARROW: Have to go through the RFP
20 process. You can't just have Section A alone, can't
21 have just one of these. You've got to take them all,
22 you know, so you've got to go down and you've got to
23 compete under that process.

24 QUESTION: May I ask if you -- do you object
25 to the five percent franchise fee, the revenue?

1 MR. FARROW: Well, that's not in this
2 lawsuit. But it will certainly be in one in the near
3 future, without any question.

4 The concept that five percent of the gross
5 revenue, over and above any cost of regulation, can be
6 siphoned off this, of course all these other things,
7 seems totally inappropriate to me. I mean, it seems to
8 me, you know, that -- you have this strange situation
9 where, you know, government intrusion into the affairs
10 of business generally are the lightest when you deal
11 with retail or light manufacturing, and if you're going
12 to carry acids or frozen materials you get a little bit
13 more government regulation, because of safety problems.

14 Then, if you're a public utility, you get even
15 more because now they're going to regulate your rates
16 and your capital costs, or whatever. These processes
17 start off with utility regulations and then add more.

18 They're going to run your programming.
19 They're going to tell you how to handle your customers.
20 They're going to tell you how or whether or not you can
21 stay in business. And they're going to supervise you,
22 like these boards that you have to set up here, spelled
23 out in this thing, that they approve all of that.

24 It goes on and on. And the question, if I
25 can, I say let me deal just quickly with a couple of

1 points I've raised. We're talking about cream
2 skimming. You know, in the materials that are lodged
3 with the Court are the materials from Palo Alto, even
4 though it's a different lawsuit than the L.A. lawsuit.

5 They were filed with the Ninth Circuit in
6 connection with a motion for filing an amicus brief, and
7 they've traveled with it and they're here. In Palo
8 Alto, those documents demonstrate that Palo Alto, Menlo
9 Park and East Palo Alto got together as a franchising
10 authority run by the City of Palo Alto.

11 East Palo Alto is the ghetto, on the wrong
12 side of the freeway, 160 homes per mile of town.
13 Atherton is the Beverly Hills of the peninsula, 40 homes
14 per mile of town.

15 The critical factor in the choice of the
16 franchisee there was whether or not each household in
17 the whole area would get exactly the same price
18 [inaudible.] The Mayor of Atherton wanted to make sure
19 that his house -- his house is up there, his estates --
20 didn't get charged a higher price than they did down in
21 the ghetto.

22 Now, here we are in Los Angeles with two black
23 professionals trying to get the right to build the black
24 section, the Watts section of Los Angeles. The rest of
25 the town has been built for years, and when they talk

1 about cream skimming it seems almost superficial.

2 One last thing, we have mentioned -- there's
3 been mention at several [inaudible] about the potential
4 for corruption, and improper government that comes about
5 with this kind of a pork barrel -- in Sacramento,
6 there's a piece of litigation going on and Sacramento is
7 going to make its brief in here too.

8 There's a piece of litigation going on here
9 that demonstrates -- as a matter of fact two pieces of
10 litigation, demonstrate that there the City and County
11 got together and gave a nonexclusive franchise to a
12 cable television company which agreed to pay certain
13 kinds of these, what I call bribes, so long as they were
14 protected from competition.

15 The total of that money for the term, 15-year
16 term, is roughly \$50 million. According to a complaint
17 filed by the City against that cable company, the amount
18 of money in 1986 alone, that that involved, was \$10
19 million.

20 Now, in the minute Sacramento lets a second
21 cable operator in there, they lose those goodies.
22 That's what we're dealing with, with this RFP process.

23 QUESTION: May I ask before you sit down, is
24 the -- is a copy of the application that your client
25 filed with the City in the record?

1 MR. FARROW: No, Your Honor.

2 QUESTION: It is not?

3 MR. FARROW: No.

4 CHIEF JUSTICE BURGER: Mr. Perez.

5 MR. PEREZ: Yes, Mr. Chief Justice.

6 ORAL ARGUMENT OF EDWARD J. PEREZ, ESQ.

7 ON BEHALF OF PETITIONER -- REBUTTAL

8 MR. PEREZ: There is a point I'd like to make,
9 but I would first offer myself open for any questions of
10 the Court.

11 One point I want to make, Your Honor, and I
12 would like to address this to Justice O'Connor, I
13 appreciate your concern, Your Honor, about the facts in
14 the complaint, but our position is that even if they are
15 all true, the City still acted reasonably.

16 We made certain legislative assumptions based
17 upon experience with other cities, as this Court said we
18 may do in the Redman case, so even if the facts are true
19 and even if we acted and it turned out to be different
20 than what we assumed, that's not important. As a matter
21 of law, this Court can still hold that there is no
22 constitutional right to construct a cable system in Los
23 Angeles, and that the City acted reasonably.

24 QUESTION: May I ask you one question. Assume
25 for the moment that there were no physical problems of

1 tearing up the streets and clutter and litter and all
2 that, but just the economic interest at stake and the
3 interest in kind of managing a good operation, you might
4 say.

5 Do you take the position that the economic
6 interest alone would be sufficient to justify a
7 municipal decision to license only one operator, even
8 through it were economically feasible to have four or
9 five?

10 MR. PEREZ: I think I'm a little confused at
11 one point. You mentioned economics. I'm thinking of a
12 natural monopoly theory. Is that what you are referring
13 to?

14 QUESTION: Assume that you couldn't prove a
15 natural monopoly, but rather the City just thought that
16 it would be in the interest of the public if they were
17 able to manage an operation and it met all the standards
18 that you've got here, to be sure they have good
19 management and adequate programming and the right kind
20 of programming.

21 Would you think the City would do that, just
22 for that one interest in the kind of operation that it
23 would be --

24 MR. PEREZ: I believe so, Your Honor. And I
25 think, as part of that -- you can't separate it

1 completely. Part of that is the fact that if you have
2 multiple systems, you have multiple --

3 QUESTION: And I say, put to one side all of
4 that. Assume that you don't have those kinds --

5 MR. PEREZ: You've just got one, yes, Your
6 Honor.

7 QUESTION: Do you think the City of Los
8 Angeles could have said, we're not going to grant any
9 franchises, we're going to run our own cable television
10 operation in the whole city, it will be the sole
11 operator of cable television in the City of Los Angeles?

12 Would that stand up under the First Amendment,
13 do you think?

14 MR. PEREZ: I think the City if they wanted to
15 could operate a cable television system. Certainly, if
16 the municipality did that, there would have to be a real
17 close scrutiny of any kind of content and programming.

18 QUESTION: You would be deciding all the time
19 what the program was, the City would be?

20 MR. PEREZ: You'd have to divorce it and have
21 a separate --

22 QUESTION: I take it there are a lot of --
23 aren't there a lot of cities that run their own cable
24 system, or not?

25 MR. PEREZ: There are some, Your Honors. I

1 don't know how many. But we could run and construct the
2 system, which is what Stroth and Company does in
3 Wisconsin, for instance, and we can construct it and
4 lease it back. There's nothing wrong with that.

5 QUESTION: Well, yes, but how about your
6 operating it? How about your operating it, your being
7 the sole voice that the people hear on the cable?

8 MR. PEREZ: That's because of Robinson.
9 That's why we're not doing it in Los Angeles, Your Honor.

10 QUESTION: Thank you.

11 CHIEF JUSTICE BURGER: Thank you, gentlemen.
12 The case is submitted.

13 [Whereupon, at 10:55 o'clock a.m., the case in
14 the above-entitled matter was submitted.]—

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-390 - CITY OF LOS ANGELES AND DEPARTMENT OF WATER-AND POWER,

Petitioner V. PREFERRED COMMUNICATIONS, INC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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