



CITY OF PACIFIC GROVE
300 Forest Avenue, Pacific Grove, California 93950

AGENDA REPORT

TO: HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: Celia Perez Martinez, Business Manager

MEETING DATE: February 6, 2008

SUBJECT: Introduce an ordinance that adds SECTION 21.12.270 TO CHAPTER 21.12 ("CABLE COMMUNICATION FRANCHISE PROCEDURES") OF TITLE 21 OF THE PACIFIC GROVE MUNICIPAL CODE, WHICH IMPLEMENTS THE PROVISIONS OF THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006

RECOMMENDATION:

Introduce the attached Ordinance adding section 21.12.270 to Chapter 21.12 to ensure continued benefits from cable franchisees.

DISCUSSION:

HISTORY

On September 29, 2006 Governor Schwarzenegger signed into law AB2987, the Digital Infrastructure and Video Competition Act of 2006 (DIVCA). This law changes the franchising and regulatory structure for the provision of cable television and other video services in California. Under DIVCA, video services operators are able to seek their franchises from the California Public Utilities Commission rather than from cities and counties. It is important to note, however, that existing locally granted franchises may be extended if the operator and local agency reach a mutually satisfactory agreement. Staff in conjunction with the Buske Group, telecommunication consultants, and the cities of Monterey, Seaside, Sand City, and Salinas entered good faith negotiations with Comcast last year. These negotiations did not yield an agreement for any of the cities. Our consultants are currently completing an audit that was approved by the Council in August of 2007. This audit is reviewing the following:

- Review of the basis on which fees are to be remitted to the City
- Review of franchise fee computation work papers provided by Comcast
- Review of monthly subscriber sub ledgers reporting subscriber revenue and bad debt
- Review of Comcast's use of the "Pasadena Pass-Through" computations for collecting franchise fees from subscribers
- Assessment of Comcast's overall compliance with the current franchise provisions concerning the computation and remittance of franchise fees

We will meet with Comcast when our audits are complete. Comcast filed for and was subsequently approved for a state franchise in October 2007. The City's franchise agreement expired January 2, 2008.

CURRENT

Though the City is no longer be the franchising authority, it will acquire certain rights and responsibilities under DIVCA with respect to any State franchise holder conducting operations in the City including Comcast. DIVCA requires that these rights and responsibilities be established by local ordinance before they become effective and enforceable. By adopting the ordinance our rights are greater than under the previous local franchise and will yield greater revenues. The previous franchise allowed Comcast to make deductions from gross revenues for advertising revenues and program license fees. This will not be the case under DIVCA. The City will receive franchise fees of 5% of an operator's gross revenues from any holder of a State franchise operating in the City, including Comcast. This is a General Fund revenue and is considered to be a form of rent in exchange for the operator's use of the public streets and rights-of-way. In addition, the City will receive 1% of an operator's gross revenues which must be used to facilitate Public, Education, and Government (PEG) Access to the cable system.

In addition, the funds to facilitate PEG Access, the proposed ordinance also requires each operator to dedicate up to four channels for PEG Access and to make a good faith effort to interconnect PEG signals with other operators. Recommendations pertaining to the delivery of PEG Access services to our community will be brought to the City Council in the near future.

The proposed ordinance also establishes customer service standards with penalties, guidelines for permits and construction activity in the public rights-of-way, audit provisions, and requirements for Emergency Alert Systems consistent with Federal law.

The proposed ordinance will be binding on Comcast and AT&T if and when it begins its construction and video operations in Pacific Grove. Should the City be successful in its efforts to negotiate a mutually acceptable franchise extension with Comcast, then Comcast's operations would be governed by local authorities other than the DIVCA ordinance.

FISCAL IMPACT:

Approximately \$67,000.00 additional franchise fees per year and \$40,000.00 in PEG funding per year.

ATTACHMENTS:

Ordinance

RESPECTFULLY SUBMITTED:



Celia Perez Martinez
Business Manager

REVIEWED BY:

James J. Colangelo

Digitally signed: I have reviewed this document

James J. Colangelo
City Manager

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF PACIFIC GROVE ADDING A SECTION 21.12.270 TO CHAPTER 21.12 (“CABLE COMMUNICATION FRANCHISE PROCEDURES”) OF TITLE 21 OF THE PACIFIC GROVE MUNICIPAL CODE, WHICH IMPLEMENTS THE PROVISIONS OF THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006, CODIFIED IN CALIFORNIA PUBLIC UTILITIES CODE SECTION 5800 ET SEQ., WHICH THE CITY IS REQUIRED TO ADMINISTER AND ENFORCE THROUGHOUT THE CITY.

Section 21.12.270

STATE VIDEO SERVICE FRANCHISES

Subsections:

- (a) General Provisions**
- (b) Definitions**
- (c) Franchise Fees**
- (d) Customer Service**
- (e) Permits and Construction**
- (f) Emergency Alert**
- (g) Public, Educational, and Government Access Channel Capacity, Interconnection, Signal Carriage and Support**
- (h) Notices**

(a) General Provisions.

1. Purpose.

This Section 21.12.270 is intended to be applicable to state franchise holders who have been awarded a state video franchise under the California Public Utilities Code section 5800 *et seq.* (the Digital Infrastructure and Video Competition Act of 2006 [“DIVCA”]), to serve any location(s) within the incorporated boundaries of the City. It is the purpose of this Section to implement within the incorporated boundaries of the City the provisions of DIVCA and the rules of the California Public Utilities Commission promulgated there under that are applicable to a “local franchising entity” or a “local entity” as defined in DIVCA.

2. Rights Reserved.

A. The rights reserved to the City under this Section 21.12.270 are in addition to all other rights of the City, whether reserved by Section 21.12.270 or authorized by law, and no action, proceeding or exercise of a right shall affect any other rights which may be held by the City.

B. Except as otherwise provided by DIVCA, a state franchise shall not include, or be a substitute for:

i. compliance with generally applicable requirements for the privilege of transacting and carrying on a business within the City, including, but not limited to, compliance with the conditions that the City may establish before facilities may be constructed for, or providing, non-video services;

ii. any permit or authorization required in connection with operations on or in public rights-of-way or public property, including, but not limited to, encroachment permits, street work permits, pole attachment permits and street cut permits; and

iii. any permit, agreement or authorization for occupying any other property of the City or any private person to which access is not specifically granted by the state franchise.

C. Except as otherwise provided in DIVCA, a state franchise shall not relieve a state franchisee of its duty to comply with all laws, including the ordinances, resolutions, rules, regulations, and other laws of the City, and every state franchisee shall comply with the same.

3. Compliance with Section 21.12.270

Nothing contained in this Section 21.12.270 shall ever be construed so as to exempt a state franchise holder from compliance with all ordinances, rules or regulations of the City now in effect or which may be hereafter adopted which are consistent with this Section or California Public Utilities Code section 5800 *et seq.*

(b) Definitions.

1. Definitions Generally -- Interpretation of Language.

For purposes of this Section 21.12.270, the following terms, phrases, words, and their derivations shall have the meaning given in this subsection (b). Unless otherwise expressly stated, words not defined in this Section 21.12.270 shall be given the meaning set forth in Section 21.12.020 of the Pacific Grove Municipal Code as may be amended from time to time, unless the context indicates otherwise. Words not defined in this subsection (b) or Section 21.12.020 of the Pacific Grove Municipal Code shall have the same meaning as established in (1) DIVCA, and if not defined therein, (2) Commission rules implementing DIVCA, and if not defined therein, (3) Title VI of Title 47 of the Communications Act of 1934, as amended, 47USC § 521 *et. seq.*, and if not defined therein (4) their common and ordinary meaning. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number, and "including" and "include" are not limiting. The word "shall" and "will" are always mandatory. References to governmental entities (whether persons or entities) refer to those entities or their successors in authority. If specific provisions of law referred to herein are renumbered, then the reference shall be read to refer to the renumbered provision. References to laws, ordinances or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

A. "Access," "PEG access," "PEG use," or "PEG" means the availability of a cable or state franchise holder's system for public, educational, or governmental use by various agencies, institutions, organizations, groups, and individuals, including the City and its

designated access providers, to acquire, create, and distribute programming not under a state franchise holder's editorial control.

B. "Gross revenues" means all revenues actually received by the holder of a state franchise that are derived from the operation of the holder's network to provide cable service or video service within the incorporated areas of the City, subject to the specifications of California Public Utilities Code section 5860.

C. "State franchise holder" or "State Franchisee" means a cable operator or video service provider that has been issued a franchise by the California Public Utilities Commission to provide cable service or video service, as those terms are defined in California Public Utilities Code section 5830, within any portion of the incorporated limits of the City.

(c) Franchise Fees.

1. State Franchise Fees.

Any state franchise holder operating within the incorporated areas of the City shall pay to the City a state franchise fee equal to five percent (5%) of gross revenues.

2. Payment of Franchise Fees.

The state franchise fee required pursuant to this subsection (c) shall each be paid quarterly, in a manner consistent with California Public Utilities Code section 5860. The state franchise holder shall deliver to the City, by check or other means, which shall be agreed to by the City, a separate payment for the state franchise fee not later than forty-five (45) days after the end of each calendar quarter. Each payment made shall be accompanied by a report, detailing how the payment was calculated, and shall include such additional information on the appropriate form as designated by the City.

3. Audits.

The City may audit the business records of the holder of a state franchise in a manner consistent with California Public Utilities Code section 5860(i).

4. Late Payments.

In the event a state franchise holder fails to make payments required by this section on or before the due dates specified in this section, the City shall impose a late charge at the rate per year equal to the highest prime lending rate during the period of delinquency, plus one percent (1%).

5. Lease of City-Owned Network.

In the event a state franchise holder leases access to a network owned by the City, the City may set a franchise fee for access to the City-owned network separate and apart from the franchise fee charged to state franchise holders pursuant to this subsection (c), which fee shall otherwise be payable in accordance with the procedures established by this subsection.

(d) Customer Service.

1. Customer Service Standards.

A state franchise holder shall comply with Sections 53055, 53055.2, 53055.2 and 53088.2 of the California Government Code; the FCC customer service and notice standards set forth in Sections 76.309, 76.1602, 76.1603, and 76.1619 of Title 47 of the Code of Federal

Regulations; Section 637.5 of the California Penal Code; the privacy standards of Section 551 of Title 47 of the United States Code; and all other applicable state and federal customer service and consumer protection standards pertaining to the provision of cable service or video service, include any such standards hereafter adopted. In case of a conflict, the stricter standard shall apply. All customer service and consumer protection standards under this paragraph shall be interpreted and applied to accommodate newer or different technologies while meeting or exceeding the goals of the standards.

2. Penalties for Violations of Standards.

The City shall enforce the compliance of state franchisees with respect to the state and federal customer service and consumer protection standards set forth in paragraph 1 of this subsection (d). The City will provide a state franchisee with a written notice of any material breaches of applicable customer service or consumer protection standards, and will allow the state franchisee 30 days from the receipt of the notice to remedy the specified material breach. Material breaches not remedied within the 30-day time period will be subject to the following penalties to be imposed by the City:

A. For the first occurrence of a material breach, a fine of \$500 may be imposed for each day the violation remains in effect, not to exceed \$1,500 for each violation.

B. For a second material breach of the same nature within 12 months, a fine of \$1,000 may be imposed for each day the violation remains in effect, not to exceed \$3,000 for each violation.

C. For a third material breach of the same nature within 12 months, a fine of \$2,500 may be imposed for each day the violation remains in effect, not to exceed \$7,500 for each violation.

3. Any penalties imposed by the City shall be imposed in a manner consistent with California Public Utilities Code section 5900.

(e) Permits and Construction.

1. Except as expressly provided in this Section 21.12.270, the provisions of Pacific Grove Municipal Code Sections 21.12.140, 21.12.180, 21.12.190, 21.12.200, 21.12.210 and 21.12.230 shall apply to all work performed by or on behalf of a state franchise holder on any City public rights-of-way, public property, or City easement as those terms are defined in Chapter 21.12 of the Pacific Grove Municipal Code.

2. Permits.

Prior to commencing any work for which a permit is required by this subsection (e), a state franchise holder shall apply for and obtain a permit in accordance with the provisions referred to in paragraph 1 of this subsection (e) and shall comply with all other applicable laws and regulations, including but not limited to all applicable requirements of Division 13 of the California Public Resources Code, section 21000, *et seq.* (the California Environmental Quality Act).

3. The City Manager or their designee shall either approve or deny a state franchise holder's application for any permit required under paragraph 1 of this subsection (e) within sixty (60) days of receiving a completed permit application from the state franchise holder.

4. If the City Manager or their designee denies a state franchise holder's application for a permit, the City Manager or their designee shall, at the time of notifying the applicant of denial, furnish to the applicant a detailed explanation of the reason or reasons for the denial.

5. A state franchise holder that has been denied a permit by final decision of the City Manager or their designee may appeal the denial to the City Council. Upon receiving a notice of appeal, the City Council shall take one of the following actions:

A. Affirm the action of the City Manager or their designee without any further hearing; or

B. Refer the matter back to the City Manager or their designee for further review with or without instructions; or

C. Set the matter for a de novo hearing before the City Council.

6. In rendering its decision on the appeal, the City Council shall not hear or consider any argument or evidence of any kind other than the record of the matter received from the City Manager or their designee unless the City Council is itself conducting a public hearing on the matter.

7. Notification to Residents Regarding Construction or Maintenance.

Prior to any construction, rebuild, or upgrade of a cable or video system, a state franchise holder shall establish procedures to notify City residents in the impacted area of construction schedules and activities. Such notices must be provided in the predominant languages spoken by those persons who work and/or reside in the impacted area. The notices shall be provided to the City Manager or their designee for review and approval no later than twenty (20) days before commencement of construction, rebuild, or upgrade activities.

8. At a minimum, the notice required in paragraph 7 of this subsection (e) shall be provided by the state franchise holder to impacted residents and occupants in the construction area not less than seventy two (72) hours prior to the planned construction. The state franchise holder shall provide additional notice to the persons described in paragraph 7 of this subsection (e) on the day of construction. The notice may be in the form of door hangers that indicate, at a minimum, the dates and times of construction and the name and telephone number of a state franchise holder contact.

9. The state franchise holder shall provide notice at least twenty (20) days prior to entering private property or public ways or public easements adjacent to or on such private property, public ways, or public easements, and provide a second notice three (3) days prior to entering such property.

A. Should there be above ground or underground installations (excluding aerial cable lines utilizing existing poles and cable paths) which will affect the private property, such notice shall be in writing and shall contain specific information regarding any above ground or underground installations (excluding aerial cable lines utilizing existing poles and existing cable paths) which shall affect the private property.

B. To the extent practicable, aboveground or underground equipment placed on private property shall be placed at the location requested by the property owner. A state franchise holder shall provide the private property owner with at least twenty (20) days advance written notice of its plans to install such equipment, and shall obtain express written consent, in the form of a recorded easement agreement, from the private property owner before installing its appurtenances. The state franchise holder shall notify the property owner, in writing, that the property owner is not obligated to agree to the placement on their property or to enter into an easement agreement with the state franchise holder. Should property owner notify the state franchise holder of objection to placement of any such above-ground or underground installations (excluding aerial cable lines utilizing existing poles and existing cable paths), the

state franchise holder shall confer with the City public works department regarding appropriate location and placement of such appurtenances.

10. In addition to any other notice of proposed entry required under this subsection (e), a state franchise holder's personnel shall make a reasonable attempt to give personal notice to residents immediately preceding entry on private property or public ways or public easements adjacent to or on such private property.

11. Identification Required.

A state franchise holder, its employees, agents, contractors, and subcontractors shall be properly identified as agents of the state franchise holder prior to and during entry on private and public property. Identification shall include the name and telephone number of the state franchise holder on all trucks and vehicles used by installation personnel.

12. Restoration of Private and Public Property.

After performance of work, the state franchise holder shall restore such private and public property to a condition equal to or better than its condition prior to construction. Any disturbance of landscaping, fencing, or other improvements upon private or public property shall, at the sole expense of the state franchise holder, be promptly repaired or restored (including replacement of such valuables as shrubbery and fencing) to the reasonable satisfaction of the property owner, in addition to the furnishing of camouflage plants on public property.

13. Reports to the City Manager.

Each state franchise holder, within 60 days after the expiration of each calendar year, shall file a report with the City Manager's office, which shall contain a street and highway map or maps of any convenient scale on which shall be plotted the location of the entire transmission and distribution system or systems covered by the report as of the last day of the calendar year, with the system or systems located in City highways indicated by distinctive coloration or symbols.

(f) Emergency Alert.

1. Emergency Alert Systems.

Each state franchise holder shall comply with the emergency alert system requirements of the Federal Communications Commission in order that emergency messages may be distributed over the state franchise holder's network.

2. To the extent consistent with California Public Utilities Code section 5880, each state franchisee shall provide the system capability to transmit an emergency alert signal to all participating subscribers, in the form of an emergency override capability to permit the City to interrupt and cablecast an audio message on all channels simultaneously in the event of a disaster or public emergency. Each state franchisee shall be exempt from all liability for the use of the emergency alert, and the City shall indemnify and hold each state franchisee harmless from any claims and damages arising out of any such use.

(g) Public, Educational, and Government Access Channel Capacity, Interconnection, Signal Carriage and Support.

1. PEG Channel Capacity.

A. A state franchisee that has been authorized by the California Public Utilities Commission to provide video service in the City shall designate and activate three PEG channels within three months from the date that the City requests that the state franchisee designate and activate these PEG channels. However, this three-month period shall be tolled for

such a period, and only for such a period, during which the state franchisee's ability to designate or provide such PEG capacity is technically infeasible, as set forth in Sections 5870(a), 5870(c) and 5870(h) of the California Public Utilities Code.

B. A state franchisee shall provide an additional PEG channel when the standards set forth in Section 5870(d) of the California Public Utilities Code are satisfied by the City or any entity designated by the City to manage one or more of the PEG channels.

2. PEG Support.

A. Amount of PEG Support Fee.

Any state franchise holder operating within the City shall pay to the City, or if directed by the City, pay to the City's designated PEG provider a PEG support fee equal to one percent (1%) of gross revenues

B. The PEG support fee shall be used for PEG purposes that are consistent with state and federal law.

C. A state franchisee shall remit the PEG support fee to the City, or if directed by the City, to the City's designated PEG provider on a quarterly basis, within forty-five days after the end of each calendar quarter. Each payment made shall be accompanied by a report, detailing how the PEG support fee was calculated.

D. If a state franchisee fails to pay the PEG support fee when due, or underpays the proper amount due, the state franchisee shall pay a late payment charge at the rate per year equal to the highest prime lending rate during the period of delinquency, plus one percent (1%), to the extent that such a late payment charge is deemed to be consistent with DIVCA.

3. PEG Carriage and Interconnection.

A. As set forth in Sections 5870(b) and 5870(g)(3) of the California Public Utilities Code, state franchisees shall ensure that all PEG channels are receivable by all subscribers, whether they receive digital or analog service, or a combination thereof, without the need for any equipment other than that needed to receive the lowest cost tier of service. PEG access capacity provided by a state franchisee shall be of similar quality and functionality to that offered by commercial channels, shall be capable of carrying a National Television System Committee (NTSC) quality television signal, and shall be carried on the state franchisee's lowest cost tier of service. To the extent feasible, the PEG channels shall not be separated numerically from other channels carried on the lowest cost tier of service and the channel numbers for the PEG channels shall be the same channel numbers used by any incumbent cable operator, unless prohibited by federal law. After the initial designation of the PEG channel numbers, the channel numbers shall not be changed without the agreement of the City unless federal law requires the change.

B. As set forth in Section 5870(h) of the California Public Utilities Code, the holder of a state franchise and an incumbent cable operator shall negotiate in good faith to interconnect their networks for the purpose of providing PEG programming. If a state franchisee and an incumbent cable operator cannot reach a mutually acceptable interconnection agreement for PEG carriage, the City shall require the incumbent cable operator to allow the state franchisee to interconnect its network with the incumbent cable operator's network at a technically feasible point on the state franchisee's network as identified by the state franchisee. If no technically feasible point of interconnection is available, the state franchisee shall make interconnection available to each PEG channel originator programming a channel in the City and shall provide

the facilities necessary for the interconnection. The cost of any interconnection shall be borne by the state franchisee requesting the interconnection unless otherwise agreed to by the parties.

(h) Notices.

1. Each state franchise holder or applicant for a state franchise shall file with the City a copy of all applications or notices that the state franchise holder or applicant is required to file with the California Public Utilities Commission.

2. Unless otherwise specified in this Section 21.12.270, all notices or other documentation that a state franchise holder is required to provide to the City under this Section or the California Public Utilities Code shall be provided to both the City Manager and the City staff person in charge of cable and telecommunications, or their successors or designees.