



DATE: October 21, 2008
TO: Mayor and City Council
FROM: City Manager
SUBJECT: Introduction of an Ordinance Implementing the Provisions of the Digital Infrastructure and Video Competition Act (DIVCA) of 2006, Codified in California Public Utilities Code Section 5800, et seq., which the City of Hayward is required to administer and enforce throughout the City.

RECOMMENDATION

That Council approves the introduction of the proposed Ordinance implementing the provisions of the Digital Infrastructure and Video Competition Act (DVICA) of 2006, by amending Sections 11-1.100 through 11-1.112, Chapter 11, Article 1 of the Hayward Municipal Code.

BACKGROUND

California Assembly Bill 2987, the Digital Infrastructure and Video Competition Act (DIVCA), was adopted in 2006 and became effective on January 1, 2007. The goal of the legislation was to promote a fair and level playing field for all competitors in the video services market, given the evolution of technology from plain old television service (POTS) and community antenna television system (CABLE) to wireless telecommunications and broadband internet access. Prior to the legislation, local jurisdictions had leeway in negotiating the terms of franchise agreements for video service, including amounts to be paid under the franchise, the number of Public Education and Government (PEG) channels, support for public access programming to air on the PEG channels, and free cable provided to public locations such as schools, libraries, and other municipal buildings. This required video service providers to negotiate individually with each jurisdiction in which they desired to provide service. The City of Hayward had previously negotiated such terms under an exclusive 20-year cable service franchise agreement with Comcast, which expired on March 8, 2007.

With the State legislation, local jurisdictions are precluded from imposing local franchise requirements on video service providers. Instead, DIVCA requires all video service providers to obtain a State franchise from the California Public Utilities Commission (CPUC). The legislation further establishes the amounts of franchise fees and PEG fees to be paid to local jurisdictions. AT&T was granted a State franchise to provide video service on March 30, 2007, and Comcast was granted a State franchise on January 2, 2008.

Under DIVCA, the CPUC retains responsibility for administration of certain provisions of the state franchises, including the enforcement of build-out and non-discrimination provisions. Administration of other provisions of DIVCA are designated to local government control, including collection of franchise fees, PEG issuance, enforcement of customer service standards, and management for construction within public rights-of-way.

DISCUSSION

Adoption of the attached Ordinance preserves the City's ability, to the extent permitted by DIVCA, to collect franchise fees and PEG fees, enforce customer service standards, and manage and control construction in the public rights-of-way by state franchise holders. As provided by DIVCA, the City's ordinance requires any state franchise holder operating within the City to pay to the City a state franchise fee of 5% of gross revenues received from activities within the local franchise area.

Additionally, the City's three PEG channels (15, 27, and 28) will be sustained on Comcast, contingent upon eight hours of daily programming per channel. The City's PEG support fee is limited to 1% of the franchise holder's gross revenues from the local franchise area. Currently, the City's main Channel, KHRT, is viewed as a normal channel on Comcast service. Staff is working with AT&T to assure that they also carry KHRT in main programming, but it is unclear if that will occur. AT&T's "U-verse" system employs a radically different method to transmit the PEG Access channels to its customers. Once the (lower quality) signals are received by AT&T, they would be placed on Channel 99 in a drop-down menu, unlike any other programming. This drop-down menu would include all other PEG Access channels in the AT&T Bay Area service area.

The customer service standards that the City is allowed to enforce are limited to those set forth in state and federal law. Those standards address issues such as installation, disconnection, service, and repair obligations; reports of service outages; notices of change in programming service, channel assignments, billing procedures; rate increases; complaint and bill dispute resolution procedures; and subscriber privacy protections. Local jurisdictions are precluded from imposing standards in other areas or from increasing performance levels in the standards specified. Similarly, the penalties for violations of the customer service standards that are imposed by the ordinance are the maximum allowed by DIVCA.

The ordinance further codifies standards for construction within the City's public rights-of-way. Under DIVCA, a holder of a state franchise is subject to local encroachment permit requirements

and the California Environmental Quality Act (CEQA) when installing, constructing, and maintaining facilities in the public rights-of-way. DIVCA requires the City to act on completed encroachment permit applications within 60 days of filing. An application is complete when the applicant has complied with all statutory requirements including CEQA. This requires the City to approve or deny permit applications for both architectural review and street work permits within this 60-day limit unless extended by mutual agreement. Staff has modified its development review and street work permit application process to ensure it complies with this new 60-day rule. DIVCA also requires the City to provide applicants with an appeal process to the Council for any adverse initial decisions on permit applications.

FISCAL AND ECONOMIC IMPACT

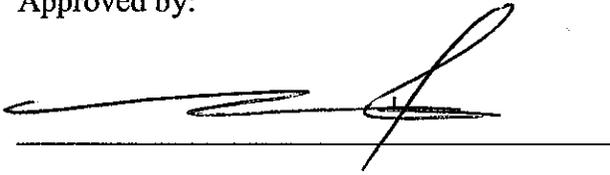
All providers of video services operating under a state franchise shall pay to the City a state franchise fee equal to five percent (5%) of the state franchise holder's gross revenue received from the local franchise area, the same percentage that was payable to the City under the previous local franchise agreement with Comcast. In FY 2008, the City received \$950K from Comcast in franchise fees.

In addition, each state franchise holder shall pay to the City a PEG fee equal to one percent (1%) of the gross revenues received from the franchise area (estimated at roughly \$10,000 annually). Those revenues must be used by the City for PEG purposes consistent with federal law (which includes costs associated with purchase, installation, repair, and maintenance of facilities and equipment, as well as staffing requirements). Under the previous agreement with Comcast, the City received \$20,000 per year for the first five years of the agreement for PEG support.

Previously, Comcast, as the City's sole franchisee, provided the community with many free service drops to City facilities. Currently, Comcast provides the City with free drops at City Hall (about 11 locations), airport, Centennial Hall, Corporation Yard, Water Pollution Control Plant, all Fire Stations, Barnes Court, HPD, and the libraries. Comcast also supplies free drops to Hayward Recreation District (Administration Offices, Hayward Senior Center, Sorensdale, Shoreline Interpretive Center, and Sulfur Creek); Chabot Community College; and Hayward Unified School District (HUSD) facilities. Staff is in conversation with Comcast to determine the status of these free drops after December 2008.

Staff has been informed by Comcast that free drops to libraries and schools will continue, but that there will be a yet-to-be-determined charge for other municipal drops. Until the specific cost is known, it is too early to determine to which City facilities, if any, we may choose to cease cable service.

Approved by:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

Fran David, Assistant City Manager

Attachment: Draft Ordinance

DRAFT

*NH
10/12/08*

ORDINANCE NO. _____

AN ORDINANCE THAT IMPLEMENTS THE PROVISIONS OF THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT (DIVCA) OF 2006, CODIFIED IN CALIFORNIA PUBLIC UTILITIES CODE SECTION 5800, ET SEQ., WHICH THE CITY IS REQUIRED TO ADMINISTER AND ENFORCE THROUGHOUT THE CITY

THE CITY COUNCIL OF THE CITY OF HAYWARD DOES ORDAIN AS FOLLOWS:

Section 1. Chapter 11, Article 1 of the Hayward Municipal Code is hereby amended by deletion of Sections 11-1.100 through 11-1.112 thereof, and replacing those sections with the following:

SEC. 11-1.100. GENERAL PROVISIONS.

1. Purpose and Title. This Section 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. These provisions shall be known and may be cited as the "State Video Service Franchises Ordinance." It is the purpose of this Ordinance 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 Ordinance are in addition to all other rights of the City, whether reserved by this Ordinance 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:

(1) 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;

- (2) 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
 - (3) 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 franchise holder of its duty to comply with all laws, including the ordinances, resolutions, rules, regulations, and other laws of the City, and every state franchise holder shall comply with the same.
 - (d) No permit issued by the City to a state franchise holder is itself a franchise, nor shall any permit create a vested right that would prohibit the City from revoking or amending the permit.

3. Compliance with Ordinances, Rules, and Regulations. Nothing contained in this Ordinance 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.

SEC. 11-1-200. DEFINITIONS

1. Definitions Generally -- Interpretation of Language. For purposes of this Ordinance, the following terms, phrases, words, and their derivations shall have the meaning given in this section. Unless otherwise expressly stated, words not defined in this Ordinance shall be given the meaning set forth in the City of Hayward Ordinance No. 87-003 C.S. as may be amended from time to time, unless the context indicates otherwise. Words not defined in this Section 2 or Ordinance No. 87-003 C.S. 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.
- (1) "Public access" or "Public use" means access where organizations, groups, or individual members of the general public, on a non-discriminatory basis, are the primary or designated programmers or users having editorial control over their communications;
- (2) "Education access" or "Education use" means access where accredited educational institutions are the primary or designated programmers or users having editorial control over their communications;
- (3) "Government access" or "Government use" means access where government institutions or their designees are the primary or designated programmers or users having editorial control over their communications.
- (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" 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.

SEC. 11-1.300. 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 Section 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. Examination of Business Records. The City may examine 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 Section, which fee shall otherwise be payable in accordance with the procedures established by this section.

SEC. 11-1.400. 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 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 franchise holders with respect to the state and federal customer service and consumer protection standards set forth in subsection 1. The City will provide a state franchise holder with a written notice of any material breaches of applicable customer service or consumer protection standards, and will allow the state franchise holder 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.

SEC. 11-1.500. PERMITS AND CONSTRUCTION.

1. Except as expressly provided in this Ordinance or as otherwise provided by DIVCA, all provisions of the City of Hayward Ordinance No. 87-003 C.S. Section 6 (“General Financial and Insurance Provisions”), and Section 7 (“Design and Construction Provisions”) 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.

2. Permits. Prior to commencing any work for which a permit is required by subsection 1, a state franchise holder shall apply for and obtain a permit in accordance with the provisions of said subsection 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 Director of Community and Economic Development shall either approve or deny a state franchise holder's application for any permit required under subsection 1 within sixty (60) days of receiving a completed permit application from the state franchise holder.

4. If the Director of Community and Economic Development denies a state franchise holder's application for a permit, the Director of Community and Economic Development 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 Director of Community and Economic Development 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 Director of Community and Economic Development without any further hearing; or
- (b) Refer the matter back to the Director of Community and Economic Development 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 Director of Community and Economic Development unless the City Council is itself conducting a public hearing on the matter.

SEC. 11-1.600. 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.

SEC. 11-1.700. PUBLIC, EDUCATIONAL AND GOVERNMENT ACCESS CHANNEL CAPACITY, SUPPORT, INTERCONNECTION, AND SIGNAL CARRIAGE.

1. PEG Channel Capacity.

- (a) A State franchise holder shall designate a sufficient amount of capacity on its network to allow the provision of at least three (3) PEG channels to satisfy the requirement of state law, within the time limits specified by state law.
- (b) A state franchise holder 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 shall pay to the City -- or if directed by the City, to the City's designated PEG provider -- a PEG 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 franchise holder shall remit the PEG support fee quarterly, within forty-five (45) days after the end of each calendar quarter. Each payment made shall be accompanied by a summary, detailing how the PEG support fee was calculated.
- (d) If a state franchise holder fails to pay the PEG support fee when due, or underpays the proper amount due, the state franchise holder shall pay interest at the rate per year equal to the highest prime lending rate during the period of delinquency, plus one percent (1%), or the maximum rate specified by state law.

3. PEG Carriage and Interconnection.

- (a) As set forth in Sections 5870(b) and 5870(g)(3) of the California Public Utilities Code, state franchise holders 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 franchise holder shall be of similar quality and functionality to that offered by commercial channels (unless the PEG signal is provided to the state franchise holder at a lower quality or with less functionality), shall be capable of carrying a National Television System Committee (NTSC) television signal, and shall be carried on the state franchise holder'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 franchise holder 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 franchise holder to interconnect its network with the incumbent cable operator's network at a technically feasible point on the state franchise holder's network as identified by the state franchise holder. If no technically feasible point of interconnection is available, the state franchise holder 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 franchise holder requesting the interconnection unless otherwise agreed to by the parties.

SEC. 11-1.800. 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, 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.

Section 2. Severance. Should any part of this ordinance be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of the City, such decision shall not affect the validity of the remainder of this ordinance, which shall continue in full force and effect, provided that the remainder of the ordinance, absent the unexcised portion, can be reasonably interpreted to give effect to the intentions of the City Council.

Section 3. In accordance with the provisions of Section 620 of the City Charter, this ordinance shall become effective thirty days after adoption.

INTRODUCED at a regular meeting of the City Council of the City of Hayward, held the ___ day of _____, 2008, by Council Member _____.

ADOPTED at a regular meeting of the City Council of the City of Hayward held the ___ day of _____, 2008, by the following votes of members of said City Council.

AYES: COUNCIL MEMBERS:
MAYOR:

NOES: COUNCIL MEMBERS:

ATTEST: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

APPROVED: _____
Mayor of the City of Hayward

DATE: _____

ATTEST: _____
City Clerk of the City of Hayward

APPROVED AS TO FORM:

City Attorney of the City of Hayward