



CITY OF HAYWARD
AGENDA REPORT

AGENDA DATE 12/12/06
AGENDA ITEM _____
WORK SESSION ITEM WS #2

TO: Mayor and City Council
FROM: City Manager
SUBJECT: Update Regarding State legislation on Cable Television

RECOMMENDATION:

It is recommended that the City Council review and comment on this report.

INTRODUCTION:

The Digital Infrastructure and Video Competition Act of 2006 (AB 2987) (See Attachment A) was passed by the State Legislature on August 31, 2006, and signed by the Governor on September 28, 2006. The stated goal of the legislation was to promote a fair and level playing field for all competitors in the video services market.

This legislation was drafted primarily to facilitate the entry of traditional telephone companies ("plain old telephone service" or POTS) into the video services market, most specifically AT&T; and to eliminate varying controls and requirements for video franchises among California's almost 500 municipal jurisdictions. This report presents an overview of Hayward's current cable video services, identifies the impacts anticipated with the implementation of AB 2987, highlights related and continuing evolution in technology, and defines the primary issues and concerns associated with these changes.

BACKGROUND

In recent past, video service (television programming) has been provided to residents in most communities through over-the-air (OTA) signals and cable providers. OTA signals were considered "basic" and the right of each citizen. Cable was a purchased, discretionary service over and above OTA; and unlike OTA, it was provided through a utility infrastructure located in the public right-of-way (ROW).

Cable providers obtained a franchise, or paid rent, for the use of the public ROW, and in exchange, were often, but not always, granted exclusive rights to provide cable service in a given community. The franchise agreement was negotiated between the local jurisdiction and the cable provider, and contained terms involving the amount to be paid and other concessions granted by

one party or the other. Among other things, cable franchise agreements generally called for the cable company to provide Public Education and Government (PEG) channels, support for public access programming to air on the PEG channels, and free cable provided to public locations like schools, libraries, and other municipal buildings. The franchise agreements generally specified how quickly the cable provider must “build out” their cable network to serve the entire population. Cable companies were required to negotiate these agreements individually with each jurisdiction within which they wanted to provide commercial video service.

In the last three years, the video service landscape has been altered dramatically due to evolving technology; changes in the business models of POTS, cellular providers, and cable providers; and changes in government regulation. The primary factors contributing to the altered landscape and their potential impact on the City of Hayward are discussed below.

Evolution of Technology – A major change to basic POTS and commercial video services was the introduction and rapid deployment of the Internet and access to the Internet through a broadband connection. Another major change was the advent of wireless telecommunications (cell phones) followed by the current explosion of Voice-over-Internet Protocol (VoIP). This is now complicated by the rising tide of Internet Protocol Television (IPTV) and the reality that the home computer, not the audio amplifier and the television, will soon be the center of the home entertainment center supported on the back of a robust broadband connection to the Internet. This will be further altered by the probability that in the near future, we will not buy packaged cable programming, but rather simply buy and download each individual program through our computer direct from the programmers or distributor, which will dramatically change cable service as we know it today.

Change in Business Models – Again, not too many years ago, there were providers of POTS, cell phone service, and cable, including satellite, and it was fairly easy to distinguish among them. Then Internet access entered the scene and was most usually provided over the existing POTS line. Shortly thereafter, everything exploded and companies with no history of competition with one another began going head-to-head to provide the entire range of services to a single household or business.

Today, it is not possible to tell what service or group of services one might expect from a named company. POTS, cell phone providers, and cable companies (including satellite) are all striving daily to develop their capability to provide voice (POTS, cell, and VoIP); data (Internet access, upload, and download, and FAX), and video services (cable and IPTV) to all their customers; and to do so with greater convenience, lower cost, and faster speed than anyone else. “Speed to Market” has become the catch phrase and the determining factor in immediate market share and/or company profits.

Changes in Government Regulation – The landscape of government regulation, particularly at the state and federal levels, has been thrown into chaos and exists in a purely reactive mode, largely unable to keep up with technology or to assume a proactive or preemptive position in relationship to changes in the market place. The motivation of competition and the “speed to market” factor have unleashed millions, if not billions, of lobbying dollars at the state and federal levels.

In the recent past, the Federal government and its various agencies (e.g., the Federal Communication Commission) set the general policy for cell service and television; and provided more direct regulation of POTS and satellite. Local jurisdictions lived with having minimal control over POTS, recognizing that they still controlled access to the public ROW, and had control over what other telecommunications companies could utilize the public ROW and other public facilities such as poles, street lights, and public buildings. Further, local jurisdictions had leeway in negotiating terms in franchise agreements, and in taxing utilities.

As business models evolved and companies began to compete against each other, differences in regulatory and tax burdens, and in access to customers became major issues. POTS companies claimed they had preference and protection because of prior era legislation saying they were not required to secure a local franchise. Cell companies balked at having to pay “utility” taxes when they were not a traditional utility, yet claimed they had the right to place cell towers and signal repeaters where needed because they were a telephone company. Cable companies raised the issue that they were slowed in rolling out new services because they had to seek a franchise agreement from every municipality, which was not required of POTS or cell providers. Satellite providers remained quiet because Federal regulation sheltered them from most local regulations or taxes. And, finally, the Federal government had short-term legislation in place that prevented any local regulation or taxation of the Internet, including possibly Internet access.

But, as described above, all these technologies were rolling into one and all providers were providing, or want to provide, all services. They began to lobby hard for “technology neutral” regulatory policies and for a “market-neutral” playing field. Of course, in doing so, most wanted to retain the protections they had while gaining the protections or advantages of their competitors.

State legislation has been passed in California in an attempt to streamline the video franchising process, which takes away the ability of local jurisdictions to control the terms of franchise agreements. Similar legislation is under development at the Federal level, which would, if passed as currently drafted, preempt the recent State legislation. Ardent discussion ensues at the Federal level over whether or not to make the Internet tax moratorium permanent and determining whether any of the provisions might apply to Internet access vs. transactions over the Internet.

DISCUSSION:

AB 2987 – As noted earlier in this report, the Digital Infrastructure and Video Competition Act of 2006 (AB 2987 or DIVCA) was passed by the State Legislature on August 31, 2006, and signed by the Governor on September 28, 2006. The stated purpose of AB 2987 was two-fold: (1) to relieve video services providers of the “onerous burden” of having to negotiate with almost 500 separate local government organizations for cable franchise agreements; and (2) to facilitate the entry of POTS (primarily AT&T) and cell providers (primarily Verizon) into the video services market. It was also designed to relieve any video service provider from having to respond to local terms and conditions such as free service to public locations, and support of PEG programming and operations. It also took giant steps toward limiting the overall franchise fee payment for the franchisee by changing the definition of gross receipts, and obscuring

exactly how and when the franchise fee is applied. It does not address the method of applying the fee to “bundled” services that mix voice, data, and video, which is becoming the common residential package. And it prevents local jurisdictions from negotiating fees and payments outside of the defined 5% franchise fee and the 1-3% PEG support.

After January 1, 2007, California cities will no longer have independent authority to enter into new cable video franchise agreements, and any company that wants to provide video service in California, within an area for which they have not already been issued a local franchise, must obtain a state franchise from the California Public Utilities Commission (CPUC).

Any cable video company that currently has a local franchise may seek to renew the franchise until January 2008, or apply for a state franchise if one of the following conditions is fulfilled:

- The local franchise has expired;
- The cable video provider and the local franchising entity agree to terminate the local franchise;
- A new cable video provider has given notice of intent to enter into an area served by an incumbent provider under its local franchise.

The City of Hayward has a 20-year cable service franchise agreement with Comcast that expires on March 8, 2007. Under AB 2987, the choice to enter into negotiations for a new franchise agreement with the local jurisdiction rests with the cable provider and is not a choice of the jurisdiction. Questions about this provision were raised during the CPUC process for the implementation of AB 2987.

Discussion focused on what happens to the renewal of local franchise agreements that expire prior to January 2, 2008, like the franchise agreement between Comcast and the City of Hayward. Notable comments were presented by the League of California Cities (LCC), and the States of California and Nevada chapter of the National Association of Telecommunications Officers and Advisors (SCAN-NATOA). Their position is that, as negotiated contracts between the cable provider and the local government, current franchise agreements require the consent of both parties for modification, and extension or renewal. In addition, federal law requires that local franchises that expire prior to January 2, 2008 are subject to the renewal procedures set forth in the federal Cable Communications Act. This has not been definitely resolved to date by the CPUC.

As a result of this tentative environment created by AB 2987, there have been no discussions between Comcast and City staff about renewing the City of Hayward franchise. Depending on the CPUC decision, the franchise agreement may be renewed to January 8, 2008, through a negotiated process as initiated and imposed by Comcast; or, if another provider announces intent to enter the Hayward market, Comcast may elect to seek a State franchise.

Project Lightspeed – Meanwhile, AT&T has submitted encroachment permit requests for installation of equipment for what they have termed “Project Lightspeed”. This is their project to upgrade their infrastructure (i.e., increase their capacity for bandwidth) in order to deliver video services and other non-traditional POTS services to customers in Hayward.

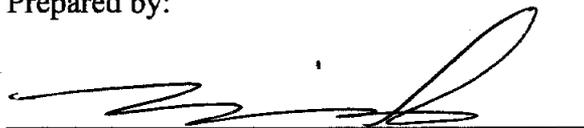
AT&T has held in the past they are not subject to securing a franchise agreement because they are exempt as a telephone company under Public Utilities Code Section 7901.1. Similarly, they have often refuted that it was their intent to provide video services of any kind over their improved infrastructure. However, they have recently communicated to staff that they will indeed be applying for a State franchise in January of 2007, effective April 1, 2007, if processed accordingly by the State CPUC; and they intend to comply with the substantive provisions of AB 2987, including payment of the franchise fee to the City of Hayward.

In the meantime, they have submitted eight (8) applications (out of a currently planned 113) for encroachment permits in the Hayward public ROW, which they are expecting the City to process and grant; and which approval they have been persistently pursuing. Staff is reviewing the situation and will return to Council with an in-depth report specific to Project Lightspeed.

National Cable Franchise Legislation - HR 5252 – Telecommunication companies continue to lobby at the federal level for legislation (HR 5252) that would end all local and state cable franchise agreements in favor of a national cable franchise system administered by the Federal Communications Commission (FCC). In addition, HR 5252 would turn over local government authority over the PROW to the FCC, a federal agency with no expertise in right-of-way public safety and health issues. Results of the recent mid-term legislative elections have slowed that process considerably.

However, the FCC is considering, as soon as December 20, a proposal from the Chairman of the FCC to impose federal franchise rules on current franchising authorities (the CPUC as of January 2) and franchise applicants that would clearly favor the telecommunication companies like AT&T and Verizon. There are flaws in the proposal that, if approved in its current form, would likely be overturned on appeal. All point to the quickly changing landscape as described herein, and the rapid erosion of local participation and control.

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Approved by:



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Attachments:

SUMMARY of KEY ANTICIPATED IMPACTS OF AB 2987

1. Local jurisdictions will have no input (after 1/2008) on new and renewal state franchise applications. Authority is placed in the California Public Utility Commission (CPUC) as defined in the legislation. The CPUC becomes the sole video franchising authority and does not invite protests or input from the local jurisdiction in which the franchise will operate, even though a State video franchise applicant must provide a copy of the application to the local entity. Both the League of California Cities and local government organization SCAN NATO have recommended the inclusion of a 30-day protest review period during which local governments may provide evidence as to the completeness of applications for new franchises and renewals, based on their experience with cable systems or other telecommunications systems in the local jurisdiction's right-of-way.
2. Small competitive phone companies with under \$1 Million customers statewide have build out requirements in their current phone service footprint. Large phone companies with more than \$1 Million customers statewide (e.g., AT&T, Verizon) have limited build out requirements that have an escape clause. Cable providers are able to alter their local service territory as needed if they choose to abrogate their current Cable TV franchise, or at the end of that term, similar to large phone companies. Some areas of a city may not receive service; and it will be difficult for local jurisdictions to track where service is provided at any point in time.
3. While under a local franchise, a cable company could be required to make new technologies available to the entire community, not just higher income areas. This is not the case under AB2 2987: build-out of new services to the entire community is uncertain. This has been an important requirement under the local franchise as a way to lessen the digital divide. All build out requirements are now defined as the provider's self-identified service territory within the State, and a cable provider may build out using more limited requirements. For example, the cable provider could specify that, within the identified state service area, over three years at least 25% of households with access to video service be in low-income households, and within five years at least 30% of low-income households have access. The CPUC has been asked to consider adding a provision to its proposed General Orders that would require a video provider to identify the entire area for which video service will be provided in its initial application.
4. Unless the CPUC Rules of Practice and Procedure are amended, local governments will not have access to the CPUC complaint process concerning video service providers.
5. Local governments will be limited to a state franchise fee of 5% of gross revenue from video cable services that will be paid quarterly. Additional funding support in

- local franchises will end once the franchise expires. The applicability of franchise fees on "bundled" services remains unresolved.
5. Support for PEG channels and programming is changed. Because the City of Hayward has three PEG channels (15, 27, and 28) in service as of January 1, 2007, these will be sustained. Continuation is contingent on 8 hours of daily programming per channel. As of 1/2009, requirements for free insertion points and transmissions from PEG studios to the head-end will end, potentially impacting broadcasting of LIVE public meetings. A 4th PEG may be requested if it has 56 hours/week of locally produced and non-duplicated programming. PEG support must come via the City enacting a local ordinance to establish a PEG fee if the City does not have a PEG fee amount specified in their current Cable TV franchise. This PEG fee is limited to 1% of franchise holder's gross revenues or up to 3% if specified in current agreement (which it is not in ours). New entrants are required to pull signal from the incumbent operator.
 6. There is no requirement for continuing, adding, or supporting free cable services to public entities after 1/1/2009. This could impact 63 public agency locations in Hayward (City and County buildings, schools and public recreational facilities.)
 7. City will be limited to enforcing customer service requirements contained in sections of the Government Code and in the FCC Federal Standards with no authority to adopt or enforce additional standards in local ordinances for companies operating under a State issued video franchise. New law also limits enforcement penalties to several hundred dollars per day for three days, half of which is remitted to the State versus today's ability to levy higher fees for as long as the problem continues to exist.
 8. Emergency alert overrides as required by the Federal Communications Commission will continue; ability for cities and counties to override the Cable System directly will end on January 1, 2009 for new video providers, or at the end of the term of the existing Cable TV franchises.