



MEETING DATE: 6/16/2008

ITEM NO:

16

COUNCIL AGENDA REPORT

DATE: JUNE 11, 2008

TO: MAYOR AND TOWN COUNCIL

FROM: GREG LARSON, TOWN MANAGER

A handwritten signature in black ink, appearing to be "GL", written over the name "GREG LARSON".

SUBJECT: INTRODUCE ORDINANCE TO IMPLEMENT THE PROVISIONS OF THE
DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT
OF 2006 (DIVCA)

RECOMMENDATION:

1. Instruct Clerk Administrator to read title of the Ordinance
2. Move to waive reading of full text of the Ordinance
3. Move to Introduce the Ordinance

BACKGROUND:

Since 1999, the Town has been involved in or affected by several significant cable-related activities, including negotiating cable television franchise extensions, corporate mergers, franchise renewal preparation and negotiations, and most recently, the adoption of the Digital Infrastructure Video Competition Act of 2006 (DIVCA) by the California State Legislature.

DIVCA, which was signed into law on September 30, 2006 and became effective on January 1, 2007, created a new regulatory scheme for video franchising in the State, which essentially shifts franchising authority away from local governments to the state level. DIVCA permanently changes the franchising and regulatory structure for the provision of cable television and other video services in the State of California. Under DIVCA, video service providers may obtain a state franchise from the California Public Utilities Commission (CPUC) in lieu of a local franchise. In a largely ministerial process, the CPUC will issue a state franchise to any provider that submits a simple application and meets minimum insurance and bonding requirements. The CPUC does not take into account any local cable-related needs and interests when issuing a state franchise.

PREPARED BY:

A large, stylized handwritten signature in black ink, appearing to be "J Haruyama", written over the name "JENNY HARUYAMA".
JENNY HARUYAMA
ADMINISTRATIVE PROGRAMS MANAGER

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Reviewed by: _____ Town Manager PSS Assistant Town Manager OK Town Attorney
SC Finance _____ Community Development

PAGE 2

MAYOR AND TOWN COUNCIL

SUBJECT: ADOPT ORDINANCE TO IMPLEMENT THE PROVISIONS OF THE
DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT
OF 2006 (DIVCA)

June 11, 2008

In early 2008, Comcast applied for and was granted a state franchise by the CPUC. Under DIVCA, this action transfers the franchising authority to the CPUC, but delegates certain rights and responsibilities to local jurisdictions, which must be established by local ordinance before they become effective and enforceable. Toward that end, staff has developed the attached proposed ordinance for Council consideration. The following section summarizes the key provisions of the ordinance.

DISCUSSION:

DIVCA brings about significant changes in how cable television franchises are granted and enforced, by whom and to what extent video service providers are regulated. The attached ordinance addresses these changes. The key issues related to DIVCA are summarized below:

- Notification of Franchise Fee Requirement
- PEG Fees to support Public, Educational, and Governmental Programming
- Customer Service Responsibilities and Penalties
- Right-of-Way and Permitting Requirements

Notification of Franchise Fee Requirement

DIVCA allows local government to assess a franchise fee of not more than 5% of a video provider's gross revenues from video services, which is consistent with the Town's past practice. However, DIVCA establishes a new definition of gross revenues that differs somewhat with the Town's current definition in Section 7.10.020 of the Town Code. It is unclear at this time what impact, if any, this change will have on the amount of franchise fees collected by the Town. However, it is clear under DIVCA that revenues from telecommunications services and high speed internet services are not included in the definition of gross revenues. For this fiscal year, it is estimated that the Town will collect \$346,400 in franchise fees from Comcast. AT&T, which provides telephone and internet service to an estimated 1,900 homes in Los Gatos, has notified the Town that it soon will be providing enhanced internet and video services. Upon adoption of this ordinance, the franchise fee requirement would apply to all state video franchise holders, including AT&T. DIVCA also provides for a 3 year statute of limitations for cities seeking to collect unpaid or underpaid franchise fees.

PEG Fees to Support Public, Educational, and Governmental Programming

DIVCA allows the Town to collect a Public, Educational, and Government (PEG) support fee of 1% of gross revenues from video services from Comcast and any other state video franchise holder for the term of the state franchise, which is 10 years. In order to collect the fee DIVCA require the Town to first adopt the fee by ordinance. The PEG fee would generate an estimated \$69,300 annually and, under federal law can be used for public, educational, and government

PAGE 3

MAYOR AND TOWN COUNCIL

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DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT
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June 11, 2008

cable-related capital needs. It should be noted that federal law also allows cable operators to itemize and pass through PEG support on customer bills. If passed through to customers, the cost would be an estimated \$.72 per subscriber per month.

Prior to the adoption of DIVCA, the Town, in preparation for its cable television franchise renewal negotiations with Comcast, conducted a community needs assessment to identify current and future cable-related needs and interests. The assessment included a statistically valid telephone survey and series of community focus groups involving government agencies, non-profit groups, schools and educational institutions, human and social services, local businesses, and members of the general public. Of the 402 telephone survey respondents, 72% indicated that PEG programming was "important" or "very important." When asked how much of their monthly cable bill should go to support PEG, about half (50.2%) felt that some portion of their cable bill should be used. The average or mean of all the responses was \$1.13 per month. Of the 62 people who participated in the focus group discussion, 62% indicated "yes" or "maybe" when asked if they would be willing to pay extra for PEG programming or additional channels for PEG.

Should Council adopt the proposed PEG fee, staff would provide Council a list of recommended uses for the PEG funding at a future meeting. If approved, the fee must be reauthorized by ordinance at the expiration and renewal of each holder's state franchise. AT&T and Comcast's franchises are expected to expire in 2017 and 2018 respectively.

Customer Service and Penalties

The Town's authority over a state video franchise holder is limited to the enforcement of state and federal customer service standards. These standards are weaker in some respects than those imposed by many municipalities. For example, municipalities typically require a local customer service office, an automatic credit for outages of 24 hours or more, and credits for missed appointments. None of these requirements are allowed under DIVCA. Local government agreements also have higher monetary sanctions than the maximum permitted under DIVCA. Further, DIVCA requires that the Town submit to the State one-half of any penalties collected for customer service standard violations. Section 30.30.020 outlines the schedule of penalties in accordance with the requirements of DIVCA.

Right-of-Way and Permitting Requirements

Under DIVCA, with respect to right-of-way management and permitting activities, state franchise video holders must generally be treated in the same manner as telecommunication companies that are certified by the CPUC. This means that video providers should be considered "utilities" under the Town Code rather than being subject to different, or additional public right-of-way obligations. In addition, video providers are subject to local encroachment

PAGE 4

MAYOR AND TOWN COUNCIL

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June 11, 2008

permit requirements and the California Environmental Quality Act (CEQA) when installing, constructing, and maintaining facilities in the public right-of-way. DIVCA requires the Town to act on completed encroachment permit applications within 60 days of filing and provide applicants with an appeal process to the Council in the event their permit is denied.

The Town should anticipate requests for encroachment permits that involve the placement of above ground cabinets or other special equipment in the public right-of-way. Under DIVCA, state video franchise holders have the right to place new cabinets in the public right-of-way as long as they comply with the Town's encroachment permit process, subject to reasonable time, place, and manner regulations intended to protect the public health and safety with minimal or no impact on the service provider. Language has been added to the ordinance to ensure compliance with existing Town Code as it relates to streets and sidewalks, utilities, and zoning.

CONCLUSION:

Under DIVCA, video service franchises are granted exclusively by the CPUC rather than by local franchising authorities. CPUC recently granted state franchises to Comcast and AT&T to operate in the Town of Los Gatos. Under DIVCA, while the franchising authority now lies with the CPUC, the statute delegates certain rights and responsibilities to local government that must be established by ordinance before they become effective and enforceable. Therefore, it is recommended that Council introduce and then adopt the attached state video services ordinance, which will allow the Town to collect franchise fees of 5% of gross revenues and PEG fees of 1% of gross revenues. The ordinance also outlines customer service responsibilities and penalties and establishes right-of-way and permitting requirements.

FISCAL IMPACT:

Adoption of the attached ordinance would allow the collection of franchise fees of 5% of the gross revenues derived from video services from state video service franchise holders. The Town would continue to collect an estimated \$346,400 annually from Comcast. The anticipated amount of franchise fees to be collected from AT&T or future state video service providers is unknown at this time. Adoption of the ordinance would also allow the Town to collect 1% of a state franchise holder's gross revenues to support PEG access.

Attachments:

Proposed State Video Service Franchise Ordinance

Electronic Distribution:

AT&T

Verizon

Comcast

ORDINANCE NO. _____

An ordinance amending the Code of the Town of Los Gatos to add Chapter 30, 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 Town is required to administer and enforce.

The Council of the Town of Los Gatos, California ordains as follows:

Chapter 30

STATE VIDEO SERVICE FRANCHISES

Article I – General Provisions

Section 30.10.010 Purpose.

This Chapter is applicable to all video service providers who are eligible for, and 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), to provide cable or video services in any portion of the Town.

Section 30.10.020 Rights Reserved.

The rights reserved to the Town under this Chapter 30.10.020 are in addition to all other rights of the Town whether reserved by this Chapter 30.10.020 or authorized by other applicable law, and no action, proceeding or exercise of a right shall affect any other rights which may be held by the Town.

Section 30.10.030 Compliance with Chapter 30

Nothing contained in this Chapter 30 exempts a state franchise holder from compliance with all ordinances, rules or regulations of the Town now in effect or which may be hereafter adopted which are not inconsistent with this Chapter or California

Public Utilities Code section 5800 *et seq.*, or obligations under any franchise previously issued by the Town, insofar as those may be enforced under California Public Utilities Code section 5800.

Section 30.10.040 Definitions

For purposes of this Chapter 30, the following terms, phrases, words, and their derivations shall have the meaning given in this chapter. Unless otherwise expressly stated, words not defined in this Chapter 30 shall be given the meaning set forth in the Digital Infrastructure and Video Competition Act of 2006, Division 2.5 of the California Public Utilities Code, section 5800 *et seq.* ("DIVCA"). 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" is always mandatory.

"Access channel" means any channel on a cable system or video system set aside by a state franchise holder for public, educational, or governmental use.

"Applicant" means any person submitting any application required under Division 2.5 of the California Public Utilities Code.

"Applicable law" means all lawfully enacted and applicable Federal, State, and Town laws, ordinances, codes, rules, regulations and orders as the same may be amended or adopted from time to time.

"Council" means the Town Council, the governing body of the Town of Los Gatos, California.

"Cable service" means (i) the one-way transmission to subscribers of video programming or other programming services; and (ii) subscriber interaction, if any,

which is required for the selection or use of such video programming or other programming service.

"Construction," "operation," or "repair" and similar formulations of those terms mean the named actions interpreted broadly, encompassing, among other things, installation, extension, maintenance, replacement of components, relocation, undergrounding, grading, site preparation, adjusting, testing, make-ready, excavation and tree trimming. The term "operation" does not encompass or regulate the provision of services, but refers to activities affecting rights-of-way and other property subject to the jurisdiction of the Town.

"Director" means the Director of Parks and Public Works of the Town, or his or her designee.

"DIVCA" means the Digital Infrastructure and Video Competition Act of 2006, Division 2.5 of the California Public Utilities Code, section 5800 et seq., as may be amended from time to time.

"Gross revenues" means all revenues (whether in the form of cash or other consideration) of a state franchise holder or its affiliates in any way derived from its operations within the Town.

"Incumbent cable operator" shall have the same meaning as in DIVCA.

"Network" shall have the same meaning as in DIVCA.

"Person" means an individual, partnership, association, joint stock company, trust, corporation, or organizational entity, or any lawful successor, transferee or assignee thereof. The term does not include the Town.

"Public rights-of-way" shall have the same meaning as in DIVCA.

"State franchise" means a franchise issued by the California Public Utilities Commission to provide cable service or video service, as those terms are defined in DIVCA, within any portion of the Town.

"State franchise holder" means a person who holds a state franchise.

"Subscriber" means the Town or any person who legally receives any cable service or video service from a state franchise holder delivered over that state franchise holder's network.

"Town" means the Town of Los Gatos, California.

"Town Manager" means the administrative head of the Town Government under the direction and control of the Town Council.

"Video Service" shall have the same meaning as in DIVCA.

Article II - Fees

Section 30.20.010 State franchise fees.

Any state franchise holder operating within the Town shall pay to the Town a state franchise fee equal to five percent (5%) of the gross revenues of it or any affiliate that are subject to a franchise fee under California Public Utilities Code Section 5860.

Section 30.20.020 PEG fees.

Any state franchise holder operating within the Town shall pay to the Town a PEG fee equal to one percent (1%) of the gross revenues of it or any affiliate that are subject to a franchise fee under California Public Utilities Code Section 5870.

Section 30.20.030 Payment of fees.

The state franchise fee required pursuant to Section 30.20.010, and the PEG fee required pursuant to Section 30.20.020, shall each be paid to the Town quarterly, in a manner consistent with California Public Utilities Code section 5860. The state franchise holder shall deliver to the Town, by check or other means specified by the Town, a payment for the state franchise fee and a separate payment for the PEG 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, containing such information as the Town Manager may require, consistent with DIVCA. Unless the Town Manager provides otherwise, the summary statement shall identify:

1. revenues received from subscribers, by category, with service revenues broken out by service levels;
2. any charges to subscribers for which revenues were received, but on which a franchise fee was not paid;
3. where the fee is paid on an allocated portion of revenues received, the total revenues received; the allocation factor; and how the allocation factor was calculated.

Section 30.20.040 Audits.

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

Section 30.20.050 Late payments.

In the event a state franchise holder fails to make payments required by this chapter on or before the due dates specified in this chapter, the Town 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%).

Section 30.20.060 Lease of Town-owned network.

In the event a state franchise holder leases access to a network owned by the Town, the Town may require a fee for access to the Town-owned network separate and apart from the franchise fee charged to state franchise holders pursuant to Section 30.20.10, which fee shall otherwise be payable in accordance with the procedures established by this Chapter.

Article III – Customer Service

Section 30.30.010 Customer service and consumer protection.

Each state franchise holder shall comply with all applicable customer service and consumer protection standards, including, to the extent consistent with California Public Utilities Code section 5900, all existing and subsequently enacted customer service and consumer protection standards established by state and federal law and regulation.

Section 30.30.020 Penalties for violations of standards.

(a) The Town shall enforce the provisions of section 30.30.010.

(b) For material breaches, as defined in California Public Utilities Code section 5900, by a state franchise holder of applicable customer service and consumer protection standards, the Town may impose the following penalties:

1. For the first occurrence of a material breach, a fine of \$500.00 may be imposed for each day the violation remains in effect, not to exceed \$1,500.00 for each violation.

2. For a second material breach of the same nature within 12 months, a fine of \$1,000.00 may be imposed for each day the violation remains in effect, not to exceed \$3,000.00 for each violation.

3. For a third material breach of the same nature within 12 months, a fine of \$2,500.00 may be imposed for each day the violation remains in effect, not to exceed \$7,500.00 for each violation.

(c) Any penalties imposed by the Town shall be imposed in a manner consistent with California Public Utilities Code section 5900.

(d) The Town Manager is authorized to provide any notices required under California Public Utilities Code section 5900.

Article IV – Right-of-Way Management

Section 30.40.010 Construction in the Public rights-of-way.

Except as expressly provided in this Chapter 30, the provisions of Chapter 23 of this Code, and all Town administrative rules and regulations developed pursuant to Chapter 23, as now existing or as hereafter amended, shall apply to all work performed by or on behalf of a state franchise holder in any public rights-of-way.

Section 30.40.020 Permits.

(a) Prior to commencing any work for which a permit is required by Chapter 23 of this Code, a state franchise holder shall apply for and obtain a permit in accordance with the provisions of Chapter 23. A permit application is complete when the state franchise holder has complied with all applicable laws and regulations, including but not limited to all Town administrative rules and regulations, and all

applicable requirements of Division 13 of the California Public Resources Code, section 21000, *et seq.* (the California Environmental Quality Act).

(b) The Director shall either approve or deny a state franchise holder's application for any permit required under Chapter 23 of this Code within sixty (60) days of receiving a complete permit application from the state franchise holder.

(c) If the Director denies a state franchise holder's application for a permit, the Director 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.

(d) A state franchise holder that has been denied a permit by final decision of the Director may appeal the denial to the Council by filing a written notice of appeal in duplicate with the Clerk not more than ten (10) days after the Director's decision is issued. The notice shall state clearly the reasons why the Director's decision should be overturned. The Council shall only hear the appeal if the notice is filed and all required fees are paid within the ten-day appeal period. Once a notice of appeal has been filed it may be withdrawn by the state franchise holder prior to the distribution of public hearing notices, but not thereafter.

(e) The appeal shall be heard by the Council within fifty-six (56) days after the date the final decision by the Director was made. The Council may continue from time to time any hearing held by it.

(f) The Clerk shall set the hearing of the appeal and shall give notice of such hearing in the manner required for the hearings before the Planning Commission. In addition, the Council may give notice of the hearing in such other manner as it wishes.

(g) The Director shall transmit the entire record concerning the permit application to the Council.

(h) When hearing the appeal, the Council shall consider the record and such additional evidence as may be offered by anyone and may affirm, modify or reverse, in whole or in part, the determination appealed from, or make and substitute such other determination as is warranted, or may remand to the Director for further review and determination. The state franchise holder bears the burden of proof before the Council to prove that one or more reasons exist on the appeal for reversing or modifying the Director's decision. The standards of Chapter 29 governing the discretion of the reviewing body shall apply to actions of the Council.

(i) Any decision of the Council modifying, in whole or in part, the order, requirement, decision, determination, interpretation, or ruling appealed from, or making and substituting another decision or determination, requires the concurrence of a majority of the membership of the Council.

(j) If the Council decides to modify or reverse the decision of the Director on any appeal, the resolution shall specify one or more of the following:

- (1) Where there was error or abuse of discretion on the part of the Director; or
- (2) The new information that was submitted to the Council during the appeal process that was not readily and reasonably available for submission to the Director; or
- (3) An issue or policy over which the Director did not have discretion to modify or address, but which is vested in the Council for modification or decision.

(k) If the only or predominant reason for modifying or reversing the decision of the Director is the availability of new information as defined in subsection (j)(2) above, it

is the policy of the Town that the permit application will be returned to the Director for review in light of the new information unless the new information has minimal effect on the application.

(l) The decision of the Council upon the appeal will be expressed by a written resolution. The Council will forthwith transmit copies of the resolution to the original applicant, the appellant, and the Planning Commission.

(m) The issuance of a permit is not a franchise, and does not grant any vested rights in any location in the Public rights-of-way, or in any particular manner of placement within the rights-of-way. Without limitation, a permit to place cabinets and similar appurtenances aboveground may be revoked and the permittee required to place facilities underground, upon reasonable notice to the permittee.

Section 30.40.030 Compliance with Other Provisions of Town Code.

Except as expressly provided in this Chapter 30, nothing in this Chapter 30 shall relieve a state franchise holder from complying with Chapter 23 (Streets and Sidewalks), Chapter 27 (Utilities) and Chapter 29 (Zoning) of the Town Code.

Article V – Emergency Alert

Section 30.50.080 Emergency Alert Systems

(a) 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.

Article VI - Interconnection

Section 3.60.010 Interconnection for PEG Programming

Each state franchise holder, and each incumbent cable operator, shall negotiate in good faith to interconnect their networks for the purpose of providing PEG programming. Interconnection may be accomplished by any means authorized under Public Utilities Code Section 5870(h). Each state franchise holder and incumbent cable operator shall provide interconnection of PEG channels on reasonable terms and conditions and may not withhold the interconnection. If a state franchise holder and an incumbent cable operator cannot reach a mutually acceptable interconnection agreement, the Town may 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 for interconnection is available, each state franchise holder will make an interconnection available to each channel originator providing PEG programming to an incumbent cable operator, and will provide the facilities necessary for the interconnection. The cost of any interconnection will be borne by the state franchise holder requesting the interconnection unless otherwise agreed to by the state franchise holder and the incumbent cable operator.

Article VII - Notices

Section 30.70.010 Notices.

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

(b). Unless otherwise specified in this chapter, all notices or other documentation that a state franchise holder is required to provide to the Town under this Division 6 or the California Public Utilities Code shall be provided to the Town Manager.