



MEETING DATE: 8/4/2008

ITEM NO:

3

COUNCIL AGENDA REPORT

DATE: AUGUST 1, 2008

TO: MAYOR AND TOWN COUNCIL

FROM: GREG LARSON, TOWN MANAGER

SUBJECT: ADOPT ORDINANCE TO IMPLEMENT STATE VIDEO FRANCHISE PROVISIONS AS REQUIRED BY THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006 (DIVCA)

RECOMMENDATION:

Adopt the attached ordinance (Attachment No. 1) to implement state video franchise provisions as required by the Digital Infrastructure and Video Competition Act (DIVCA) of 2006.

DISCUSSION:

On June 16, 2008, the Town Council voted to introduce an ordinance implementing the provisions of the DIVCA Act of 2006. Subsequent to the introduction of the ordinance, AT&T submitted the attached document (Attachment No. 2) with proposed changes regarding the definition of gross revenues, fee payment, including Public, Educational, and Government (PEG) fees, auditing, and late payments. After close examination of the proposed changes, staff recommends no changes to the ordinance language.

Many of the issues raised by AT&T are differences without a distinction in that the current language of the Ordinance does no more than permit the Town to exercise its rights to the fullest extent under, but not in excess of the DIVCA law. Additionally, AT&T errs in suggesting that the Town does not collect Public, Educational, and Government (PEG) fees from the incumbent cable provider. The PEG fee is applicable to all cable service providers in the Town, including the incumbent.

Attachments:

- Attachment No. 1: Ordinance implementing state video services franchise provisions as required by the Digital Infrastructure and Video Competition Act of 2006 (DIVCA)
Attachment No. 2: Proposed Ordinance Language Changed from AT&T

Distribution:

AT&T

Verizon

Comcast

KCAT, Community Access Channel 15

PREPARED BY:

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ASSISTANT TO THE TOWN MANAGER

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Reviewed by: _____ Assistant Town Manager _____ Town Attorney
_____ Clerk Administrator _____ Finance _____ Community Development

**ORDINANCE OF THE TOWN OF LOS GATOS IMPLEMENTING STATE VIDEO SERVICES
FRANCHISE PROVISIONS AS REQUIRED BY THE DIGITAL INFRASTRUCTURE AND VIDEO
COMPETITION ACT OF 2006 (DIVCA)**

The Town Code of the Town of Los Gatos is hereby amended 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.

In the event that any part of this ordinance is held to be invalid, the invalid part or parts shall be severed from the remaining portions which shall remain in full force and effect.

Article VIII

In the event that any part of this ordinance is held to be invalid, the invalid part or parts shall be severed from the remaining portions which shall remain in full force and effect.

Article VIX

This ordinance was introduced at a regular meeting of the Town Council of the Town of Los Gatos on _____, 20__ and adopted by the following vote as an ordinance of the Town of Los Gatos at a regular meeting of the Town Council of the Town of Los Gatos on _____, 20__
This ordinance takes effect 30 days after it is adopted.

COUNCIL MEMBERS:

AYES:

NAYS:

ABSENT:

ABSTAIN:

SIGNED:

MAYOR OF THE TOWN OF LOS GATOS
LOS GATOS, CALIFORNIA

ATTEST:

CLERK ADMINISTRATOR OF THE TOWN OF LOS GATOS
LOS GATOS, CALIFORNIA

N:\MGR\JHaruyama\Projects\cable television renewal\Cable Ordinance\Final Ordinance Chapter 30 - 6-10-08.DOC

Proposed DIVCA Ordinance Changes/Concerns from AT&T

Section 30.10.040 Definitions

The definition of gross revenues in the Ordinance is inconsistent with DIVCA and is overbroad. The Ordinance defines "gross revenues" as "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.*" Public Utilities Code § 5850(d) defines "gross revenues" as all "revenue actually received by the holder of a state franchise, as determined in accordance with generally accepted accounting principles, *that is derived from the operation of the holder's network to provide cable or video service within the jurisdiction of the local entity. . .*"

The City's definition would require a franchise fee to be paid on the revenues obtained from AT&T's telephone or wireless operations. That is not permitted under DIVCA.

The Ordinance defines most terms as having "the same meaning as in DIVCA." It is unclear why the City decided to use a different definition for "gross revenues" which is not permitted under DIVCA, Public Utilities Code § 5850(c), which provides as follows: "No local entity or any other political subdivision of this state may demand any additional fees or charges or other remuneration of any kind from the holder of a state franchise based solely on its status as a provider of video or cable services other than as set forth in this division *and may not demand the use of any other calculation method or definition of gross revenues.*" [Emphasis added.]

Section 30.20.020 PEG fees.

This section would require a state franchise holder to pay a PEG support fee equal to 1% of gross revenues. It is my understanding that the City does not collect PEG support fees from its incumbent cable provider. Under DIVCA, Public Utilities Code § 5870(l), "[a]ll video service providers and the incumbent cable operator shall be subject to the same requirements for recurring payments for the support of PEG channel facilities."

Section 30.20.030 Payment of fees.

This section states that each franchise fee payment shall be "accompanied by a report, detailing how the payment was calculated, containing such information as the Town Manager may require, consistent with DIVCA." DIVCA, however, provides only that each franchise fee payment be "accompanied by a summary explaining the basis for the calculation of the state franchise fee." Section 5840(a) of DIVCA further provides that a local entity may not "impose any requirement on any holder of a state franchise except as expressly provided in this division."

Section 30.20.040 Audit

The language of this section is inconsistent with DIVCA. Public Utilities Code § 5860(i) allows a local entity to “examine” the business records of a state franchise holder rather than “audit” them as set forth in the Ordinance.

Section 30.20.050 Late payments.

This section would impose late fees on *any* late payments due the City. DIVCA, however, only permits late fees on late franchise fee payments. Public Utilities Code § 5860(h).