



June 24, 2008

SUBJECT: ORDINANCE ADDING CHAPTER 5.48 (STATE VIDEO FRANCHISES) TO TITLE 5 (BUSINESS LICENSES AND REGULATIONS) OF THE SUNNYVALE MUNICIPAL CODE RELATING TO REGULATIONS FOR THE PROVISION OF VIDEO SERVICE BY STATE FRANCHISE HOLDERS

REPORT IN BRIEF

The Digital Infrastructure and Video Competition Act of 2006 ("DIVCA") established the California Public Utilities Commission (CPUC) as the state franchising authority for new video service providers and providers are no longer required to obtain local franchises. However, DIVCA also delegates certain rights to local authorities, including imposition of pass-through fees for capital support of Public, Educational, and Government channels (PEG) and enforcement of certain customer service standards. These rights must be established by local ordinance. Staff recommends that the City Council adopt an ordinance adding Chapter 5.48 to Title 5 of the Sunnyvale Municipal Code (Attachment A), to allow Sunnyvale to collect fees for PEG channels and to enforce DIVCA customer service standards.

BACKGROUND

The Digital Infrastructure and Video Competition Act of 2006 ("DIVCA") (originally known by its bill designation, AB 2987), was signed by the Governor in September 2006, and went into effect on January 1, 2007. DIVCA is intended to streamline the entrance of telephone companies into the cable television market. DIVCA establishes a state-wide franchising scheme for video providers that is administered by the CPUC.

Under DIVCA, the City is entitled to receive a franchise fee of 5% of gross revenues. In addition, DIVCA authorizes the City to enact an ordinance imposing an additional pass-through fee of 1% of gross revenues for capital support of Public, Educational, and Government (PEG) Channels. Cities may also monitor customer service of state franchise holders, but are limited to enforcing the standards that appear in DIVCA, and may only impose fines or penalties of violations by adopting an ordinance.

The City's current cable provider, Comcast, has chosen not to seek a state franchise from the CPUC at this time. Comcast is currently operating subject to a memorandum of understanding (MOU) approved by the City Council in December 2007 which provides for PEG programming and service standards. The proposed ordinance will affect other new providers who may wish to offer video service in Sunnyvale, such as AT&T's U-Verse service; it may cover Comcast in the future if it decides to obtain a DIVCA franchise instead of a City MOU.

EXISTING POLICY

Council Policy 7.2.16. Telecommunications.

DISCUSSION

DIVCA provides that cities and other local franchising authorities may adopt by ordinance requirements that are applicable to holders of CPUC issued statewide video franchises in the following areas:

- PEG Fees. Fees to support local Public, Educational, and Government programming ("PEG fees"). PEG fees may not exceed 1% of gross revenues, unless the local agency has been receiving higher fees (up to 3%) under a pre-existing franchise agreement (which is not the case in Sunnyvale).
- Customer Service Standards. DIVCA provides that state franchise holders must comply with the customer service standards that apply to cable providers under state and federal law and regulations. Local agencies are prohibited from imposing additional or different customer service standards, and must adopt an ordinance in order to impose penalties for violations. DIVCA also imposes caps on the penalties allowed.
- Audits. DIVCA authorizes local agencies to examine business records of state franchise holders to audit compliance with franchise fee requirements.
- 5% Franchise Fee. Although DIVCA does not require a local agency to enact an ordinance in order to receive the 5% franchise fee, doing so is considered good practice to ensure payment.

FISCAL IMPACT

The proposed ordinance will assure timely payment of the 5% franchise fee and 1% PEG fee as provided by state law for new state franchise video service providers. The ordinance also authorizes local audits of statewide video franchise holders and establishes a schedule of fines to enforce customer service standards. The fiscal impact of the ordinance is unknown at this time because it will depend on the number of new customers that subscribe to services offered by statewide video franchise holders; however, many of these customers may be switching from existing cable service, with no net fiscal impact on City revenues.

Costs may be incurred in activities related to enforcement of customer service standards and financial audits.

CONCLUSION

Enacting a DIVCA ordinance will ensure that the City receives timely franchise and PEG fees from video franchise holders, and will authorize the City to enforce customer service standards and conduct financial audits to the extent permitted by state law.

PUBLIC CONTACT

Public contact was made through posting of the Council agenda on the City's official notice bulletin board, posting of the agenda and report on the City's web page, and the availability of the report in the library and the City Clerk's Office.

ALTERNATIVES

1. Adopt the proposed ordinance adding Chapter 5.48 to Title 5 of the Sunnyvale Municipal Code to provide local authority for PEG programming, franchise fees and audits under the Digital Infrastructure and Video Competition Act of 2006.
2. Adopt, with amendments, the proposed ordinance, adding Chapter 5.48 to the Sunnyvale Municipal Code to provide local authority for PEG programming, franchise fees and audits under the Digital Infrastructure and Video Competition Act of 2006.
3. Do not adopt the proposed ordinance adding Chapter 5.48 to Title 5 of the Sunnyvale Municipal Code to provide local authority for PEG programming, franchise fees and audits under the Digital Infrastructure and Video Competition Act of 2006.

RECOMMENDATION

Staff recommends that Council adopt the proposed ordinance (Attachment A) adding Chapter 5.48 to Title 5 the Sunnyvale Municipal Code to provide local authority for PEG programming, franchise fees and audits under the Digital Infrastructure and Video Competition Act of 2006.

Prepared by:

Rebecca Moon, Assistant City Attorney

Approved by:

David Kahn, City Attorney

Attachments

- A. Proposed ordinance adding Chapter 5.48 to Title 5 of the Sunnyvale Municipal Code, relating to regulations for the provision of video service by state franchise holders

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SUNNYVALE ADDING CHAPTER 5.48 (STATE VIDEO FRANCHISES) TO TITLE 5 (BUSINESS LICENSES AND REGULATIONS) OF THE SUNNYVALE MUNICIPAL CODE RELATING TO REGULATIONS FOR THE PROVISION OF VIDEO SERVICE BY STATE FRANCHISE HOLDERS

WHEREAS, local public entities within the state of California have traditionally had the authority to regulate, in accordance with federal, state, and local law, certain aspects of the provision of video services, including the authority to award franchises, within the boundaries of those local entities, and

WHEREAS, the California Legislature adopted the Digital Infrastructure and Video Competition Act of 2006, California Public Utilities Code sections 5800 et seq. (“DIVCA”), which became effective January 1, 2007, and

WHEREAS, DIVCA substantially changed California law by establishing a statewide franchising procedure for video service providers to be administered by the California Public Utilities Commission (“CPUC”), and

WHEREAS, DIVCA establishes that the CPUC is the sole authority to award statewide franchises for the provision of video services, which preempts local franchising authority, and

WHEREAS, DIVCA establishes limited authority of local entities over state franchise holders, and

WHEREAS, the City of Sunnyvale desires to exercise that authority and to facilitate the implementation of DIVCA by setting forth regulations for the provision of video service by state franchise holders within the City of Sunnyvale, in accordance with the requirements set forth in DIVCA;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES ORDAIN AS FOLLOWS:

SECTION 1. CHAPTER 5.48 ADDED. Chapter 5.48 (State Video Franchises) is hereby added to Title 5 (Business Licenses and Regulations) of the Sunnyvale Municipal Code to read as follows:

**Chapter 5.48
STATE VIDEO FRANCHISES**

- 5.48.010 Purpose and Application**
- 5.48.020 State Video Franchise and PEG Fees**
- 5.48.030 Audit Authority**
- 5.48.040 Customer Service Penalties Under State Franchises**

Section 5.48.010. Purpose and Application.

This Chapter is designed to regulate video service providers holding state video franchises and operating within the City of Sunnyvale.

Section 5.48.020. State Video Franchise and PEG Fees.

(a) Any state video franchise holder operating within the boundaries of the City shall pay a fee to the City equal to five percent (5%) of the gross revenue of that state video franchise holder.

(b) Any state video franchise holder operating within the boundaries of the City shall also pay the City a fee equal to one percent (1%) of the gross revenue of that state video franchise holder, which fee shall be used by the City for any Public, Educational, and/or Governmental (PEG) purposes consistent with state and federal law.

(c) Any state franchisee that has held a locally issued franchise agreement shall, consistent with Public Utilities Code § 5870, continue to fully provide and support PEG channel facilities and institutional networks and to provide cable services to community buildings to the maximum extent permitted by law.

(d) Gross revenue, for the purposes of (a) and (b) above, shall have the definition set forth in California Public Utilities Code § 5860.

Section 5.48.030. Audit Authority.

Not more than once annually, the City Manager or the City Manager's designee may examine and perform an audit of the business records of a holder of a state video franchise to ensure compliance with Section 5.48.020.

Section 5.48.040. Customer Service Penalties Under State Video Franchises.

(a) The holder of a state video franchise shall comply with all applicable state and federal customer service and protection standards pertaining to the provision of video service.

(b) The City shall have the right to monitor the compliance of state video franchise holders with respect to state and federal customer service and protection standards. The City Manager or the City Manager's designee will provide the state video franchise holder written notice of any material breaches of applicable customer service standards, and will allow the state video 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 shall be subject to the following penalties to be imposed by the City Manager or designee:

- (1) For the first occurrence of a violation, a fine of up to \$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 violation of the same nature within 12 months, a fine of up to \$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 or further violation of the same nature within 12 months, a fine of up to \$2,500.00 may be imposed for each day the violation remains in effect, not to exceed \$7,500.00 for each violation.

(c) A state video franchise holder may appeal a penalty assessed by the City Manager or the City Manager’s designee to the City Council within 60 days of the initial assessment. The City Council shall hear all evidence and relevant testimony and may uphold, modify or vacate the penalty. The City Council’s decision on the imposition of a penalty shall be final.

SECTION 2. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 3. CEQA - EXEMPTION. The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3), that this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment. The Council therefore directs that the Planning Division may file a Notice of Exemption with the Santa Clara County Clerk in accordance with the Sunnyvale Guidelines for the implementation of CEQA adopted by Resolution No. 118-04.

SECTION 4. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 5. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication of a notice once in The Sun, the official newspaper for publication of legal notices of the City of Sunnyvale, setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, 2008, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2008, by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

ATTEST:

APPROVED:

City Clerk
Date of Attestation: _____

Mayor

(SEAL)

APPROVED AS TO FORM AND LEGALITY

David Kahn, City Attorney