

TO: James L. App, City Manager
FROM: Jim Throop, Administrative Services Director
SUBJECT: Video Service by State Franchise Holders
DATE: September 15 2009

NEEDS: For the City Council to consider an ordinance implementing the provisions of the Digital Infrastructure and Video Competition Act of 2006 (DIVCA).

- FACTS:
1. Effective January 1, 2007, DIVCA provides for a State video franchising process to be administered by the California Public Utilities Commission.
 2. Under DIVCA, new video service providers had the ability to apply for a State video franchise beginning March 2, 2007. In contrast, incumbent cable operators applying for a State franchise were required to wait until January 2, 2008.
 3. State franchise applicants are required to designate which areas within the State they intend to serve, with local jurisdictions named to be notified accordingly.
 4. Video providers with a State franchise need not obtain a local franchise from the City.
 5. Local franchises typically impose customer service standards on video providers and can also require various public benefits for the privilege of operating within the City.
 6. DIVCA changes the authority of cities to set the terms under which video providers operate within a community.
 7. In order to maintain the rights delegated by the CPUC to local entities, adoption of this ordinance is required.

ANALYSIS &

CONCLUSION: DIVCA was initiated at the request of telephone industry to streamline their entrance into the cable television market. Cable companies have been offering “bundled” service packs including cable services, high-speed internet, and telephone service. Without cable franchises, the telephone companies were unable to provide video service in most locations and could not match this bundling package. They complained that negotiating individual franchise agreements with individual cities would take an inordinate amount of time and would result in further losses to both the companies and the consumers. In response, the legislature passed AB 2987 (DIVCA), which established a state-wide franchising scheme for video providers administered by the CPUC.

With regard to any new video service providers who wish to provide services within the City, DIVCA grants the City a franchise fee up to five percent (5.0%) of gross revenues, which is currently the amount received from Charter Communications. Additionally, cities are entitled to an additional fee up to one percent (1.0%) of gross revenues for PEG support, provided the City has enacted an ordinance establishing the fee.

Cities may also monitor customer service standards of state video franchise holders, but are limited to enforcing only those standards listed in DIVCA and may only impose fines or violations of those standards if the City enacts an ordinance or resolution establishing the fine schedule. The amount of each fine is limited by DIVCA. Consequently, the City must adopt the attached ordinance to add these provisions to the City's Municipal Code.

DIVCA affords the City the ability to retain revenue for PEG purposes (PUC Section 5870); collect franchise fees (PUC Section 5860); assess penalties for violations of customer service standards (PUC Section 5860); and impose restriction on the use of City rights-of-way (PUC Section 5885). DIVCA also requires the City to provide a process for State franchise holders to appeal encroachment permit denials (CPUC Section 5885(c)(4)). In order to secure these rights a local ordinance becomes necessary.

The California Public Utilities Commission can issue a State franchise at any time within 44 days after it receives an application.

The current franchise with Charter Communications expires in April 2010. It is imperative to have an ordinance in place prior to that time to ensure the franchise rights that are delegated by the State to the City are preserved.

Policy

Reference: Digital Infrastructure & Video Competition Act of 2006; City Franchise Agreements.

FISCAL

IMPACT: The ordinance will assure timely payment of the five percent (5.0%) franchise fee and the one percent (1.0%) PEG fees as provided by state law. The ordinance also authorizes local audit of statewide video franchise holders and establishes a schedule of fines to enforce customer service standards.

Options:

- a. Introduce the First Reading Ordinance No. XXX N.S. adding Chapter 5.50 Title 5 of the Municipal Code relating to the regulations for the provision of video service by State franchise holders, and set October 6 2009 as the date for adoption of said ordinance; or
- b. Amend, modify, or reject the above option

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES ADDING CHAPTER 5.50 TO TITLE 5 OF THE EL PASO DE ROBLES 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 El Paso de Robles 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 El Paso de Robles, in accordance with the requirements set forth in DIVCA;

THEREFORE, THE CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES DOES ORDAIN AS FOLLOWS:

SECTION 1. Chapter 5.50 is hereby added to Title 5 of the El Paso de Robles Municipal Code to read as follows:

Chapter 5.50. State Video Franchises

Sections:

- 5.50.010 Purpose and Application
- 5.50.020 State Video Franchise and PEG Fees
- 5.50.030 Audit Authority
- 5.50.040 Customer Service Penalties Under State Franchises

Section 5.50.010 Purpose and Application

This Chapter is designed to regulate video service providers holding state video franchises and operating within the City of El Paso de Robles.

Section 5.50.020 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 5.50.030 Audit Authority

Not more than once annually, the City Manager or the 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 5.50.020.

Section 5.50.040 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 Manager or the Manager's designee shall monitor the compliance of state video franchise holders with respect to state and federal customer service and protection standards. The City Manager or the 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 will be subject to the following penalties to be imposed by the City Manager or the Manager's 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 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. SEVERABILITY. If any action, subsection, sentence, clause or phrase of this Ordinance is, for any reason, held by a court of competent jurisdiction to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance which can be given effect without the invalid provisions or application, and to this end the provisions of this Ordinance are declared to be severable.

SECTION 3. PUBLICATION. The City Clerk shall cause this Ordinance to be published once within fifteen (15) days after its passage in a newspaper of general circulation, printed, published and circulated in the City in accordance with Section 36933 of the Government Code.

SECTION 4. INCONSISTENCY. To the extent that the terms or provisions of this Ordinance may be inconsistent or in conflict with the terms or conditions of any prior City ordinance(s), motion, resolution, rule, or regulation governing the same subject matter thereof, such inconsistent and conflicting provisions of prior ordinances, motions, resolutions, rules, and or regulations are hereby repealed.

SECTION 5. EFFECTIVE DATE. This Ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

Introduced at a regular meeting of the City Council held on September 15, 2009, and adopted as an ordinance of the City of El Paso de Robles at a regular meeting of the City Council held on _____, 2009, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

Duane Picanco, Mayor

ATTEST:

Cathy David, Deputy City Clerk