



REPORT TO MAYOR AND COUNCIL

AGENDA ITEM NO.

4.6

TO THE HONORABLE MAYOR AND COUNCIL:

DATE: September 25, 2007

SUBJECT: ORDINANCE TO IMPLEMENT THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006

Report in Brief

The Council Committee on Infrastructure & Franchise recommends the City Council introduce Ordinance No. 07-11 amending Chapter 102 - Telecommunications of the Concord Municipal Code (Exhibit A). This ordinance is authorized by a new state law AB 2987, the Digital Infrastructure and Video Competition Act of 2006 (DIVCA). DIVCA establishes the California Public Utilities Commission (CPUC) as the sole franchising authority for new video service providers state-wide but delegates certain rights to local authorities. These rights must be established by local ordinance to be enforceable on state video franchise holders.

Background

The Digital Infrastructure and Video Competition Act of 2006 (DIVCA) was passed by the State Legislature, signed by the Governor and chaptered into law on September 28, 2006. The Act became effective on January 1, 2007. DIVCA was initiated at the request of the telephone companies as a method to streamline their entrance into the cable television market. Cable companies have been offering "bundled" service packs to subscribers including cable service, 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 independent franchise agreements with cities would take an inordinate amount of time and would result in further losses to both the companies and consumers. In response, the Legislature passed and the Governor signed 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 may wish to provide services within the City, DIVCA grants the City a franchise fee of up to five percent of gross revenues, which is currently the amount received from Astound Broadband and Comcast. Additionally, cities are entitled to an additional fee of up to three percent of gross revenues for PEG¹ support, provided the City has enacted an ordinance establishing the fee.

¹ PEG is Public, Educational and Government programming provided by cities and counties.

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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 for 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 current cable ordinance (Exhibit A).

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 these areas:

- PEG fees to support local Public, Educational and Governmental Programming
- Penalties for enforcement of customer service standards
- Right of local audit of statewide franchise holders
- Notification of requirement for franchise fees

PEG Fees

Section 5870(n) of DIVCA states that cities may adopt a PEG fee of up to 3% of gross revenues if up to 3% is charged to another cable provider in the city. This PEG fee is in addition to the 5% franchise fee:

“5870(n) A local entity may, by ordinance, establish a fee to support PEG channel facilities consistent with federal law that would become effective subsequent to the expiration of any fee imposed pursuant to paragraph (2) of subdivision (1). If no such fee exists, the local entity may establish the fee at any time. The fee shall not exceed 1 percent of the holder's gross revenues, as defined in Section 5860. Notwithstanding this limitation, if, on December 31, 2006, a local entity is imposing a separate fee to support PEG channel facilities that is in excess of 1 percent, that entity may, by ordinance, establish a fee no greater than that separate fee, and in no event greater than 3 percent, to support PEG activities. The ordinance shall expire, and may be reauthorized, upon the expiration of the state franchise.”

The City's cable television franchise agreement with Astound Broadband provides for a PEG fee that is calculated at 3% of Astound's gross revenues. Section 2 of Ordinance No. 07-11 proposes a 3% PEG fee be applied to statewide video franchise holders as allowed by Section 5870(n) of DIVCA.

Customer Service Fines

Section 5900(d) of DIVCA provides that cities may adopt by ordinance or resolution a fine schedule to enforce customer service standards set out in the law:

“5900(d) The local entity shall, by ordinance or resolution, provide a schedule of penalties for any material breach by a holder of a state franchise of this section. No monetary penalties shall be assessed for a material breach if it is out of the reasonable control of the holder. Further, no monetary penalties may be imposed prior to January 1, 2007. Any schedule of monetary penalties adopted pursuant to this section shall in no event exceed five hundred dollars (\$500) for each day of each material breach, not to

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exceed one thousand five hundred dollars (\$1,500) for each occurrence of a material breach. However, if a material breach of this section has occurred, and the local entity has provided notice and a fine or penalty has been assessed, and if a subsequent material breach of the same nature occurs within 12 months, the penalties may be increased by the local entity to a maximum of one thousand dollars (\$1,000) for each day of each material breach, not to exceed three thousand dollars (\$3,000) for each occurrence of the material breach. If a third or further material breach of the same nature occurs within those same 12 months, and the local entity has provided notice and a fine or penalty has been assessed, the penalties may be increased to a maximum of two thousand five hundred dollars (\$2,500) for each day of each material breach, not to exceed seven thousand five hundred dollars (\$7,500) for each occurrence of the material breach. With respect to video providers subject to a franchise or license, any monetary penalties assessed under this section shall be reduced dollar-for-dollar to the extent any liquidated damage or penalty provision of a current cable television ordinance, franchise contract, or license agreement imposes a monetary obligation upon a video provider for the same customer service failures, and no other monetary damages may be assessed.”

Section 1 of the proposed Ordinance No. 07-11 establishes fines in accordance with the requirements of DIVCA (Exhibit A).

Right of Audit

Section 5860(i) of DIVCA provides that City Councils may authorize City staff to conduct an annual local audit of statewide video franchise holders:

“§860(i) Not more than once annually, a local entity may examine the business records of a holder of a state franchise to the extent reasonably necessary to ensure compensation in accordance with subdivision (a). The holder shall keep all business records reflecting any gross revenues, even if there is a change in ownership, for at least four years after those revenues are recognized by the holder on its books and records. If the examination discloses that the holder has underpaid franchise fees by more than 5 percent during the examination period, the holder shall pay all of the reasonable and actual costs of the examination. If the examination discloses that the holder has not underpaid franchise fees, the local entity shall pay all of the reasonable and actual costs of the examination. In every other instance, each party shall bear its own costs of the examination. Any claims by a local entity that compensation is not in accordance with subdivision (a), and any claims for refunds or other corrections to the remittance of the holder of a state franchise, shall be made within three years and 45 days of the end of the quarter for which compensation is remitted, or three years from the date of the remittance, whichever is later. Either a local entity or the holder may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction.”

Section 2 of the proposed Ordinance No. 07-11 establishes this authority (Exhibit A).

Notification of Franchise Fee

DIVCA does not require that cities adopt by ordinance the requirement for a 5% franchise fee but it is good practice to do so. This notification can help assure timely payment of the fee. Section 2 of the proposed Ordinance No. 07-11 provides this notification DIVCA (Exhibit A). Staff has previously informed AT&T,

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for example, of the 5% franchise fee requirement in writing and has supplied the company with copies of the Astound Broadband and Comcast franchise agreements containing this requirement.

The Council Committee on Infrastructure & Franchise reviewed the proposed ordinance at their July 23, 2007 meeting. The Committee recommends the City Council introduce Ordinance No. 07-11 amending Chapter 102 - Telecommunications of the Concord Municipal Code (Exhibit A). This ordinance is authorized by a new state law AB 2987, the Digital Infrastructure and Video Competition Act of 2006 (DIVCA). DIVCA establishes the California Public Utilities Commission (CPUC) as the sole franchising authority for new video service providers state-wide but delegates certain rights to local authorities. These rights must be established by local ordinance to be enforceable on state video franchise holders

Fiscal Impact

Ordinance No. 07-11 will assure timely payment of the 5% franchise fee and 3% PEG fee 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. The exact fiscal impact of the Ordinance is unknown at this time. New statewide video franchise holders may attract customers of existing cable companies which may result in increased or decreased revenues to the City.

Adopting Ordinance No. 07-11 will assure that City revenues are not eroded due to failing to exercise rights granted to cities under state law.

Public Contact

Posting of the Agenda. A copy of this report has been sent to Will Rigney, ATT, Philip Arndt, Comcast and Will Minyard, Astound Broadband.

Alternative Courses of Action

1. Introduce Ordinance No. 07-11 of the City Council of the City of Concord amending Chapter 103 (Telecommunications) of the Concord Municipal Code (Exhibit A).
2. Do not introduce Ordinance No. 07-11 of the City Council of the City of Concord amending Chapter 103 (Telecommunications) of the Concord Municipal Code (Exhibit A).

Council Committee Recommendation

1. Introduce Ordinance No. 07-11 of the City Council of the City of Concord amending Chapter 103 (Telecommunications) of the Concord Municipal Code (Exhibit A).

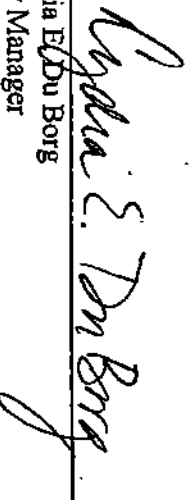
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Recommendation for Action

1. Introduce Ordinance No. 07-11 of the City Council of the City of Concord amending Chapter 103 (Telecommunications) of the Concord Municipal Code (Exhibit A).


Lydia E. Du Borg
City Manager

Prepared by: Peter Dragovich
Director of City Management

Enclosures: Exhibit A Proposed Ordinance No. 07-11

Additional Reviewers:

Mark T. Boehme, Senior Assistant City Attorney

ORDINANCE NO. 07- 11

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CONCORD AMENDING CHAPTER 102, (TELECOMMUNICATIONS), ARTICLE II, (CABLE COMMUNICATIONS SYSTEMS), DIVISION 3, (CUSTOMER SERVICE) AND DIVISION 6, (RATE REGULATION) OF THE CONCORD MUNICIPAL CODE ESTABLISHING FRANCHISE AND PEG FEES AND CUSTOMER SERVICE PENALTIES FOR STATE FRANCHISE HOLDERS PROVIDING VIDEO SERVICE WITHIN THE CITY OF CONCORD

WHEREAS, the Digital Infrastructure and Video Competition Act of 2006 (AB 2987) went into effect January 1, 2007;

WHEREAS, under the new state law, the State of California shall have sole franchising authority for new video service providers within the City;

WHEREAS, the City of Concord, although not the franchising authority, will acquire certain rights and responsibilities with respect to the new state video franchise holders;

WHEREAS pursuant to AB 2987, certain rights and responsibilities must be established by local ordinance before they may become effective and enforceable against state video franchise holders;

WHEREAS, the City of Concord shall receive a fee of 5% of gross revenues of each state video franchisee which operates within the City of Concord for use of the public rights-of-way;

WHEREAS, the City of Concord shall receive an additional fee of 3% of gross revenues of each state video franchisee which operates within the City of Concord as authorized by Public Utilities Code section 5870 (n) for Public, Educational and Government (PEG) purposes;

WHEREAS, the City of Concord may audit the business records of a state video franchisee once annually to ensure compliance with the payment of the franchise and PEG fees;

WHEREAS, the City of may establish and enforce penalties against state video franchisees for violations of customer service rules consistent with state law;

WHEREAS, the City of Concord will retain authority, without change, over the City's current cable franchise until such time as it no longer holds a City franchise, or is no longer operating under a current or expired City franchise;

WHEREAS, the terms "video service", "video franchise" and "holder" shall have the same meaning as those terms are defined in Public Utilities Code section 5830.

NOW, THEREFORE, the City Council of the City of Concord does ordain as follows:

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1 SECTION 1. Concord Municipal Code Chapter 102, (Telecommunications) Article II, (Cable
2 Communications Systems), Division 2, (Customer Service) is amended by adding section 102-86 to
3 read:

4 Section 102-86 Customer Service Penalties Under State Video Franchises

- 5 (a) The Holder of a state video franchise shall comply with all applicable state and federal
6 customer service and protection standards pertaining to the provision of video service.
- 7 (b) The City Manager or his/ her designee shall monitor the compliance of state video
8 franchise holders with respect to state and federal customer service and protection
9 standards. The City Manager or his/her designee will provide the state video franchise
10 holder written notice of any material breaches of applicable customer service standards,
11 and will allow the state video franchise holder 30 days from the receipt of the notice to
12 remedy the specified material breach. Material breaches not remedied within the 30-day
13 time period will be subject to the following penalties to be imposed by the City:

- 14 (1) For the first occurrence of a violation, a fine of \$500.00 shall be
15 imposed for each day the violation remains in effect, not to exceed
16 \$1,500.00 for each violation.
- 17 (2) For a second violation of the same nature within 12 months, a fine of
18 \$1,000.00 shall be imposed for each day the violation remains in effect,
19 not to exceed \$3,000.00 for each violation.
- 20 (3) For a third or further violation of the same nature within 12 months, a
21 fine of \$2,500.00 shall be imposed for each day the violation remains in
22 effect, not to exceed \$7,500.00 for each violation.

23 A state video franchise holder may appeal a penalty assessed by the City Manager or his/her
24 designee to the City Council within 60 days of the initial assessment. The City Council shall hear all
25 evidence and relevant testimony and may uphold, modify or vacate the penalty. The City Council's
26 decision on the imposition of a penalty shall be final.

27 Section 2. Concord Municipal Code Chapter 102, (Telecommunications) Article II, (Cable
28 Communications Systems), Division 6, (Rate Regulation), is amended by adding sections 102-110,
102-111 and 102-112 to read as follows:

1 Section 102-110 State Video Franchise and PEG Fees

2 (a) For any state video franchise holder operating within the boundaries of the City of
3 Concord, there shall be a fee paid to the City equal to five percent of the gross
4 revenue of that state video franchise holder.

5 (b) As of December 31, 2006, the City of Concord imposed a separate fee to support
6 Public, Educational and Governmental (PEG) channels, that are in excess of 1%.
7 For any state video franchise holder operating within the boundaries of the City of
8 Concord, there shall be an additional fee paid to the City equal to three percent (3%)
9 of the gross revenue of that state video franchise holder, which fee shall be used by
10 the City for PEG purposes consistent with state and federal law.

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

13 Section 102-111 Audit Authority

14 Not more than once annually, the City Manager or his designee may examine and
15 perform an audit of the business records of a holder of a state video franchise to ensure
16 compliance with Section 102-110.

17 Section 102-112 City Response to State Video Franchise Applications

18 (a) Applicants for state video franchises within the boundaries of the City of Concord must
19 concurrently provide complete copies to the City of any application or amendments to
20 applications filed with the Public Utilities Commission (PUC).. One complete copy
21 must be provided to the City Manager.

22 (b) Within 30 days of receipt, the City Manager will provide any appropriate comments to
23 the PUC regarding an application or an amendment to an application for a state video
24 franchise.

25 SECTION 3. Severability.

26 If any section, sentence, clause or phrase of this Ordinance is for any reason held to be invalid
27 or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect
28 the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would
have passed this ordinance and adopted this Ordinance and each section, sentence, clause or phrase

1 thereof, irrespective of the fact that any one or more section, subsections, sentences, clauses or phrases
2 be declared invalid or unconstitutional.

3 Section 4. This Ordinance No. 07-11 shall become effective thirty (30) days following its
4 passage and adoption. In the event a summary of said Ordinance is published in lieu of the entire
5 Ordinance, a certified copy of the full text of this Ordinance shall be posted in the office of the
6 City Clerk at least five (5) days prior to its adoption and within fifteen (15) days after its adoption,
7 including the vote of the Councilmembers. Additionally, a summary prepared by the City
8 Attorney's Office shall be published once at least five (5) days prior to the date of adoption of this
9 Ordinance and once within fifteen (15) days after its passage and adoption, including the vote of
10 the Councilmembers, in the Contra Costa Times, a newspaper of general circulation in the City of
11 Concord.

12
13
14 Mark Peterson
Mayor

15 ATTEST:

16
17 Mary Rae Lehman
18 City Clerk

19
20 (Seal)

21 Ordinance No. 07-11 was duly and regularly introduced at a regular joint meeting of the
22 City Council and Redevelopment Agency held on September 25, 2007, and was thereafter duly
23 and regularly passed and adopted at a regular joint meeting of the City Council and
24 Redevelopment Agency held on October 9, 2007, by the following vote:

25 AYES: Councilmembers -

26 NOES: Councilmembers -

27 ABSTAIN: Councilmembers -

28 ABSENT: Councilmembers -

1 **I HEREBY CERTIFY** that the foregoing is a true and correct copy of an ordinance
2 duly and regularly introduced, passed, and adopted by the City Council of the City of Concord,
3 California.

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6 Mary Rae Lehman
7 City Clerk

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