

**MOORPARK CITY COUNCIL
AGENDA REPORT**

TO: Honorable City Council

FROM: John A. Brand, Senior Management Analyst 

DATE: May 10, 2007 (CC Meeting of 5/16/2007)

SUBJECT: Consider an Ordinance Amending Title 5 of the Moorpark Municipal Code (Business Taxes, Licenses and Regulations), by Adding Chapter 5.07, State Video Franchises

BACKGROUND

In 2006, the California Legislature enacted a completely new franchising law for companies intending to provide video services to the state's residents - AB 2987, the "Digital Infrastructure and Video Competition Act of 2006" (DIVCA). This law became effective on January 1, 2007. DIVCA was adopted in anticipation of telephone companies offering video services to their customers in competition with incumbent cable operators. It radically changed the manner in which video services are regulated by replacing local franchising with a state franchising system administered by the California Public Utilities Commission (CPUC). DIVCA applies to all persons who use any part of the public right-of-way to deliver video programming to subscribers, including those using an Internet Protocol (IP) delivery system. However, because satellite television providers do not use the public right-of-way to deliver video services, they are not subject to DIVCA and will continue to be exempt from local franchise regulations under federal law. The CPUC has exclusive authority under DIVCA to grant state franchises to video service providers. DIVCA also provides an expedited process for reviewing and granting state franchises that is essentially a ministerial process.

In brief, the major provisions of DIVCA include the following:

1. Replaces local franchising of video services with a State franchising system administered by the CA Public Utilities Commission (CPUC).
2. Provides that incumbent cable operators may seek a state franchise when the local franchise expires; or when both the local entity and the cable operator agree in writing; or when a new video service provider indicates its intention to operate in the incumbent's territory. A State franchise may be applied for on or after April 1, 2007
3. Preserves payment of a 5% franchise fee to the local authority (now called a "state" franchise fee and paid quarterly)
4. Maintains the existence of the Public, Education, and Government (PEG) access channels in existing franchises, and spreads the obligation to support access channels to any new State Video Franchises Providers. (Moorpark has two active

access channels – channel 10 City government Channel, Channel 25 public access channel, and additionally there is an obligation in the existing franchise or a third educational channel.) Programming for the access channels must be non-commercial and is provided by the public, local government, or educational institution. This means that, for example, a new State Video Provider would have to carry the City's channel 10 programming.

5. Provides for the levy of a 1% fee by the local entity that can be used to support PEG capital needs
6. Ensures compliance with Federal Emergency Alert System (EAS) requirements
7. Preserves the right of local entities to manage their local right-of-way, including requirement for encroachment permits, etc.
8. Removes customer service standards from the local entity and replaces them with the customer service standards established by state and federal law. Local entities however, are delegated the responsibility for enforcement with respect to complaints.
9. Prohibits discrimination in build-out based on income.

DISCUSSION

It is necessary to modify the Municipal Code for compliance and consistency with DIVCA. This will enable the City to still exert a certain degree of local authority in the area of video franchises. The key areas to be considered in developing the proposed new ordinance include:

Right-of-Way Management

DIVCA preserves the City's right to manage its local right-of-way consistent with the provisions of the Public Utilities Code Section 7901.1 and to require encroachment permits for any construction activities in the public rights-of-way. Therefore, the City can continue to apply reasonable time, place and manner regulations on video service providers with a state franchise. DIVCA also makes it clear that the California Environmental Quality Act (CEQA) applies to the local projects of a State Video Franchise holder and that the City is the lead agency for the purposes of environmental review and the preparation of CEQA documents.

However, DIVCA protects the standards under which telephone companies may perform video construction in the public rights-of-way. They are the same as under current law for traditional telephonic activities in the public rights-of-way. Consequently, the provisions of DIVCA require the local entity to allow the holder of a state franchise to install, construct, and maintain a network within the public rights-of-way under the same time, place, and manner provisions as those governing telephone corporations under applicable state and federal law.

DIVCA requires the City to act on an encroachment permit application within 60 days after the completed application is received, unless the parties mutually agree on a time extension. The application will not be deemed complete until a CEQA review and documentation are completed. The City is required by DIVCA to adopt regulations prescribing the procedures for an applicant to appeal to the City Council the denial of an encroachment permit application. Moorpark has these appeal procedures already in place in the Code.

The proposed ordinance includes provisions in §5.07.050 to address the City review and approval process in response to permit applications from State Video Franchise holders. On April 19, AT&T initiated its application process for encroachment permits in the City. Timely consideration of the proposed ordinance may help facilitate the processing of AT&T's application process.

Customer Service

Enforcement of customer service standards is still under the authority of local governments. However, the authority in DIVCA is somewhat weaker in comparison with the authority local governments had in many cases under local franchise agreements. The local entity shall enforce all of the customer service and protection standards with respect to complaints received from residents within the local entity's jurisdiction, but it may *not* adopt or seek to enforce any additional or different customer service or other performance standards.

According to DIVCA, the State franchise holder shall comply with the provisions of CA Gov't. Code §53055, §53055.1, and §53088.2 and any other customer service standards pertaining to the provision of video service established by Federal law or regulation. The State franchise holder also shall comply with provisions of §637.5 of the Penal Code and 47 U.S.C. 551 et seq. Moorpark's customer service standards are based on federal standards, so it appears that the performance expectations will be the same under DIVCA. This includes the so-called "thirty-second rule" to reach a customer service representative by telephone that has recently been the subject of some concern by the Council with the incumbent cable operator. The proposed ordinance includes financial penalties for material breaches of customer services standards as stipulated by DIVCA. These are in §5.07.040 of the proposed ordinance.

Fiscal Impact

The City traditionally collected a 5% Franchise Fee from cable television providers for using the City's public rights-of-way. In FY 2005-2006, the City received about \$280,000 in Franchise fees from the incumbent Time Warner Cable. For the first half of FY 2006-2007, the City has received \$163,500. A provision is included in §5.07.020 of the proposed ordinance that will enable the City to continue to receive Franchise fees from a State Video

Franchise holder's gross revenue in an amount equal to the 5% currently received from the incumbent cable operator's gross revenue. DIVCA preserves the City's 5% Franchise Fee only if an ordinance such as the one proposed is adopted.

DIVCA also redefines "gross revenue," the revenue streams that are subject to the Franchise Fee, as well as the revenue that is excluded from the calculation of the video provider's gross revenue. It will be beneficial to State Video Franchise holders to have a single consistent definition of gross revenue for every jurisdiction where it operates. The effect on individual cities is less clear. Some cities anticipate a modest reduction in Franchise fees, while others project it to be revenue neutral. Perhaps the greatest impact of DIVCA on video Franchise fees will be if franchise fees from any new State Video operators are collected by the California Public Utilities Commission and then distributed to local agencies. At the present time, the city receives the Franchise fees directly from Time Warner Cable.

In addition, DIVCA allows the City to establish, by ordinance, a separate fee to support public, education and government (PEG) access channel facilities that State Video Franchise holders will be required to pay. To be consistent with federal law, the PEG fee cannot exceed 1% of gross revenue. The proposed ordinance §5.07.020 establishes this 1% PEG fee for the City. Under the City's current local franchise agreement, Time Warner Cable collects a 40¢ per customer PEG fee. Under the current formula, the City receives about \$36,000 annually in PEG fees. If calculated at the proposed 1% instead of the existing 40¢, PEG revenue may increase to about \$50,000 per year.

Additionally, when the current cable franchise was renewed with Adelphia, provisions were made for an initial PEG grant of \$175,000 for capital equipment (used to upgrade channel 10 equipment) and an additional \$150,000 grant due no earlier than 2009, the fifth year of the Franchise Agreement. Time Warner Cable absorbed these obligations. They also provide in-kind support to the City in forms such as facilitating channel 10 and by providing labor and equipment to record and broadcast the Country Days Parade. DIVCA provides that after January 1, 2007, the cost of those obligations to support PEG and institutional networks and to provide cable services to community buildings that are contained in the City's existing cable franchise agreement will be divided among all cable or video providers on a pro rata basis.

Even if Time Warner Cable opts out of its local franchise agreement prior to its expiration and obtains a State Video Franchise, it will be required to continue to provide in-kind support for PEG access at its current level until its current franchise would have expired. Existing federal law provides that the portion of any PEG fee used to pay for operational costs may be offset by the operator against the 5% Franchise Fee. This provision has the effect of limiting PEG fees to capital costs unless the City is willing to have its Franchise fees reduced by the amount spent on operational costs.

As the incumbent cable operator, Time Warner Cable must continue to provide this PEG support and cable services to City facilities as required by the existing local cable franchise until the date the local franchise expires or January 1, 2009, whichever is later. Time Warner Cable's franchise is scheduled to expire on October 1, 2019. This obligation will continue even if Time Warner Cable receives a State Video Franchise prior to the expiration of its local franchise agreement with the City.

Assistant City Attorney Scott E. Porter prepared the attached proposed ordinance, which has also been reviewed by the City Attorney.

STAFF RECOMMENDATION

Introduce Ordinance No. _____, State Video Franchises, for first reading, waive full reading, and schedule second reading and adoption for June 6, 2007.

Attachments

Attachment "A" Proposed Ordinance

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF MOORPARK, CALIFORNIA, ADDING CHAPTER 5.07, STATE VIDEO FRANCHISES, TO TITLE 5 OF THE MOORPARK MUNICIPAL CODE, ESTABLISHING FRANCHISE AND PEG FEES AND CUSTOMER SERVICE PENALTIES FOR STATE VIDEO FRANCHISE HOLDERS PROVIDING VIDEO SERVICE WITHIN THE CITY OF MOORPARK

WHEREAS, a new state law, the Digital Infrastructure and Video Competition Act of 2006 (Pub. Util. Code § 5800 *et seq.*, "DIVCA") went into effect on January 1, 2007; WHEREAS, under DIVCA, the State of California is the "sole franchising authority" for new video service providers within the City of Moorpark ("City"); and

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

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

WHEREAS, the City retains authority, without change, over the City's current cable franchisee until the franchisee no longer holds a City issued franchise, or the franchise expires; and

WHEREAS, the City will receive a fee of 5% of gross revenues from each state video franchisee which operates within the City for use of the public rights-of-way unless the City opts to waive collection of the fee; and

WHEREAS, the City does not currently opt to waive the collection of the 5% franchise fee; and

WHEREAS, Time Warner Cable is currently providing cable service within the City pursuant to a document entitled "Cable System Franchise Agreement Between the City of Moorpark and Century-TCI California, L.P." (the "TWC Franchise"); and

WHEREAS, the TWC Franchise has effective date of October 1, 2004 and is not set to expire until October 1, 2019; and

WHEREAS, consistent with Utilities Code 5870(k), Time Warner Cable must continue to provide and support PEG channel facilities and institutional networks and to provide cable services to community buildings contained in the TWC Franchise until the TWC Franchise expires, until the term of the franchise would have expired if it had not

been terminated pursuant to Public Utilities Code Section 5840(o), or until January 1, 2009, whichever is later; and

WHEREAS, so long as Time Warner Cable has existing unsatisfied obligations under the franchise to remit to the City any cash payments for the ongoing costs of public, educational, and governmental access channel facilities or institutional networks, the City must divide those cash payments among all cable or video providers on a pro rata basis; and

WHEREAS, the TWC Franchise includes such payment obligations; and

WHEREAS, consistent with Public Utilities Code section 5970(n), the City is authorized to establish a fee to support PEG channel facilities consistent with federal law that would become effective at the expiration of the duty to make any such payments pursuant to the TWC franchise; and

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

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

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

SECTION 1. Chapter 5.07 of the Moorpark Municipal Code is hereby added to provide as follows:

“Chapter 5.07

STATE VIDEO FRANCHISES

Sections:

- 5.07.010 Purpose and Application**
- 5.07.020 State Video Franchise and PEG Fees**
- 5.07.030 Audit Authority**
- 5.07.040 Customer Service Penalties Under State Franchises**
- 5.07.050 City Response to State Video Franchise**

Section 5.07.010 Purpose and Application.

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

On January 1, 2007, the State of California became the sole authority with power to grant state video franchises pursuant to the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). Pursuant to DIVCA, the City of Moorpark shall receive a franchise fee from all state franchisees. Additionally, each state franchisee must remit to the City its pro rata share of any cash payments for the ongoing costs of public, education, and governmental access channel facilities or institutional networks, as long as there are such payment obligations imposed by a City issued franchise. Upon the termination of such payment obligations, the City intends to impose a fee for public, educational and/or government (PEG) purposes from all state video franchise holders operating within the City. DIVCA confirmed that the City may establish and enforce penalties, consistent with state law, against all state video franchise holders operating within the City for violations of customer service standards. DIVCA precludes the City from adopting its own standards and grants all authority to adopt customer service standards to the state. DIVCA leaves unchanged the City's authority to regulate, in accordance with Chapter 5.06, the City's current cable franchises and any City cable franchise(s) issued on or before January 1, 2008, until the expiration of any such franchise(s).

Section 5.07.020 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 of the gross revenue of that state video franchise holder.

(b) Any state video franchise holder operating within the boundaries of the City shall pay a fee to the City in the amount of its pro rata share of any cash payments for the ongoing costs of public, education, and governmental access channel facilities or institutional networks, so long as there are such payment obligations imposed by a City issued franchise, or until January 1, 2009, whichever is latest.

(c) Effective the first date on which state franchisees operating within the boundaries of the City are not obligated to make payments pursuant to subdivision (b) of this section, each state franchisee shall pay a fee to the City equal to one percent of gross revenue of that state video franchise holder to support Public, Educational, and/or Governmental (PEG) channel facilities consistent with federal law.

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

Section 5.07.030 Audit Authority

Not more than once annually, the City Manager or his designee may examine and perform an audit of the business records of a holder of a state video franchise to ensure compliance with Section 5.07.020.

Section 5.07.040 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 his 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 his 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:

(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 5.07.050 City Response to State Video Franchise Applications

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

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

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

SECTION 3. This Ordinance shall become effective thirty (30) days after its passage and adoption.

SECTION 4. The City Clerk shall certify to the passage and adoption of this ordinance; shall enter the same in the book of original ordinances of said City; shall make a minute of the passage and adoption thereof in the records of the proceedings of the City Council at which the same is passed and adopted; and shall, within fifteen (15) days after the passage and adoption thereof, cause the same to be published once in the Moorpark Star a newspaper of general circulation, as defined in Section 6008 of the Government Code, for the City of Moorpark, and which is hereby designated for that purpose.

PASSED AND ADOPTED this 16th day of May, 2007.

Patrick Hunter, Mayor

ATTEST:

Deborah S. Traffenstedt, City Clerk