



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Ed Shikada

SUBJECT: AT&T PROJECT LIGHTSPEED

DATE: December 20, 2006

Approved

Date

12-22-06

REASON FOR SUPPLEMENTAL MEMO

This memorandum updates the reports previously prepared for City Council consideration and reports on significant recent developments.

RECOMMENDATION

- a) Accept report on recent State actions establishing a statewide franchising system for video services and implications on AT&T's encroachment permit applications for its Project Lightspeed.
- b) Approval of an Ordinance authorizing the construction and operation of facilities and equipment in the City right of way to provide video services in the City under certain prescribed circumstances without obtaining a cable services franchise.
- c) Direct staff to negotiate and execute a "Gap Agreement" with AT&T for the provision of video services within San José, prior to second reading of the Ordinance referenced above.

ANALYSIS

As previously reported to the City Council, the State of California recently enacted the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). DIVCA establishes a statewide franchising system for video services, and designates the California Public Utilities Commission (CPUC) as the sole agency responsible for the issuance of video franchises. This new system substantially replaces the current system of cable television franchises negotiated and issued by municipalities. As a result, several priority policy issues previously raised in City Council discussions are no longer controlled by the City. These include buildout requirements, franchise fees, public, educational and government programming (PEG) support, customer service, and

consumer protection. The primary remaining local issues are right-of-way management, and transition to the new statewide framework.

Several recent developments have occurred that could affect the City's position regarding Project Lightspeed. These include activity involving other cities, further evaluation of proposed utility cabinet locations, and the potential effect of these developments on the implementation timeframe for services within San José. In addition, AT&T has indicated a willingness to agree to apply for and diligently pursue the obtaining of a state franchise to provide the desired video services.

Activity Involving Other California Cities

At City staff request, AT&T provided a list of local agencies that have agreed to allow the company to proceed with the installation of cabinets and other infrastructure construction required for its Project Lightspeed. The list has grown significantly over the past month, to 46 municipalities throughout California. The list includes both large and Santa Clara County municipalities, such as: Los Angeles, Los Angeles County, San Diego, San Diego County, Sacramento, Sacramento County, Anaheim, Fresno, Modesto, Riverside, Santa Ana, Santa Clarita, Santa Rosa, Stockton, Cupertino, Los Altos Hills, Milpitas, Palo Alto, and Saratoga.

AT&T also indicates that several cities have also authorized the company to begin offering video programming to subscribers, in advance of obtaining a state franchise. These include Anaheim, Burbank, Cupertino, Danville, Foster City, Glendale, San Ramon, Santa Clarita, and Saratoga. AT&T has further indicated that they may begin offering video service in these communities within the next month.

In addition, on December 7th a Contra Costa Superior Court ruled on the lawsuit filed by AT&T against the City of Walnut Creek. The City of Walnut Creek had imposed an encroachment permit condition requiring that AT&T obtain a City franchise prior to activating video services. The court ruled in favor of AT&T, noting that it was not convinced that the installation of Project Lightspeed constituted the construction of a cable service.

Proposed Utility Cabinet Locations

AT&T began submitting encroachment permit applications for review on August 20, 2006. The City agreed to do an administrative review of the applications for utility cabinet site location, orientation and appropriate placement. To date the City has reviewed roughly 130 applications and accepted roughly 60 after review and minor revisions to address conflicts with traffic, pedestrian, and existing utilities, and has held these applications pending completion of a resident consultation process as described below.

AT&T has developed a Resident Notification Plan, recently revised and acceptable by staff, to detail how AT&T will communicate with and receive input from adjacent residents regarding

cabinet placement. The plan specifies an initial notification by AT&T to residents adjacent and within line-of-sight of proposed cabinet, and an opportunity for input to the placement and visual screening of large Lightspeed cabinets. In order to advance identification and resolution of these site-specific issues, AT&T has begun contacting residents to solicit feedback.

Staff has also been advised that a smaller version of the Lightspeed cabinet (4 feet tall, versus 5 feet as previously presented) may be used in certain installations. Staff will work with AT&T to determine where this alternative would be feasible.

POLICY ALTERNATIVES

In light of the rapidly evolving regulatory environment, staff has discussed a variety of approaches with AT&T over the past several weeks. The current options are the following:

Option A: The City retains its current requirement that AT&T obtain a franchise prior to issuance of encroachment permits.

Given AT&T's consistent indication that this is not acceptable, reinforced by the Walnut Creek court ruling, this approach would likely result in no encroachment permits issued until AT&T obtains a state franchise. If the CPUC holds to its published implementation schedule, AT&T could have a state franchise as early as March 2007 and the City would be obligated to issue permits within a specified time thereafter. However, AT&T has indicated that absent an earlier start date, the company may reallocate construction resources to other communities where service is being rolled out in 2007. If that occurred, services might not be available in San José until 2008.

Option B: The City authorizes AT&T to begin construction, but requires an ordinance to address the authority to construct and operate such a system be effective prior to construction.

The City's Municipal Code requires a cable franchise be established prior to the construction or operation of a cable system. In order to maintain consistency with the Municipal Code, the City Attorney's Office has drafted an ordinance that acknowledges the current circumstances that would allow AT&T to proceed with Project Lightspeed construction and operation. This ordinance provides for a narrow exception to the requirement of a City cable franchise under the circumstances presented here, including the expectation that a state franchise will be obtained soon eliminating any need for a City issued franchise. Presuming first reading on January 9th and second reading on January 23rd, the ordinance would become effective on February 23rd. If the City were to not release encroachment permits until the ordinance becomes effective, AT&T would be authorized to start construction in late February.

AT&T has indicated that this delay in the start of construction could result in a much greater delay in providing services as noted in Option A.

Option C: The City authorizes AT&T to begin construction, and allows permits to be issued immediately.

Given that the City currently has received a large number of permit applications, AT&T is anxious to begin construction activity. Staff has completed review of these applications and could issue permits, subject to individual environmental review and completion of the resident communication plan, which are both in progress.

This option is favored by AT&T as it allows AT&T to begin construction immediately but does not address the Municipal Code requirement of the need for a franchise for cable service. Moreover, once construction is complete the City would be in a weak position for negotiating the terms or timeframe for AT&T offering video service to consumers.

Option D: The City authorizes AT&T to begin construction, allows permits to be issued immediately, approves an ordinance as described in Option B and authorizes the negotiation of a "Gap Agreement" to allow AT&T to offer video services to consumers prior to obtaining a state franchise but not until the ordinance is effective.

Beyond allowing the construction of infrastructure, AT&T is currently negotiating "Gap Agreements" with communities to allow the company to offer video services in advance of obtaining a state franchise. Under such an agreement, AT&T would voluntarily agree to comply with provisions of DIVCA related to franchise fees and PEG support, emergency alerts, encroachment permits, customer service and consumer protection.

This Option recognizes the dispute with respect to the ability of AT&T to operate the proposed video services in San Jose without a cable franchise by not authorizing the operation of the system until the ordinance is effective and the Gap Agreement negotiated but still allows AT&T to begin construction immediately.

Independent of these options, AT&T has also indicated their interest in providing a demonstration of good faith and interest in working with the City of San José, by providing a grant to the San José Public Library. They have indicated that AT&T will provide a \$100,000 library grant during the first quarter of 2007, and an equal grant in the first quarter of 2008. AT&T has further indicated that his grant is not dependent on moving forward with a Gap Agreement.

Recommendation

In reviewing these options, staff believes that in light of new state limitations the City's interest are best served by expediting the availability of competitive services to San José consumers, while ensuring that infrastructure installations are compatible with the surrounding environment. On this basis, staff recommends proceeding with Option D.

In order to proceed in a timely manner, upon City Council authorization staff would endeavor to negotiate and execute a Gap Agreement with AT&T prior to second reading of an authorizing Ordinance. The Gap Agreement would include the following key provisions, and any others direct by the City Council:

- Voluntary compliance with the provisions of DIVCA related to franchise fees and PEG support, emergency alerts, encroachment permits, customer service and consumer protection;
- Deferral of PEG channel capacity requirements until August 31, 2007;
- A term that expires upon AT&T obtaining a state franchise, and AT&T's commitment to seek a state franchise; and
- AT&T's agreement to defend the City in case of a challenge by an incumbent video service provider.

If a Gap Agreement cannot be negotiated by second reading of the ordinance, staff may recommend deferral of second reading.

COORDINATION

This memorandum has been coordinated with the Department of Public Works and the City Attorney's Office.

CEQA

Mitigated Negative Declaration File No. PP96-093, and Addenda thereto, dated December 2006, prepared by the Director of Planning, Building and Code Enforcement.



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