



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Ed Shikada
Katy Allen

SUBJECT: AT&T PROJECT LIGHTSPEED
POLICY OPTIONS

DATE: 04-19-06

Approved

Date

4/20/06

COUNCIL DISTRICT: Citywide

RECOMMENDATION

- a) Acceptance of the report on policy options related to AT&T's Project Lightspeed.
- b) Approval to schedule a study session on May 11, 2006 from 1:00 p.m. - 3:00 p.m. to review policy options and provide input to staff regarding positions related to AT&T's Project Lightspeed as well as recently introduced telecommunications legislation.

CEQA: Not a project.

OUTCOME

City Council policy direction will enable staff to proceed with negotiations with AT&T, as well as communicate priority elements for telecommunications legislation advocacy.

EXECUTIVE SUMMARY

As previously reported to the City Council, there are several ongoing activities affecting the regulation of video programming services within the city. These include discussions with AT&T regarding its desire to construct and operate "Project Lightspeed," similar discussions that AT&T and other telecommunications companies are having with other municipalities nationwide, and federal and state legislative initiatives to reform telecommunications regulatory framework. The City is also engaged in the ongoing administrative process for renewal of the expired Comcast franchise agreement.

In order to ensure a clear and consistent City position in these activities, this report evaluates alternatives and recommends that the City Council adopt the position that any agreement with AT&T for the construction and operation of Project Lightspeed must meet or exceed the business terms provided in previously approved franchise agreements, and that any changes resulting

from Federal and State legislation should ensure that these terms are enhanced to match current franchises.

BACKGROUND

Information regarding AT&T's Project Lightspeed was presented to the City Council on January 24, 2006 and March 14, 2006. In order to provide a brief overview of the issue, Attachment A provides a copy of the presentation provided to the City Council on January 24th.

Over the past several months, senior City staff members have quickly and flexibly responded to AT&T (formerly SBC) requests for meetings and discussion of the City's priority issues related to Project Lightspeed. These meetings have focused on efforts to identify potential business terms that both address the City's priorities and are acceptable to AT&T.

As discussed with the City Council on January 24th, from the outset AT&T communicated its unwillingness to seek a City cable franchise, based on AT&T's position that Project Lightspeed does not meet the definition of a cable system. Proceeding with discussion therefore required that the City consider the possibility of executing an agreement that is not a franchise, while providing the benefits of a franchise to the extent practicable. At the March 14th City Council meeting, the City Manager suggested that staff return to the City Council with a framework for negotiation with AT&T.

The City of Walnut Creek was sued by AT&T over the City's requirement that AT&T obtain a franchise agreement prior to offering video services in Walnut Creek. An April 14, 2006 ruling from a judge in U.S. District Court for the Northern District of California, sided with the City of Walnut Creek. The City Attorney's Office, in a memorandum to the City Council dated April 17, 2006, discussed this ruling.

Meanwhile, debate over telecommunication regulatory reform continues in Congress and at the California Legislature. As of the writing of this report, the House of Representatives Energy and Commerce Committee is currently conducting a hearing on Chairman Barton's bill, which creates a national franchise for cable operations. At the State level, Assembly Speaker Nunez, has introduced AB 2987, "The Digital Infrastructure and Video Competition Act of 2006" with Assemblymember Levine as co-author. The bill would create a new state-wide franchise for cable and video providers. AB 2987 is now set for hearing on April 24, before the Assembly Utilities Committee with Assemblymember Levine as Chair. On behalf of cities, the League of California Cities (LOCC) has been meeting with the Speaker's staff to seek amendments to the bill based on LOCC's position of opposition to the bill in its current amended form.

ANALYSIS

Previous staff reports to Council identified a number of policy issues to guide discussions with AT&T. Among them are the following:

- Revenue protection
- Maintaining a level playing field among competing services
- Support for Public, Educational and Government (PEG) programming
- Broad service rollout, ultimately Citywide
- Customer service standards
- Utility cabinet size and placement

Based on the ongoing activity at various levels of government, staff has assessed discussions with AT&T to date as well as the experience of other cities. Staff therefore recommends the following overall position:

- Any agreement with AT&T should meet or exceed terms provided in previously approved cable franchise agreements. This would allow a non-franchise agreement if providing equivalent terms, as well as indemnification and defense if challenged.
- Terms of an agreement should include the following basic elements:
 - A franchise fee equal to the existing cable franchise – 5% of subscription revenue;
 - A term sufficient to complete buildout of the system, subject to prior termination after a limited negotiation period upon either: (a) changes in federal or state law, or (b) execution of a new competing franchise;
 - The agreement must provide a plan for buildout of the system to the entire city;
 - The new service must carry PEG broadcasts, plus provide capital and per-subscriber contributions at least equal to the (expired) Comcast franchise on a per subscriber basis;
 - Connections to public buildings, or an equivalent in-lieu fee, must be provided;
 - Other applicable terms should be consistent with the previously approved 1996 Pacific Bell interim cable system franchise, including a procedure for community communications and approval of cabinet installations;

In order to provide a framework for City Council review and discussion of alternatives, Attachment B outlines a range of possible positions related to each priority area. Options are listed from least to most restrictive, along with key pros and cons of each option where clearly applicable.

Utility Cabinets

As the policy discussion of this important topic continues, it should be also noted that AT&T has resubmitted utility excavation/encroachment permit applications, limited to modifying AT&T's existing cable and conduit system to enhance their non-video services. These permit applications do not include large utility cabinets. City staff is processing applications and issuing permits in

accordance with State telecommunications regulations and Chapter 15.50 of the Municipal Code. In addition, AT&T has advised staff that in the case of new residential tracts, AT&T encroachment permits may reflect use of integrated utility cabinets for phone and data services as well as video. In such instances, staff will proceed with issuing permits under current regulations, however no permits will be issued for the installation of "Project Lightspeed" utility cabinets used exclusively for video services until authorized by the City Council.

The 1996 Interim Franchise Agreement with Pacific Bell included a comprehensive communications plan that outlined how the community would be kept informed about the construction and roll-out of Pacific Bell's Advance Communications Network. A key component of the communications plan was the approval process necessary for the placement of utility cabinets on or near private properties.

The cabinet siting approval process essentially required Pacific Bell to field review proposed cabinet locations with City staff prior to approaching adjacent property owners to discuss placement and landscaping/screening options. Initial contact with the property owner would take place approximately six months prior to the proposed cabinet installation. If agreement could not be reached with the property owner, Pacific Bell would look elsewhere until they found a location suitable with the property owner immediately adjacent to the proposed cabinet.

Comcast utilized a nearly identical communications plan during the recent construction upgrade of its cable system in San Jose. Staff recommends that any agreement with AT&T for the installation of utility cabinets related to providing video service include similar provisions.

Status of Franchise Negotiations with Comcast

There has been little progress in the effort to negotiate a franchise renewal with Comcast. The company has not responded to recent messages from the City, and there appears to be little interest on the company's part in moving forward with the informal renewal negotiations. It is possible that this may be due to the pending legislation regarding cable television franchising and telecommunications. Both the phone and cable companies are pushing for legislative changes in Washington and Sacramento that could significantly alter the landscape for cable service franchises.

In the formal renewal process with Comcast, the City is waiting for the hearing officer to issue a decision on the protective order that Comcast has requested to allow discovery to move forward. This decision is expected within the next two weeks. Once this order is issued, the City would expect the formal administrative process to move forward through the briefing stage to a hearing sometime early in 2007.

Applicability to Pending Legislation

The City Council's consideration of Project Lightspeed provides the opportunity to connect these discussions with ongoing State and Federal legislative initiatives. In order to maximize our

opportunity to participate in the debate at the State and Federal levels, it is necessary for the City to adopt policy positions which reflect the City's 2006 Legislative Priorities. Ongoing communications to the City's Federal and State legislative delegations will require a clear delineation of the City's telecom policy positions and coordination with other municipalities to ensure maximum effectiveness. The following specific positions are recommended:

- Support legislation in the area of telecommunication that
 - Preserves valuable City services and does not undermine the ability of local municipalities to collect fees or raise revenues;
 - Maintains municipalities' authority through franchise agreement negotiations to protect customers, to work with providers to provide key services, and to maintain the public, education, and government broadcasting channels;
 - Ensures service availability to all customers by reducing the digital divide and preventing "redlining" that picks more affluent areas for service delivery and ignores less affluent areas and specifies build-out requirements; and
 - Supports local government's ability to regulate use of public rights-of-way.
(From the City of San Jose's 2006 Legislative Priorities)
- Advocate that any specific national or statewide franchise terms must meet or exceed City positions related AT&T's Project Lightspeed
- The definition of gross revenues on which fees are collected should include advertising;
- Rates for competing services must be consistent across the city, with no differential between areas where there are alternatives and areas where there are not;
- Federal or State regulatory bodies should ensure that utility cabinets and other infrastructure are designed in a manner that minimizes potential safety, noise, aesthetic and walkability impacts;
- The ability of a municipality to require the installation of an Institutional Network, or INET, should be preserved.

The City's activities continue to focus on the City's franchise agreement with Comcast which expired in 2000 and is currently working through an administrative resolution process. This extended period with no agreement argues that any legislative reform initiatives should address this issue. Creating incentives or a structure for finalizing renewals should be a priority.

ALTERNATIVES

This report presents a range of alternatives for City Council discussion and direction to staff.

PUBLIC OUTREACH

The policy framework and status of negotiations with AT&T for the deployment of Project Lightspeed has been discussed with the City Council on January 24, 2006 and March 14, 2006. Interested stakeholders have had the opportunity to offer comments at each of these Council meetings.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office and the Office of Intergovernmental Relations.

CEQA

Not a project.



ED SHIKADA
Deputy City Manager



KATY ALLEN
Director, Public Works Department

For questions please contact ED SHIKADA, DEPUTY CITY MANAGER, at (408) 535-8190.

ATTACHMENT A

SBC's Project Lightspeed



Potential Benefits:

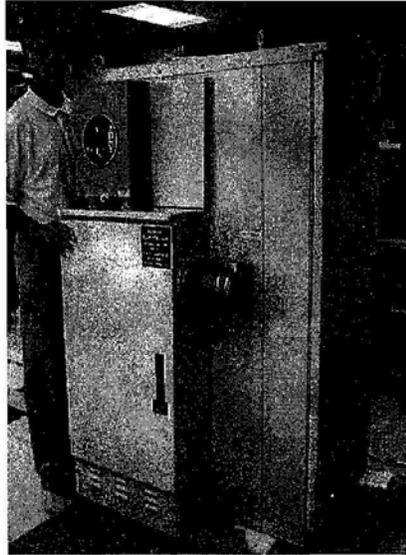
- Enhanced internet services (Super fast DSL)
 - Enhanced telephone service (VoIP)
 - Television Programming (Internet Protocol TV)
- Competition for San José customers; potentially lower prices

Potential Threats

- Cable TV services are regulated primarily at City level
 - Telephone services regulated primarily at State level
 - Federal and State legislation could preempt local regulation of converging technologies
 - Current applications for street encroachment permits put Cities in the middle of the debate
 - Telecom companies' proceeding without City franchise raises level playing field issues with cable
- Many cities, telecom, and cable companies are having similar discussions and watching one another
- San José's market and reputation for innovation make an attractive front line

What's at Stake

- **Critical local funding sources, including franchise fees and potentially utility users tax and 911 access fees**
- **Ability to negotiate service coverage and public benefits**
- **Authority to manage public rights-of-way**



Next Steps

- **City Staff is continuing discussions with SBC to address franchise requirements prior to issuing encroachment permits**
- **Moving forward without a franchise could involve amendments to San José's franchise ordinance**
- **Keep in contact with other agencies, and be engaged in statewide and national discussion**
- **Staff will continue discussions with flexibility and urgency, and return to the City Council with specific recommendations**

Priority Issues for Discussion with SBC

- **Revenue protection**
- **Maintaining a level playing field among competing services, including contingencies for the future**
- **Support for Public, Educational and Government (PEG) programming**
- **Broad service rollout, ultimately citywide**
- **Utility cabinet size and placement**
- **Customer service standards**

I. Priority - Revenue protection			
Issue	Option	Pros	Cons
A. Franchise fees	1. Require no franchise fees	Could reduce rates for consumers.	Inconsistent with existing franchise, resulting in potential revenue loss for the City.
	<u>2. Require fee equal to existing franchise - 5% of subscription revenue (AT&T proposal)</u>	Matches revenue methodology existing San Jose franchise, to provide a level playing field among competing services	Generates less revenue than current practice among cities (to include advertising revenue in fee calculation), as well as excludes satellite service subscriptions
	3. Negotiate fee equal to 5% of subscription revenue from both hardwired and satellite video services (Note that this could not be required, only negotiated)	Adds justification to AT&T's description of Lightspeed as "technology neutral"	Exceeds City's authority to require fees under the Cable Act; AT&T has indicated not acceptable
	4. Require fee equal to 5% of gross revenue, including subscriptions and advertising, from hardwired video services	Consistent with current franchising practice among cities	Raises level playing field issue, since it exceeds revenue requirement in existing franchise

Note: Staff recommendations are indicated by underlining

II. Priority - Maintain a level playing field among competing services and flexibility for future technologies			
Issue	Option	Pros	Cons
A. Framework for an Agreement	1. Permit AT&T to upgrade its system ministerially, under existing State telecom regulations	Maximizes speed to service availability for consumers	<ul style="list-style-type: none"> o Requires that City accept that Lightspeed does not meet the definition of a cable system o Loses benefits such as PEG, administrative controls, and franchise fee revenues o May be challenged by Comcast
	2. Consider a <u>non-franchise "interim" Agreement, with AT&T providing City with indemnification and defense to challenge</u>	Could allow service availability to proceed without resolving disagreement over applicable laws	<ul style="list-style-type: none"> o Requires City to waive franchise requirement o May be challenged by Comcast
	3. Require that AT&T obtain a City Franchise	<ul style="list-style-type: none"> o Maximizes consistency with existing franchise and protections to the City o Establishes a straightforward position 	<ul style="list-style-type: none"> o AT&T has indicated not acceptable, as it would require that AT&T acknowledge City(ies) authority to require a franchise

B. Term of Agreement	1. Indefinite term, presuming federal or state regulatory reform (AT&T proposal)		Allows AT&T to begin offering service to consumers, making future termination difficult
	2. Three year term, unless superseded by changes in federal or state law	Relatively short term reduces likelihood of obsolete provisions	<ul style="list-style-type: none"> o Allows AT&T to begin offering service to consumers, making future termination difficult o Unlikely that buildout will be completed to all customers
	3. <u>Term defined to allow system buildout, with earlier termination upon any of the following: (a) changes in federal or state law, (b) execution of a new competing franchise, or (c) seven years</u>	Maximizes City's ability to modify provisions to ensure level playing field in future	Unlikely that AT&T would accept
	4. Long (7 to 10+) year term	Could secure fee revenues beyond effective date of new federal or state regulations	Unlikely that AT&T would accept
C. Template for the Agreement	1. New non-franchise Agreement (AT&T proposal)	Potential simplicity	Provides limited protections to City
	2. <u>1996 Pacific Bell Interim Cable System Franchise</u>	<ul style="list-style-type: none"> o Incorporates franchise business terms and associated protections to City o Provides terms equal to existing franchise (level playing field) 	Does not reflect current business terms desired by City for a new cable franchise
	3. Proposed new Comcast franchise	Reflects current business terms desired by City for a cable franchise	Raises level playing field issue, since it exceeds terms incumbent currently operates under

III. Priority - Support for Public, Educational, and Government programming			
Issue	Option	Pros	Cons
A. PEG Contributions	<u>1. Require AT&T carry PEG broadcasts, plus capital and per-subscriber contributions equal to existing franchise</u>	Provides level playing field with incumbent	Would generate less revenue than current practice among cities
	2. Require capital and per-subscriber contributions equal to proposed Comcast franchise	Reflects current business terms desired by City for a cable franchise	Raises level playing field issue, since it exceeds terms incumbent operates under
B. Public building connections	1. Building connections only required upon system buildout in vicinity		Uncertain schedule
	<u>2. Require connection on mutually agreed upon schedule, and consider fee in lieu of connection</u>	Avoids duplication with existing service connections while maintaining level playing field	
	3. Require connection and service on mutually agreed upon schedule	Maximizes provision of service at public buildings	Unlikely that AT&T would accept

IV. Priority - Broad service rollout, ultimately Citywide			
Issue	Option	Pros	Cons
A. Buildout requirement	1. Define service as "technology neutral" based on immediate satellite service availability throughout city, and require no buildout timeframe (AT&T proposal)		Provides no positive assurance when less affluent residents could receive service
	2. Require periodic reporting of system buildout to verify nondiscriminatory service availability	Provides opportunity for public review of service availability	Provides no positive assurance when less affluent residents could receive service
	3. Incorporate into Agreement criteria for scheduling and locations of buildout	Could establish AT&T's commitment to nondiscriminatory buildout	<ul style="list-style-type: none"> o Criteria would need to be negotiated and could be abstract o Does not allow individual residents to anticipate when service would be available
	4. <u>Incorporate into Agreement a schedule of planned citywide buildout, while allowing variance</u>	Would allow individual residents ability to anticipate when service would be available	
	5. Require a schedule and map of planned buildout, with penalties for non-performance	Affirms AT&T's commitment to nondiscriminatory buildout	AT&T has stated not acceptable due to competitive concerns

V. Priority - Customer service standards			
Issue	Option	Pros	Cons
A. Customer service standards	<u>1. Incorporate by reference California Government Code customer service standards applicable to cable operators, with no additional local standards</u>	Follows consistent requirements	Limits City's ability to require more stringent standards than currently required at State level
	2. Add local requirements for customer service	Allows ability to address specific concerns	
B. Rate regulation	1. No City review or approval of subscription rates		Inconsistent with existing franchise
	2. Require City approval of rates	Consistent with existing franchise	
	<u>3. Require City approval of rates and consistent rates across service area</u>	Maximizes benefit of competition to consumers	

VI. Priority - Utility cabinet size and placement			
Issue	Option	Pros	Cons
A. Utility cabinet size	1. Accept proposed cabinets as consistent with current Municipal Code requirements		May result in community objections
	2. <u>Require cabinet replacement as technology advances</u>	Allows for future improvement	May result in community objections
	3. Commission technical review of cabinet design	Provides independent validation of cabinet size required	Requires engaging third party engineering expertise and AT&T cooperation
B. Utility cabinet placement	1. Issue public works permits for cabinets and cabling ministerially, under existing telecom regulations		Requires that City accept that Lightspeed does not meet the definition of a cable system
	2. Issue public works permits for all equipment not used exclusively for video programming (requires franchise or agreement)	Excludes cabinets in existing neighborhoods, described by AT&T as exclusively for video	AT&T has indicated that integrated phone, data, and video cabinets will be used in new tracts
	3. <u>Require PW permit application (or administrative permit for private property) and public review process for individual cabinet installations</u>	Consistent with 1996 Pacific Bell Agreement and recent Comcast system upgrade requirements.	
	4. Consider establishing a moratorium on new large cabinets pending technical and regulatory review	Could force a substantive discussion of technological necessity for size	May be challenged by AT&T
	5. Require undergrounding of cabinets	Minimizes potential for safety and aesthetic impacts	Technical feasibility questionable; at a minimum would require new maintenance and servicing models as well as increased costs, therefore AT&T has indicated not acceptable