



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Ordinance Implementing the
Digital Infrastructure and Video
Competition Act of 2006

DATE: April 9, 2009

RECOMMENDATION

Approve an ordinance amending Title 15 of the San José Municipal Code by adding Chapter 15.34 to implement certain provisions of the Digital Infrastructure and Video Competition Act of 2006, relating to the regulation of video service providers.

OUTCOME

Approval of the proposed ordinance will provide in the San José Municipal Code certain requirements of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), relating to the regulation of video service providers. Consistent with DIVCA, the proposed ordinance requires video service providers who have obtained a state franchise ("State Video Franchise Holder"), to pay the City certain fees, including a franchise fee and a fee for Public, Educational and Governmental ("PEG") purposes. The proposed ordinance will also enable the City to enforce penalties, established under DIVCA, against State Video Franchise Holders who violate customer service and protection standards set forth in state and federal law.

BACKGROUND

DIVCA (originally known by its bill designation, AB 2987), was signed by the Governor in September 2006, and went into effect on January 1, 2007. DIVCA is intended to streamline the potential entrance of telephone companies and other utility providers into the cable television market and establishes a state-wide franchising process for video service providers.

ANALYSIS

DIVCA requires that most of the state franchise requirements, including the issuance of state franchises and the enforcement of build-out and non-discrimination provisions, be administered by the California Public Utilities Commission. However, there are some provisions in DIVCA which must be administered by the local entity and include the following:

- **Franchise Fee Collection.** DIVCA requires that the City receive a franchise fee from State Video Franchise Holders which is equal to 5% of the State Video Franchise Holder's gross revenues derived from its provision of cable or video service within San José. The fee may be used for any lawful purpose. The City is not required to enact an ordinance in order for the City to receive the 5% franchise fee, but including it in the proposed ordinance will assist the City with the enforcement of payment.
- **PEG Fee Collection.** DIVCA authorizes the City to enact an ordinance establishing a fee which is equal to 1% of the State Video Franchise Holder's gross revenues derived from its provision of cable or video service within San José. The fee shall be used to support Public, Educational and Government Access (PEG) channel facilities consistent with federal law.
- **Enforcement of Customer Service Standards.** DIVCA requires that customer service and protections standards that are set forth in federal and state law be enforced by the City. The City may only impose monetary penalties for violations if the penalties have been established by the City through an ordinance or resolution. The penalty amounts are set forth in DIVCA and the City does not have the discretion to modify the amounts.
- **Encroachment Permit Application Appeals.** DIVCA requires that State Video Franchise Holders be given the opportunity to appeal the denial of an encroachment permit application to the governing body of the local entity. Under the City's encroachment permit procedures (S.J.M.C., Chapter 15.50), an applicant has the right to appeal the denial of a permit application to the Director of Public Works, but may not appeal the Director's decision to the City Council. The proposed ordinance provides an exception to the City's regular appeal process whereby video service providers only, may appeal the Director's denial of a permit application to the City Council.

CONCLUSION

Enacting the proposed ordinance will implement certain procedures and requirements set forth in DIVCA related to the regulation of State Video Franchise Holders as described above.

PUBLIC OUTREACH/INTEREST

This memorandum and proposed ordinance have been posted on the City's website for the April 21, 2009, agenda.

COORDINATION

This memorandum and the proposed ordinance have been coordinated with the City Manager's Office, the Department of Public Works, and the Department of Planning, Building and Code Enforcement.

CEQA

Not a Project.

RICHARD DOYLE
City Attorney

By 
Jennifer Pousho
Deputy City Attorney

cc: Debra Figone

For questions please contact Jennifer Pousho, Deputy City Attorney, at (408) 535-1922.