PSFSS COMMITTEE: 01-17-08, #12
City Council Agenda: 01-29-08

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: Public Safety, Finance and Strategic Support Committee

FROM: Tom Manheim

SUBJECT: **Proposed San Jose Community Media Access Corporation Contract**

DATE: January 3, 2008

Approved Deanna Santana Date 1/8/07

RECOMMENDATION

Consideration of a proposed contract between the City of San Jose and the San Jose Community Media Access Corporation to provide Public and Educational (PE) Access cable programming services for the City of San Jose for an initial seven (7) year term, with an option to extend for three (3) additional years, in an amount that is subject to receipt of payments from the City's cable providers, but that is projected to be approximately $10 million over the initial seven year term. Cross reference for consideration by the City Council.

OUTCOME

Approval of this contract will provide funding for Public and Educational Access programming services to the San Jose Community Media Access Corporation (SJCMAC). The funds for this effort are designated for this purpose in the Comcast Cable Franchise and in AT&T's State Franchise. SJCMAC was established to encourage and support the use of public and educational access resources among a wide range of individuals, organizations, and institutions within the City of San José and to promote a free exchange of ideas and information in the City. SJCMAC's role is to support, manage, produce, and distribute noncommercial community programming in a non-discriminatory manner.

BACKGROUND

Currently, Public, Educational and Government (PEG) access channels on the Comcast cable system are managed by three distinct entities. Comcast manages the Public Access Channel (Channel 15); the Community College Network (composed of Foothill/DeAnza, West Valley, Mission, San José City and Evergreen Community Colleges) in co-operation with San José State University and the

Santa Clara County Office of Education manages programming for Educational channels 27 and 28; and the City manages the Government Access Channel (*CivicCenter Television/Channel 26*).

In December 2006, the City Council approved a settlement agreement with Comcast Cable Company, resolving a number of outstanding disputes. At the same time, a 10-year extension to the Comcast cable franchise was approved. Under the new extended franchise, Comcast will stop providing Public Access services on June 30, 2008. The new extended franchise and settlement agreement established a funding mechanism designed to support PEG Access programming in San Jose throughout the franchise term.

As part of an extensive community engagement process initiated when the City first began negotiating the terms for the new franchise, a number of individuals and community organizations with a significant stake in the future of Public and Educational Access (PE) programming were identified. As we reported to the PSFSS Committee last August, this group formed the San Jose Community Media Access Corporation (SJCMAC) which has incorporated as a 501 (c) 3. The City and SJCMAC have reached agreement on the terms of the contract (Attachment A), which is described in more detail below.

Analysis

Services Provided

Under the proposed contract, SJCMAC will be required to locate, establish, and operate a Community Media Center (CMC) for seven years, with an option to renew that contract for an additional three years. A CMC is a video and computer production facility that would be available for use by the general public and members of the educational community to create video programming that would air on the Public and Educational Access Channels. It also typically includes a studio, editing equipment, and field production equipment that can be checked out and used to record content throughout the community. The Community Media Center would also provide training in video production and in the use of other media, and would promote the facility so that a broad cross section of the community is aware of this new resource. Access to equipment and facilities will be open to all those who receive training or who receive a certification from SJCMAC that they have met the training requirements. Finally, the CMC would be the 24/7 playback center that provides all programming on cable channels 15, 27, and 28 to the cable company for distribution, and would be responsible for equipment maintenance and development and management of volunteers.

Funding Mechanism

Because of restrictions contained in the Federal Cable Act regarding what cities can require for PEG support during a cable renewal process, it is not unusual to have funding streams strictly limited to use for PEG Capital facilities, and the Comcast agreement is no different. This is also consistent with California's Digital Video Infrastructure and Video Competition Act (DIVCA). Under the Comcast Franchise agreement approved in December 2006, Comcast is required to pay 1% of gross

revenues for PEG Capital costs. Based on historical trends, these payments are projected to be $1.25 million annually during the ten year franchise term. As part of the Franchise agreement, Comcast paid $1.25 million of this money in advance so that there is a pool of funds available to establish the CMC. The company will recover this advance by deducting $125,000 annually from future PEG payments. It should be noted that, while the bulk of funding for PEG programming is coming from the Comcast franchise, AT&T is in the early stages of establishing a competing video services network called *U-Verse*. AT&T has received a state franchise under DIVCA, which requires the AT&T system to carry the same PEG channels that Comcast currently carries and to pay 1% of its gross revenues to support PEG capital costs. While the dollars associated with this system are currently negligible, they are expected to grow over time. What is less clear is whether they will grow at the expense of Comcast revenues, or in addition to them.

At the same time that the City and Comcast reached agreement on the new franchise, we also reached agreement on the terms of a Settlement Agreement resolving outstanding disputes between the City and Comcast. Under the Settlement Agreement, Comcast agreed to pay the City $2 million. Of this money, $1million was provided without restrictions and the other $1 million was earmarked for "any PEG purpose." The City Council designated that the full $2 million be used to provide PEG operating funds as part of its 2006-2007 Mid-year Budget Review.

Under the proposed contract, SJCMAC will receive the $2 million (plus accrued interest) that the City Council designated to cover PEG operating costs. In addition, the non-profit will receive 90% of the revenue designated for PEG capital purposes. The other 10% will be reserved to cover future capital costs associated with *CivicCenter Television,* the City's Government Access channel.

All of the existing funds necessary to meet the terms of the contract were allocated by the City Council through its 2006-2007 Mid-year Budget Review, and any future revenues necessary are committed through the terms of the Cable Franchise. However, the contract has been structured so that future payments to SJCMAC are contingent upon the City's receipt of those funds from Comcast and/or AT&T. When the contract goes forward to the City Council for approval, staff will also bring forward any budget actions necessary to transfer funds to SJCMAC.

Non-Profit Management

At the start of San Jose's cable franchise renewal effort in 1998, the City undertook an extensive public input and community needs assessment process to identify San José's "cable-related needs and interests" as defined under Federal law. The needs assessment process included 12 community focus groups with more than 140 participants representing numerous community interests and community-based organizations. Growing out of this outreach effort, a Community Needs Assessment Task Force formed, made up of community, educational, and civic leaders, and in 1999, this same group formed a *Board of Conveners,* the first step in establishing a nonprofit organization to manage public and educational access in San José.

The *Board of Conveners* went through an extensive public application process to permit community members, community organizations, and institutions to submit applications for persons to serve as

the initial Board of Directors for the new organization. A Board of 15 people was identified for the new San José Community Media Access Corporation. Its mission is to encourage and support the use of public and educational access resources among a wide range of individuals, organizations, and institutions within the City of San José and to promote a free exchange of ideas and information in the City. Its role is to support, manage, produce, and distribute noncommercial community programming in a non-discriminatory manner.

The SJCMAC Board of Directors is a mix of representatives from key institutional partners and interested members of the public. Seven Board members are appointed by designated community organizations to represent a broad category or constituency within the community. The role of the persons seated in these designated Board seats is not to represent their specific appointing organization but rather to represent that identified constituency. Each designated appointing entity appoints one person to be seated as a Board member. The appointing entities are as follows:

- Evergreen Valley College/San José City College
- Santa Clara County Office of Education
- Silicon Valley Council of Nonprofits
- City of San José
- San José-Santa Clara Office of the League of Women Voters
- San José State University
- United Neighborhoods of Santa Clara County

The other eight Board Seats are filled by interested member of the community who apply to be on the Board. The SJCMAC membership votes on applicants for these seats. In addition, the Board can appoint from three to five members to provide professional expertise in areas such as legal, financial, and technology. The contract will require SJCMAC to meet and confer with the City and to adopt any reasonable requirements contained in the Sunshine Reform policies that the City Council might adopt.

Public and Educational Access Management Performance

The opportunity to create a robust Public and Educational Access program to serve our residents and educational institutions is new in San Jose. Historically, Public Access services have been provided by the cable company at its local studio in a limited way and at a cost to users. Being the provider of access services, however, comes with an unusual obligation. Public Access, in particular, serves as an electronic town square. It is intentionally a place where programs representing many diverse viewpoints are created and aired. In fact, Congress, when it revised the Cable Act in 1996 and 2007, acknowledged the unique first amendment role played by PEG Access and specifically included PEG as one of the few things that cities are allowed to require from a cable company through the federal rules for cable renewal. Because Public Access provides a forum for *all* points of view, the City necessarily must avoid putting itself in a role where it controls the speech of those who would use Public Access as a forum. In Public Access, all decisions about programming content are made by the individuals and organizations that are creating the programming, rather than by the management of the access facility. Under the First Amendment, only extremely limited categories

of speech are prohibited such as obscenity and libelous/slanderous content. Should access management refuse to air a program based on questionable content, the creator of the programming may assert a claim of unlawful censorship, even if a court subsequently deems the content to fall within these limited categories of unprotected speech.

To ensure that the City is not inadvertently placed in the position of controlling speech, the City and SJCMAC have reached agreement on a contract that protects against direct or indirect intrusion into the operation of the non-profit for programming purposes. To protect these first amendment concerns, the contract foregoes termination language that would allow the City to terminate the agreement without cause. Instead, the contract allows the City to review SJCMAC's long-term budgeting strategies and to require changes if those strategies appear to threaten the organization's ability to survive for the long term. The contract would allow termination should the non-profit fail to follow the City's recommendations in this regard. This approach is intended to ensure that SJCMAC is using the funding provided under this agreement in a way that will allow the organization to sustain itself and provide the required services at least through the initial seven-year term.

Time Concerns

As noted earlier, the new franchise calls for the City to replace Comcast as the Public and Educational Access provider by July 1, 2008. This places significant time pressure on the non-profit. To meet this goal, SJCMAC must hire an executive director, identify and outfit a facility, and hire staff to operate the facility. SJCMAC has identified several potential locations for the Community Media Center and an executive director has been recruited. Approval of this contract will provide the funding necessary for all of these efforts to proceed.

EVALUATION AND FOLLOW-UP

Under the terms of the contract, the City will annually receive SJCMAC's financial report and budget and the City has the right to make recommendations regarding any fiscal controls it believes are necessary to ensure the organization's long-term fiscal viability. The City has the right to review all of the non-profits records at any time and will annually receive an audited financial report.

PUBLIC OUTREACH/INTEREST

As noted above, extensive public outreach has occurred at a number of steps throughout the process. SJCMAC was created following an extensive public outreach and engagement process at the outset of the City's cable renewal process to determine the community's needs and interests regarding cable services. This outreach effort included:

1. Two telephone surveys of San José residents;
2. Twelve community focus group workshops (attended by 142 people, including citizens and representatives of 98 San José community groups, organizations, institutions, and

government agencies) to help identify current and future cable-related needs and ascertain attitudes about the existing PEG access operations and programming;

3. Distribution of questionnaires to the focus group participants that were designed to identify community cable-related needs and interests regarding PEG access and attitudes regarding the future usage of a variety of new cable communication services;
4. Meetings with educational institutions (K-12 and post secondary);
5. Meetings with community groups and organizations;
6. Meetings with the staff of the cable company's local programming operations in San José and inspection of their production facilities;
7. Analysis of information gathered through the review of local strategic, long range, and technology plans; and
8. The completion of an extensive series of reports documenting the findings and recommendations.

Following this, a group of stakeholders formed a Board of Conveners, a preliminary step to forming the new non-profit, they undertook an extensive public outreach process to community members, community organizations, and institutions seeking applications to serve as the initial Board of Directors for the new organization. Outreach to interested community members included website posting, along with flyers in libraries and community centers and distributed through City Council offices. Recently, a similar outreach effort was undertaken to fill seats that had been vacated during the intervening years.

COORDINATION

This memorandum has been coordinated with the Office of the City Attorney.

COST SUMMARY/IMPLICATIONS

All funding anticipated under the proposed contract comes from Comcast and AT&T.

TOM MANHEIM
Communications Director

For questions please contact Tom Manheim, Communications Director, at 535-8170.