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DATE: January 17, 2007

TO: Honorable Mayor and City Councilmembers

FROM: City Manager's Office – Information Technologies

SUBJECT: **INTRODUCTION OF AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OCEANSIDE ADDING CHAPTER 9B TO THE OCEANSIDE MUNICIPAL CODE ESTABLISHING FRANCHISE AND PEG FEES AND CUSTOMER SERVICE PENALTIES FOR STATE FRANCHISE HOLDERS PROVIDING VIDEO SERVICE WITHIN THE CITY OF OCEANSIDE**

**SYNOPSIS**

Staff recommends that the City Council introduce an ordinance establishing franchise and Public, Educational and Government (PEG) fees and customer service penalties for state franchise holders providing video service within the City of Oceanside. This ordinance is in accordance with new state law which was chaptered on September 28, 2006, and went into effect January 1, 2007. The Digital Infrastructure and Video Competition Act of 2006 (The Act) establishes the state Public Utilities Commission as the sole franchising authority for new video service providers state-wide but delegates certain rights and responsibilities to local authorities. However, certain rights and responsibilities must be established by local ordinance before they may become effective and enforceable against state video franchise holders.

**BACKGROUND**

The Act was initiated at the request of the telephone companies as a method to streamline their entrance into the cable television market. Cable companies have been offering "bundled" service packs to subscribers which include cable service, high speed internet access and telephone service. Without cable franchises, the telephone companies were unable to provide video service in most locations and could not match this bundling package. They complained that having to negotiate independent franchise agreements with individual franchising authorities would take an inordinate amount of time and would result in further losses to both the companies and consumers. Assembly member Nuñez sponsored this bill, which passed on a platform of "consumer choice" and the promise of decreased overall rates due to competition.

The primary impact of this legislation on the City is that beginning January 1, 2007, cities are precluded from issuing new cable franchises. Instead, the California Public Utilities Commission (PUC) will be the sole franchising authority for video service providers in the State. This legislation does not immediately affect the City's current cable franchise with Cox Cable, although it allows Cox to unilaterally opt out of the franchise agreement and obtain a state franchise if any other state franchisee states its intention to operate within the City. However, incumbent cable operators such as Cox may not obtain state franchises until January 1, 2008, at the earliest. Therefore, the current cable franchise with Cox will remain unchanged through 2007.

With regard to any new video service providers who may wish to provide services within the City, The Act grants the City a franchise fee of up to five percent of gross revenues (as defined in The Act), which is currently what the City receives from Cox. Additionally, cities are entitled to an additional fee of up to one percent of gross revenue for PEG support, provided the City has enacted an ordinance establishing such fee. Likewise, cities must also monitor customer service standards for state video franchisees, but are limited to enforcing only those standards enumerated in The Act and may only impose fines for violations of those standards if the City enacts an ordinance or resolution establishing the fine schedule. The amount of each fine is limited by The Act. Consequently, the City must adopt the attached ordinance to add these provisions to the City's current cable ordinance.

The PUC will begin accepting applications for State video franchises no later than April 1, 2007, although it is likely that some telephone companies will submit applications in early January. Once the applications are submitted, the PUC only has 30 days after deeming them complete to act upon them. Thus, there is a potential for a state video franchisee to begin service in the City as early as February. If the City does not have this ordinance enacted prior to the date the first state video franchisee begins operations in the City, then the new state franchisee may not have to pay either the PEG fee or be subject to any customer service violations until such time as the ordinance is adopted.

The Act requires any prospective state video franchisee to notify the City at least ten days in advance of starting service, and it also requires the prospective franchisee to notify the City of its application. The City will have a relatively short 30-day window of time to provide comments to the PUC on the prospective franchisee, but there is no guarantee that the PUC will take heed of the City's concerns.

As the Council may note from the description above, this legislation was hastily shepherded through the legislature and includes many last-minute modifications, concessions, and alterations which rendered the bill internally inconsistent. Likewise there is an open question of the interplay between this sweeping new Act and other state and federal laws, and many issues will likely be decided in the coming years through the legislative and judicial process. In the interim, staff has determined that it is prudent to enact this ordinance, which addresses the most urgent aspects of The Act

and provides the best protection for the potentially valuable PEG funding source as well as establishing fines and penalties for customer service standards violations.

### **ANALYSIS**

The Act gives Cities limited authority over state video franchisees. In order to protect the potential PEG funding and the City's ability to enforce customer service standards, this new ordinance should be adopted prior to any state video franchisees providing video service within the City. Specifically, section 5870(n) of The Act states that the City may adopt an ordinance establishing the PEG fees of up to one percent of gross revenues, and may establish a customer service standards fine schedule by ordinance or resolution. Staff feels the City will retain the most authority through enactment of this ordinance at the earliest possible date.

### **FISCAL IMPACT**

The exact fiscal impact of this ordinance is unknown at this time and to a great extent depends upon the gross revenues of each state franchisee operating within the City. It is highly likely, however, that without this ordinance, the state video franchisees would argue that they should not have to provide any PEG funding at all, and may not be subject to any fine schedule for customer service standards violations. This ordinance will do the maximum allowable under The Act to protect this PEG revenue source and to establish the City's ability to levy fines against state video franchisees for customer service standards violations.

Additionally, if the City does not adopt the proposed ordinance there is no guarantee the City will continue to receive the one percent PEG fee from the current cable provider, Cox, after the contract expires with Cox Communications, or if Cox seeks a state video franchise after January 1, 2008.

### **COMMISSION OR COMMITTEE REPORT**

This ordinance was discussed with the Telecommunications Committee at its December 2006 meeting. At that time, the draft ordinance had not yet been prepared, and hence the committee had no opportunity to comment on the ordinance itself. However, staff outlined The Act and advised the Telecommunications Committee that staff would be bringing this ordinance forward at the earliest possible opportunity in order to maximize the protection of PEG programming fees and enforcement of customer service standards. The Committee members agreed with this strategy and advised they will continue to monitor The Act as it is implemented throughout the coming year. Staff will also keep the Committee and Council advised of any further legislative changes necessary at the City level to maximize the City's ability to protect both the video franchisee revenue streams and the customer service standards.

**CITY ATTORNEY'S ANALYSIS**

The Ordinance has been largely drafted by the City Attorney's office and is approved as to form. It was drafted with input from industry experts as well as other City Attorney offices, including Los Angeles.

The proposed ordinance allows the City to exercise its rights under the new law and allows the City to fulfill its new responsibilities, particularly in the area of PEG fees and customer service standards. Time is of the essence because the City may be at a disadvantage with respect to PEG monies if the City does not act at the earliest possible time.

**RECOMMENDATION**

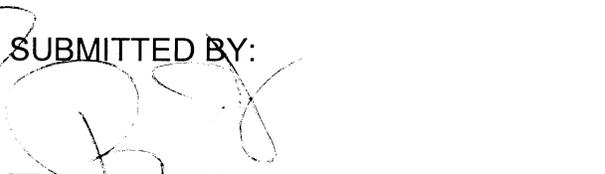
Staff recommends that the City Council introduce an ordinance of the City Council of the City of Oceanside adding Chapter 9B to the Oceanside Municipal Code establishing franchise and PEG fees and customer service penalties for state franchise holders providing video service within the City of Oceanside.

PREPARED BY:



Michael Sherwood  
CIO

SUBMITTED BY:



Barry E. Martin  
Interim City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Interim Deputy City Manager



Leslie M. Gallagher, Deputy City Attorney



ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF  
OCEANSIDE ADDING CHAPTER 9B TO THE OCEANSIDE  
MUNICIPAL CODE ESTABLISHING FRANCHISE AND PEG  
FEES AND CUSTOMER SERVICE PENALTIES FOR STATE  
FRANCHISE HOLDERS PROVIDING VIDEO SERVICE  
WITHIN THE CITY OF OCEANSIDE

WHEREAS, a new state law, the Digital Infrastructure and Video Competition Act of 2006 (AB 2987) goes into effect January 1, 2007;

WHEREAS, under the new state law, the State of California shall have sole franchising authority for new video service providers within the City;

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

WHEREAS pursuant to AB 2987, certain rights and responsibilities must be established by local ordinance before they may become effective and enforceable against state video franchise holders;

WHEREAS, the City of Oceanside shall receive a fee of 5% of gross revenues of each state video franchisee which operates within the City of Oceanside for use of the public rights-of-way;

WHEREAS, the City of Oceanside shall receive an additional fee of 1% of gross revenues of each state video franchisee which operates within the City of Oceanside for Public, Educational and Government (PEG) purposes;

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

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

WHEREAS, the City of Oceanside will retain authority, without change, over the City's current cable franchisee until such time as it no longer holds a City franchise, or is no longer operating under a current or expired City franchise;

1 WHEREAS, the terms “video service”, “video franchise” and “video franchisee” shall  
2 have the same meaning as the terms “cable service”, “franchise” and “franchisee” as they are  
3 used in Chapter 9A;

4 NOW, THEREFORE, the City Council of the City of Oceanside does ordain as follows:

5 SECTION 1. The following Chapter is hereby added to the Oceanside Municipal Code:

6 Chapter 9B Regulation of State Video Franchise Holders

7 Section 9B.1 “Purpose and Authority”

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

10 As of January 1, 2007, the State of California will have the sole authority to grant state  
11 video franchises pursuant to the Digital Infrastructure and Video Competition Act of 2006.  
12 (“The Act”). Pursuant to The Act, the City of Oceanside shall receive a franchise fee and shall  
13 receive a fee for public, educational and government (PEG) purposes from all state video  
14 franchise holders operating within the City. Additionally, the City will acquire the responsibility  
15 to establish and enforce penalties, consistent with state law, against all state video franchise  
16 holders operating within the City for violations of customer service standards but The Act  
17 grants all authority to adopt customer service standards to the state. The Act leaves unchanged  
18 the City’s authority to regulate the City’s current cable franchise in accordance with Chapter 9A  
19 and the cable franchise currently in effect until such time as the cable franchisee no longer  
20 holds a City franchise or is no longer operating under a current or expired city franchise.

21 Section 9B.1.1 “State Video Franchise and PEG Fees”

- 22 (a) For any state video franchise holder operating within the boundaries of the  
23 City of Oceanside, there shall be a fee paid to the City equal to five percent of  
24 the gross revenue of that state video franchise holder.
- 25 (b) For any state video franchise holder operating within the boundaries of the city  
26 of Oceanside, there shall be an additional fee paid to the City equal to one  
27 percent of the gross revenue of that state video franchise holder, which fee  
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1 shall be used by the City for PEG purposes consistent with state and federal  
2 law.

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

5 Section 9B1.2 “Audit Authority”

6 Not more than once annually, the City Manager or his designee may examine and  
7 perform an audit of the business records of a holder of a state video franchise to ensure  
8 compliance with Section 9B1.1.

9 Section 9B1.3 “Customer Service Penalties Under State Video Franchises”

- 10 (a) The Holder of a state video franchise shall comply with all applicable state and  
11 federal customer service and protection standards pertaining to the provision of  
12 video service.
- 13 (b) The City Manager shall monitor the compliance of state video franchise holders  
14 with respect to state and federal customer service and protection standards. The  
15 City Manager will provide the state video franchise holder written notice of any  
16 material breaches of applicable customer service standards, and will allow the  
17 state video franchise holder 30 days from the receipt of the notice to remedy the  
18 specified material breach. Material breaches not remedied within the 30-day time  
19 period will be subject to the following penalties to be imposed by the City:
- 20 (1) For the first occurrence of a violation, a fine of \$500.00 shall be  
21 imposed for each day the violation remains in effect, not to exceed  
22 \$1,500.00 for each violation.
  - 23 (2) For a second violation of the same nature within 12 months, a fine  
24 of \$1,000.00 shall be imposed for each day the violation remains  
25 in effect, not to exceed \$3,000.00 for each violation.
  - 26 (3) For a third or further violation of the same nature within 12  
27 months, a fine of \$2,500.00 shall be imposed for each day the  
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1 violation remains in effect, not to exceed \$7,500.00 for each  
2 violation.

- 3 (c) A state video franchise holder may appeal a penalty assessed by the City Manager  
4 to the City Council within 60 days of the initial assessment. The City Council  
5 shall hear all evidence and relevant testimony and may uphold, modify or vacate  
6 the penalty. The City Council's decision on the imposition of a penalty shall be  
7 final.

8 Section 9B.1.4 "City Response to State Video Franchise Applications"

- 9 (a) Applicants for state video franchises within the boundaries of the City of  
10 Oceanside must concurrently provide complete copies to the City of any  
11 application or amendments to applications filed with the PUC. One complete  
12 copy must be provided to the City Manager.
- 13 (b) Within 30 days of receipt, the City Manager will provide any appropriate  
14 comments to the PUC regarding an application or an amendment to an application  
15 for a state video franchise.

16 SECTION 2. Severability.

17 If any section, sentence, clause or phrase of this Chapter is for any reason held to be  
18 invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision  
19 shall not affect the validity of the remaining portions of this Chapter. The City Council hereby  
20 declares that it would have passed this ordinance and adopted this Chapter and each section,  
21 sentence, clause or phrase thereof, irrespective of the fact that any one or more section,  
22 subsections, sentences, clauses or phrases be declared invalid or unconstitutional.

23 SECTION 3. The City Clerk of the City of Oceanside is hereby directed to publish this  
24 ordinance, or the title hereof as a summary, pursuant to state statute, once within fifteen (15)  
25 days after its passage in the North County Times, a newspaper of general circulation published  
26 in the City of Oceanside.

27 SECTION 4. This ordinance shall take effect and be in force on the thirtieth (30<sup>th</sup>) day  
28 from and after its final passage.

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INTRODUCED at a regular meeting of the City Council of the City of Oceanside, California, held on the \_\_\_ day of \_\_\_\_\_, 2007, and, thereafter,

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Oceanside California, held on the \_\_\_ day of \_\_\_\_\_, 2007, by the following vote:

- AYES:
- NAYS:
- ABSENT:
- ABSTAIN:

MAYOR OF THE CITY OF OCEANSIDE

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
CITY CLERK

  
\_\_\_\_\_  
CITY ATTORNEY