



## CITY COUNCIL STAFF REPORT

DATE: March 25, 2009 LEGISLATIVE ITEM \_\_

SUBJECT: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS ADOPTING CHAPTER 5.79 OF TITLE 5 OF THE PALM SPRINGS MUNICIPAL CODE PERTAINING TO STATE VIDEO FRANCHISE HOLDERS.

FROM: David H. Ready, City Manager

BY: Douglas Holland, City Attorney

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### **RECOMMENDATION:**

Introduce and waive reading of AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS ADOPTING CHAPTER 5.79 OF TITLE 5 OF THE PALM SPRINGS MUNICIPAL CODE PERTAINING TO STATE VIDEO FRANCHISE HOLDERS.

### **STAFF ANALYSIS:**

In 2006, the California State Legislature adopted the Digital Infrastructure and Video Competition Act 2006. This legislation originally was known as AB 2987 and now often is referred to by the acronym "DIVCA."

DIVCA provides a new mechanism for video franchising in California. Under DIVCA, cities no longer have the power to issue franchises to video providers; instead, the power to issue new franchises will be held solely by the California Public Utilities Commission ("PUC"). Public Utilities Code Section 5810, which contains the Legislative findings of DIVCA, declares that the Legislature intended to preempt the authority of Charter Cities to regulate video franchise providers, and declares that DIVCA's regulations are "a matter of statewide concern to best ensure equal protection and parity among providers and technologies, as well as to achieve the goals [of DIVCA]."

The current franchise agreement between the City and Time Warner Cable has expired. Pursuant to DIVCA, Time Warner was allowed to obtain a state franchise commencing January 2, 2008. Time Warner Cable applied for a state franchise in November 19, 2007 and obtained its state franchise from the PUC on December 20, 2007, effective January 2, 2008. Thus, Time Warner does not need to renew its franchise with the City.

DIVCA, among other things, requires video service providers to:

- Pay the City a franchise fee of 5% of gross revenues (this is the same as required in the City's past cable franchise agreement);
- Pay the City an additional fee to support Public, Educational, or Governmental ("PEG") channels of 1% of gross revenues (this is a new fee);
- Offer at least three PEG channels (the City's Channel 17 is an example of a Governmental Access channel);
- Negotiate in good faith with incumbent cable operators to interconnect their networks for the purposes of providing PEG access channel programming;
- Comply with Federal Emergency Alert System requirements;
- Secure encroachment permits for any construction activities in the public right-of-way; and
- Comply with customer service standards established by state and federal law.

Although franchise authority over video service providers now rests with the PUC, the Act does designate certain administrative responsibilities to local governments. These responsibilities include the collection and administration of franchise and PEG fees, enforcement of customer service standards, and issuance of encroachment permits. In order to impose PEG fees and enforce customer service standards, an enabling ordinance must be adopted.

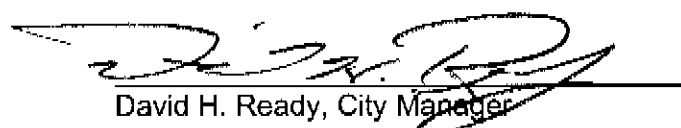
The adoption of this ordinance enables the City, consistent with DIVCA, to: (1) impose a franchise fee of 5% of gross revenues; (2) impose a fee of 1% of gross revenues to support PEG channels; and (3) enforce the state statutory schedule of penalties for customer service violations.

The ordinance also incorporates other important provisions of the Act into the Municipal Code, including the requirements to: collect and pay franchise and PEG fees to the City; offer at least three PEG channels; and comply with Emergency Alert System requirements.

#### **FISCAL IMPACT**

If a competitive state video franchise holder such as Verizon provides video service in the City in competition with Time Warner, and expands the population of video service subscribers, the proposed ordinance will likely increase the franchise fees and PEG access support fees paid by the video providers to the City. Possible costs related to enforcement are not known at this time, but likely will be consistent or less than those expenses associated with existing City expenses for regulating City-granted cable franchises.

  
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Douglas Holland, City Attorney

  
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David H. Ready, City Manager

**Attachments and Exhibits:** Proposed Ordinance

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

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS ADOPTING CHAPTER 5.79 OF TITLE 5 OF THE PALM SPRINGS MUNICIPAL CODE PERTAINING TO STATE VIDEO FRANCHISE HOLDERS.**

***City Attorney's Summary***

*This Ordinance adopts Chapter 5.79 of Title 5 of the Palm Springs Municipal Code to implement the Digital Infrastructure and Video Competition Act of 2006 pertaining to State Video Franchise Holders.*

THE CITY COUNCIL OF THE CITY OF PALM SPRINGS ORDAINS:

SECTION 1. Chapter 5.79 of Title 5 of the Palm Springs Municipal Code is hereby adopted to read as follows:

**Chapter 5.79**

**STATE VIDEO FRANCHISE HOLDERS**

**5.79.010 Purpose.**

(a) This Chapter is designed to regulate video service providers holding state video franchises and operating within the City. As of January 1, 2007, the State of California has the sole authority to grant state video franchises pursuant to the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). Pursuant to DIVCA, the City of Palm Springs may receive a franchise fee and may receive a fee for public, educational, and governmental access (defined in this Chapter as "PEG" or "PEG access channels") from all state video franchise holders operating within the City. Additionally, although DIVCA grants all authority to adopt customer service standards to the state, the City has the responsibility to establish and enforce penalties, consistent with state law, against all state video franchise holders operating within the City for violations of such customer service standards.

(b) It is the purpose of this Chapter to implement within the City the provisions of DIVCA and the rules the California Public Utilities Commission ("Commission") promulgated thereunder that are applicable to the City as a "local franchising entity" or a "local entity" as defined in DIVCA. Consistent with that purpose, the provisions of this Chapter are to be construed in a manner that is consistent with DIVCA and the applicable rules of the Commission promulgated thereunder.

### **5.79.020 Applicable Definitions.**

Terms used in this Chapter shall have the meaning as established in (1) DIVCA, and, if not defined therein, (2) Commission rules implementing DIVCA, and, if not defined therein, (3) Subchapter V-A of Chapter 5 of Title 47 of the United States Code, and, if not defined therein, (4) their common and ordinary meaning. References to governmental entities (whether persons or entities) shall refer to those entities or their successors in authority. If a specific provision of law referred to in this Chapter should be renumbered, then the reference shall be read to refer to the renumbered provision. References to any law shall be interpreted broadly to cover government actions, including any law now in force or subsequently enacted or amended.

### **5.79.030 State Franchise Required.**

(a) Except as the City Council may authorize pursuant to Article X of the Charter, no person may construct, operate, maintain, or repair a cable system or video service provider's network in the City without first obtaining a state franchise therefor.

(b) A state franchise shall not convey rights other than as specified in this Chapter or in DIVCA or other applicable law; no rights shall pass by implication.

(c) Except as otherwise provided by DIVCA, a state franchise shall not include, or be a substitute for:

(1) Compliance with generally applicable requirements for the privilege of transacting and carrying on a business within the City, including, but not limited to, compliance with the conditions that the City may establish before facilities may be constructed, or for providing non-video services;

(2) Any permit or authorization, other than a state franchise, required in connection with operations on or in public rights-of-way or public property; and

(3) Any permit, agreement or authorization for occupying any other property of the City or private persons to which access is not specifically granted by the state franchise.

(d) Except as otherwise provided in DIVCA, a state franchise shall not relieve a franchisee of its duty to comply with all laws, including laws of the City, and every state franchisee shall comply with the same. The City reserves its rights to the lawful exercise of police and other powers the City now has or may later obtain.

(e) The City reserves the right to construct, operate, maintain or repair its own cable system or video service provider network.

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#### **5.79.040 Administration and Regulations.**

(a) The City may from time to time adopt rules and regulations to implement the provisions of this Chapter consistent with DIVCA.

(b) The City Manager, or his/her designee, is hereby authorized to administer this Chapter and to provide or cause to be provided any notices (including noncompliance notices) and to take any action on behalf of the City that may be required under this Chapter, DIVCA, or under applicable law.

(c) The failure of the City, upon one or more occasions, to exercise a right or to require compliance or performance under this Chapter or any other applicable law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance, unless such right has been specifically waived in writing or its exercise by the City is not permitted by DIVCA.

(d) The City may designate one or more entities, including itself, to control and manage the use of PEG access channels, and any PEG facilities and equipment owned, controlled or used by the City or the designated entity or entities.

#### **5.79.050 Franchise Fee.**

A state video franchise holder operating in the City shall pay to the City a franchise fee that is equal to five percent (5%) of the gross revenues of that state video franchise holder. The term "gross revenues" shall be defined as set forth in Public Utilities Code Section 5860.

#### **5.79.060 PEG Fee.**

In addition to the franchise fee required pursuant to section 5.79.050, a state video franchise holder operating in the City shall pay to the City a fee that is equal to one percent (1%) of the gross revenues of that state video franchise holder which fee shall be used to support PEG channel facilities. The term "gross revenues" shall be defined as set forth in Public Utilities Code Section 5860.

#### **5.79.070 Payment of Fees; Examination of Business Records.**

(a) The Franchise Fee and PEG Fee shall be remitted to the City on a quarterly basis within 45 days after the end of each quarter for that calendar year. Each payment shall be accompanied by a detailed summary explaining the basis for the calculation of the Franchise Fee and PEG Fee.

(b) If a state video franchise holder fails to pay the fees when due, or underpays the proper amounts due, the state video franchise holder shall pay a late payment charge at the annual interest rate equal to the highest prime lending rate during the period of

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delinquency, plus one percent (1%). If the state video franchise holder has overpaid the fees, it may deduct the overpayment from its next quarterly payment.

(c) Not more than once annually, the City may examine the business records of a state video franchise holder to ensure compliance with all applicable statutes and regulations related to the computation and payment of franchise fees.

**5.79.080 Customer Service Penalties Under State Video Franchises.**

(a) The holder of a state video franchise shall comply with California Government Code §§ 53055, 53055.1, 53055.2 and 53088.2; the FCC customer service and notice standards set forth in 47 C.F.R. §§ 76.309, 76.1602, 76.1603 and 76.1619; California Penal Code § 637.5; the privacy standards of 47 U.S.C. § 551; and all other applicable state and federal customer service and consumer protection standards pertaining to the provision of video service, including any such standards hereafter adopted. In case of a conflict, the stricter standard shall apply. All customer service and consumer protection standards under this section shall be interpreted and applied to accommodate newer or different technologies while meeting or exceeding the goals of the standards.

(b) The City shall monitor state video franchise holder's compliance with state and federal customer service and protection standards. The City will provide to the state video franchise holder written notice of any material breaches of applicable customer service and protection standards, and will allow the state video franchise holder 30 days from receipt of the notice to remedy the specified material breach. Material breaches not remedied within the 30-day time period are subject to the following monetary penalties to be imposed by the City in accordance with state law:

(1) For the first occurrence of a violation, a monetary penalty of \$500 shall be imposed for each day the violation remains in effect, not to exceed \$1500 for each violation.

(2) For a second violation of the same nature within a 12-month period, a monetary penalty of \$1000 shall be imposed for each day the violation remains in effect, not to exceed \$3000 for each such violation.

(3) For a third or further violation of the same nature within a 12-month period, a monetary penalty of \$2500 shall be imposed for each day the violation remains in effect, not to exceed \$7,500 for each such violation.

(c) A state video franchise holder may appeal to the City Council, or a hearing officer as the City Council may appoint, a monetary penalty assessed by the City within 60 days after notice of the assessment. After relevant evidence and testimony as may be received, and staff reports as may be submitted, the City Council may uphold, vacate, or modify the monetary penalty consistent with the evidence presented. The decision of

the City Council, or hearing officer, on the imposition of a monetary penalty shall be final.

**5.79.090 City Response to State Video Franchise Applications.**

(a) Applicants for state video franchises within the boundaries of the City must concurrently provide to the City complete copies of any application or amendments to applications filed with the California Public Utilities Commission. One complete copy must be provided to the City Clerk.

(b) The City may provide any appropriate comments to the California Public Utilities Commission regarding an application or an amendment to an application for a state video franchise.

**5.79.100 PEG Channel Capacity.**

(a) A state video franchise holder shall designate sufficient capacity on its network to enable the carriage of at least three PEG access channels. PEG access channels shall be for the exclusive use of the City or its designees to provide public, educational, or governmental programming.

(b) A state video franchise holder shall provide additional PEG channels when the standards set forth in Public Utilities Code Section 5870 are satisfied by the City or any entity designated by the City to be responsible for PEG access.

**5.79.110 Emergency Alert System and Emergency Overrides.**

A state video franchise holder must comply with the Emergency Alert System requirements of the Federal Communications Commission so that emergency messages may be distributed over its network.

**SECTION 2. Severability.** If any section, subsection, subdivision, sentence, clause, phrase, word or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Chapter. The City Council hereby declares that it would have adopted this Ordinance and each section, subsection, subdivision, sentence, clause, phrase, word or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, words or portions thereof be declared invalid or unconstitutional.

PASSED and ADOPTED this \_\_\_\_ day of \_\_\_\_\_ 2008.

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STEVE POUQUET, MAYOR

ATTEST:

JAMES THOMPSON, CITY CLERK

I, JAMES THOMPSON, City Clerk of the City of Palm Springs, do hereby certify that the foregoing Ordinance was introduced at a regular meeting of the City Council held on the \_\_\_\_ day of \_\_\_\_\_, 2008 and was finally adopted at a regular meeting held thereof on the \_\_\_\_ day of \_\_\_\_\_, 2008, by the following vote:

AYES:           COUNCILMEMBERS:  
NOES:           COUNCILMEMBERS:  
ABSENT:        COUNCILMEMBERS:  
ABSTAIN:       COUNCILMEMBERS:

JAMES THOMPSON, CITY CLERK

APPROVED AS TO FORM

DOUGLAS C. HOLLAND, CITY ATTORNEY