



Agenda Item #: _____

Staff Report

City of Manhattan Beach

TO: Honorable Mayor Montgomery and Members of the City Council

THROUGH: Geoff Dolan, City Manager

FROM: Lindy Coe-Juell, Assistant to the City Manager

DATE: June 17, 2008

SUBJECT: Adoption of an Ordinance to Establish the Obligations of Cable Operators Providing Service in Manhattan Beach Under a State Franchise Agreement

RECOMMENDATION:

Staff recommends that the City Council adopt Ordinance No. 2116.

FISCAL IMPLICATION:

Under the new state cable franchise system, cities will be able to collect two types of fees from cable providers that operate in their jurisdiction. These fees consist of a franchise fee of 5% of gross revenues for operations in that city, and a fee of 1% of gross revenues for the support of the city's Public, Education and Government (PEG) channels.

The 5% franchise fee is the same term that we had established with Time Warner and Verizon under our local franchise agreements, so there will be no material difference in the franchise fee amount collected. In 2007, we collected \$349,449.08 from Time Warner and \$84,716.04 from Verizon in franchise fees, which have traditionally been sources of general fund revenue.

Under our local franchise agreement with Time Warner, we did not collect a PEG fee because Time Warner provided non-cash support for our PEG channels such as staff support for broadcasting, the provision of audio and video equipment and access to their studio facilities. Under the state franchise, we will collect a 1% PEG fee from Time Warner instead of receiving the non-cash support. Based on the franchise fee amount that we collected from Time Warner in 2007 (5% of gross revenues = \$349,449.08), we can expect to receive approximately \$70,000 for the 1% PEG fee from Time Warner in future years.

Under our local franchise agreement with Verizon, we collect a PEG fee based on the formula of \$0.70, per month, per subscriber in the service area to Verizon's basic service tier. In 2007, the total PEG fee collected from Verizon was \$14,202. Staff expects that the 1% PEG fee under the state franchise system will provide a slightly larger PEG fee to Manhattan Beach from Verizon. For example, Verizon's gross revenue for operations in Manhattan Beach in 2007 was \$1,693,780.60, which would have provided a PEG fee of \$16,937.81. It is also of interest to note that Verizon saw substantial gross revenue growth in each 2007 quarter in their operations in Manhattan Beach.

BACKGROUND:

On June 3, 2008, City Council introduced and waived further reading of Ordinance No. 2116. The following background and discussion information was provided with the June 3rd Staff report.

In September 2006, Governor Schwarzenegger signed into law AB 2987, which became effective on January 1, 2007. The statute, known as the “Digital Infrastructure and Video Competition Act of 2006” (DIVCA), established a new framework for the regulation of cable television. Prior to January 2007, no cable company was allowed to construct or operate a cable television system in any city until having been awarded a franchise or license with that city. This structure gave cities the opportunity to negotiate the terms of their local franchise agreement covering all aspects of operation from customer service standards to franchise fees. Under DIVCA, the power to issue franchise agreements belongs solely to the California Public Utilities Commission (PUC).

According to the League of California Cities, many other states have enacted laws that replace the local franchising system with a centralized state franchising system. The League has stated that new entrants to the video service market, primarily telephone companies, saw the local franchising process as an impediment to getting new services into the market quickly. This consideration weighed heavily on state legislators who wanted the successful deployment of these services so that the companies would not move their investments in video to other states. The text of AB 2987 declares the purpose of the law is to promote competition in the cable sector.

As local franchise agreements expire, and as new cable operators enter the market, they will be able to apply for a state franchise to be issued by the PUC. Two companies, Time Warner and Verizon, have provided cable service to Manhattan Beach and both have operated under a local franchise agreement. Our local franchise with Time Warner Cable expired on June 2, 2008. Time Warner has applied for a state franchise, which became effective today. Our local franchise with Verizon is a fifteen (15) year term, which began in August 2006. Although their franchise does not expire soon, one of the provisions of DIVCA provides that once one company (e.g. Time Warner) obtains a state franchise, any other cable operator (e.g. Verizon) providing service in that city is also allowed to seek a state franchise to replace its locally issued franchise. Verizon has expressed its intent to apply for a state franchise for their operation in our city. Staff is not aware of any other company that is seeking a state franchise to operate in our jurisdiction at this time.

DISCUSSION:

The rights and responsibilities between the city and the cable companies will change under the state franchise system. The following is a summary of terms under the state franchise:

- Cable companies holding a state franchise will gain, or retain, the right to provide service in the area requested in the application and they will gain the right to use/build in the public rights-of-way “in exchange for a franchise fee.” Cities still have the right to require an encroachment permit and to regulate the “time, place and manner” of installation of the cable infrastructure.
- DIVCA established the franchise fee that companies will pay at 5% of gross revenues for operations in each city. These terms are the same as we had established with Time Warner and Verizon in our local franchise agreements, so there will not be a material change.

- DIVCA requires state franchise holders to comply with state and federally mandated customer service standards. However, cities will still be responsible for enforcing the standards.
- Cities are required to establish a schedule of penalties for any material breach of the state and federal customer service standards. Ordinance No. 2116 establishes these penalties.
- Previously, cities had great latitude for negotiating the operating and financial support that cable companies would provide for Public, Educational and Government Channels (PEG) through the local franchise agreement. Under DIVCA, cities can require a fee of 1% of gross operating revenues for PEG support via ordinance (Ordinance No. 2116 establishes this fee). However, cities can no longer require non-cash benefits such as cable service to community buildings, staff support for broadcasting, provision of audio and video equipment and access to studio facilities.
- Under our local franchise agreements, we did not receive a PEG fee from Time Warner and our PEG fee from Verizon was based on a different (and less favorable) formula.

The new situation under DIVCA which prevents cities from requiring support for PEG programming presents the biggest change, challenge and opportunity for the City of Manhattan Beach. DIVCA requires cable companies that had been providing non-cash PEG support before the expiration of a local franchise agreement to continue to provide the same level of service through December 2008. For Manhattan Beach this means that as of January 1, 2009, Time Warner will no longer supply staff for our Council Meetings, access to their studio, support for and creation of the bulletins on channel 8, etc.

We have already begun to prepare for this transition. For example, IS Staff has trained and are fully able to handle the broadcast responsibilities for live meetings from the Council Chambers. We have also begun to explore opportunities for contracting creative support and partnering with local cities for program development. The possibilities in this arena are endless and there are many resources that we could tap in the local and regional area. Other cities are providing programming on their PEG channels that range from filming and broadcasting local sports, to creating and showing public service announcements, to covering local musical talent, to producing original series on local interests, to news broadcasts, etc. Staff will return to Council in the next several months to discuss ideas, opportunities and limitations associated with the transition to local control of the PEG channels.

Staff recommends that the City Council adopt Ordinance No. 2116 to establish our franchise fee and PEG fee rights.

ATTACHMENT: Ordinance No. 2116

ORDINANCE NO. 2116

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MANHATTAN BEACH, CALIFORNIA, ADDING A NEW CHAPTER 13.03 TO TITLE 13 OF THE MANHATTAN BEACH MUNICIPAL CODE REGARDING CABLE TELEVISION

THE CITY COUNCIL OF THE CITY OF MANHATTAN BEACH, CALIFORNIA, DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council of the City of Manhattan Beach hereby finds as follows:

- A. In September 2007 the legislature adopted AB 2987 which amended State law to provide that Cable Television franchises were no longer a matter of local regulation and to authorize State wide franchises;
- B. This change in State law permits local jurisdictions some remaining power over Cable Television operations in their jurisdictions;
- C. In order to preserve this power it is necessary to adopt a local ordinance memorializing the powers the City is permitted to exercise under State law.
- D. This ordinance is not subject to the California Environmental Quality Act pursuant to Section 15061(b)(3) in that the activity will not result in direct or indirect or reasonably foreseeable direct or indirect physical change to the environment.
- E. The proposed amendments will have no impact on Fish and Game resources pursuant to Section 21089(b) of the Public Resources Code.

SECTION 2. A new Chapter 13.03 is hereby added to Title 13 of the Manhattan Beach Municipal Code to read as follows:

“CHAPTER 13.03 STATE CABLE TELEVISION FRANCHISES

13.03.010 PURPOSE.

This Chapter applies to all cable service or video service providers who are applying for, or have been awarded, a franchise under California Public Utilities Code Section 5800 et seq., the Digital Infrastructure and Video Competition Act of 2006, (“DIVCA”), to serve any area within the City of Manhattan Beach, including cable service or video service providers who are otherwise subject to DIVCA. By this Chapter the City of Manhattan Beach intends to exercise to the fullest extent possible all rights and privileges afforded to it by DIVCA and any other applicable law.

13.03.020 DEFINITIONS AND INTERPRETATION OF LANGUAGE.

For purposes of this Chapter, the following terms, phrases, words, and their derivations shall have the meaning given in this section. Unless otherwise expressly stated, words not defined in this Chapter shall be given the meaning set forth in California Public Utilities Code, Section 5800 et seq. as amended from time to time. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number, and “including” and “include” are not limiting. The word “shall” is always mandatory.

(a) **Access, PEG access, PEG use, or PEG.** “Access,” “PEG access,” “PEG use,” or “PEG” means the availability of a cable or video system for public, educational, or governmental use by various agencies, institutions, organizations, groups, and individuals, including the City of Manhattan Beach and its exclusive City use channels or any existing agreement between the City and any

incumbent cable operator, to acquire, create, and distribute programming not under a state franchise holder's editorial control.

(b) **City.** "City" means the City of Manhattan Beach, California.

(c) **City Council.** "City Council" means the City Council of the City of Manhattan Beach.

(d) **City Manager.** "City Manager" means the City Manager of the City of Manhattan Beach or his or her designee.

(e) **Gross revenues.** "Gross revenues" means all revenues actually received by the holder of a state franchise that are derived from the operation of the holder's network to provide cable service or video service within the unincorporated areas of the county, subject to the specifications of California Public Utilities Code Section 5860.

(f) **Director.** "Director" means the director of the Finance Department of the City of Manhattan Beach or his or her designee.

(g) **State Franchise Holder, Holder of a State Franchise, Holder of the State Franchise, or Holder.** "State Franchise Holder," "holder of a state franchise," "holder of the state franchise," or "holder" means any person or group of persons who has been issued a franchise by the California Public Utilities Commission to provide cable service or video service, as those terms are defined in Public Utilities Code Section 5830, within any portion of the City of Manhattan Beach.

13.03.030 STATE FRANCHISE HOLDER FEE.

Any State Franchise Holder operating within the City shall pay to the City a State Franchise Holder fee equal to five percent of gross revenues, as defined in this Chapter and applicable law, unless a different amount is otherwise payable according to applicable law or resolution adopted by the City Council. Nothing in this section is intended to limit the City's ability to impose utility user taxes and other generally applicable taxes, fees and charges that are applied in a nondiscriminatory and competitively neutral manner.

13.03.040 STATE FRANCHISE HOLDER PEG FEES.

Any State Franchise Holder operating within the City shall pay to the City a PEG fee equal to one percent of gross revenues, as defined in this Chapter and applicable law, unless a different amount is payable in accordance with applicable law or resolution adopted by the City Council.

13.03.050 PAYMENT OF FEES.

The State Franchise Holder shall pay quarterly all fees required pursuant to this Chapter in a manner consistent with Public Utilities Code Section 5860. The State Franchise Holder shall deliver to the City by check or other means agreeable to the City Manager, a separate payment for the state franchise fee and the PEG fee not later than forty-five days after the end of each calendar quarter. Each payment made shall be accompanied by a report to the City Manager detailing how the payment was calculated, and shall include such additional information on appropriate forms as may be determined by the City Manager.

13.03.050 AUDITS.

The City may audit the business records of the holder of a State Franchise in a manner not inconsistent with California Public Utilities Code Section 5860(i).

13.03.060 LATE PAYMENTS.

In the event a State Franchise Holder fails to make any payment required by this Chapter on or before the due dates specified in this Chapter, the City shall impose a late charge at the rate per year equal to the highest prime lending rate during the period of delinquency, plus one percent unless a different rate is set by applicable law or resolution adopted by the City Council.

13.03.070 LEASE OF CITY PROPERTY OR NETWORK.

To the extent not inconsistent with California Public Utilities Code Section 5840(q)(2)(B), in the event a State Franchise Holder desires to lease access to City property or to a network owned or controlled by the City, the City may set terms and charge a fee for access to the property or City network separate and apart from any franchise fee or other fee charged to the State Franchise Holders pursuant to this Chapter. The City Council may set any such fee by resolution.

13.03.080 CUSTOMER SERVICE AND CONSUMER PROTECTION STANDARDS.

Each State Franchise Holder shall comply with all applicable customer service and consumer protection standards, including, to the extent not inconsistent with California Public Utilities Code Section 5900, all existing and subsequently enacted customer service and consumer protection standards established by local, state or federal law and regulation.

13.03.100 PENALTIES FOR VIOLATIONS OF STANDARDS.

(a) The City shall monitor compliance with and enforce the provisions of this Chapter and DIVCA.

(b) For any material breach, as defined in California Public Utilities Code Section 5900(j), by a State Franchise Holder of applicable customer service and consumer protection standards, the City Manager, or the City Manager's designee, in his or her sole discretion may impose the following fines or penalties:

- (1) For the first occurrence of a material breach, a fine of five hundred dollars shall be imposed for each day the violation remains in effect, not to exceed one thousand five hundred dollars for each violation.
- (2) For a second material breach of the same nature within twelve months, a fine of one thousand dollars shall be imposed for each day the violation remains in effect, not to exceed three thousand dollars for each violation.
- (3) For a third or further material breach of the same nature within twelve months, a fine of two thousand five hundred dollars shall be imposed for each day the violation remains in effect, not to exceed seven thousand five hundred dollars for each violation.

(c) Any penalties imposed by the City shall be imposed in a manner not inconsistent with California Public Utilities Code Section 5900.

(d) To the extent not inconsistent with California Public Utilities Code Section 5900, the City, acting through its City Manager or his or her designee, in its sole discretion may waive, modify, or defer the imposition of a penalty.

13.03.110 GENERAL REQUIREMENTS.

Except as expressly provided in this Chapter, the provisions of this Chapter shall apply to all work performed by or on behalf of a State Franchise Holder upon, above or below any street, highway, sidewalk, parkway, alley or other public right-of-way of any kind whatsoever within the City.

13.03.120 PERMITS.

(a) Prior to commencing any work, a State Franchise Holder shall apply for and obtain a permit in accordance with the applicable provisions of this Chapter and Chapters 7.16 and 7.36 of this Code and shall comply with all other applicable laws and regulations, including, but not limited to, all applicable requirements of Public Resources Code Section 21000 et seq. (the California Environmental Quality Act).

(b) The Director of Community Development shall either approve or deny a State Franchise Holder's application for any permit required under this Chapter in accordance with the applicable terms of Chapter 7.16 and 7.36.

(c) If the Director of Community Development denies a State Franchise Holder's application for a permit, the Director shall, at the time of notifying the applicant of denial, furnish to the applicant an explanation of the reason or reasons for the denial.

(d) A State Franchise Holder that has been denied a permit by final decision of the Director of Community Development may appeal the denial to the City Council whose decision shall be final. Upon receiving a notice of appeal, the City Council shall consider the permit de novo.

(e) A State Franchise Holder whose permit has been revoked may appeal that decision to the City Council in writing within ten (10) days after issuance of the notice of revocation.

13.03.130 TERMS AND CONDITIONS.

The work of constructing, laying, replacing, maintaining, repairing, abandoning, or removing all property and appurtenances of the State Franchise Holder in, over, under, along, or across any City right-of-way as defined in Chapters 7.16 and 7.36 shall be done to the satisfaction of the Director of Community Development and at the expense of the State Franchise Holder, and in accordance with the terms and conditions of Chapters 7.16 and 7.36.

13.03.140 RELOCATION OF FRANCHISE PROPERTY AND APPURTENANCES.

(a) The City reserves the right to change the grade, change the width, or alter or change the location of any City right-of-way. If any Franchise Holder's property or appurtenance is installed or maintained by the State Franchise Holder on, along, under, over, in, upon, or across any public right-of-

way in a manner which prevents or interferes with any alteration or other change of grade, traffic needs, operation, maintenance, improvement, repair, construction, reconstruction, widening, or relocation of the right-of-way, or any work or improvement upon the right-of-way, the State Franchise Holder shall relocate any such property or appurtenances to the satisfaction of the Director at no expense to the City upon receipt of a written request from the Director to do so and in accordance with the terms of Chapter 7.16. Should the State Franchise Holder neglect or fail to relocate its facilities in a timely manner after receipt of any such notice, the State Franchise Holder shall be responsible for and shall reimburse the City for any and all costs or expenses incurred by City due to or arising from the failure to relocate the facilities.

(b) The City reserves the right to lay, construct, repair, alter, relocate, and maintain subsurface or other facilities or improvements of any type or description in a governmental but not proprietary capacity within the right-of-way over which the franchise is granted. If the City finds that the location or relocation of such facilities or improvements conflicts with the property or appurtenances laid, constructed, or maintained by the State Franchise Holder, whether such property was laid, constructed, or maintained before or after the facilities of the City were laid, the State Franchise Holder shall at no expense to the City, on or before the date specified in a written request from the Director, commence work to change the location as required by the Director. Should the State Franchise Holder neglect or fail to relocate its facilities within the period specified in any such notice, the State Franchise Holder shall be responsible for and shall reimburse the City for any and all additional costs or expenses incurred by the City due to the failure to relocate the facilities.

13.03.150 REMOVAL OF ABANDONED FACILITIES.

Upon the abandonment or other discontinuance of the use of all or a portion of its property, the State Franchise Holder shall remove the property in accordance with the terms of Chapter 7.16. If the State Franchise Holder fails to comply with the terms and conditions of abandonment or removal as may be required by this Chapter and Chapter 7.16, the Director of Public Works may remove, or cause to be removed, such facilities at the State Franchise Holder's expense and the State Franchise Holder shall pay to the City the cost of such work.

13.03.160 NOTIFICATION TO RESIDENTS REGARDING CONSTRUCTION OR MAINTENANCE.

(a) Prior to any construction activity related to any cable service or video service, a State Franchise Holder shall provide public notification as required by the Director or applicable law.

(b) To the extent practicable, equipment placed on private property shall be placed at the location requested by the property owner. A State Franchise Holder shall provide the private property owner with reasonable advance written notice of its plans to install equipment, and shall obtain express written consent from the private property owner before installing any equipment. The State Franchise Holder shall notify the property owner, in writing, that the property owner is not obligated to agree to the placement of equipment on the property or to enter into any agreement with the State Franchise Holder. Should a property owner notify the State Franchise Holder of his or her objection to any placement of equipment, the State Franchise Holder shall confer with the Director regarding appropriate location and placement of such equipment.

13.03.170 IDENTIFICATION REQUIRED.

Employees, agents, contractors, and subcontractors of any State Franchise Holder shall at all times be properly identified as employees or agents of the State Franchise Holder while performing any work or other activity within the City on behalf of the State Franchise Holder. Identification shall include

the name of the employee or agent. The name and telephone number of the State Franchise Holder shall appear on all trucks and vehicles used by such personnel.

13.03.180 CONSTRUCTION REQUIREMENTS AND PROTECTION OF HEALTH AND SAFETY.

Each State Franchise Holder shall comply with all applicable construction requirements of Chapter 7.16 and shall undertake all necessary and appropriate means to protect and preserve health and safety, including complying with all construction requirements of Chapter 7.16 or as otherwise required by the Director of Public Works.

13.03.190 REPORTS TO THE DIRECTOR OF COMMUNITY DEVELOPMENT.

Each state franchise holder, within sixty days after the completion of any work, shall file a report with the Director of Community Development an as-built set of drawings.

13.03.200 EMERGENCY ALERT SYSTEMS.

(a) Each State Franchise Holder shall comply with the emergency alert system requirements of the Federal Communications Commission in order that emergency messages may be distributed over the State Franchise Holder's network.

(b) To the extent not inconsistent with California Public Utilities Code Section 5880, each State Franchise Holder shall incorporate into its network the capability to permit the City in times of emergency to override the audio portion of all channels simultaneously. In addition, if feasible, each State Franchise Holder may be required to designate a channel, which may be a PEG channel, to be used for emergency broadcasts of both audio and video signals. The State Franchise Holder shall cooperate with the City in the use and operation of the emergency alert override system.

13.03.210 INTERCONNECTION FOR PEG PROGRAMMING.

Each holder of a State Franchise, and each incumbent cable operator operating under a City franchise issued pursuant to this Code, shall negotiate with each other in good faith to interconnect their networks for the purpose of providing PEG programming including, but not limited to, any exclusive City use channel. Interconnection may be accomplished by any means authorized under California Public Utilities Code Section 5870(h). Each holder of a State Franchise and any incumbent cable operator shall provide interconnection of PEG channels, including any exclusive City use channel on reasonable terms and conditions and may not withhold the interconnection. If a holder of a State Franchise and an incumbent cable operator cannot reach a mutually acceptable interconnection agreement, the City may require the incumbent cable operator to allow the holder of the State Franchise to interconnect its network with the incumbent cable operator's network at a technically feasible point on the State Franchise Holder's network as identified by the Holder or as otherwise permitted by applicable law. If no technically feasible point for interconnection is available, the holder of a State Franchise shall make an interconnection available to the channel originator and shall provide the facilities necessary for the interconnection. The cost of any interconnection shall be borne by the State Franchise Holder requesting the interconnection unless otherwise agreed to by the State Franchise Holder and the incumbent cable operator. To the extent not inconsistent with California Public Utilities Code Section 5870(h), the City Manager or the City Manager's designee may waive, modify, or defer this requirement of interconnection in his or her sole discretion.

13.03.220 NOTICES.

(a) Each State Franchise Holder or applicant for a state franchise shall file with the City Manager and with the City's cable television or video manager a copy of all applications that the State Franchise Holder or applicant is required to file with the Public Utilities Commission.

(b) Unless otherwise specified in this Chapter, all notices or other documentation that a State Franchise Holder is required to provide to the City under this Chapter or the California Public Utilities Code shall be provided to the City Manager and to the City's cable television or video manager.

13.03.230 RIGHTS RESERVED.

The rights reserved to the City of Manhattan Beach under this Chapter are in addition to all other applicable rights of the City, whether granted or reserved by other provisions of the Manhattan Beach Municipal Code or as otherwise authorized by federal or state law, and no action, proceeding, or exercise of a right by the City of Manhattan Beach shall affect any other rights which may be held by the City of Manhattan Beach.

13.03.240 COMPLIANCE WITH LAW.

Nothing contained in this Chapter shall be construed to exempt a State Franchise Holder from compliance with all applicable ordinances, rules, or regulations of the City of Manhattan Beach now in effect or which may be adopted that are not inconsistent with this Chapter or California Public Utilities Code Section 5800 et seq..

SECTION 3. All other provisions of Manhattan Beach Municipal Code shall remain unchanged and continue in full force and effect.

SECTION 4. Any provisions of the Manhattan Beach Municipal Code, or appendices thereto, or any other ordinances of the City, to the extent that they are inconsistent with this ordinance, and no further, are hereby repealed.

SECTION 5. If any section, subsection, sentence, clause, or phrase 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 the ordinance. The City Council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

SECTION 6. This ordinance shall go into effect and be in full force and operation from and after thirty days after its final passage and adoption.

SECTION 7. The City Clerk shall cause this Ordinance or a summary thereof to be published and, if appropriate posted, as provided by law. Any summary shall be published and a certified copy of the full text of this Ordinance posted in the Office of the City Clerk at least five (5) days prior to the City Council meeting at which this Ordinance is to be adopted. Within fifteen (15) days after the adoption of this Ordinance, the City Clerk shall cause a summary to be published with the names of those City Council members voting for and against this Ordinance and shall post in the Office of the City Clerk a certified copy of the full text of this Ordinance along with the names of those City Council members voting for and against the Ordinance.

PASSED, APPROVED and ADOPTED this 17th day of June, 2008.

Ayes:
Noes:
Absent:
Abstain:

Mayor, City of Manhattan Beach, California

ATTEST:

City Clerk