


OFFICE OF THE CITY CLERK

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APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER _____


City Attorney

OAKLAND CITY COUNCIL
ORDINANCE No. 12819 C.M.S.

An Ordinance Amending the Oakland Municipal Code to Add Chapter 5.17, Adopting Local Regulations Applicable to Holders of State Video Franchises Issued by the California Public Utilities Commission Pursuant to the Digital Infrastructure and Video Competition Act of 2006, Codified in California Public Utilities Code Section 5800 et seq.

WHEREAS, the California Legislature adopted the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”) establishing a state video franchising scheme under which holders of state-issued video franchises would be partially regulated by the California Public Utilities Commission (“CPUC”) and partially regulated by local governments; and

WHEREAS, under DIVCA, the CPUC has authority to grant state franchises, regulate build-out and non-discrimination standards for state franchise holders, enforce anti-subsidy provisions, and impose user and application fees; and

WHEREAS, under DIVCA, the City has authority to manage the rights-of-way, regulate the payment of state franchise fees and Public Education and Government (“PEG”) fees, require the provision of PEG channels, and enforce federal and state customer service standards; and

WHEREAS, amending the Oakland Municipal Code is necessary in order to preserve the City’s authority to regulate state video franchise holders to the extent permitted under DIVCA; now, therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. The Oakland Municipal Code, TITLE 5, BUSINESS LICENSES AND REGULATIONS is hereby amended to add Chapter 5.17, entitled “State Video Service Franchises,” to read as follows:

Chapter 5.17

STATE VIDEO SERVICE FRANCHISES

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- 5.17.600 Reports to the City Administrator**
- 5.17.610 Notices**

Part 1
GENERAL PROVISIONS

5.17.010 **Purpose**

This Chapter is intended to be applicable to video service providers who are applying for, or have been awarded, a state video franchise under California Public Utilities Code section 5800 *et seq.* (the Digital Infrastructure and Video Competition Act of 2006), to serve any area of the City.

5.17.020 **Rights reserved**

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

5.17.030 **Compliance**

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 now in effect or which may be hereafter adopted which are not inconsistent with this Chapter or California Public Utilities Code section 5800 *et seq.*

Part 2
DEFINITIONS

5.17.100 Definitions generally – Interpretation of language

For purposes of this Chapter, the following terms, phrases, words, and their derivations shall have the meaning given in this chapter. Unless otherwise expressly stated, words not defined in this Chapter shall be given the meaning set forth in Division 2.5 of the California Public Utilities Code, section 5800 *et seq.* (the Digital Infrastructure and Video Competition Act of 2006) and the provisions of Title 1, Chapter 1.04, GENERAL PROVISIONS, of the Oakland Municipal Code.

- A. References to governmental entities (whether Persons or entities) refer to those entities or their successors in authority.

- B. If specific provisions of law referred to herein are renumbered, then the reference shall be read to refer to the renumbered provision.

- C. Unless otherwise specified, references to laws, ordinances or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

5.17.110 Public, Education and Government (“PEG”) Access

“PEG access,” or “PEG use” refers to the availability of a cable or video system for public, education or government use by various agencies, institutions, organizations, groups, and individuals, including the City and its designated access providers, to distribute programming not under a State Franchise Holder's editorial control.

5.17.120 City

“City” means the City of Oakland and all departments, divisions, and agencies thereof; except that, when used to describe a geographic area, the term refers to the boundaries of the City of Oakland, California, as they exist now or may exist in the future.

5.17.130 City Administrator

"City Administrator" means the City Administrator of the City of Oakland or his or her designee.

5.17.140 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 areas of the City, subject to the specifications of California Public Utilities Code section 5860.

5.17.150 Network

“Network” means a component of a facility that is wholly or partly physically located within the public right-of-way that is used to provide video service or cable service.

5.17.160 Person

“Person,” unless it otherwise appears from the context as used, means and includes any person, individual, firm, organization, corporation, partnership, association, limited liability company, joint stock or other company, business or other trust, public agency, school district, the State of California, its political subdivisions and/or instrumentalities, or any other legal entity, but not the City.

5.17.170 Public rights-of-way

“Public rights-of-way” or “rights-of-way” means the surface of and the space above and below any street, road, highway, freeway, bridge, lane, path, alley, court, sidewalk, parkway, parkstrip,

drive, or right-of-way or easement generally available to and used by utilities, communication companies, or for travel by the public, now or hereafter existing within the City which may be properly used and the City has the authority to allow the use of.

5.17.180 State Franchise Holder

"State Franchise Holder" or "holder" means a person or group of persons that has been issued a franchise by the California Public Utilities Commission to provide cable service or video service, as those terms are defined in California Public Utilities Code section 5830, within any portion of the areas of the City.

Part 3

FEES

5.17.200 State franchise fees

Each State Franchise Holder operating within the areas of the City shall pay to the City a state franchise fee equal to five percent (5%) of gross revenues.

5.17.210 PEG fees

Each State Franchise Holder operating within the areas of the City shall pay to the City a PEG fee equal to one percent (1%) of gross revenues.

5.17.220 Payment of fees

The state franchise fee required pursuant to Section 5.17.200, and the PEG fee required pursuant to Section 5.17.210, shall each be paid quarterly, in a manner consistent with California Public Utilities Code section 5860. The State Franchise Holder shall deliver to the City, by check or other means agreeable to the City, a payment for the state franchise fee and a separate payment for the PEG fee not later than forty-five (45) days after the end of each calendar quarter. Each payment made shall be accompanied by a report, detailing how the payment was calculated, and shall include such additional information on the appropriate form as designated by the City.

5.17.230 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).

5.17.240 Late payments

In the event a State Franchise Holder fails to make payments 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 (1%).

5.17.250 Lease of city-owned network

To the extent not inconsistent with California Public Utilities Code section 5840(q)(2)(B), in the event a State Franchise Holder leases access to a network owned by the City, the City may set a franchise fee for access to the city-owned network separate and apart from the franchise fee charged to State Franchise Holders pursuant to Section 5.17.200.

Part 4

CUSTOMER SERVICE

5.17.300 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 state and federal law and regulation.

5.17.310 Penalties for violations of standards

- A. The City shall monitor compliance with and enforce the provisions of Section 5.17.300.
- 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 may impose the following penalties:
 - 1. For the first occurrence of a material breach, a fine of \$500.00 shall be imposed for each day the violation remains in effect, not to exceed \$1,500.00 for each violation.
 - 2. For a second material breach of the same nature within 12 months, a fine of \$1,000.00 shall be imposed for each day the violation remains in effect, not to exceed \$3,000.00 for each violation.
 - 3. For a third or further material breach of the same nature within 12 months, a fine of \$2,500.00 shall be imposed for each day the violation remains in effect, not to exceed \$7,500.00 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 may waive, modify, or defer the imposition of a penalty.

Part 5

PERMITS AND CONSTRUCTION

5.17.400 General requirements

- A. The construction, operation, upgrade and repair of a State Franchise Holder's Network shall be performed in compliance with all laws, ordinances, resolutions, departmental rules, regulations, written policies, and practices affecting such system. By way of example, and not limitation, this includes the relevant portions of the Oakland Municipal Code (e.g., the City's zoning regulations), ordinances, regulations and policies to preserve or protect the public safety, construction standards, regulations for providing notice to Persons that may be affected by system construction, and directives governing the time, place and manner in which facilities may be installed in the public rights-of-way. Persons engaged in the construction, operation, upgrade or repair of a State Franchise Holder's Network shall exercise reasonable care in the performance of all their activities and shall use commonly accepted methods and devices for preventing failures and accidents that are likely to cause damage, injury, or nuisance to the public or to property.
- B. A State Franchise or a local franchise is required before a permit may be issued for work associated with the construction, operation, upgrade or repair of a network. Any permit issued for such work to a person that does not hold a franchise shall vest no rights in the permittee; the permit may be revoked at will, and the permittee shall remove all facilities installed under the permit upon and in full compliance with the City's demand.
- C. Construction, operation, upgrade or repair of a State Franchise Holder's Network shall not commence until all required permits have been obtained from the proper City officials and all required fees have been paid. All work performed will be performed in

strict accordance with the conditions of the permit. Upon order of the City, any work and/or construction undertaken that is not completed in compliance with the City's requirements, or which is installed without obtaining necessary permits and approvals shall be removed in accordance with the reasonable timeline set forth by the City. A State Franchise Holder shall reimburse the City for costs incurred in inspecting construction projects undertaken in the course of major or minor upgrades, installation of fiber optics, minor and major repairs, all other work for which the City requires inspection, and permit review and processing.

- D. The City Administrator shall either approve or deny a State Franchise Holder's application for any permit within sixty (60) days of receiving a completed permit application from the State Franchise Holder. An application for a permit shall not be complete until the applicant has complied with applicable laws and regulations, including but not limited to, all applicable requirements of Division 13 of the California Public Resources Code section 21000 *et seq.* (the California Environmental Quality Act).
- E. If the City Administrator denies a State Franchise Holder's application for a permit, the City Administrator shall, at the time of notifying the applicant of denial, furnish to the applicant a detailed explanation of the reason or reasons for the denial.
- F. A State Franchise Holder that has been denied a permit by final decision of the City Administrator may appeal the denial to the City Council whose decision shall be final. Upon receiving a notice of appeal, the City Council shall take one of the following actions:
 - 1. Affirm the action of the City Administrator without a hearing; or
 - 2. Refer the matter back to the City Administrator for further review with or without instructions.

G. Interference with the use of the Public rights-of-way by others must be minimized. The City may require, except as prohibited by law, a Person using the Public rights-of-way to cooperate with others through joint trenching and other arrangements to minimize adverse impacts on the Public rights-of-way.

H. To the extent possible, State Franchise Holders shall use existing poles and conduit. Additional poles may not be installed in the right-of-way, nor may pole capacity be increased by vertical or horizontal extenders, without the permission of the City Administrator, which permission shall not be unreasonably withheld.

I. Undergrounding

1. Whenever all existing utilities are located underground in an area in the City, the installation of the Network of every State Franchise Holder shall conform to and be governed by the Oakland Municipal Code, Sub-section F of Section 5.16.390 of Chapter 5.16 entitled "Cable Systems and Open Video Systems. ~~every State Franchise Holder installing its Network in the same area must locate its Network underground.~~

2. ~~Whenever the owner of a pole locates or relocates underground within an area of the City, every State Franchise Holder in the same area shall concurrently relocate its cables, wires or fiber optics underground.~~

J. Any and all public or private property that is disturbed or damaged during the construction, operation, upgrade or repair of a State Franchise Holder's Network shall be promptly repaired by the Holder. Public property must be restored to a condition as good as before the disturbance or damage occurred. Public rights-of-way must be restored to a condition consistent with City standards that are generally applicable to all persons performing construction or excavation in the Public rights-of-way.

K. Relocation

1. A State Franchise Holder shall at no cost to the City and by a time specified by City, protect, support, temporarily disconnect, relocate, or remove any of its property when requested by the City by reason of traffic conditions; public safety; Public rights-of-way construction and repair (including regrading, resurfacing or widening); vacating Public rights-of-way ; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of government-owned system or utility, public work, public facility, or improvement; or for any other purpose where the work involved would be aided by the removal or relocation of the State Franchise Holder's Network. Collectively, such matters are referred to below as the "public work."

2. The City shall provide written notice to the State Franchise Holder describing where the public work is to be performed at least three (3) weeks prior to the deadline by which the State Franchise Holder must protect, support, temporarily disconnect, relocate or remove its facilities. The State Franchise Holder may seek an extension of the time to perform the work. The City shall not unreasonably deny such an extension where the State Franchise Holder demonstrates it can not perform the work by the deadline even with the exercise of due diligence. Provided that, in an emergency, or where a State Franchise Holder's Network creates or is contributing to an imminent danger to health, safety, or property, the City may protect, support, temporarily disconnect, remove, or relocate any or all parts of the Network without prior notice, and charge the State Franchise Holder for costs incurred; however, the City will make reasonable efforts, considering the circumstances, to provide prior notice.

L. Construction activities of others

1. To accommodate the construction, operation, upgrade or repair of the facilities of another person authorized to use the Public rights-of-way or public property, a State Franchise Holder shall, by a time specified by such person, protect, support, temporarily disconnect, relocate or remove its facilities. The State Franchise Holder shall be given written notice describing where the construction, operation or repair is to be performed at least fifteen (15) days prior to the time the work will commence. Unless the matter is governed by a valid contract or a state or federal law or regulation, or unless the Network that is being requested to move was not properly installed, the reasonable cost of the same shall be borne by the person requesting the protection, support, temporary disconnection, removal, or relocation and at no charge to the City, even if the City makes the request for such action. In cases where the requesting person is required under this section 5.17.400(L)(1) to bear the cost of relaying, relocation or temporary removal, a State Franchise Holder may require the person to agree, before the work is performed, to pay the reasonable actual cost of the work. If the State Franchise Holder does so, it must provide an estimate of the cost of the work and support for that estimate.
2. A State Franchise Holder shall, on the request of any Person holding a valid permit issued by a governmental authority, temporarily raise or lower its wires by a time specified to permit the moving of buildings or other objects. A State Franchise Holder shall be given not less than fifteen (15) days advance notice to arrange for such temporary wire changes. The expense of such temporary removal or raising or lowering of wires shall be paid in advance by the Person requesting the same.

M. Abandonment

1. A State Franchise Holder may abandon any property in place in the Public rights-of-way or upon public property upon written notice to the City. However, if,

within ninety (90) days of the receipt of written notice of abandonment, the City determines that the safety, appearance, functioning or use of the Public rights-of-way or the public property and facilities in the Public rights-of-way or on the public property will be adversely affected, the property must be removed by a date specified by the City. In specifying a date for removal, the City shall take into account the amount of work to be performed.

2. A State Franchise Holder that abandons its property must, upon request, transfer ownership of the property to the City at no cost, and execute necessary quitclaim deeds provided that nothing in the preceding sentence prevents a State Franchise Holder from bringing an action in a court of competent jurisdiction if it believes that the Network was not abandoned. Whether or not ownership is transferred, the State Franchise Holder must indemnify the City against future costs associated with mitigating or eliminating any hazard associated with the abandoned property.
- N. Every Network shall be subject to inspection by the City. Each State Franchise Holder must timely and fully respond to requests for information regarding its system and plans for the system as the City may from time to time issue, including requests for information regarding its plans for construction, operation and repair and the purposes for which the plant is being constructed, operated, or repaired.
- O. Each State Franchise Holder that places facilities underground shall be a member of the regional notification center for subsurface installations (Underground Services Alert) and shall field mark the locations of its underground communications facilities upon request. The State Franchise Holder shall locate its facilities for the City at no charge.
- P. At least ninety (90) days prior to commencing construction, each State Franchise Holder shall provide the City a construction plan for any initial construction, operation or repair or for any substantial rebuild, upgrade or extension of its Network, which shall show its

timetable for construction of each phase of the project, and the areas of the City that will be affected. The construction plans and timetables shall be reviewed by the City. The City acknowledges that certain portions of the construction plan may be tentative. The State Franchise Holder shall provide additional information requested by the City within thirty (30) days of receipt of the request; to the extent such information is available. During construction, notice of changes to the construction plans and/or timetables must be provided to the City forty-eight (48) hours in advance. To the extent that any portion of such plan is tentative, the State Franchise Holder shall provide the City with an update reasonably in advance of initiating such construction and repair.

5.17.410 Identification required

A State Franchise Holder, its employees, agents, contractors, and subcontractors shall be properly identified as agents of the State Franchise Holder prior to and during entry on private and public property. Identification shall include the name and telephone number of the State Franchise Holder on all trucks and vehicles used by installation personnel.

Part 6

PUBLIC, EDUCATION AND GOVERNMENT (PEG) REQUIREMENTS

5.17.500 Emergency Alert Systems

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.

5.17.510 Interconnection for PEG programming

Each State Franchise Holder and each incumbent cable operator operating under a City franchise, shall negotiate with each other in good faith to interconnect their networks for the purpose of providing PEG programming including, but not limited to, the exclusive City use channel. Interconnection may be accomplished by any means authorized under California Public Utilities Code section 5870(h). Each State Franchise Holder and each cable operator shall provide interconnection of PEG channels including the exclusive City use channel on reasonable terms and conditions and may not withhold the interconnection. If a State Franchise Holder and an incumbent cable operator cannot reach a mutually acceptable interconnection agreement, the City may require the incumbent cable operator to allow the State Franchise Holder to interconnect its network with the incumbent cable operator's network at a technically feasible point identified by the State Franchise Holder on the State Franchise Holder's Network. If no technically feasible point for interconnection is available, the State Franchise Holder shall make an interconnection available to each 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 may waive, modify, or defer this requirement of interconnection.

Part 7
REPORTS AND NOTICES

5.17.600 Reports to the City Administrator

Each State Franchise Holder, within sixty (60) days after the expiration of each calendar year, shall file a report with the City Administrator, which shall contain a streets and Public rights-of-way map or maps of any convenient scale on which shall be plotted the location of the entire transmission and distribution system or systems as of the last day of the just expired calendar year, with the system or systems located in the City rights-of-way indicated by distinctive coloration or symbols.

5.17.610 Notices

- A. Each State Franchise Holder or applicant for a state franchise shall file with the City a copy of all applications or notices that the State Franchise Holder or applicant is required to file with the California 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 Administrator.

SECTION 2. No Conflict With Federal or State Law.

Nothing in this Ordinance shall be interpreted or implied so as to create any requirement, power or duty in conflict with any federal or state law.

SECTION 3. Severability

If any article, section, subsection sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional, the offending portion shall be severed and shall not affect the validity of remaining portions which shall remain in full force and effect.

IN COUNCIL, OAKLAND, CALIFORNIA, JUL 17 2007, 20

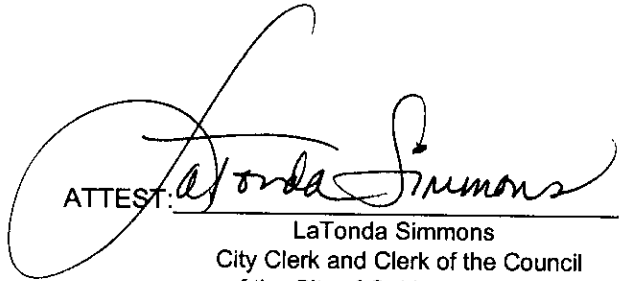
PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE - 8

NOES- 0

ABSENT- 0

ABSTENTION- 0

ATTEST: 
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

Introduction Date: JUL - 3 2007