

# **STAFF REPORT**

## **CITY OF YORBA LINDA**

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**CITY MANAGER**

**DATE: JUNE 2, 2009**

**TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL**

**FROM: BRETT CHANNING AND LAUREN COCHRAN, MANAGEMENT ASSISTANTS**

**SUBJECT: ORDINANCE NO. 2009-931 ADOPTING CHAPTER 5 ARTICLE 2 OF THE YORBA LINDA CITY CODE RELATING TO STATE VIDEO FRANCHISE PROVIDERS**

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### **RECOMMENDATION**

It is recommended that the City Council of the City of Yorba Linda introduce and conduct the first reading of Ordinance No. 2009-931 adopting Chapter 5, Article 2 of the Yorba Linda City Code relating to state video franchise providers.

### **BACKGROUND**

In 2006 the California State Legislature adopted AB 2987, or the Digital Infrastructure and Video Competition Act (DIVCA). Governor Schwarzenegger signed the bill on September 29, 2006 and DIVCA became effective on January 1, 2007.

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 is held solely by the California Public Utilities Commission (PUC).

Any cable provider with a state franchise can notify a City that it intends to begin providing cable service within its boundaries. When this occurs, the existing local cable franchise is still able to continue to operate under the existing franchise agreements until it expires or it is mutually terminated by the franchisee and the City. Alternatively, the local cable provider may obtain a state franchise and opt out of a local franchise agreement.

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The Yorba Linda City Code does not address state-issued franchises and the recent transition of Time Warner from a City franchise to a State franchise has necessitated the adoption of a new city code section.

Ordinance Number 2009-931 will adopt Chapter 5 of Article 2 of the Yorba Linda City Code relating to state video franchise providers. AT&T was issued a state franchise by the PUC on March 30, 2007 and is currently providing video service to some residents of the City of Yorba Linda. AT&T has been coordinating service issues with City staff and has been paying franchise fees to the City Yorba Linda despite there not being an ordinance consistent with DIVCA. AT&T is currently providing Public Educational or Governmental (PEG) programming to customers in Yorba Linda.

**DISCUSSION/ ANALYSIS**

The City of Yorba Linda does not have a current franchise agreement with Time Warner. The City had a franchise agreement previously with Adelphia, however it expired in August 2001. When the franchise was transferred to Time Warner in 2005 (Resolution NO. 2005-3772), the City did not sign a franchise agreement. Time Warner is still currently operating under a state-issued franchise and would be governed by the ordinance being proposed in this report.

DIVCA requires video service providers pay a franchise fee to the City it provides services to. Currently, that fee is set at 5% of the video service providers' gross revenues, which is the same amount required in the City of Yorba Linda's previous cable franchise agreements. In addition, DIVCA requires state franchisees to:

- Pay the City a fee to support Public Educational or Governmental (PEG) channels of 1% of gross revenues;
- Offer up to three PEG channels, such as the City's existing TV channel, which is 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;
- Comply with customer service standards established by State and Federal law.

Although franchise authority over video service providers now rests with the California PUC, DIVCA does delegate certain administrative responsibilities to local governments. These responsibilities include the enforcement of customer service standards, the issuance of encroachment permits, the collection of franchise and PEG fees, and providing PEG programming. In order to enforce customer service standards and continue to collect PEG fees, an enabling ordinance must be adopted.

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If adopted the proposed ordinance will give the City the authority 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.

**FISCAL IMPACT**

The proposed ordinance will provide PEG access support fees paid by the cable providers to the City of Yorba Linda. As stated above, this will consist of an imposed fee of 1% of the cable provider's gross revenues. This revenue that the City of Yorba Linda receives is restricted to media services pertaining to the PEG channel. Costs related to enforcement of a state franchise are likely to be consistent with existing City expenses for regulating City granted cable franchises.

The City will notify these cable franchise providers of the increased fee via letter. The franchise providers have 6 months to comply.

**RECOMMENDATION**

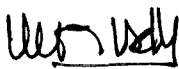
It is recommended that the City Council of the City of Yorba Linda introduce and conduct the first reading of Ordinance No. 2009-931 adopting Chapter 5 Article 2 of the Yorba Linda City Code relating to state video franchise providers.

**ATTACHMENTS**

1. Ordinance No. 2009-931
2. State Public Utilities Commission Form

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Approved By:



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William R. Kelly  
Interim City Manager



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Susan L. Hartman  
Finance Director

ORDINANCE NO. 2009-931

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF YORBA LINDA AMENDING THE YORBA LINDA MUNICIPAL CODE TO ADD AN ARTICLE REGARDING THE ESTABLISHMENT OF FRANCHISE FEES, PUBLIC ACCESS SUPPORT FEES AND CUSTOMER SERVICE PENALTIES FOR STATE FRANCHISE HOLDERS PROVIDING VIDEO SERVICE WITHIN THE CITY OF YORBA LINDA**

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

**WHEREAS**, under AB 2987, the State of California is authorized to issue video services franchises; and

**WHEREAS**, the City of Yorba Linda ("City"), although not the franchising authority with respect to franchises issued under AB 2987, has certain rights and responsibilities with respect to the new state video franchise holders, which must be addressed through the adoption of an ordinance; and

**WHEREAS**, AB 2987 provides that the City shall receive a fee of five percent (5%) of gross revenues of each state video franchisee which operates within the City for use of the public rights-of-way, but requires the City to adopt an ordinance in order to make this effective; and

**WHEREAS**, AB 2987 further authorizes the City to establish and enforce penalties against state video franchisees for violations of customer service rules consistent with state law; and

**WHEREAS**, the proposed Ordinance adds Article XVII to Chapter 5.40 of the Yorba Linda Municipal Code but does not apply to any locally issued franchise or franchisee;

**THE CITY COUNCIL OF THE CITY OF YORBA LINDA DOES HEREBY ORDAIN AS FOLLOWS:**

Section 1. Chapter 5.40 of the Yorba Linda Municipal Code is hereby amended to add a new Article XVII to read as follows:

**"Article XVII. State Video Services Franchises.**

**5.40.1090. Applicability of chapter to state video services franchises.**

Notwithstanding any provision of this chapter to the contrary, nothing in this chapter shall be deemed to require any person or entity to obtain a franchise or license issued by the City, to the extent that such person or entity is authorized to provide cable service or video services, as defined in Section 5800 et seq. of the California Public Utilities Code, under a cable franchise or video services franchise issued by another government entity under applicable law, including but not limited to Section 5800 et seq. of the California Public Utilities Code. The requirements and provisions of this chapter shall not apply or be enforced to the extent that they actually conflict with applicable state or federal law.

**5.40.1100. Regulation of state video services franchisees.**

This article is intended to regulate video service providers, as defined in Section 5800 et seq. of the California Public Utilities Code, 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 ("Act"). Pursuant to the Act, the City shall receive a franchise fee from all state video franchise holders operating within the City. Additionally, 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

customer service standards, but the Act grants all authority to adopt customer service standards to the state. The Act leaves unchanged the City's authority to regulate the City's current cable franchise in accordance with this chapter and the cable franchise currently in effect, until such time as the cable franchisee no longer holds a City franchise or is no longer operating under a current or expired City franchise.

**5.40.1110. State video franchise fee.**

(A) For any state video franchise holder operating within the boundaries of the City, there shall be a fee paid to the City equal to five percent (5%) of the gross revenue of that state video franchise holder. Gross revenue, for the purposes of this section, shall have the definition set forth in California Public Utilities Code 5860.

(B) For any state video franchise holder operating within the boundaries of the City, there shall be an additional fee paid to the City equal to one percent (1%) of the gross revenue of that state video franchise holder, which fee shall be used by the City for public, educational and government access purposes consistent with state and federal law. This fee may be collected by the City upon the earlier of: (i) the fulfillment of all obligations to remit cash payments to the City for support of public, educational and government access facilities which are contained within a City-issued cable franchise that was in effect on January 1, 2007, and which remained unsatisfied as of the effective date of this ordinance; or (ii) the termination by the holder of a City-issued cable franchise of its franchise as provided under state law. The intent of this subsection is to comply with the requirements of subsections (l), (m), and (n) of Section 5870 of the California Public Utilities Code, and the fee established in this subsection is intended to be a fee authorized by subsection (n) of Section 5870.

**5.40.1120. Audit authority.**

Not more than once annually, the City Manager, or his or her designee, may examine and perform an audit of the business records of all holders of a state video franchise operating within the boundaries of the City to ensure compliance with Section 22-293 of this Code.

**5.40.1130. Customer service penalties under state video franchises.**

(A) Any holder of a state video franchise operating within the boundaries of the City shall comply with all applicable state and federal customer service and protection standards pertaining to the provision of video service.

(B) The City Manager shall monitor the compliance of holders of a state video franchise operating within the boundaries of the City with respect to state and federal customer service and protection standards. The City Manager, or his or her designee, will provide the state video franchise holder written notice of any material breaches of applicable customer service standards and will allow the state video franchise holder 30 days from the receipt of the notice to remedy the specified material breach. Material breaches not remedied within the 30-day time period will be subject to the following penalties to be imposed by the City:

(1) For the first occurrence of a violation, 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 violation 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 violation 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) A holder of a state video franchise operating within the boundaries of the City may appeal a penalty assessed by the City Manager to the City Council within 60 days of the initial assessment. The City Council shall hear all evidence and relevant

testimony and may uphold, modify or vacate the penalty. The City Council's decision on the imposition of a penalty shall be final.

**5.40.1140. City response to state video franchise applications.**

(A) Applicants for state video franchises, or amendments to existing franchises, that will authorize the applicant to operate within the boundaries of the City must concurrently provide complete copies to the City of any application or amendments to applications filed with the Public Utilities Commission. At a minimum, one (1) complete copy must be provided to the City Manager.

(B) Within 30 days of receipt, the City Manager will provide any appropriate comments to the Public Utilities Commission regarding an application or an amendment to an application for a state video franchise."

Section 2. Severability. If any section, subsection, sentence, clause, phrase, 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 Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases or portions might subsequently be declared invalid or unconstitutional.

Section 3. Effective Date. This Ordinance shall take effect thirty days after its adoption. The City Clerk shall certify to the adoption of this Ordinance and shall cause this Ordinance or a summary thereof to be published in the manner required by law.

**PASSED, APPROVED AND ADOPTED** at a regular meeting of the City Council of the City of Yorba Linda on this \_\_\_th day of \_\_\_, 2009.

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MAYOR  
CITY OF YORBA LINDA

ATTEST:

\_\_\_\_\_  
KATHIE M. MENDOZA, CITY CLERK  
CITY OF YORBA LINDA

APPROVED AS TO FORM:

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

STATE OF CALIFORNIA )  
COUNTY OF ORANGE ) **ss.**

I, **KATHIE M. MENDOZA**, City Clerk of the City of Yorba Linda, California, **DO HEREBY CERTIFY** that the foregoing Ordinance was adopted at a regular meeting of the City Council of the City of Yorba Linda held on the \_\_\_th day of \_\_\_, 2009, and was carried by the following roll call vote:

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

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KATHIE M. MENDOZA, CITY CLERK  
CITY OF YORBA LINDA



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STATE OF CALIFORNIA  
PUBLIC UTILITIES COMMISSION

505 Van Ness Avenue San Francisco, CA 94102  
www.cpuc.ca.gov

April 1, 2009

Mr. David Gruchow  
4845 Casa Loma Ave  
Yorba Linda, CA 92885

Dear Mr. Gruchow:

As you know, Time Warner NY Cable filed an amended Application for a state video franchise with the Commission on February 20, 2009. On March 23, 2009 the Commission's Executive Director deemed the Application complete, and issued a California Video Franchise Certificate to Time Warner NY Cable. As your community is an affected local entity, we wanted to be sure to provide you notice of this determination within the 30-day period specified in Section 5840(h) of the Public Utility Code.

Time Warner NY Cable's amended Application, as well as the Commission's March 23, 2009 notification of completeness and the Franchise Certificate itself, can be found on the Video Franchise page of the Commission's web site at: [www.cpuc.ca.gov](http://www.cpuc.ca.gov).

Your local entity should be taking certain actions under the state video franchising statute (AB2987 or DIVCA), such as adopting customer service standards. In addition, you should notify the new franchisee regarding your franchise fee, and if you wish carriage of PEG channels. These are just examples. There may be other steps that you wish to take as well under the provisions of DIVCA. In this regard, you may find the information on SCAN-NATOA's web site useful ([http://www.scannatoa.org/info\\_docs.html](http://www.scannatoa.org/info_docs.html)). Also, feel free to call me if you have any questions.

Yours truly,

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