



C O U N T Y A D M I N I S T R A T O R

SUSAN S. MURANISHI
COUNTY ADMINISTRATOR

DONNA LINTON
ASSISTANT COUNTY ADMINISTRATOR

March 12, 2008

Honorable Board of Supervisors
Administration Building
Oakland, CA 94612

Dear Board Members:

SUBJECT: ALAMEDA COUNTY GENERAL ORDINANCE CODE AMENDMENT

RECOMMENDATION:

That your Board adopt an ordinance amending the County of Alameda General Ordinance Code, Title 3 – Business Licenses and Regulations, to add Chapter 3.17, which implements the provisions of the Digital Infrastructure and Video Competition Act of 2006, codified in California Public Utilities Code Section 5800 et seq., which the County is required to administer and enforce.

DISCUSSION/SUMMARY:

Pursuant to Government Code Section 53066, Alameda County was authorized to require franchises and impose fees on cable and video service operators in the unincorporated areas of the County. In 2007, Assembly Bill 2987, known as the Digital Infrastructure and Video Competition Act (DIVCA), became effective and is codified in Public Utilities Code (PUC) Section 5800 et seq. DIVCA provides for a state franchising process that replaces locally negotiated franchise agreements. Pursuant to PUC Section 5840(a) the Commission now has sole franchising authority for cable and video service and local jurisdictions no longer have franchising authority, once existing local franchises have expired.

Under the new law, local entities still retain authority to monitor customer service, impose franchise fees, and impose public, educational, and government (PEG) access fees. PUC Section 5800 et seq. authorizes local jurisdictions to pass an ordinance implementing DIVCA, including provisions for collection of fees and consumer protection remedies. The new law removes the ability of local jurisdictions to negotiate local agreements that may have traditionally negotiated for universal service (the ability to require the local franchisee to provide service to all residents in the jurisdiction), free cable service to County government and school buildings, enforceability (the ability to enforce customer service provisions and other franchise obligations by use of contractual remedies such as liquidated damages, revocation, and other remedies, rather than going to court), and institutional networks or I-Nets (the ability to acquire fiber optic connectivity to County government and school buildings for the transmission of data, voice, and video).

The Alameda County Administrator's Office and County Counsel staff have worked with Miller & Van Eaton (MVE), a law firm specializing in communications and cable and video services law, and various County Departments to develop draft ordinance language to implement the new state franchise law.

FINANCING:

Adoption of this ordinance will enable Alameda County to require that any State video franchise holder remit a PEG fee of 1% of gross revenues to the County in addition to the franchise fee of 5% of gross revenues that each State franchise holder must pay the County. The 1% PEG fee is restricted to PEG-related capital uses only. Staff estimates that the PEG fee may amount to approximately \$200,000 per year. There would be no net county costs as a result of this action.

Very truly yours,



Susan S. Muranishi
County Administrator

SSM:CHG

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c: Richard E. Winnie, County Counsel
Patrick O'Connell, County Auditor-Controller
Joe Van Eaton, Miller & Van Eaton, LLP
Ken Brunetti, Miller & Van Eaton, LLP
Shiyama Clunie, AT&T External Affairs Area Manager
George Granger, AT&T
Cheryl Chambers, Comcast, Director, Government Affairs

By Corey Deaman

**AN ORDINANCE AMENDING
THE COUNTY OF ALAMEDA GENERAL ORDINANCE CODE,
TITLE 3 – BUSINESS LICENSES AND REGULATIONS, TO ADD CHAPTER 3.17,
WHICH IMPLEMENTS THE PROVISIONS OF THE DIGITAL INFRASTRUCTURE
AND VIDEO COMPETITION ACT OF 2006, CODIFIED IN CALIFORNIA PUBLIC
UTILITIES CODE SECTION 5800 ET SEQ., WHICH THE COUNTY IS REQUIRED TO
ADMINISTER AND ENFORCE.**

The Board of Supervisors of the County of Alameda, California ordains as follows:

SECTION I

Chapter 3.17 - STATE VIDEO SERVICE FRANCHISES

Article I – General Provisions

3.17.010 Purpose.

This chapter is applicable to all cable service and video service providers who are eligible for, and have been awarded, a state video franchise under the California Public Utilities Code section 5800 *et seq.* (the Digital Infrastructure and Video Competition Act of 2006), to provide cable or video services in any portion of the unincorporated areas of the County.

3.17.020 Rights Reserved.

The rights reserved to the County under this Chapter 3.17 are in addition to all other rights of the County whether reserved by this Chapter 3.17 or authorized by other applicable law, and no action, proceeding or exercise of a right shall affect any other rights which may be held by the County.

3.17.030 Compliance with Chapter 3.17

Nothing contained in this Chapter 3.17 exempts a state franchise holder from compliance with all ordinances, rules or regulations of the County 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.*, or obligations under any franchise previously issued by the County, insofar as those may be enforced under California Public Utilities Code section 5800.

3.17.040 Definitions

For purposes of this Chapter 3.17, 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 3.17 shall be given the meaning set forth in the Digital Infrastructure and Video Competition Act of 2006, Division 2.5 of the California Public Utilities Code, section 5800 et seq. ("DIVCA"). 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.

"Applicant" means any person submitting any application required under Division 2.5 of the California Public Utilities Code.

"Applicable law" means all lawfully enacted and applicable Federal, State, and County laws, ordinances, codes, rules, regulations and orders as the same may be amended or adopted from time to time.

"Board" means the Board of Supervisors, the governing body of the County of Alameda, California.

"Cable service" means (i) the one-way transmission to subscribers of video programming or other programming services; and (ii) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

"CDA director" means the Director of the Alameda County Community Development Agency or his or her designee.

"Construction," "operation," or "repair" and similar formulations of those terms mean the named actions interpreted broadly, encompassing, among other things, installation, extension, maintenance, replacement of components, relocation, undergrounding, grading, site preparation, adjusting, testing, make-ready, excavation and tree trimming. The term "operation" does not encompass or regulate the provision of services, but refers to activities affecting rights-of-way and other public property or easements subject to the jurisdiction of the County.

"County" means the County of Alameda, California. Any act that may be taken by the County may be taken by the Board or any agency, department, agent or other entity now or hereafter authorized to act on the County's behalf.

"County Administrator" means the chief executive officer of the County Administrator Office. Any act that may be taken by the County Administrator be taken by any agency, department, agent or other entity now or hereafter authorized to act on behalf of the County Administrator.

"Director" means the director of the public works agency of the county or his/her designee.

"DIVCA" means the Digital Infrastructure and Video Competition Act of 2006, Division 2.5 of the California Public Utilities Code, section 5800 et seq., as may be amended from time to time.

"Gross revenues" means all revenues (whether in the form of cash or other consideration) of a state franchise holder and/or its affiliates in any way derived from its operations within the County.

"Incumbent cable operator" shall have the same meaning as in DIVCA.

"Network" shall have the same meaning as in DIVCA.

"PEG" means any channel on a cable system or video system set aside by a state franchise holder for public, educational, or governmental use.

"Person" means an individual, partnership, association, joint stock company, trust, corporation, or organizational entity, or any lawful successor, transferee or assignee thereof. The term does not include the County.

"Public rights-of-way" shall have the same meaning as in DIVCA.

"State franchise" means a franchise issued by the California Public Utilities Commission to provide cable service or video service, as those terms are defined in DIVCA, within any portion of the County.

"State franchise holder" means a person who holds a state franchise.

"Subscriber" means the County or any person who legally receives any cable service or video service from a state franchise holder delivered over that state franchise holder's network.

"User" means a person or the County utilizing a channel, capacity or equipment and facilities for purposes of producing or transmitting material, as contrasted with the receipt thereof in the capacity of a subscriber.

"Video Service" shall have the same meaning as in DIVCA.

Article II - Fees

3.17.050 State franchise fees.

Any state franchise holder operating within the County shall pay to the County a state franchise fee equal to five percent (5%) of the gross revenues of it or any affiliate that are subject to a franchise fee under California Public Utilities Code Section 5860.

3.17.060 PEG fees.

Any state franchise holder operating within the County shall pay to the County a PEG fee equal to one percent of the gross revenues of it or any affiliate that are subject to a franchise fee under California Public Utilities Code Section 5860.

3.17.070 Payment of fees.

The state franchise fee required pursuant to Section 3.17.050, and the PEG fee required pursuant to Section 3.17.060, shall each be paid to the County quarterly, in a manner consistent with California Public Utilities Code section 5860. The state franchise holder shall deliver to the County, by check or other means specified by the County, 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, containing such information as the County Administrator may require, consistent with DIVCA. Unless the County Administrator provides otherwise, the summary statement shall identify:

1. revenues received from subscribers, by category, with service revenues broken out by service levels;
2. any charges to subscribers for which revenues were received, but on which a franchise fee was not paid;
3. where the fee is paid on an allocated portion of revenues received, the total revenues received; the allocation factor; and how the allocation factor was calculated.

3.17.080 Audits.

The County may audit the business records of the holder of a state franchise in a manner consistent with California Public Utilities Code section 5860(i).

3.17.090 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 County 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%).

3.17.100 Lease of County-owned network.

In the event a state franchise holder leases access to a network owned or controlled by the County, the County may set a franchise fee for access to the County-owned network separate and apart from the franchise fee charged to state franchise holders pursuant to Section 3.17.050, which fee shall otherwise be payable in accordance with the procedures established by this Chapter.

Article III – Customer Service

3.17.110 Customer service and consumer protection.

Each state franchise holder shall comply with all applicable customer service and consumer protection standards, including, to the extent consistent 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.

3.17.120 Penalties for violations of standards.

A. The County shall monitor compliance with and enforce the provisions of section 3.17.110.

B. For material breaches, as defined in California Public Utilities Code section 5900, by a state franchise holder of applicable customer service and consumer protection standards, the County may impose the following penalties:

1. For the first occurrence of a material breach, a fine of \$500.00 may 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 may be imposed for each day the violation remains in effect, not to exceed \$3,000.00 for each violation.

3. For a third material breach of the same nature within 12 months, a fine of \$2,500.00 may 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 County shall be imposed in a manner consistent with California Public Utilities Code section 5900 and the provisions of Chapter 12.8 of this code.

D. The County Administrator is authorized to provide any notices required under California Public Utilities Code section 5900. The County Administrator shall coordinate with the Division of Ratepayer Advocate to protect consumers in the County.

Article IV – Right-of-Way Management

3.17.130 Construction in the Public rights-of-way.

Except as expressly provided in this Chapter 3.17, the provisions of Chapter 12.08 of this code, and all County administrative rules and regulations developed pursuant to Chapter 12.08, as now existing

or as hereafter amended, shall apply to all work performed by or on behalf of a state franchise holder in any public rights-of-way.

3.17.140 Permits.

A. Prior to commencing any work for which a permit is required by Chapter 12.08 of this code, a state franchise holder shall apply for and obtain a permit in accordance with the provisions of Chapter 12.08. A permit application is complete when the state franchise holder has complied with all applicable laws and regulations, including but not limited to all County administrative rules and regulations, and Division 13 of the California Public Resources Code, section 21000, *et seq.* (the California Environmental Quality Act).

B. The Director shall either approve or deny a state franchise holder's application for any permit required under Division 1 of this title within sixty (60) days of receiving a complete permit application from the state franchise holder.

C. If the Director 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 a detailed 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 may appeal the denial to the Board in accordance with Section 17.54 of this code. Upon receiving a notice of appeal, the board of supervisors shall take one of the following actions:

1. Affirm the action of the Director without any further hearing; or
2. Refer the matter back to the Director for further review with or without instructions; or
3. Set the matter for a public hearing before the Board.

E. In rendering its decision on the appeal, the Board shall not hear or consider any argument or evidence of any kind other than the record of the matter received from the Director unless the Board is itself conducting a public hearing on the matter.

F. The issuance of a permit is not a franchise, and does not grant any vested rights to locate facilities in any specific location, or in any particular manner of placement in, on, under or within the public right-of-way. An encroachment permit allowing placement of facilities or appurtenances aboveground, for example, may be revoked and the permittee may be required to place those facilities or appurtenances underground, upon reasonable notice to the permittee.

3.17.150 Construction standards.

A. The construction, operation, or repair of a state franchise holder's network shall be in accordance with all applicable Federal, State and local laws, including without limitation, zoning and specific plan laws, streetscape design guidelines, construction codes, electrical codes, and occupational safety and health acts. A state franchise holder shall at all times use reasonable care, within the meaning of applicable law, and shall implement and enforce practices and standards that meet or exceed accepted industry practices and standards intended to prevent damage, injury, or nuisance to the public, or the public right-of-way.

B. Without limiting the foregoing, all of a state franchise holder's network shall be constructed, operated and maintained in accordance with safe and reasonable engineering practices that meet or exceed accepted industry practices and standards, performed by experienced and properly trained maintenance and construction personnel.

3.17.160 Undergrounding.

A. Where utilities are already underground, or are being initially placed underground, or where required by applicable law, the network shall be constructed underground in accordance with existing County practices at the time the network is constructed subject to any waivers that may be granted. When utilities that are installed overhead are moved underground and any area, all network facilities and plant in that area shall be similarly moved underground by the state franchise holder as directed by the Director in accordance with then-existing County practices, subject to any waivers that may be granted. Such undergrounding shall be performed at the state franchise holder's sole expense, unless applicable law provides otherwise. The County will cooperate in good faith with a state franchise holder in any waiver process. Other facilities installed in the rights-of-way will be placed aboveground or underground in accordance with the County's practices, as amended from time to time.

B. In cases of new construction or property development where utilities are to be placed underground, upon request by the County the developer or property owner shall give all state franchise holders at least seventy-two (72) hours' notice of the particular date on which open trenching will be available for state franchise holders to install conduit, pedestals, and or vaults, at the state franchise holder's expense. The costs of trenching and easements shall be borne by the developer or property owner; provided that, if the state franchise holder fails to install its conduit, pedestals, and/or vaults within 5 working days of the date the trenches are available as designated in the notice given by the developer

or property owner, and if the trenches are closed after the five-day period, the cost of new trenching shall be borne by the state franchise holder.

3.17.170 Street Occupancy.

A. Each state franchise holder shall utilize existing poles, conduits and other facilities whenever possible and economically feasible, and shall not construct or install any new, different, or additional poles, conduits, or other facilities on public property without the prior written approval of the County, or on privately owned property except in accordance with applicable building and zoning ordinances. Where there is insufficient space in the right-of-way for the state franchise holder to meet the county's streetscape design guidelines, the state franchise holder shall seek an easement from the adjacent private property owner to install any new utility improvements as approved by both the director and the CDA director.

B. The state franchise holder shall notify the County in writing at least fifteen (15) days prior to the intention of the state franchise holder to commence any work to be performed in the public right-of-way. The County shall cooperate with the state franchise holder in processing any work permits. Work by the state franchise holder shall not interfere with the use of the public right-of-way and shall be done in accordance with applicable provisions of the County code and permit requirements and conditions.

C. All transmission lines, equipment, structures or other facilities shall be so installed and located as to not interfere with the rights and reasonable use or convenience of the public and property owners. At all times, the facilities shall be maintained in safe and proper working order. The state franchise holder shall, at all times, implement and enforce standards and practices in the construction, operation and repair of its facilities that meet or exceed industry standard and practices intended to prevent damage, injuries, or nuisances to the public. For example, suitable barricades, flags, lights, flares or other devices shall be used at such times and places as are reasonably necessary to protect the public health, welfare or safety. Any poles or other fixtures placed in any public way by the state franchise holder shall be placed in such a manner as not to interfere with the usual pedestrian or vehicular travel on such public way, or to be in conflict with the county Streetscape Design Guidelines, or goals to provide walkable communities and meet livability principles.

D. If the state franchise holder's work or activities cause any damage or injury to the public right-of-way, the state franchise holder shall restore, at its own expense, and in a manner approved by the County, the public right-of-way to the condition that existed, or better.

E. In cases of emergency as defined by the California Government Code, the county may remove or relocate some or all of the state franchise holder's facilities. In that case, as a condition of permitting of facilities, the state franchise holder shall bear all costs associated with the restoration or repair of its facilities, unless otherwise provided by contract or applicable law.

F. The state franchise holder shall have the authority to trim trees or shrubs located in the public right-of-way at its own expense as may be reasonably necessary to protect its wires and facilities, subject to the supervision and direction of the County and consistent with the county code.

G. Upon receipt of thirty (30) days' written notice from the County, the state franchise holder, at its expense, shall protect, support, temporarily disconnect, relocate, or remove any of the permitted facilities of a state franchise holder when in the opinion of the County that action is required to protect the public health, safety or welfare where the county is, by reason of: traffic conditions, public safety, street vacation, freeway or street grade, separation or realignment, installation of sewers, drains, waterpipes, power line, signal line, transportation facilities, tracks, heritage trees and major landscape features or any other types of structure or improvements of governmental agencies, acting in a governmental or a proprietary capacity, or in connection with any program under which the County shall undertake to cause any such permitted facilities to be located beneath the surface of the ground. Nothing hereunder shall be deemed a taking of the property of the state franchise holder, and the state franchise holder shall be entitled to no surcharge by reason of anything required to be done hereunder, except as specifically provides under applicable law.

H. The county may provide to the state franchise holder a written notice of any failure of a state franchise holder to commence, pursue or complete any permitted work. If the state franchise holder fails to remedy that failure within thirty (30) days after the date of the notice, except as otherwise agreed in writing by the county, the County, at its option, may but is not obligated to remedy or attempt to remedy that failure by its own forces or with retained contractors. In that event, the state franchise holder shall be responsible for all costs, including reasonable attorney fees, incurred by the county in connection therewith. The county shall provide an itemized statement of those costs and fees to the state franchise holder who shall pay the amount within thirty (30) days after receipt of the statement.

I. The state franchise holder shall make no paving cuts or curb cuts unless absolutely necessary, and only after written permission has been given by the County.

J. The County reserves the right to require conduit for underground cabling in special areas.

K. Any contractor or subcontractor used for work or construction, installation, operation, maintenance, or repair of network equipment must be properly licensed under laws of the State and all applicable local ordinances, and each contractor or subcontractor shall have the same obligations with respect to its work as the state franchise holder would have under this Chapter and applicable law if the work were performed by state franchise holder. The state franchise holder shall be responsible for ensuring that the work of contractors and subcontractors is performed consistent with this Chapter and other applicable law, shall be responsible for all acts or omissions of contractors or subcontractors, shall be responsible for promptly correcting acts or omissions by any contractor or subcontractor, and shall implement a quality control program to ensure that the work is properly and safely performed. This section is not meant to alter tort liability of a state franchise holder to third parties.

3.17.180 Participation with other utilities.

Each state franchise holder shall cooperate in the planning, locating and construction of its network in utility joint trenches or common duct banks with other telecommunications providers. The County will provide advance notice to any state franchise holder when it plans to open a trench and each state franchise holder shall provide notice to the County when it plans to open a trench. A state franchise holder and the County will offer to make space available to the other, and to other persons who participate in joint trenching, on reasonable terms.

3.17.190 Underground Services Alert.

At all times, the state franchise holder shall be a member of the Northern California notification center for subsurface installations (which, on the effective date of this chapter, is operated by Underground Services Alert) and shall field mark, at its sole cost and expense, the locations of its underground network facilities upon notification in accordance with the requirements of Sections 4216, *et seq.* of the Government Code, and any other applicable law.

Article V – Emergency Alert

3.17.200 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 consistent with Public Utilities Code Section 5880, each state franchise holder shall incorporate into its network the capability to permit the County in times of emergency to override the audio portion of all channels simultaneously, as such capability was required under local franchises in effect in the County on the effective date of this Chapter.

Article VI - Interconnection

3.17.210 Interconnection for PEG Programming

Each state franchise holder, and each incumbent cable operator operating under a County franchise issued pursuant to Division 6 of this title, shall negotiate in good faith to interconnect their networks for the purpose of providing PEG programming. Interconnection may be accomplished by any means authorized under Public Utilities Code Section 5870(h). Each state franchise holder and incumbent cable operator shall provide interconnection of PEG channels 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 County 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 on the state franchise holder's network as identified by the state franchise holder. If no technically feasible point for interconnection is available, each state franchise holder will make an interconnection available to each channel originator providing PEG programming to an incumbent cable operator, and will provide the facilities necessary for the interconnection. The cost of any interconnection will be borne by the state franchise holder requesting the interconnection unless otherwise agreed to by the state franchise holder and the incumbent cable operator.

Article VII - Notices

3.17.220 Notices.

A. Each state franchise holder or applicant for a state franchise shall file with the County a copy of all applications or notices 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 County under this Division 6 or the California Public Utilities Code shall be provided to the County Administrator.

Article VIII– Extension of Franchises

3.17.230 Extension of Franchises

In accordance with Public Utilities Code section 5930(b) all cable franchises issued by the county under which a cable operator is providing cable services in the unincorporated areas of the county on the effective date of this ordinance are hereby extended through January 1, 2008, unless otherwise agreed to between the county and the cable or video service provider or unless otherwise provided for by applicable law.

SECTION II

This ordinance shall become effective 30 days from the date of final passage, and before the expiration of fifteen days after its passage, shall be published once along with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda.