



Office of the City Manager

CONSENT CALENDAR  
December 18, 2007

To: Honorable Mayor and Members of the City Council  
 From: *PK* Phil Kamlarz, City Manager  
 Submitted by: Zach Cowan, Acting City Attorney  
 Subject: Adoption of Ordinance for Cable Public Access (PEG) Support

RECOMMENDATION

Adopt first reading of an Ordinance adding a new chapter to the Berkeley Municipal Code (“BMC”), Chapter 9.58 entitled “Video Franchise Fees, Customer Service and Other Video Related Matters” to enable the City to receive an additional fee equal to one percent (1%) of the gross revenue of a video franchisee to support PEG and to establish customer service standards.

FISCAL IMPACTS OF RECOMMENDATION

By adopting this Ordinance, the City would add an additional 1% to the current 5% cable franchise fee. This additional 1% can be used specifically only to support PEG.

CURRENT SITUATION AND ITS EFFECTS

Comcast is currently the only local franchised cable service provider in Berkeley. The City is collecting a 5% franchise fee from Comcast pursuant to the City’s franchise agreement. As explained in the next section, Comcast has informed the City that it intends to apply for a new state franchise. With a state franchise, Comcast is still required to pay a franchise fee of 5%. However, the City has the option to require a state franchise holder to pay an additional PEG fee of 1% of gross revenues. Although Comcast is currently the only franchised cable provider in the City, this 1% fee would apply to all companies who intend to provide video services in the City through a state franchise.

### BACKGROUND AND RATIONALE FOR RECOMMENDATION

The City has franchised its rights-of-way for cable television services since 1968. The current cable franchise was approved by Council in 1992, and expired in November of this year. The franchise has been transferred several times, most recently in 2002 from AT&T Inc. to Comcast, who remains the current holder. Under federal and state law, the terms of the local franchise continue on a month-to-month basis until the agreement is extended through negotiation, terminated, or a state franchise is issued.

In September 2006, Governor Schwarzenegger signed the Digital Infrastructure and Video Competition Act (the "Act") of 2006, better known by its working title, AB 2987. The Act enabled the creation of a single, statewide cable television franchise administered by the California Public Utilities Commission ("CPUC"). As a consequence, the legislation overturned the decades-old practice of California municipalities granting franchises to cable television companies to deploy their infrastructure in local rights-of-way. Thus, instead of obtaining local franchises, companies interested in providing video franchises can now obtain a franchise through the state. The Act also provided incumbent cable companies such as Comcast with the right to apply for a state franchise, which Comcast indicated it intends to do. Once Comcast applies for a state franchise, the CPUC will likely issue the franchise within 45 days.

Under the Act, all video service providers, including Comcast, are required to pay the City a 5% franchise fee, which is the same percentage that Comcast is required to pay the City pursuant to its existing local franchise agreement with the City. However, the Act also allows Cities to require by ordinance an additional PEG fee of 1% of gross revenue. By adopting this ordinance, the City will be able to collect the 1% PEG fee from all companies that are issued a statewide franchise, including Comcast when it applies for a state franchise. In addition, this ordinance allows the City to enforce customer service standards with penalties provided for in the Act.

### ALTERNATIVE ACTIONS CONSIDERED

Failure to pass this ordinance will result in the City being precluded from assessing an additional 1% fee for PEG support.

### CONTACT PERSON

Zach Cowan, Acting City Attorney, 981-6950  
Michael Woo, Deputy City Attorney, 981-6990

Attachment:

1. Ordinance

ORDINANCE AMENDING THE BERKELEY MUNICIPAL CODE TO ADD  
CHAPTER 9.58, REGULATING HOLDERS OF STATE VIDEO FRANCHISES

BE IT ORDAINED by the City Council of the City of Berkeley as follows:

Section 1. Findings

The Council finds as follows:

A. The Digital Infrastructure and Video Competition Act of 2006 ("Act") established a state video franchising system to govern video franchises.

B. Under the Act, only the state has the authority to grant franchises, regulate build-out and non-discrimination standards, impose user and application fees and establish franchise fees.

C. Under the Act, the City has the authority to manage the rights of way, regulate the payment of Public, Education and Government ("PEG") fees, require the provision of PEG channels and enforce federal and state customer service standards.

Section 2. The Berkeley Municipal Code Chapter 9 is amended by adding Section 9.58 as following:

**9.58.010 Title**

This ordinance shall be known as the "Video Franchise Fees, Customer Service and Other Video-Related Matters Ordinance."

**9.58.020 Regulation of State Video Franchises and City Video Franchises**

Under State law effective January 1, 2007, the California Public Utilities Commission ("PUC") will have the authority to grant state video franchises ("State Franchises"). The City of Berkeley ("City") will acquire certain rights and responsibilities with respect to state video franchise holders. These include the receipt of a franchise fee and a fee for Public, Educational and Government ("PEG") purposes, both based on a percentage of the gross revenues of state franchise holders, as well as the establishment and enforcement of penalties for violations of customer service rules.

**9.58.030 State Video Franchise Fees**

(a) Any state video franchise holder ("State Franchisee") operating within the boundaries of the City shall pay a fee to the City equal to five percent (5%) of the Gross Revenue of that State Franchisee.

(b) Any State Franchisee operating within the boundaries of the City shall pay an additional fee to the City equal to one percent (1%) of the Gross Revenue of that State Franchisee, which fee shall be used by the City for PEG purposes consistent with state and federal law.

(c) Gross Revenue, for the purposes of (a) and (b) above, shall have the definition set forth in California Public Utilities Code § 5860.

**9.58.040 Audit Authority.**

Not more than once annually, the City may examine and perform an audit of the business records of a State Franchisee to ensure compliance with Section 9.58.030.

**9.58.050 Customer Service Penalties Under State Franchises**

(a) The holder of a State Franchise shall comply with all applicable state and federal customer service and protection standards pertaining to the provision of video service.

(b) The City Manager, or his/her designee, shall monitor the compliance of State Franchisee(s) with respect to state and federal customer service and protection standards. The City Manager, or his/her designee, shall provide the State Franchisee(s) written notice of any material breaches of applicable customer service standards, and shall allow the State Franchisee(s) thirty (30) days from the receipt of the notice to remedy the specified material breach. Material breaches not remedied within the 30-day time period shall be subject to the following penalties by the City Manager, or his/her designee.

(i) 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 \$1500.00 for each violation.

(ii) 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.

(iii) For a third 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 State Franchisee may appeal a penalty assessed to the City Council within sixty (60) days by providing written notice to the City Manager. Upon receiving the written notice from the State Franchisee, the City Council shall schedule a public hearing to be noticed in a public agenda. In addition, such public notice shall be mailed, not fewer than 14 days prior to the hearing, to any resident that is directly affected by the actions of the State Franchisee which formed the basis for the assessment of penalties by the City Manager. After relevant speakers are heard, and any necessary staff reports are submitted, the City Council will vote to either uphold or vacate the penalty. The City Council's decision on the imposition of a penalty shall be final.

**9.58.060 City Response to State Franchise Applications**

(a) Applicants for State Franchises within the boundaries of the City must concurrently provide complete copies to the City of any application or amendments to applications filed with the PUC. One complete copy must be provided to the City Clerk, and one complete copy to the City Manager.

(b) The City Manager shall provide any appropriate comments to the PUC regarding an application or an amendment to an application for a State Franchise.

**9.58.070 Severability**

In the event any court of competent jurisdiction holds any provision of this Ordinance invalid or unenforceable, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within fifteen (15) days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

