

City of Brisbane

Agenda Report

TO: Honorable Mayor and City Council

FROM: Fred Smith via Clay Holstine, City Manager

DATE: Meeting of March 1, 2010

SUBJECT: Consider introduction of Ordinance No. 541, adding Chapter 5.41, "State Video Franchises" to the Brisbane Municipal Code.

CITY COUNCIL GOALS: Goal #4, To promote economic development that stabilizes and diversifies the tax base.

PURPOSE: The proposed ordinance adds to the Brisbane Municipal Code Chapter 5.41, "State Video Franchises". The proposed ordinance protects the rights of the City of Brisbane, including the right to enforce customer service standards and receive Public, Educational and Governmental television access (PEG) support.

RECOMMENDATION:

Introduce ordinance No. 541.

BACKGROUND and DISCUSSION:

The Digital Infrastructure and Video Competition Act of 2006 (DIVCA) was passed by the State Legislature, signed by the Governor and became effective on January 1, 2007.

DIVCA was initiated at the request of the telephone industry as a method to streamline their entrance into the cable television market. Cable companies had been offering "bundled" service packs to subscribers including cable service, high speed internet, and telephone service. Without local cable franchises, the telephone companies were unable to provide video service in most locations and could not match this bundling package. They complained that negotiating individual franchise agreements for video services with cities would take an inordinate amount of time and would result in further losses to both the companies and consumers. In response, the Legislature passed and the Governor signed AB 2987 (DIVCA), which established a state-wide franchising scheme for video providers administered by the California Public Utilities Commission (CPUC). DIVCA establishes the CPUC as the sole franchising authority for new video service providers state-wide but delegates certain rights to local authorities. These rights must be established by local ordinance to be enforceable on state video franchise holders.

With regard to any new video service providers who may wish to provide services within the City, DIVCA grants the City a franchise fee of up to five percent of gross revenues, which is currently the amount received from Comcast. Additionally, cities are entitled to an additional fee of up to one percent of gross revenues for PEG support, provided the City has enacted an ordinance establishing the fee. Until the current local franchise expires in December 2020, the DIVCA PEG fee is limited to the PEG fee which was in place when DIVCA became law. For the City of Brisbane, the current fee of .83% will increase to 1% at that time. The ordinance authorizes local audit of statewide video franchise holders to ensure accurate payment of these fees.

Cities may also monitor customer service standards of state video franchise holders, but are limited to enforcing only those standards listed in DIVCA and may only impose fines for violations of those standards if the City enacts an ordinance or resolution establishing the fine schedule. The amount of each fine is limited by DIVCA. Consequently, the City must adopt the attached ordinance to add these provisions to the City's Municipal Code.

There are currently no state video franchise holders providing service in Brisbane but it is anticipated that AT&T will begin offering its "U-Verse" service here within the next year or two.

FISCAL IMPACT/FINANCING ISSUES:

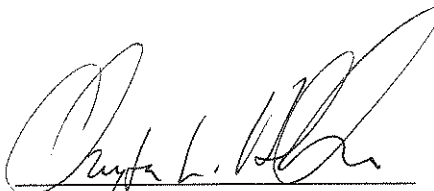
None at this time. At such time as a state video franchise holder begins providing service in Brisbane, the City will receive franchise fee payments of 5% and PEG fees of .83% of gross revenues from such service providers.

MEASURE OF SUCCESS:

At such time as a state video franchise holder begins providing service in Brisbane, the City will be prepared to timely collect all fees to which it is legally entitled and to enforce service standards as provided by state law.



Department Head



City Manager

ATTACHMENTS:

Proposed Ordinance No. 541

ORDINANCE NO. 541

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF
BRISBANE ADDING A NEW CHAPTER 5.41 OF THE
MUNICIPAL CODE AND ESTABLISHING FRANCHISE FEES,
PEG FEES, AND CUSTOMER SERVICE PENALTIES FOR
STATE VIDEO FRANCHISE HOLDERS PROVIDING VIDEO
SERVICE WITHIN THE CITY OF BRISBANE**

The City Council of the City of Brisbane does hereby Ordain as follows:

Section 1. RECITALS

WHEREAS, a new state law, the Digital Infrastructure and Video Competition Act of 2006 (Pub. Util. Code § 5800 *et seq.*, “DIVCA”) went into effect on January 1, 2007;

WHEREAS, on March 5, 2007, the California Public Utilities Commission released its Final Decision on the Commission's rulemaking to implement DIVCA, which determined that the State of California is the “sole franchising authority” for new video service providers within the City of Brisbane (“City”);

WHEREAS, pursuant to DIVCA, certain rights and responsibilities must be established by local ordinance before they may become effective and enforceable against state video franchise holders;

WHEREAS, DIVCA requires that local entities, although not franchising authorities are nonetheless responsible for the administration and implementation of certain provisions of DIVCA;

WHEREAS, The City has entered into franchises with Comcast of California IX, Inc. (“Comcast”) for the provision of cable television services;

WHEREAS, the City currently receives \$0.55 per subscriber per month which is less than is less than 1% of the gross revenues Comcast receives per subscriber;

WHEREAS, the City will receive a fee of five percent (5%) of gross revenues from each state video franchisee which operates within the City for use of the public rights-of-way unless the City opts to waive collection of the fee;

WHEREAS, the City does not currently opt to waive the collection of the five percent (5%) franchise fee;

WHEREAS, the City may require state franchisees to pay the fee of \$0.55 per subscriber per month;

WHEREAS, the City may authorize the audit of the business records of a state video franchisee once annually to ensure compliance with the payment of the franchise and PEG fees;

WHEREAS, the City may establish and enforce penalties against state video franchisees for violations of customer service rules consistent with state law;

WHEREAS, nothing in State law or this ordinance affects or will affect the ongoing authorization of Comcast to provide video services within the City;

WHEREAS, on March 30, 2007, AT&T obtained a video services franchise from the California Public Utilities Commission, and thereby became authorized to provide video services within numerous jurisdictions in the state, including the City and other providers may also obtain such franchises;

Section 2. A new Chapter 5.41 of the Brisbane Municipal Code, entitled “State Video Franchises” is hereby added to provide as follows:

**“Chapter 5.41
State Video Franchises**

Sections:

- 5.41.010 Purpose and Application.**
- 5.41.020 State Video Franchise.**
- 5.41.030 PEG Support Fees.**
- 5.41.040 PEG Channels.**
- 5.41.050 Audit Authority.**
- 5.41.060 Customer Service Penalties.**
- 5.41.070 City Response to State Video Franchise Applications**

Section 5.41.010. Purpose and Application.

This Chapter is designed to regulate video service providers holding state video franchises and operating within the City pursuant to that franchise. On January 1, 2007, the State of California became the sole authority with power to grant state video franchises pursuant to the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”), codified at Public Utilities Code Section 5800 et seq. under the California Public Utilities Commission final rulemaking decision dated March 1, 2007. Pursuant to DIVCA, the City of Brisbane shall receive a franchise fee and a fee for public, educational and/or government (PEG) purposes from all state video franchise holders operating within the City.

Additionally, the City acquired 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. DIVCA leaves unchanged the City's franchise with Comcast to operate in the City pursuant to Chapter 5.40 of the Municipal Code, until its expiration.

Section 5.41.020. State Video Franchise Fees.

Any state video franchise holder 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 video franchise holder. Gross revenue, for the purposes of this chapter, shall have the definition set forth in California Public Utilities Code § 5860. The state franchise fee shall be remitted to the applicable local entity quarterly, within forty-five (45) days after the end of the quarter for that calendar quarter. Each payment shall be accompanied by a summary explaining the basis for the calculation of the state franchise fee. If the holder does not pay the franchise fee when due, the holder shall pay a late payment charge at a rate per year equal to the Bank of America prime lending rate during the period of delinquency, plus one percent (1%). If the holder has overpaid the franchise fee, it may deduct the overpayment from its next quarterly payment.

Section 5.41.030. PEG Support Fees

(a) Any state video franchise holder operating within the boundaries of the City shall pay a PEG fee to the City or the City's designee for capital support of Public, Educational, and/or Governmental (PEG) purposes that are consistent with state and federal law equal to no more than one percent (1%) of gross receipts.

(b) Upon the expiration of the current local cable franchise operator, every state franchisee operating within the City shall pay a PEG capital support fee of \$0.55 per subscriber per month.

(c) As of December 19, 2005, pursuant to Resolution No. 2005-70, the City also imposed on the local cable operator a one-time capital grant of forty-five thousand four hundred ninety-eight dollars (\$45,498) for PEG equipment and facilities. Pursuant to section 5870(1) of the California Public Utilities Code, every state franchisee operating within the boundaries of the City shall be responsible for a pro-rata, per subscriber share of any outstanding capital grant payments.

Section 5.41.040. PEG Channels.

(a) The current franchise with Comcast provides for four (4) Public, Educational and Governmental channels for PEG programming. Local franchisees and holders of a state franchise under DIVCA shall provide four (4) PEG channels.

(b) All state franchisees shall comply with the provisions of DIVCA related to PEG channels. Without limiting the foregoing, the PEG channels shall be carried on the basic service tier. To the extent feasible, the PEG channels shall not be separated numerically from other channels carried of the basic service tier and the channel numbers for the PEG channels shall be the same channel numbers used by the incumbent cable operator as defined in Public Utilities Code Section 5830(i) unless prohibited by federal law and shall provide video and sound quality, recording capability, channel accessibility and location equal to, or substantially equal to, that provided by the incumbent cable providers. After the initial designation of PEG channel numbers, the channel numbers shall not be changed without agreement from the City unless the change is required by federal law.

(c) A state franchise holder shall have three (3) months from the date City requests the PEG channels to designate the capacity. However, the three-month period shall be tolled by any period during which the designation or provision of PEG channel capacity is technically infeasible, including any failure or delay of the incumbent cable operator to make adequate interconnection available, as required by DIVCA. Any state franchise holder who believes that the designation or provision of PEG channel capacity is technically infeasible, shall provide to City, in writing, its reasons therefore and its plan for correcting or solving the infeasibility. City may hold a hearing on the claim of infeasibility and, thereafter, take such action as City deems proper to require the designation and provision of the PEG channels on the state franchise holder's system.

Section 5.41.050. Audit Authority.

Not more than once annually, the City Manager or the Manager's designee may examine and perform an audit of the business records of a holder of a state video franchise to ensure compliance with Sections 5.41.020 and 5.41.030.

Section 5.41.060. Customer Service Penalties.

(a) The holder of a state video 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 the Manager's designee shall monitor the compliance of state video franchise holders with respect to state and federal customer service and protection standards. The City Manager or the Manager's 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 up to \$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 violation of the same nature within 12 months, a fine of up to \$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 or further violation of the same nature within 12 months, a fine of up to \$2,500.00 may be imposed for each day the violation remains in effect, not to exceed \$7,500.00 for each violation.

(c) A state video franchise holder 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.

As used herein, "Material Breach" is defined as set forth in DIVCA as section 5900.

Section 5.41.070. City Response to State Video Franchise Applications.

(a) Applicants for state video 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 California Public Utilities Commission (PUC). One 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 PUC regarding an application or an amendment to an application for a state video franchise."

Section 3. Reservation of Rights.

The City of Brisbane reserves the right to enforce Chapter 5.40 of the Municipal Code to regulate Cable Television Services within the City should it be determined by State or Federal law, regulation or rule, that City may enter into a local franchise with providers of cable television or video services within the City.

Section 4. Severability.

If any section, sentence, clause or phrase of this Chapter is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Chapter. The City Council hereby declares that it would have passed this ordinance and adopted this Chapter and each section, sentence, clause or phrase thereof, even if one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

Section 5. Effective Date.

This ordinance shall take effect and be in force on the thirtieth (30th) day from and after its final passage.

W. Clarke Conway, Mayor

I hereby certify that the foregoing Ordinance No. 541 was introduced on _____,
2010, and adopted at a regular meeting of the Brisbane City Council on _____,
2010, by the following vote:

AYES: COUNCILMEMBERS:

NOES: COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:

APPROVED AS TO FORM:

ATTEST:

Harold S. Toppel, City Attorney

Sheri Marie Spediacci, City Clerk