



**CITY OF ELK GROVE  
CITY COUNCIL STAFF REPORT**

**AGENDA TITLE:** Sacramento Metropolitan Cable Television Commission Joint Powers Agreement; introduce an ordinance implementing the provisions of the Digital Infrastructure and Video Competition Act of 2006

**MEETING DATE:** June 25, 2008

**PREPARED BY:** Kara Reddig, Assistant to the City Manager

**DEPARTMENT HEAD:** Laura S. Gill, City Manager  
Susan Cochran, City Attorney

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**RECOMMENDED ACTION:**

Staff recommends that the City Council of the City of Elk Grove introduce, and waive the full reading by substitution of title only, an ordinance amending its Cable Television Franchise and License ordinances to add article 5D to Chapter 5.50 and amend section 5.50.108C to implement the Digital Infrastructure and Video Competition Act of 2006 (the "Act"); to delegate to the Sacramento Metropolitan Cable Commission authority to administer and enforce the Act; to provide for Public, Educational, and Governmental (PEG) Channels, PEG Channel Facilities Fees, and Franchise and License Fees applicable to local and state franchises and to establish penalties for violation of the Act, including but not limited to customer service requirements.

**BACKGROUND INFORMATION:**

The Joint Powers Agreement (the "JPA") that created the Sacramento Metropolitan Cable Television Commission (the "Commission") is included in the Cable Television Ordinance of the City of Elk Grove Municipal Code.

Adoption of the attached ordinance will implement provisions of the Act including delegation of administration and enforcement, franchise fees, PEG Channel requirements, PEG Channel Facilities Fees, and customer service.

In previous meetings, the Commission proposed amendments to the JPA, approved the resolution in Attachment 2 and directed staff and legal counsel to contact the member agencies and request they consider and adopt the proposed amendments.

The Digital Infrastructure and Video Competition Act of 2006 (AB 2987 (Nunez) (DIVCA) passed and became effective on January 1, 2007. The Act provides for state video franchises and sets the rules for these franchises. In March 2007, the California Public Utilities Commission ("CPUC") adopted implementation regulations and began issuing state video franchises. The CPUC has issued a state franchise to AT&T for an area that covers the County of Sacramento and cities in Sacramento.

Under the Act, while the CPUC is now the franchise authority for the state, local agencies retain various rights. Attachment 1 is a proposed ordinance that would implement the Act by delegating administration and enforcement of the Act to the Commission, confirming the franchise fees and PEG requirements applicable to state franchises and adopting the penalties in the Act for material breaches of the state franchise. Prior to the ordinance becoming effective, it is necessary for each member agency, including the County, to adopt the same the ordinance.

The following summarizes the provisions of the ordinance:

### **1. Delegation of Administration and Enforcement of the Act**

The Act provides that cities, counties and joint powers agencies shall implement, administer and enforce the provisions of the Act that are delegated to local agencies. Consistent with past practice for local franchises and licenses, the ordinance delegates to the Commission the authority to administer and enforce the Act for state franchises. The County and cities could, if they choose, take action in the future to either revoke this authority or exercise this authority concurrently with the Commission.

## **2. Franchise Fees for State Franchises**

The ordinance confirms that the current franchise fee is five percent (5%) of gross revenues. For state franchises, the franchisee will pay 5% of gross revenues based on the definition of "gross revenues" in the Act.

## **3. PEG Channels**

Consistent with the Act, the ordinance confirms that state franchise holders will be required to provide the same seven PEG channels that the incumbent operators provide. The ordinance also requires that the PEG channels shall be carried on the basic service tier and, to the extent feasible, with a quality and channel location substantially equal to that provided by the incumbent providers.

## **4. PEG Channel Facilities Fee**

The ordinance delegates to the Commission the ability to impose a PEG facilities fee of up to three percent (3%). The Act provides that local agencies may charge a PEG facilities fee of one percent (1%), but if the local agency was imposing a higher fee before January 1, 2007, the state franchisee can be required to pay a higher PEG fee not to exceed 3%. To preserve the authority of a fee up to 3%, the Commission imposed, but delayed collection of, such a fee of up to 3%.

Charging such a fee is a significant policy issue for the Commission and its member agencies. On one hand, the fee will help balance the inequity of PEG support since the incumbent operators participate through in kind and I-Net support, which the Act does not allow to be required from state franchises. On the other hand, the Commission has always supported competition and low rates, and the collection of the fee would likely be passed through to subscribers.

The ordinance delegates the imposition of this fee to the Commission. If approved, the Commission may then impose a fee of 1%, a fee of up to 3%, or no fee at all. The imposition of this fee and any resulting

controversy and potential legal challenge would be the responsibility of the Commission, not the County and cities.

## **5. Customer Service and Penalties**

As with local franchises and licenses, the ordinance delegates the enforcement of customer service to the Commission. The ordinance also adopts the maximum penalties set forth in the Act for breach of the Act, including customer service requirements.

The Commission deliberated on the ordinance at several meetings. The Commission also solicited comments from local and state franchisees and licensees, member agency staff and counsels, PEG providers, and other interested parties. Most of the comments received related to the PEG fee, both supporting and opposing the fee. In the end, the Commission unanimously approved and recommended the ordinance amendment to its member jurisdictions.

### **FISCAL IMPACT:**

The ordinance confirms that state franchises, as with local franchises and licenses, are required to pay a 5% franchise fee. The actual revenue to be received from state franchises is unknown, but is likely to be a small amount initially, and will increase as operators with state franchises gain more customers. If the Commission should ever go forward with the PEG Fee, it would be shown as a separate line item on customers' bills. For example, the 3% PEG Fee on a \$55 bill would be a separate line item of \$1.65, or \$19.80 per year. In theory, the PEG fee could offset some of the franchise or license fees currently being allocated by the Commission for PEG support.

### **ATTACHMENTS:**

1. Ordinance
2. Sacramento Metropolitan Cable Television Commission Resolution No. 07-011
3. Letter from Harriet A. Steiner, Legal Counsel to the Sacramento Metropolitan Cable Television Commission

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ELK GROVE  
AMENDING ITS CABLE TELEVISION FRANCHISE AND LICENSE ORDINANCES  
TO ADD ARTICLE 5D TO CHAPTER 5.50 AND AMEND SECTION 5.50.108C TO THE  
ELK GROVE MUNICIPAL CODE TO IMPLEMENT THE DIGITAL INFRASTRUCTURE  
AND VIDEO COMPETITION ACT OF 2006 (THE "ACT") AND DELEGATE TO THE  
SACRAMENTO METROPOLITAN CABLE COMMISSION AUTHORITY TO  
ADMINISTER AND ENFORCE THE ACT**

The City Council of the City of Elk Grove does ordain as follows:

Section 1: Purpose and Authority

The purpose and authority of this ordinance is to amend the Cable Television Franchise and License ordinances to add article 5D to Chapter 5.50 and amend section 5.50.108C to implement the Digital Infrastructure and Video Competition Act of 2006 (the "Act") and delegate to the Sacramento Metropolitan Cable Commission authority to administer and enforce the Act to provide for Public, Educational, and Governmental (PEG) Channels, PEG Channel Facilities Fees, and Franchise and License Fees applicable to local and state franchises and to establish penalties for violation of the Act, including but not limited to customer service requirements.

In support of this ordinance, the Council finds and declares as follows:

WHEREAS, the City of Elk Grove is a member of the Sacramento Metropolitan Cable Television Commission, a joint powers agency ("SMCTC"); and

WHEREAS, SMCTC has entered into franchises and licenses for the provision of cable television services for areas that include the County and the cities of Citrus Heights, Folsom, Galt, Rancho Cordova, Sacramento and Elk Grove; and

WHEREAS, such franchises and licenses are currently held by Comcast, SureWest Televideo and STI; and

WHEREAS, the California State Legislature passed and the Governor signed the Digital Infrastructure and Video Competition Act of 2006 (AB 2987, the "Act"), effective January 1, 2007, which provides for state video franchises; and

WHEREAS, AT&T has applied for and obtained a state video franchise which includes the Sacramento area and SMCTC and the City/County anticipate that others will also apply for state franchises to provide video programming services with the County and the cities that are members of SMCTC; and

WHEREAS, the County and the cities have previously delegated to SMCTC the authority to administer and enforce cable and video franchises and licenses within the County and the cities and the Video Customer Service Act.

NOW THEREFORE, it is the intent of the City Council of the City of Elk Grove, in enacting this ordinance to maintain a positive relationship with the Sacramento Metropolitan Cable Television Commission and continue as a member agency.

Section 2: Additions

SECTION 2. Article 5d, Sections 5.50.975 through 5.50.979, is hereby added to Chapter 5.50, Title 5, of the Elk Grove Municipal Code to read as follows:

**Article 5-d**  
**Local Administration and Enforcement of Provisions of the**  
**Digital Infrastructure and Video Competition Act of 2006**

**5.50.975 Delegation of Powers.**

Except as otherwise expressly provided in any action of the Elk Grove City Council pursuant to its reserved powers under section 5.50.042 of Chapter 5.50, all powers, rights, duties and obligations of the City pursuant to the provisions of the Digital Infrastructure and Video Competition Act of 2006 (the "Act"; Public Utilities Code section 5800 et seq.) as it exists now or should hereafter be amended, is hereby delegated to and conferred upon the Board of Directors of the Sacramento Metropolitan Cable Television Commission as to any video provider included within the scope of the Act, including, without limitation, the Act's provisions for customer service regulation and enforcement, establishment of the percent of franchise fees, provision of PEG channels, carriage and channel facilities fees and enforcement of the Act.

**5.50.977 Implementation Actions.**

Consistent with the delegation of powers provided in Section 5.50.975 and without limiting this delegation of powers, the following implementation actions provided for under the Act are hereby confirmed, ratified and delegated to the SMCTC:

A. Franchise Fee. As provided in the current cable franchise and license ordinances and established by SMCTC, the franchise or license fee established within the area covered by SMCTC, including the County, for cable franchises and/or licenses is five percent (5%) of gross revenues. Said franchise or license fee amount shall also apply to holders of state franchises under the Act who provide services within the county/city.

B. PEG Channels.

1. The current cable franchise designates seven channels for Public, Educational and Government PEG programming. Local franchisees and holders of state franchises under the Act shall provide seven PEG channels.

2. All state franchisees shall comply with the provisions of the Act related to PEG channels. Without limiting the foregoing, the PEG channels shall all be carried on the basic service tier. To the extent feasible, the PEG channels shall not be separated numerically from other channels carried on the basic service tier and the channel numbers for the PEG channels shall be the same channel numbers used by the incumbent cable operator unless prohibited by federal law. After the initial designation of PEG channel numbers, the channel numbers shall not be changed without the agreement of the local entity unless the change is required by federal law. The PEG

access capacity provided shall be of similar quality and functionality to that offered by commercial channels on the lowest cost tier of service unless the signal is provided to the holder at a lower quality or with less functionality.

3. A state franchise holder shall have three months from the date SMCTC 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 take adequate interconnection available, as required by the Act. Any state franchise holder who believes that the designation or provision of PEG channel capacity is technically infeasible, shall provide to SMCTC, in writing, its reasons therefor and its plan for correcting or solving the infeasibility. SMCTC may hold a hearing on the claim of infeasibility and, thereafter, take such action as SMCTC deems proper to require the designation and provision of the PEG channels on the state franchise holder's system.

C. PEG Channel Facilities Fee.

1. In December 2006, pursuant to its delegated authority, the SMCTC imposed a PEG Channel Facilities Fee ("PEG Fee") in the amount of three percent (3%) of gross revenues of the franchisee or licensee per subscriber but delayed collection of that fee. Pursuant to its delegation of authority, SMCTC is hereby authorized to commence collection of a PEG Fee, a separate fee to support PEG channel facilities and equipment, of up to three percent (3%) of gross revenues applicable to state and local franchisees and licensees, in the manner and at the time SMCTC determines. This fee shall apply to all video franchisees, whether local or state granted, within the County. Use of the PEG Fees shall be consistent with applicable state and federal law. Any PEG Fee required to be collected may be shown as a separate line item on the regular bill of each subscriber.

2. Any franchisee or licensee that believes that it is exempt from said PEG Fee or subject to a different or lower fee may file a written request for a determination of the applicability of the PEG Fee with the SMCTC. Said request shall be filed within thirty days of the effective date of this ordinance or within thirty days of commencement of video services within the City, whichever occurs last. Said request shall be heard by the SMCTC.

a. Exemptions claims may be based on state or federal law, or on the provisions of existing franchise agreements.

b. Additional exemptions for claims for and action on claims for reduction in the PEG Fee to be paid to the SMCTC may be based on monetary or in kind PEG financial support provided by the claimant based, for example, on agreements between SMCTC and the franchisee or licensee for support of PEG facilities and equipment and/or institutional network facilities and support provided by the franchisee or licensee.

**5.50.979 Customer Service and Protection; Monetary Penalties.**

A. Local franchisees and licensees and holders of state franchises under the Act shall comply with the provisions of section 637.5 of the Penal Code and the privacy standards contained in Section 631 of the federal Cable Act. (47 U.S.C. section 551 et seq.) Local franchisees and licensees and the holders of state franchises shall comply with the provisions of Sections 53055, 53055.1, 53055.2, and 53088.2 of the

Government Code, and any other customer service standards pertaining to the provision of video service established by federal law or regulation or adopted by subsequent enactment of the Act. Local franchisees and licensees shall comply with any customer services standards included in the franchise and license agreements. SMCTC, and/or the County, shall enforce, in the manner set forth in the Act, all customer service and protection standards contained in section 5900 of the Act, including without limitation those standards set forth in section 5900(c). SMCTC has been and hereby is authorized to impose penalties for any material breach of the Act, as set forth herein.

B. The maximum monetary penalties set forth in Public Utilities Code section 5900 are hereby adopted and enacted as the applicable schedule of penalties for the material breach of the Act, including but not limited to section 5900 of the Act, by a holder of a state franchise, as follows:

1. Five hundred dollars (\$500) per day for each material breach, not to exceed one thousand five hundred dollars (\$1,500) for occurrence of a material breach.

2. If a material breach has occurred and notice has provided and a fine or penalty has been assessed, for any subsequent breach of the same nature within twelve (12) months, shall be subject to a penalty of up to one thousand dollars (\$1,000) for each day of each material breach, not to exceed three thousand dollars (\$3,000) for each occurrence of the material breach.

3. If a third or further material breach of the same nature occurs within those same twelve (12) months, and notice has provided and a fine or penalty has been assessed; the penalties shall be increased to a maximum of two thousand five hundred dollars (\$2,500) for each occurrence of the material breach, not to exceed seven thousand five hundred dollars (\$7,500) for each occurrence of the material breach. As used herein, "Material Breach" is defined as set forth in the Act, Public Utilities Code Section 5900.

### Section 3: Amendments

SECTION 3. Section 5.50.108 of Chapter 5.50, Title 5, of the Elk Grove Municipal Code is hereby amended to read as follows:

The purposes of the Cable Television Commission shall be as follows:

a. To administer pursuant to the terms and conditions of the Franchise Documents, the Initial CATV Franchise and any franchise subsequently issued pursuant to the provisions of this Chapter;

b. To exercise any and all other powers conferred by the Franchise Documents;

c. To administer and enforce the Digital Infrastructure and Video Competition Act of 2006.

Section 4: No Mandatory Duty of Care.

This ordinance is not intended to and shall not be construed or given effect in a manner that imposes upon the City or any officer or employee thereof a mandatory duty of care towards persons and property within or without the City, so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

Section 5: Severability.

If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable. This City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof and intends that the invalid portions should be severed and the balance of the ordinance be enforced.

Section 6: Effective Date and Publication

This Ordinance shall take effect thirty (30) days after its adoption. In lieu of publication of the full text of the ordinance within 15 days after its passage, a summary of the ordinance may be published at least five days prior to and fifteen (15) days after adoption by the City Council and a certified copy shall be posted in the office of the City Clerk, pursuant to GC 36933(c)(1).

INTRODUCED: June 25, 2008  
ADOPTED:  
EFFECTIVE:

\_\_\_\_\_  
GARY DAVIS, MAYOR of the  
CITY OF ELK GROVE

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
SUSAN J. BLACKSTON, CITY CLERK

\_\_\_\_\_  
SUSAN COCHRAN, CITY ATTORNEY

Date signed: \_\_\_\_\_

SACRAMENTO METROPOLITAN CABLE TELEVISION COMMISSION

A RESOLUTION RECOMMENDING AMENDMENTS TO THE CABLE TELEVISION FRANCHISE AND LICENSE ORDINANCES TO IMPLEMENT THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006 TO DELEGATE TO THE SACRAMENTO METROPOLITAN CABLE COMMISSION AUTHORITY TO ADMINISTER AND ENFORCE THE ACT; TO PROVIDE FOR PEG CHANNELS, PEG CHANNEL FACILITIES FEES, AND FRANCHISE AND LICENSE FEES APPLICABLE TO LOCAL AND STATE FRANCHISES AND TO ESTABLISH PENALTIES FOR VIOLATION OF THE ACT, INCLUDING BUT NOT LIMITED TO CUSTOMER SERVICE REQUIREMENTS.

RESOLUTION NO. 07-011

WHEREAS, the California State Legislature passed and the Governor signed the Digital Infrastructure and Video Competition Act of 2006 (AB 2987, DIVCA, the "Act"), effective January 1, 2007, which provides for state video franchises; and

WHEREAS, at its meetings of June 7, 2007 and October 4, 2007, the Commission considered public testimony on the proposed Ordinance language intended to implement the DIVCA Act provisions; and

WHEREAS, the proposed Ordinance changes delegates jurisdiction to the Commission to implement and enforce without limitation the Act's provisions for customer service regulation and enforcement, establishment of the percent of franchise fees, provision of PEG channels, carriage and channel facilities fees and enforcement of the Act; and

WHEREAS, the Sacramento Metropolitan Cable Television Commission recommends the Ordinance additions and changes, for the reasons outlined in the Commission Counsel staff report dated November 28, 2007, and attached hereto as Exhibit A; and

NOW THEREFORE BE IT RESOLVED AND ORDERED BY THE BOARD OF DIRECTORS OF THE SACRAMENTO METROPOLITAN CABLE TELEVISION COMMISSION that the Commission hereby recommends to each of its member agencies that they adopt the amendments to the Ordinances set forth in Exhibit B, attached hereto, to delegate jurisdiction to the Commission to implement and enforce the Act's provisions.

FURTHER BE IT RESOLVED that Commission staff and counsel are directed to circulate the Ordinance language as attached as Exhibit B for adoption by each member agency and are hereby directed to do and perform everything necessary to carry out the purpose of this resolution.

On a motion by Director Andy Morin, seconded by Director Kevin McCarty, the foregoing Resolution was passed and adopted by the Sacramento Metropolitan Cable Television Commission this 6<sup>th</sup> day of December 2007 by the following vote to wit:

AYES: UNANIMOUS VOICE VOTE
Directors Waters, Morin, McCarty, Yee, Wolter (Alternate for MacGlashan), Williams (Alternate for Peters), Leary, Sheedy

NOES: None

ABSENT: Directors Dickinson, Nottoli, Peters, Miller, MacGlashan

ATTEST: [Signature]
Secretary, Sacramento Metropolitan Cable Television Commission

[Signature]
Chairperson, Sacramento Metropolitan Cable Television Commission

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May 13, 2008

**VIA E-MAIL**

City Attorneys  
Sacramento Metropolitan  
Cable Member Cities

Re: DIVCA Implementing Ordinance: Cable Commission Request

Dear City Attorneys:

As you know, I am Legal Counsel to the Sacramento Metropolitan Cable Television Commission (SMCTC). In addition, as I am sure you recall, the Digital Infrastructure Video Competition Act of 2006 (DIVCA), then called AB 2987, is the 2006 legislation that authorized State franchises for video providers. As a result of the DIVCA, the Sacramento County Region now has cable providers with local franchises (Comcast and SureWest) and one new State franchise (AT&T).

Over the last year or so, the Sacramento Metropolitan Cable Television Commission has continued to work through numerous issues related to State cable franchises under the DIVCA, as well as issues related to AT&T's roll out of its cable service under its State franchise, including PEG interconnect, PEG fees, customer service regulations, and other issues.

To that end, the Commission adopted and recommends to the JPA member agencies a modification of the local cable ordinances to implement the requirements of the DIVCA and ensure that the Commission has clear authority to enforce State franchise requirements on your City's behalf. As with all of the cable regulations currently in place, this authority is concurrent with the JPA member agencies' authority over cable.

Attached is a copy of the proposed ordinance, the Commission's Resolution No. 07-011 and the staff report that was approved by the County of Sacramento's Board of Supervisors. The Ordinance would implement the DIVCA by delegating administration and enforcement of the DIVCA to the Commission, confirming the franchise fees and PEG requirements applicable to State franchises and adopting the

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penalties in the Act for material breaches of the State franchise. The PEG requirements in the Ordinance include delegation of the imposition of a PEG Channel Facilities Fee to the Commission. If approved, the Commission may then impose a fee of 1%, a fee of up to 3%, or no fee at all. The imposition of this fee and any resulting controversy and potential legal challenge would be the responsibility of the Commission, not the County and cities.

The County of Sacramento approved the proposed changes on April 1, 2008 under Consent Item 2 as Sacramento County Code (SCC) No. 1383.

(<http://www.agendanet.saccounty.net/sirepub/cache/2/dlrntomutwowibrv22tso255/289947805092008102154642.PDF>)

We are requesting that all of the JPA member agencies follow suit and adopt identical ordinances, as the member agencies have done for past ordinance amendments. The following outlines the main arguments for recommending approval of the Ordinance:

- The DIVCA requires adoption of local implementation ordinances.
- The SMCTC JPA structure has a unique and positive track record since 1983.
- There is no reasonable reason to not continue the current cable TV oversight protocol provided by the SMCTC in light of the DIVCA
- Continuing the Commission's role with state franchises (as with local franchises) will provide consistent processes for constituents for their cable/video customer service issues regardless of what cable operator or what franchise (local or state) applies or what city within Sacramento County.
- The community (PEG) programmers, who will likely have the most benefit from this Ordinance, are all in support.

The SMCTC Board of Directors, including representatives from the JPA member agencies, deliberated this Ordinance at length over several public hearings; and their recommendation was unanimous.

We are asking that you place the enclosed Ordinance on the agenda for adoption by your Council at its next available regularly scheduled meeting. We would be

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happy to provide Commission staff reports related to this item or any other materials that would assist you in supporting and presenting this matter to your Council for adoption. In addition, Bob Davison, the Commission's Executive Director, or I can be available, if necessary, to attend the meeting. Feel free to contact me at 444-3900 or Bob at 874-6926 if we can provide you with any additional background information to address any concerns you may have.

Thank you for your consideration of this item.

Very truly yours,

Harriet A. Steiner  
Legal Counsel

HAS:cp

cc: City Managers  
Bob Davison, SMCTC Executive Director  
SMCTC Board of Directors

Enclosures/Attachments:

1. Proposed Ordinance
2. SMCTC Resolution 07-011
3. Sacramento County Board of Supervisors' Staff Report