

ORDINANCE NO. 4180

AN ORDINANCE OF THE CITY OF HUNTINGTON BEACH REPEALING ORDINANCE NO. 4130 AND ADDING CHAPTER 3.50 TO THE HUNTINGTON BEACH MUNICIPAL CODE RELATING TO STATE VIDEO FRANCHISES

WHEREAS, since 1990, the City has been a member of the Public Cable Television Authority, a joint powers authority (the "PCTA"); and

Prior to 2007, the PCTA granted cable television franchises covering its jurisdiction, which included the Cities of Huntington Beach, Fountain Valley, Stanton and Westminster; and

The California Legislature enacted the Digital Infrastructure and Video Competition Act of 2006 set forth in Public Utilities Code Section 5800 et seq. ("DIVCA"), which authorized, in lieu of local cable television franchises, the California Public Utilities Commission to grant State video franchises for ten year terms, subject to renewal. Public Utilities Code Sections 5840(q) and 5860 provide that each franchisee of a state franchise shall remit to each local jurisdiction a franchise fee in the amount of five percent (5%) of gross revenues derived from the operation of the franchisee's network to provide cable or video service within the jurisdiction of the local entity; and

Pursuant to Public Utilities Code Section 5870 (n), DIVCA also authorized the City, to enact an ordinance requiring the state franchisees to continue to pay a PEG fee in the amount of one percent (1%) of gross revenues to support PEG channels consistent with Federal law. Any such ordinance must be renewed every ten years; and

Further, Public Utilities Code Section 5870(a) required that each new state franchisee shall designate the same number of public, educational, and governmental access ("PEG") channels for local programming as were provided under the franchisee's previous local franchise; and

Subsequently, Spectrum Pacific West, LLC, and Frontier California, Inc. (formerly, Verizon California), which both had previously operated under PCTA franchises, opted to obtain State Video Franchises. Both companies continued to provide the City a PEG channel as they had provided the City prior to DIVCA; and

Public Utilities Code Section 5870(n) provides that PEG fees must be reauthorized upon the expiration of an applicable State Franchise. Some State video franchises within the PCTA's jurisdiction expired and were renewed in 2017. Accordingly, the City enacted Ordinance No. 4130 that renewed the City's PEG fee. Further, Ordinance No. 4130 provided that the video franchise fee and PEG Fee were to be remitted to the PCTA on a quarterly basis; and

On January 22, 2019, the City Council directed that, and the City Manager did give notice to the PCTA that the City was terminating its membership in the PCTA, effective July 22, 2019, and

In connection with terminating its membership in the PCTA effective July 22, 2019, the City will concurrently repeal Ordinance No. 4130 and adopt in its place Chapter 3.50 to the Municipal Code relating to State video franchises; and

Effective July 22, 2019, all State franchisees operating within the City shall remit all franchise fees and PEG fees to the City and not the PCTA.

NOW, THEREFORE, the City Council of the City of Huntington Beach does hereby ordain as follows:

SECTION 1. Ordinance No. 4130 is repealed.

SECTION 2. Chapter 3.50 is added to the Municipal Code:

“3.50.010 Purpose and application.”

The State of California, through the Public Utilities Commission, is the sole authority with power to grant state video franchises pursuant to the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”), effective January 1, 2007, and codified at Public Utilities Code §5800 *et seq.* at the time of enactment of this Chapter. The purposes of this Chapter are to implement DIVCA in the City of Huntington Beach and to regulate video service providers, consistent with DIVCA and General Order 169, as amended, which the California Public Utilities Commission adopted to implement DIVCA. This Chapter shall be applied to and interpreted consistently with any amendments to DIVCA.

3.50.020 Definitions

A. Whenever a term or phrase is not defined in this Section, or elsewhere in this Code, the most common dictionary definition is presumed to be correct.

B. “Access” means that the State Video Franchise Franchisee is capable of providing video service at the household address using any technology, other than direct-to-home satellite service, providing two-way broadband Internet capability and video programming, content, and functionality, regardless of whether any customer has ordered service or whether the owner or landlord or other responsible person has granted access to the household. If more than one technology is utilized, the technologies shall provide similar two-way broad band Internet accessibility and similar video programming.

C. “CPUC” means the California Public Utilities Commission.

D. “DIVCA” means the Digital Infrastructure and Video Competition Act of 2006 (Ch. 700, Stats. 2006), as amended.

E. “PEG channels” means public, educational, and governmental access channels.

F. “State Video Franchisee” or “Franchisee” means any entity providing Video Service pursuant to a franchise issued by the CPUC pursuant to DIVCA.

G. “Video Service” means video programming services, cable service, or open-video system service provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology. This definition does not include (1) any video programming provided by a commercial mobile service provider defined in Section 322(d) of Title 47 of the United States Code, or (2) video programming

provided as part of, and via, a service that enables users to access content, information, electronic mail, or other services offered over the public Internet.

3.50.030 State Video Franchise Fees.

Pursuant to Public Utilities Code §5840(a), any State Video Franchisee operating within the boundaries of the City shall pay a fee to the City equal to five percent of the State Video Franchisee's gross revenues as defined in Public Utilities Code Section 5860(d). The Franchise Fee shall be remitted to the City quarterly, within forty-five days after the end of the calendar quarter. Each payment shall be accompanied by a summary explaining the basis for the calculation of the State Franchise Fee. If the Franchisee does not pay the Franchise Fee when due, the Franchisee shall pay a late payment charge at a rate per year equal to the highest prime lending rate during the period of delinquency, plus one percent. If the Franchisee has overpaid the Franchise Fee, it may deduct the overpayment from its next quarterly payment.

3.50.040 PEG Support Fee.

A. Any State Video Franchisee operating within the boundaries of the City shall pay a PEG Support Fee to the City for capital support of public, educational, and/or governmental ("PEG") purposes equal to one percent of gross revenues, as defined by §5870(n) of the California Public Utilities Code.

B. Effective as of April 19, 2017, the City reauthorized the PEG Support Fee on State Video Franchisees to support PEG channel facilities pursuant to Ordinance No. 4130 and all other provisions therein. The adoption of this Section 3.50.040 is intended to extend the PEG Support Fee for the remainder of the ten-year term of Ordinance No. 4130.

C. Commencing from, and after the effective date of this Chapter, the City's PEG Support Fee shall continue to apply to any new or existing State Video Franchisee operating in the City, and shall automatically be reauthorized within the meaning of Public Utilities Code Section 5870(n) upon expiration and renewal of any existing or future State Video Franchisee operating in the City. Such automatic renewals of the PEG Support Fee shall continue until such time that the City Council takes formal affirmative action to cease the renewals.

3.50.050 PEG channels.

A. The City's current franchises with Frontier Communications and Spectrum provide for three public, educational and governmental channels for PEG programming.

B. All State Video 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 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 as defined in Public Utilities Code §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 of the City unless Federal law requires the change.

C. A State Video Franchisee shall have three months from the date the 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 Video Franchisee which believes that the designation or provision of PEG channel capacity is technically infeasible shall provide to City, in writing, its reasons therefor and its plan for correcting or solving the infeasibility. The City may hold a hearing on the claim of infeasibility and, thereafter, take such action as the City deems proper to require the designation and provision of the PEG channels on the State Video Franchisee's system.

3.50.060 Audit authority.

Not more than once annually, the City Manager or designee may examine and perform an audit of the business records of each State Video Franchisee operating within the boundaries of the City to ensure compliance with of the California Public Utilities Code Section 5860.

3.50.070 Customer service penalties.

A. Each State Video Franchisee shall comply with all applicable California and Federal customer service and protection standards pertaining to the provision of video service, including those specified at Sections 53055, 53055.1, 53055.2, and 53088.2 of the California Government Code.

B. The City Manager or designee shall monitor the compliance of each State Video Franchisee operating within the boundaries of the City with respect to California and Federal customer service and protection standards. The City Manager or designee will provide the State Video Franchisee written notice of any material breaches of applicable customer service standards, and will allow the State Video Franchisee thirty days from the receipt of the notice to remedy the specified material breach. The City may impose the following penalties for any material breaches not remedied within the thirty-day time period:

1. For the first occurrence of a violation, a fine of up to five hundred dollars (\$500.00) may be imposed for each day the violation remains in effect, not to exceed one thousand five hundred dollars (\$1,500.00) for each violation.
2. For a second violation of the same nature within twelve months, a fine of up to one thousand dollars (\$1,000.00) may be imposed for each day the violation remains in effect, not to exceed three thousand dollars (\$3,000.00) for each violation.
3. For a third or further violation of the same nature within twelve months, a fine of up to two thousand five hundred dollars (\$2,500.00) may be imposed for each day the violation remains in effect, not to exceed seven thousand five hundred dollars (\$7,500.00) for each violation.

C. A State Video Franchisee may appeal a penalty assessed by the City Manager to the City Council within sixty 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 Public Utilities Code Section 5900.

3.50.080 Public rights-of-way.

For the purpose of operating and maintaining a video system in the City, a State Video Franchisee may erect, install, construct, repair, replace, reconstruct, and retain in, on, over, under, upon, across and along the public rights-of-way and public cables, conductors, ducts, conduits, vaults, manholes, amplifiers, property and equipment as are necessary and appurtenant to the operations of the cable system. The State Video Franchisee shall comply with all applicable provisions of the Huntington Beach Municipal Code.

The City maintains the right to perform any public work or public improvement of any description, including, without limitation, all work authorized by applicable law. In the event that the State Video Franchisee's system interferes with the construction, operation, maintenance or repair of any such public work or improvement, the State Video Franchisee, after reasonable notice from the City, shall, at its own cost and expense, promptly protect, alter or relocate the system, or any part thereof, as directed by the City.

In the event that the State Video Franchisee refuses or neglects to so protect, alter or relocate all or any part of its system, the City shall have the right in connection with the performance of such public work or public improvement to break through, remove, alter or relocate all or any part of the system without any liability to the State Video Franchisee except for the City's willful misconduct and the State Video Franchisee shall promptly pay to the City its costs incurred by such breaking through, removal, alteration or relocation.

3.50.090 Police powers.

The rights of a State Video Franchisee operating within the boundaries of the City are subject to the police power of the City to adopt and enforce general ordinances necessary to the health, safety and welfare of the public, and each state video franchise Franchisee shall comply with all applicable general laws and ordinances enacted by the City pursuant to such power.

3.50.100 Preemption – Reservation of rights.

If any area of regulatory authority is or was preempted from local regulation by Federal or State law, and such preemption later ceases, the City reserves the right to resume local regulation to the extent permitted, including the right to enact an ordinance or to enforce this Chapter of the Municipal Code to regulate video services within the City, should it be determined by State or Federal law, regulation or rule that the City may enter into a local franchise with providers of video services within the City."

SECTION 3. This Ordinance shall become effective July 22, 2019.

PASSED AND ADOPTED by the City Council of the City of Huntington Beach at a regular meeting thereof held on the _____ day of _____, 2019.

Mayor

ATTEST:

APPROVED AS TO FORM:

City Clerk



City Attorney

SFF
MV

REVIEWED AND APPROVED:

INITIATED AND APPROVED:

City Manager



Assistant City Manager