

ORDINANCE NO. 2008-240

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF WINDSOR
ADDING CHAPTER 4 TO TITLE XV OF THE WINDSOR MUNICIPAL
CODE, RELATING TO REGULATIONS FOR THE PROVISION OF
VIDEO SERVICE BY STATE FRANCHISE HOLDERS**

THE COUNCIL OF THE TOWN OF WINDSOR ORDAINS AS FOLLOWS:

SECTION 1. The Council finds as follows:

1. Local entities within the state of California have traditionally had the authority to regulate, in accordance with federal, state, and local law, certain aspects of the provision of video services, including the authority to award franchises, within the boundaries of those local entities.
2. The state Legislature adopted the Digital Infrastructure and Video Competition Act of 2006, California Public Utilities Code sections 5800 *et seq.* (“DIVCA”), which became effective January 1, 2007.
3. DIVCA substantially changed California law by establishing a statewide franchising procedure for video service providers to be administered by the California Public Utilities Commission (“CPUC”).
4. DIVCA establishes that the CPUC is the sole authority to award statewide franchises for the provision of video services, which preempts local franchising authority.
5. DIVCA establishes limited authority of local entities over state franchise holders.
6. The Town of Windsor desires to exercise that authority and to facilitate the implementation of DIVCA by setting forth regulations for the provision of video service by state franchise holders within the Town of Windsor, in accordance with the requirements set forth in DIVCA.

SECTION 2. Chapter 4 is hereby added to Title XV of the Windsor Municipal Code to read as follows:

Chapter 4

VIDEO SERVICE PROVIDED BY STATE FRANCHISE HOLDERS

Sections:

15-4-100	Purpose and Applicability.
15-4-105	Definitions.
15-4-110	Franchise Fee for State Franchise Holders.
15-4-115	Public, Educational, and Government Channels.
15-4-120	Payment of Fees.
15-4-125	Customer Service Penalties for State Franchise Holders.
15-4-130	Appeal Process for Customer Service Penalties.
15-4-135	Encroachment Permit.
15-4-140	Authority to Examine and Audit Business Records.
15-4-145	Environmental Review.
15-4-150	Emergency Alert System.
15-4-155	Non-Discriminatory Video Service.
15-4-160	Town Response to State Video Franchise Applications

15-4-100 **Purpose and Applicability.**

The purpose of this chapter is to set forth regulations for the provision of video service by state franchise holders, in accordance with the Digital Infrastructure and Video Competition Act, California Public Utilities Code sections 5800 *et seq* ("DIVCA"). This chapter shall apply only to video service providers issued a state franchise to serve any area within the City by the California Public Utilities Commission ("CPUC") pursuant to DIVCA.

15-4-105 **Definitions.**

For the purposes of this chapter, the words set out in this section shall have the following meanings:

- A. "Cable service" shall have the meaning given that term by the California Public Utilities Code section 5830(c).
- B. "Town" shall mean the Town of Windsor.
- C. "Town Council" shall mean the City Council of the City.
- D. "Encroachment" includes going upon, over or under a public right-of-way or easement or an area adjacent to a public right-of-way, or easement or using a public right-of-way or easement or an area adjacent to a public right-of-way or easement in such a manner as to prevent, obstruct or interfere with the intended use of the public right-of-way or easement or a modification or its mode or use, and shall include excavation and disturbance, installation, construction, placement, erection and maintenance of any physical

improvement (permanent or temporary) or network within, upon, over, or under the public right-of-way or easement.

- E. "Encroachment permit" shall have the meaning given that term by the California Public Utilities Code section 5885(c)(1), which shall include any permit issued by the Town pursuant to Title X Chapter 2, Articles 1 and 2 of the Windsor Municipal Code.
- F. "Franchise" shall have the meaning given that term by the California Public Utilities Code section 5830(f).
- G. "Franchise fee" shall have the meaning given that term by the California Public Utilities Code section 5830(g).
- H. "Gross revenues" shall have the meaning given that term by the California Public Utilities Code section 5860.
- I. "Holder" shall have the meaning given that term by the California Public Utilities Code section 5830(i).
- J. "Incumbent cable operator" shall have the meaning given that term by the California Public Utilities Code section 5830(j).
- K. "Lead agency" shall have the meaning given that term by the California Public Resources Code section 21067.
- L. "Local franchise" shall mean a cable television franchise, permitting the incumbent cable operator to own, operate, and maintain a cable system and provide cable services within the Town, issued by the City prior to December 31, 2006.
- M. "Material breach" shall have the meaning given that term by the California Public Utilities Code section 5900(j).
- N. "Network" shall have the meaning given that term by the California Public Utilities Code section 5830(l), which shall include any component of a facility used to provide video service, cable service, voice, or data services that is wholly or partly physically located within, upon, over or under a public right-of-way.
- O. "Public right-of-way" shall have the meaning given that term by the California Public Utilities Code section 5830(o) and, public right-of-ways which have been dedicated to the public or are hereafter dedicated to the public and maintained under public authority or by others and located within the service area: streets, roadways, highways, avenues, lanes, alleys, sidewalks, easements, rights-of-way and similar public property..
- P. "State franchise" shall have the meaning given that term by the California Public Utilities Code section 5830(p).

- Q. "Video service" shall have the meaning given that term by the California Public Utilities Code section 5830(s).

15-4-110 Franchise Fee for State Franchise Holders

Any state franchise holder shall remit to the Town a franchise fee in the amount of five percent (5%) of the gross revenues of the state franchise holder in compliance with California Public Utilities Code sections 5840(q) and 5860.

15-4-115 Public, Educational, and Government Channels.

- A. All unsatisfied obligations, existing on January 1, 2007, to remit any cash payments to the Town for the ongoing costs of public, educational, and government ("PEG") channel facilities or institutional networks contained in a local franchise, shall continue until May, 12, 2009 and shall be paid by the incumbent cable operator and any state franchise holders pursuant to California Public Utilities Code section 5870. Such cash payments shall be divided among the incumbent cable operator and all state franchise holders pursuant to California Public Utilities Code section 5870.
- B. All obligations, existing on December 31, 2006, to provide and support PEG channel facilities and institutional networks and to provide cable services to community buildings contained in a local franchise, shall continue until May, 12, 2009 pursuant to California Public Utilities Code section 5870.
- C. Commencing May 13, 2009, any state franchise holder shall remit to the Town a fee to support PEG channel facilities in the amount of one percent (1%) of the gross revenues of the state franchise holder in compliance with California Public Utilities Code section 5870. All revenue collected pursuant to this fee shall be deposited in a separate fund and shall only be expended for the purpose of supporting PEG channel facilities.
- D. Any state franchise holder shall designate a sufficient amount of capacity on its network to allow the provision of PEG channels in accordance with California Public Utilities Code section 5870. Any state franchise holder shall have three (3) months from the date the Town requests the PEG channels to designate the capacity. The three (3) month period shall be tolled by any period during which the designation or provision of PEG channel capacity is technically infeasible.
- E. This section shall be enforced, and disputes regarding this section shall be resolved, pursuant to California Public Utilities Code section 5870.

15-4-120 Payment of Fees.

- A. Any state franchise holder shall pay the franchise fee established in section 15-4-110 and the PEG channel facilities fee established in section 15-4-115.C on a quarterly basis in a manner consistent with California Public Utilities Code section 5860.

- B. Any state franchise holder shall deliver to the Town by check, or other means agreeable to the Town Manager, a separate payment for the franchise fee established in section 15-4-110 and the PEG channel facilities fee established in section 15-4-115.C not later than forty-five (45) days after the end of each calendar quarter.
- C. Each payment of the franchise fee established in section 15-4-110 delivered to the Town shall be accompanied by a summary report explaining the basis for the calculation of the payment.
- D. Any state franchise holder shall deliver to the Town by check, or other means agreeable to the Town Manager, any cash payment required by section 15-4-115.A either (1) upon ninety (90) days written notice from the Town. if such cash payment is a one time capital grant or, (2) if other than a one time capital grant on a quarterly basis upon (90) days written notice from the Town.
- E. If any state franchise holder fails to remit the franchise fee established in section 15-4-110 when due, the state franchise holder shall remit to the Town a late payment charge at the rate per year equal to the highest prime lending rate during the period of delinquency plus one percent (1%).
- F. This section shall be enforced, and disputes regarding this section shall be resolved, pursuant to California Public Utilities Code section 5870.

15-4-125 Customer Service Penalties for State Franchise Holders.

- A. Any state franchise holder shall comply with the customer service provisions set forth in California Public Utilities Code section 5900.
- B. The Town shall impose the following penalties against a state franchise holder for any material breach of the customer service provisions set forth in California Public Utilities Code section 5900:
 - 1. For the first occurrence of a material breach, a fine of five hundred dollars (\$500.00) shall be imposed for each day of each material breach, not to exceed one thousand five hundred dollars (\$1,500.00) for each occurrence of the material breach.
 - 2. For a second occurrence of a material breach of the same nature as the first material breach that occurs within twelve (12) months, a fine of one thousand dollars (\$1,000.00) shall be imposed for each day of each material breach, not to exceed three thousand dollars (\$3,000.00) for each occurrence of the material breach.
 - 3. For a third or further occurrence of a material breach of the same nature as the previous material breaches that occurs within twelve (12) months, a fine of two

thousand five hundred dollars (\$2,500.00) shall be imposed for each day of each material breach, not to exceed seven thousand five hundred dollars (\$7,500.00) for each occurrence of the material breach.

- C. The Town shall provide the state franchise holder with written notice of any alleged material breach of the customer service provisions set forth in California Public Utilities Code section 5900 and shall allow the state franchise holder at least thirty (30) days from receipt of the notice to remedy the specified material breach.
- D. A material breach for the purposes of assessing penalties shall be deemed to have occurred for each day within the jurisdiction of the Town, following the expiration of the period specified in section 15-4-125.C, that any material breach has not been remedied by the state franchise holder, irrespective of the number of customers affected. No monetary penalties shall be assessed for a material breach if it is out of the reasonable control of the state franchise holder.
- E. Pursuant to California Public Utilities Code section 5900, any penalty remitted to the Town by a state franchise holder for a material breach of the customer service provisions set forth in California Public Utilities Code section 5900 shall be split in half, and the Town shall submit one half of the penalty amount to the Digital Divide Account established by California Public Utilities Code section 280.5.

15-4-130 Appeal Process for Customer Service Penalties.

- A. Any state franchise holder may appeal any customer service penalty assessed pursuant to section 15-4-125 according to the following procedure:
- B. The state franchise holder may file a Request for Hearing form with the Town Clerk within thirty (30) days from receipt of the written notice specified in section 15-4-125.C with an advance deposit of the penalty amount.
- C. A Request for Hearing form may be obtained from the Town Clerk.
- D. The state franchise holder requesting the hearing shall be notified by the Town Clerk of the time and place set for the hearing at least ten (10) days prior to the date of the hearing.
- E. The hearing shall be set by the Town Clerk for a date that is not less than fifteen (15) days and not more than sixty (60) days from the date that the Request for Hearing form is filed with the Town Clerk.
- F. At the hearing, the Town shall bear the burden of proof by a preponderance of the evidence that the material breach occurred as charged. The Town may be represented by counsel.
- G. At the hearing, the state franchise holder may cross examine any witness against the state franchise holder and may present evidence. The state franchise holder may be represented by counsel.

- H. The formal rules of evidence shall not apply at the hearing. The hearing officer may rely upon such evidence as he or she believes reasonable persons would rely upon in the conduct of their affairs. Any witnesses shall testify under oath.
- I. After hearing and reviewing all of the testimony and evidence submitted at the hearing, the hearing officer shall issue a written decision to uphold or cancel the penalty and shall list in the decision the reasons for that decision. The decision of the hearing officer shall be final.
- J. If the hearing officer determines that the penalty should be canceled, the Town shall promptly refund the amount of the deposited penalty, together with interest at the average rate earned on the City's investment portfolio for the period of time that the penalty amount was held by the City.
- K. The hearing officer shall be the Town Manager or his or her designee.
- L. Any interested person may obtain review of the decision of the hearing officer by filing an appeal in a court of competent jurisdiction pursuant to California Public Utilities Code section 5900.

15-4-135 **Encroachment Permit.**

- A. Any state franchise holder shall apply for an encroachment permit to install, construct or maintain a network pursuant to Title X, Chapter 2, Articles 1 and 2 of the Windsor Municipal Code. In addition to the above referenced procedures of the Windsor Municipal Code, the following shall apply to any state franchise holder applying for an encroachment permit:
 - 1. Any encroachment permit application submitted by any state franchise holder shall be approved or denied within sixty (60) days of receipt by the Town of a completed application. An application for an encroachment permit is complete when the state franchise holder has complied with all statutory requirements, including CEQA, pursuant to California Public Utilities Code section 5885.
 - 2. The sixty (60) day time period for approval or denial of an encroachment permit application may be extended if mutually agreed to in a written agreement between the state franchise holder and the Town.
 - 3. Any denial of an encroachment permit application submitted to any state franchise holder by the Town shall be written and shall include a detailed explanation of the reason for the denial.
 - 4. Any state franchise holder may appeal a denial of an encroachment permit application or a condition placed on an approved encroachment permit to the Town

Manager or his/her designee by submitting a written appeal within fifteen (15) days of the date the application was denied or condition imposed. The Town Manager or his/her designee shall thereafter give written notice to the state franchise holder of a hearing to be held within thirty (30) days of receipt of the appeal. The decision of the Town Manager or his/her designee on the appeal shall be final.

- B. In the event that any part of this section conflicts in any way with Title X, Chapter 2, Articles 1 and 2 of the Windsor Municipal Code, this section shall apply.

15-4-140 Authority to Examine Business Records.

- A. The Town may examine once per year the business records of any state franchise holder relating to gross revenues in a manner consistent with California Public Utilities Code section 5860.
- B. All state franchise holders shall keep and maintain all business records reflecting any gross revenues, regardless of change in ownership, for at least four (4) years after those gross revenues are recognized by the state franchise holder on its books and records pursuant to California Public Utilities Code section 5860.
- C. If the state franchise holder has underpaid the franchise fee established by section 15-4-110 by more than five percent (5%), the state franchise holder shall pay the reasonable and actual costs of the examination. If the state franchise holder has not underpaid the franchise fee established in section 15-4-110, the City shall pay the reasonable and actual costs of the examination. If the state franchise holder, however, has underpaid the franchise fee established by section 15-4-110 by five percent (5%) or less, the state franchise holder and the City shall each bear their own costs of the examination.

15-4-145 Environmental Review.

The Town shall serve as the lead agency for any environmental review under DIVCA. The Town may impose conditions to mitigate environmental impacts of any state franchise holder's use of the public rights-of-way that may be required pursuant to the California Environmental Quality Act, California Public Resources Code sections 21000 *et seq.* ("CEQA").

15-4-150 Emergency Alert System.

All state franchise holders shall comply with the Emergency Alert System requirements of the Federal Communications Commission in order that emergency messages may be distributed over all state franchise holders' networks.

15-4-155 Non-Discriminatory Video Service.

Any state franchise holder is prohibited from discriminating against or denying access to service to any group of potential residential subscribers within the Town because of the income of the residents in the local area in which the group resides. This requirement may be satisfied

pursuant to California Public Utilities Code section 5890. The Town may bring complaints to the CPUC that a state franchise holder is not offering video services as required by California Public Utilities Code section 5890.

15-4-160 **Town Response to State Video Franchise Applications**

A. Applicants for state video franchises within the boundaries of the Town of Windsor must concurrently provide complete copies to the Town of any application or amendments to applications filed with the California Public Utilities Commission (PUC) and any other agency. One complete copy must be provided to the Town Manager.

B. Within 30 days of receipt, the Town Manager may provide any appropriate comments to the PUC or other agency regarding an application or an amendment to an application for a state video franchise.

SECTION 3. Severability. The provisions of this Ordinance are severable and if any provision, clause, sentence, word or part thereof is held illegal, invalid, unconstitutional, or inapplicable to any person or circumstances, such illegality, invalidity, unconstitutionality, or inapplicability shall not affect or impair any of the remaining provisions, clauses, sentences, sections, words or parts thereof of this Ordinance or their applicability to other persons or circumstances.

SECTION 4. Effective Date. This Ordinance shall take effect and be enforced thirty (30) days following its adoption.

SECTION 5. Publication. The Town Clerk of the Town of Windsor shall cause this Ordinance to be published or to be posted in at least three (3) public places in the Town of Windsor in accordance with California Government Code Section 36933.

PASSED AND ADOPTED this 2nd day of July 2008, by the following vote:

**AYES: COUNCILMEMBERS ALLEN, GOBLE, PARKER, SALMON AND
 MAYOR FUDGE**

NOES: NONE

ABSTAIN: NONE

ABSENT: NONE


DEBORA FUDGE, MAYOR

ATTEST:


MARIA DE LA O, TOWN CLERK