

ORDINANCE NO. 736

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF
MILLBRAE ADDING MUNICIPAL CODE CHAPTER 11.20
ESTABLISHING FRANCHISE FEES, PEG FEES, AND
CUSTOMER SERVICE PENALTIES FOR STATE VIDEO
FRANCHISE HOLDERS PROVIDING VIDEO SERVICE WITHIN
THE CITY OF MILLBRAE**

The City Council of the City of Millbrae does hereby ordain as follows:

SECTION 1. FINDINGS

1. The Digital Infrastructure and Video Competition Act of 2006 (Pub. Util. Code § 5800 *et seq.*, "DIVCA") went into effect on January 1, 2007;
2. DIVCA provides that the California Public Utilities Commission is the "sole franchising authority" for new video service providers operating in any city in the State;
3. On March 5, 2007, the Public Utilities Commission issued its Final Decision on the Commission's rulemaking to implement DIVCA;
4. 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;
5. DIVCA requires that local entities, although not franchising authorities, are nonetheless responsible for the administration and implementation of certain provisions of DIVCA;
6. The City of Millbrae ("City") has entered into a franchise with Comcast of California IX, Inc. (Comcast) for the provision of cable television services, which franchise expires on January 14, 2021;
7. The City currently receives \$0.55 per subscriber per month for Public, Education, and Governmental (PEG) access facilities support, which is less than one percent (1%) of the gross revenues Comcast receives per subscriber, and under DIVCA, the PEG support fee in the City can be up to 1% of gross revenues as calculated under DIVCA;
8. The City will receive a franchise fee of five percent (5%) of gross revenues from each State video franchise holder which operates within the City for use of the public rights-of-way unless the City opts to waive collection of the fee;
9. The City does not desire to waive the collection of the five percent (5%) franchise fee;
10. The City may authorize the audit of the business records of a State video franchise holder once a year to ensure compliance with the payment of the franchise and PEG fees;

11. The City may establish and enforce penalties against State video franchise holders for violations of customer service rules consistent with State law;
12. Nothing in State law or this ordinance affects or will affect the ongoing authorization of Comcast to provide video services within the City;
13. 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 11.20 of the Millbrae Municipal Code, entitled "State Video Franchises" is hereby added to provide as follows:

**Chapter 11.20
State Video Franchises**

Sections:

- 11.20.010 Purpose and Application.**
- 11.20.020 State Video Franchise Fees.**
- 11.20.030 PEG Support Fees.**
- 11.20.040 PEG Channels.**
- 11.20.050 Audit Authority.**
- 11.20.060 Customer Service Penalties.**
- 11.20.070 Public Rights-of-Way.**
- 11.20.080 Police Powers.**
- 11.20.090 Preemption; Reservation of Rights.**

Section 11.20.010 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 Section 5800 et seq. at the time of enactment of this Chapter. The purposes of this Chapter are to implement DIVCA in the City of Millbrae and to regulate, consistent with DIVCA and the implementing rules issued by the California Public Utilities Commission dated March 1, 2007, video service providers holding state video franchises and operating within the City pursuant to that franchise. This Chapter shall be applied to and interpreted consistently with any amendments to, or re-codifications of, DIVCA that may be made from time to time

Section 11.20.020 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 State video franchise holder's "gross revenue" as defined in California Public Utilities Code § 5860(d). This fee shall be remitted to the City quarterly, within 45 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 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 highest prime lending rate during the period of delinquency, plus 1 percent. If the holder has overpaid the franchise fee, it may deduct the overpayment from its next quarterly payment.

Section 11.20.030 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 is consistent with State and federal law equal to no more than one percent (1%) of gross revenues, as defined by Section 5870(n) of the California Public Utilities Code.

(b) Upon the expiration or termination of the current local cable franchise, every State video franchise holder operating within the City shall pay to the City, on a schedule and in a manner to be determined by the City, a PEG capital support fee in an amount equal to one percent (1%) of gross revenues per subscriber per month.

(c) Until the expiration or termination of the current local cable franchise, and pursuant to Section 5870(l) of the California Public Utilities Code, every State video franchise holder operating within the boundaries of the City shall be responsible for a pro-rata, per subscriber share of the two outstanding capital grant payments required under the current local cable franchise agreement, totally \$31,463 each, scheduled as of September 8, 2010 for payment in January 2011 and January 2016.

Section 11.20.040 PEG Channels.

(a) The City's current franchise with Comcast of California IX, Inc. provides for four (4) Public, Educational and Governmental channels for PEG programming. Local franchise holders and holders of a State video franchise under DIVCA shall each provide at least four (4) PEG channels.

(b) All State video franchise holders 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 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 of the City unless the change is required by federal law.

(c) A State video franchise holder shall have three (3) 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 franchise holder 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 franchise holder's system.

Section 11.20.050 Audit Authority.

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

Section 11.20.060 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 designee shall monitor the compliance of State video franchise holders operating within the boundaries of the City with respect to State and federal customer service and protection standards. The City Manager or 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 thirty (30) days from the receipt of the notice to remedy the specified material breach. Material breaches not remedied within the thirty (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 twelve (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 twelve (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 sixty (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 Public Utilities Code Section 5900.

Section 11.20.070 Public Rights-of-Way

For the purpose of operating and maintaining a cable television system in the City, a State video franchise holder 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 franchise holder shall comply with all applicable City construction codes and procedures.

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 franchise holder's system interferes with the construction, operation, maintenance or repair of any such public work or improvement, the State video franchise holder, 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 franchise holder 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 or any part of the system without any liability to the State video franchise holder except for the City's willful misconduct and the State video franchise holder shall promptly pay to the City the costs incurred by such breaking through, removal, alteration or relocation.

Section 11.20.080 Police Powers.

The rights of a State video franchise holder 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 holder shall comply with all applicable general laws and ordinances enacted by the city pursuant to such power.

Section 11.20.090 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 Chapter 11.15 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 the City may enter into a local franchise with providers of cable television or video services within the City.

SECTION 3. SEVERABILITY.

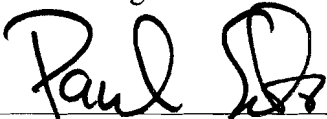
If any section, sentence, clause or phrase of this Chapter is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Chapter. The City Council hereby declares that it would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

SECTION 4. EFFECTIVE DATE; PUBLICATION.

This ordinance shall be in full force and effect thirty (30) days from and after its passage. At least five (5) days prior to its adoption and within fifteen (15) days after its adoption, a summary of this ordinance, in a form approved by the City Attorney, shall be published once in a newspaper of general circulation printed and published in the County of San Mateo and circulated in the City of Millbrae.

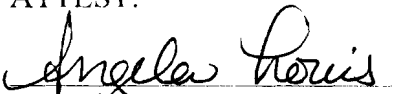
INTRODUCED at a regular meeting of the City Council of the City of Millbrae held on the 14th day of September, 2010.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Millbrae held on the 28th day of September, 2010 by the following roll call vote.



Mayor

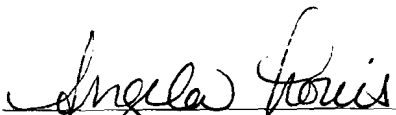
ATTEST:



City Clerk

I do hereby certify that the foregoing Ordinance was duly and regularly passed and adopted by the City Council of the City of Millbrae this 28th day of September 2010, by the following vote:

AYES:	COUNCILMEMBERS:	Seto, Colapietro, Papan, and Holober
NOES:	COUNCILMEMBERS:	None
ABSENT:	COUNCILMEMBERS:	None
ABSTAIN:	COUNCILMEMBERS:	None
EXCUSED:	COUNCILMEMBERS:	Quigg


CITY CLERK