



BILL NO. B-99

ORDINANCE NO. 2007-94

AN EMERGENCY ORDINANCE OF THE CITY OF FRESNO, CALIFORNIA,  
ADDING SECTION 9-235 OF THE FRESNO MUNICIPAL CODE RELATING  
IMPLEMENTATION OF THE DIGITAL INFRASTRUCTURE AND VIDEO  
COMPETITION ACT OF 2006 FOR STATE FRANCHISE HOLDERS  
PROVIDING VIDEO SERVICE THROUGHOUT THE CITY

THE COUNCIL OF THE CITY OF FRESNO DOES ORDAIN AS FOLLOWS:

SECTION 1. Section 9-235 is added to the Fresno Municipal Code to read:

(a) Findings

(1) Any ordinance declared by the Council to be necessary as an emergency measure for preserving the public peace, health or safety, and containing a statement of the reasons for its urgency, may be introduced, adopted, and become effective at one and the same meeting if passed by at least five affirmative votes.

(2) The Council finds that continuity of cable communication and video franchise services impact, further and are necessary to ensure the public's health and safety including as to Emergency Alert Broadcasting of public safety information and public, educational and governmental broadcasting and fees in support thereof, and therefore require the adoption of this ordinance based upon the following findings: the city must enact this ordinance prior to January 2, 2008 in order to preserve and fully exercise rights preserved to the city under the Digital Infrastructure and Video Competition Act of 2006 ["DIVCA"]; in the absence of a DIVCA implementing ordinance effective as of January 2, 2008, the city will be unable to fully exercise rights preserved to the city under DIVCA as against a state franchisee as of said date; enactment of this ordinance as an urgency measure is necessary to ensure its effect from and after January 2, 2008.

(b) General Provisions

(1) This section 9-235 is intended to be applicable to state franchise holders who have been awarded a state video franchise under the California Public Utilities Code section 5800 *et seq.*, as amended from time to time (the Digital Infrastructure and Video Competition Act of 2006 ["DIVCA"]), to serve any location(s) within the incorporated boundaries of the City. It is the purpose of this section to implement within the incorporated boundaries of the City the provisions of DIVCA and the rules of the California Public Utilities Commission promulgated there under that are applicable to a "local franchising entity" or a "local entity" as defined in DIVCA.

Adopted 12-4-07  
Approved 12-4-07  
Effective 12-4-07



(2) The rights reserved to the City under this section 9-235 are in addition to all other rights of the City, whether reserved by section 9-235 or authorized by law, and no action, proceeding or exercise of a right shall affect any other rights which may be held by the City.

(3) Except as otherwise expressly provided by DIVCA, a state franchise shall not include, or be a substitute for:

(i) compliance with generally applicable requirements for the privilege of transacting and carrying on a business within the City, including, but not limited to, compliance with the conditions that the City may establish before facilities may be constructed for, or providing, non-video services;

(ii) any permit or authorization required in connection with construction, repair, maintenance and/or operations on or in public rights-of-way or public property, including, but not limited to, encroachment permits, street work permits, pole attachment permits and street cut permits; and

(iii) any permit, agreement or authorization for occupying any other property of the City or any private person to which access is not specifically granted by the state franchise.

(4) Except as otherwise provided in DIVCA, a state franchise shall not relieve a state franchisee of its duty to comply with all laws, including the ordinances, resolutions, rules, regulations, and other laws of the City, and every state franchisee shall comply with the same.

(5) Nothing contained in this section 9-235 shall ever be construed so as to exempt a state franchise holder from compliance with all ordinances, rules or regulations of the City now in effect or which may be hereafter adopted which are consistent with the DIVCA.

(c) Definitions.

(1) For purposes of this section 9-235, the following terms, phrases, words, and their derivations shall have the meaning given in this section. Unless otherwise expressly stated, words not defined in this section 9-235 shall be given the meaning set forth in Section 9-204 of the Fresno Municipal Code as may be amended from time to time, unless the context indicates otherwise. Words not defined in this subsection (b) or Section 9-204 of the Fresno Municipal Code shall have the same meaning as established in (1) DIVCA, and if not defined therein, (2) Commission rules implementing DIVCA, and if not defined therein, (3) Title VI of Title 47 of the Communications Act of 1934, as amended, 47USC § 521 et. seq., and if not defined therein (4) their common and ordinary meaning. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number, and "including" and "include" are not limiting. The word "shall" and "will" are always mandatory. References to governmental entities (whether persons or entities) refer to those entities or their successors in authority. If specific provisions of law referred to herein are renumbered, then the reference



shall be read to refer to the renumbered provision. References to laws, ordinances or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

(i) "Access," "PEG access," "PEG use," or "PEG" means the availability of a cable or state franchise holder's system for public, educational, or governmental use by various agencies, institutions, organizations, groups, and individuals, including the City and its designated access providers, to acquire, create, and distribute programming not under a state franchise holder's editorial control.

(ii) "Director" means the Director of the Public Works Department of the City, acting either directly or through authorized agents.

(iii) "Gross revenues" means all revenues actually received by the holder of a state franchise that are derived from the operation of the holder's network to provide cable service or video service within the incorporated areas of the City, subject to the specifications of California Public Utilities Code section 5860.

(iv) "State franchise holder" or "State Franchisee" means a cable operator or video service provider that has been issued a franchise by the California Public Utilities Commission to provide cable service or video service, as those terms are defined in California Public Utilities Code section 5830, within any portion of the incorporated limits of the City.

(d) Franchise Fees.

(1) Any state franchise holder operating within the incorporated areas of the City shall pay to the City a state franchise fee equal to five percent (5%) of gross revenues.

(2) The state franchise fee required pursuant to this subsection (c) shall each be paid quarterly, in a manner consistent with California Public Utilities Code section 5860. The state franchise holder shall deliver to the City, by check or other means, which shall be agreed to by the City, a separate payment for the state franchise fee not later than forty-five (45) days after the end of each calendar quarter. Each payment made shall be accompanied by a summary explaining the basis for the calculation of the state franchise fee.

(3) The City may examine the business records of the holder of a state franchise not more than once annually, in a manner consistent with California Public Utilities Code section 5860(i).

(4) In the event a state franchise holder fails to make payments required by this section on or before the due dates specified in this section, the City shall impose a late charge at the rate per year equal to the highest prime lending rate during the period of delinquency, plus one percent (1%).



(5) In the event a state franchise holder leases or licenses access to a network owned by the City, the City may set a franchise or other fee for access to the City-owned network separate and apart from the franchise fee charged to state franchise holders pursuant to this subsection (c), which fee shall otherwise be payable in accordance with the procedures established by this section.

(e) Customer Service

(1) A state franchise holder shall comply with Sections 53055, 53055.1, 53055.2 and 53088.2 of the California Government Code; the FCC customer service and notice standards set forth in Sections 76.309, 76.1602, 76.1603, and 76.1619 of Title 47 of the Code of Federal Regulations; Section 637.5 of the California Penal Code; the privacy standards of Section 551 of Title 47 of the United States Code; and all other applicable state and federal customer service and consumer protection standards pertaining to the provision of cable service or video service, including any such standards hereafter adopted. All customer service and consumer protection standards under this paragraph shall be interpreted and applied to accommodate newer or different technologies while meeting or exceeding the goals of the standards.

(2) The City shall enforce the compliance of state franchisees with respect to the state and federal customer service and consumer protection standards set forth in paragraph (1). The City will provide a state franchisee with a written notice of any material breaches of applicable customer service or consumer protection standards, and will allow the state franchisee 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:

(i) For the first occurrence of a material breach, a fine of \$500 may be imposed for each day the violation remains in effect, not to exceed \$1,500 for each violation.

(ii) For a second material breach of the same nature within 12 months, a fine of \$1,000 may be imposed for each day the violation remains in effect, not to exceed \$3,000 for each violation.

(iii) For a third material breach of the same nature within 12 months, a fine of \$2,500 may be imposed for each day the violation remains in effect, not to exceed \$7,500 for each violation.

(3) Any penalties imposed by the City shall be imposed in a manner consistent with California Public Utilities Code section 5900.

(f) Permits And Construction

(1) Except as expressly provided in this Section 9-235, the provisions of sections 9-224, 9-225 and 9-226 shall apply to all work performed by or on behalf of a state



franchise holder on any City public rights-of-way, public property, or City easement as those terms are defined in Chapter 9 of the Fresno Municipal Code.

(2) Prior to commencing any work for which a permit is required by this subsection (e), a state franchise holder shall apply for and obtain a permit in accordance with the provisions referred to in paragraph (1) of this subsection (e) and shall comply with all other applicable laws and regulations, including but not limited to all applicable requirements of Division 13 of the California Public Resources Code, section 21000, *et seq.* (the California Environmental Quality Act).

(3) The Director shall either approve or deny a state franchise holder's application for any permit required under paragraph (1) of this subsection (e) within sixty (60) days of receiving a completed permit application from the state franchise holder.

(4) If the Director denies a state franchise holder's application for a permit, the Director shall, at the time of notifying the applicant of denial, furnish to the applicant a detailed explanation of the reason or reasons for the denial.

(5) A state franchise holder that has been denied a permit by final decision of the Director may appeal the denial to the City Council pursuant to the provisions of Section 13-216 of this Code.

(6) The Council may affirm, modify, or reverse the determination or dismiss the appeal there from, as may be just. The hearing before the Council shall be conducted informally, may be continued. The decision of the Council shall be final.

(g) Emergency Alert

(1) Each state franchise holder shall comply with the emergency alert system requirements of the Federal Communications Commission in order that emergency messages may be distributed over the state franchise holder's network.

(2) To the extent consistent with California Public Utilities Code section 5880, each state franchisee shall provide the system capability to transmit an emergency alert signal to all participating subscribers, in the form of an emergency override capability to permit the City to interrupt and cablecast an audio message on all channels simultaneously in the event of a disaster or public emergency.

(h) Public, Educational and Government Access Channel Capacity, Interconnection, and Signal Carriage

(1) PEG Channel Capacity.

(i) A state franchisee that has been authorized by the California Public Utilities Commission to provide video service in the City shall designate and activate three PEG channels within three months from the date that the City requests that the state franchisee



designate and activate these PEG channels. However, this three-month period shall be tolled for such a period, and only for such a period, during which the state franchisee's ability to designate or provide such PEG capacity is technically infeasible, as set forth in Sections 5870(a), 5870(c) and 5870(h) of the California Public Utilities Code.

(ii) A state franchisee shall provide an additional PEG channel when the standards set forth in Section 5870(d) of the California Public Utilities Code are satisfied by the City or any entity designated by the City to manage one or more of the PEG channels.

(2) PEG Support.

(i) Any state franchise holder operating within the City shall pay to the City, or if directed by the City, pay to the City's designated PEG provider a PEG fee equal to one percent (1%) of gross revenues.

(ii) The PEG support fee shall be used for PEG purposes that are consistent with state and federal law.

(iii) A state franchisee shall remit the PEG support fee to the City or to the City's designated PEG provider quarterly, within forty-five days after the end of each calendar quarter. Each payment made shall be accompanied by a report, detailing how the PEG support fee was calculated.

(iv) If a state franchisee fails to pay the PEG support fee when due, or underpays the proper amount due, the state franchisee shall pay 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%).

(3) PEG Carriage and Interconnection.

(i) As set forth in Sections 5870(b) and 5870(g)(3) of the California Public Utilities Code, state franchisees shall ensure that all PEG channels are receivable by all subscribers, whether they receive digital or analog service, or a combination thereof, without the need for any equipment other than that needed to receive the lowest cost tier of service. PEG access capacity provided by a state franchisee shall be of similar quality and functionality to that offered by commercial channels, shall be capable of carrying a National Television System Committee (NTSC) quality television signal, and shall be carried on the state franchisee's lowest cost tier of service. To the extent feasible, the PEG channels shall not be separated numerically from other channels carried on the lowest cost tier of service and the channel numbers for the PEG channels shall be the same channel numbers used by any incumbent cable operator, unless prohibited by federal law. After the initial designation of the PEG channel numbers, the channel numbers shall not be changed without the agreement of the City unless federal law requires the change.

(ii) As set forth in Section 5870(h) of the California Public Utilities Code, the holder of a state franchise and an incumbent cable operator shall negotiate in good



faith to interconnect their networks for the purpose of providing PEG programming. If a state franchisee and an incumbent cable operator cannot reach a mutually acceptable interconnection agreement for PEG carriage, the City shall require the incumbent cable operator to allow the state franchisee to interconnect its network with the incumbent cable operator's network at a technically feasible point on the state franchisee's network as identified by the state franchisee. If no technically feasible point of interconnection is available, the state franchisee shall make interconnection available to each PEG channel originator programming a channel in the City and shall provide the facilities necessary for the interconnection. The cost of any interconnection shall be borne by the state franchisee requesting the interconnection unless otherwise agreed to by the parties.

(i) Notices.

(1) Each state franchise holder or applicant for a state franchise shall concurrently file with the City a complete copy of all applications, amendments to applications and notices that the state franchise holder or applicant is required to file with the California Public Utilities Commission. Within 30 days of receipt, the CAO shall provide any appropriate comments to the Commission regarding an application or amendment to an application for a state franchise.

(2) Unless otherwise specified in this section, all notices or other documentation that a state franchise holder is required to provide to the City under this Section or the California Public Utilities Code shall be provided to both the City Manager and the City staff person in charge of cable and telecommunications, or their successors or designees.

(j) Existing Franchise(s).

(1) The City will retain authority, without change, over the City's current cable franchisee until such time as it no longer holds a City franchise, or is no longer operating under a current or expired City franchise.

(k) Severability.

(1) If any sentence, clause or phrase of this section 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 section. The City Council hereby declares that it would have passed this ordinance and adopted this section and each sentence, clause or phrase thereof, irrespective of the fact that any one or more subsections, sentences, clauses or phrases be declared invalid or unconstitutional.

(l) No Vested Rights.

(1) Nothing in the Section 9-235 shall be deemed as creating a vested right in the state franchise holder or its affiliates.



(m) Conflict of Law.

(1) In the event of any conflict between this terms and conditions of this Section 9-235 and the terms and conditions of DIVCA, the terms and conditions of DIVCA shall control and take precedence.

SECTION 2. This ordinance shall become effective and in full force upon the date of final passage pursuant to charter section 610.



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STATE OF CALIFORNIA )  
COUNTY OF FRESNO ) ss.  
CITY OF FRESNO )

I, REBECCA E. KLISCH, City Clerk of the City of Fresno, certify that the foregoing ordinance was adopted by the Council of the City of Fresno, at a regular meeting held on the 4th day of December, 2007.

AYES : Calhoun, Dages, Duncan, Sterling, Westerlund, Xiong, Perea  
NOES : None  
ABSENT : None  
ABSTAIN : None

Mayor Approval: N/A, 2007

Mayor Approval/No Return: N/A, 2007

Mayor Veto: N/A, 2007

Council Override Vote: N/A, 2007

REBECCA E. KLISCH  
City Clerk

BY: Rebecca E. Klisch  
Deputy

APPROVED AS TO FORM:  
CITY ATTORNEY'S OFFICE

BY: R 11-30-07  
Deputy Gyle

RRC:sn [42816sn/ORD] 10/26/07rvsdRRC11-30-07