



# TOWN OF APPLE VALLEY

## TOWN COUNCIL STAFF REPORT

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**To:** Honorable Mayor and Town Council **Date:** February 28, 2012

**From:** Marc Puckett, Director of Finance **Item No:** 3  
Finance

**Subject:** AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY, AMENDING TITLE 5, CHAPTER 5.06 OF THE APPLE VALLEY MUNICIPAL CODE TO ESTABLISH FRANCHISE FEES, AND CUSTOMER SERVICE PENALTIES FOR STATE FRANCHISE HOLDERS PROVIDING VIDEO SERVICE WITHIN THE TOWN OF APPLE VALLEY

**T.M. Approval:** \_\_\_\_\_

**Budgeted Item:**  Yes  No  N/A

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### RECOMMENDED ACTION:

That the Town Council:

1. Adopt Ordinance No. 429.

### SUMMARY:

Adoption of Ordinance No. 429 will update the Town's existing cable franchise ordinance to comply with legislative changes enacted in the Digital Infrastructure and Video Competition Act (DIVCA). These changes include providing the Town with audit authority of the cable franchise fees collected and remitted to the Town, and creation of customer service penalties for state franchise holders providing cable services within the Town. No new or adjusted fees are proposed within the revision to the ordinance. The Act leaves unchanged the Town's current authority to regulate current cable franchisees until such time as the current franchise holders are no longer operating or the current agreements expire. The Town's franchise agreement with Charter Communications expires on April 22, 2013.

### BACKGROUND:

At its February 14, 2012, Council meeting, the Town Council held a public hearing on Ordinance No. 429. There were no public comments during the public hearing. After the public hearing was held, the Town Council voted unanimously to review and introduce Ordinance No. 429.

On January 1, 2007, the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA") went into effect, taking away cable television franchise authority from local municipalities and giving it exclusively to the California Public Utilities Commission ("Commission"). The stated purpose of this legislation was to enable greater competition in the cable television market. Once the Town's cable franchises expire, the cable providers will be operating under a state franchise. The legislation states that the Town may continue to receive its 5% franchise fee from state franchisees issued after expiration of the Town's franchise.

The attached ordinance amendment is intended to update the Town's existing ordinance to comply with these legislative changes. This proposed ordinance addresses the technical requirement that the Town adopt the 5% franchise fee, as well as adopting all applicable State and Federal customer service and protection standards pertaining to the provision of video services.

The customer service standards included in the proposed ordinance are State and Federal customer service standards commonly adopted by reference by municipalities to update their cable franchise ordinance to comply with the legislative changes included in the DIVCA. The proposed ordinance also includes creation of customer service penalties for state franchise holders providing cable services within the Town.

DIVCA would also require municipalities to authorize or re-authorize by ordinance its Public access/Educational access/Government access (PEG) fee at the expiration and renewal of each Holder's state franchise. Under DIVCA, the term of a state franchise will be 10 years.

Per Council's direction, the proposed ordinance does not include a PEG fee. The Town's franchise agreement with Charter Communications expires on April 22, 2013. Upon expiration of the Town's franchise agreement and issuance of a state franchise agreement, the Town will be precluded from considering the addition of such a fee for the 10-year term of the state franchise agreement.

For informational purposes only, the following background information about PEG fees is included herein. A PEG fee, if imposed, would require that all cable providers in Apple Valley pay the Town a fee of 1% of revenues in addition to the franchise fee to support a public access/ educational access/government access (PEG) municipal access cable channel or cable programming. A 1% PEG fee would amount to about \$0.45 per month on the average basic cable services billing of approximately \$45. The PEG fees would generate approximately \$85,000 in total annually.

Per a statewide survey, over 90% of all municipalities in California that have cable franchises have PEG fees included in their franchise agreements. The PEG fees assist these communities by providing some funding for local control over increased public access and educational access to local government such as provision of a municipal access channel or cable programming.

The attached ordinance amendment also includes addition of audit authority which provides that the Town may perform an audit of all holders of a State video franchise within the Town to ensure compliance with the ordinance and payment of the appropriate franchise fees.

Staff is available to answer any questions Council may have.

**FISCAL IMPACT:**

There is no fiscal impact for this agenda item.

Attachment: 1) Proposed Ordinance Number 429

**ORDINANCE NO. 429**

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY, AMENDING TITLE 5, CHAPTER 5.06 OF THE APPLE VALLEY MUNICIPAL CODE TO ESTABLISH FRANCHISE FEES, AND CUSTOMER SERVICE PENALTIES FOR STATE FRANCHISE HOLDERS PROVIDING VIDEO SERVICE WITHIN THE TOWN OF APPLE VALLEY**

**WHEREAS**, a State of California (“State”) law known as the Digital Infrastructure and Video Competition Act of 2006 (AB 2987) went into effect on January 1, 2007;

**WHEREAS**, under AB 2987, the State is authorized to issue video services franchises; and

**WHEREAS**, the Town of Apple Valley (the “Town”), although not the franchising authority with respect to franchises issued under AB 2987, has certain rights and responsibilities with respect to the new State video franchise holders, which must be addressed through the adoption of an ordinance;

**WHEREAS**, AB 2987 provides that the Town shall receive a fee of 5% of gross revenues of each State video franchisee that operates within the Town for use of the public rights-of-way, but requires the Town to adopt an ordinance in order to make this effective; and

**WHEREAS**, AB 2987 further authorizes the Town to establish and enforce penalties against State video franchisees for violations of customer service rules consistent with State law.

**NOW THEREFORE**, THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY DOES ORDAIN AS FOLLOWS:

**Section 1.** Section 5.06.160 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code, to read as follows:

**5.06.160 Applicability of chapter to State video services franchisees.**

Notwithstanding any provision of this chapter to the contrary, nothing in this chapter shall be deemed to require any person or entity to obtain a franchise issued by the Town, to the extent that such person or entity is authorized to provide cable service or video services under a cable franchise or video services franchise issued by another government entity under applicable law, including but not limited to Section 5800, et seq., of the California Public Utilities Code. The requirements and provisions of this

chapter shall not apply or be enforced to the extent that they actually conflict with applicable State or Federal law.

**Section 2.** Section 5.06.170 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code, to read as follows:

**5.06.170 Regulation of State video services franchisees.**

Sections 5.06.160 through 5.06.220 of this chapter are designed to regulate video service providers holding state video franchises and operating within the Town. As of January 1, 2007, the State has the sole authority to grant State video franchises pursuant to the Digital Infrastructure and Video Competition Act of 2006 ("Act"). Pursuant to the Act, the Town shall receive a franchise fee from all State video franchise holders operating within the Town. Additionally, the Town has the responsibility to establish and enforce penalties, consistent with State law, against all State video franchise holders operating within the Town for violations of customer service standards, but the Act grants all authority to adopt customer service standards to the State. The Act leaves unchanged the Town's authority to regulate the Town's current cable franchise in accordance with this chapter and the cable franchise currently in effect, until such time as the cable franchisee no longer holds a Town franchise or is no longer operating under a current or expired Town franchise.

**Section 3.** Section 5.06.180 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code, to read as follows:

**5.06.180 State video franchise fee.**

For any State video franchise holder operating within the boundaries of the Town, there shall be a fee paid to the Town equal to five percent (5%) of the gross revenue of that State video franchise holder. Gross revenue, for the purposes of this section, shall have the definition set forth in California Public Utilities Code 5860.

**Section 4.** Section 5.06.190 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code, to read as follows:

**5.06.190 Audit authority.**

Not more than once annually, the Town Manager or his or her designee may examine and perform an audit of the business records of all holders of a State video franchise operating within

the boundaries of the Town to ensure compliance with Section 5.06.180 of this Code.

**Section 5.** Section 5.06.200 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code, to read as follows:

**5.06.200 Customer service penalties under State video franchises.**

(a) Any holder of a State video franchise operating within the boundaries of the Town shall comply with all applicable State and Federal customer service and protection standards pertaining to the provision of video service. The Town Manager, or his or her designee, shall provide any required notice in advance of enforcing such standards, including but not limited to the 90-day notice required by 47 CFR 76.309(a), 76.1602(a), 76.1603(a), and 76.1619(c).

(b) The Town Manager shall monitor the compliance of holders of a State video franchise operating within the boundaries of the Town with respect to State and Federal customer service and protection standards. The Town Manager, or his or her designee, shall provide the State video franchise holder written notice of any material breaches of applicable customer service standards, and shall allow the State video franchise holder 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 Town:

(1) For the first occurrence of a violation, a fine of \$500.00 shall 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 12 months, a fine of \$1,000.00 shall 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 12 months, a fine of \$2,500.00 shall be imposed for each day the violation remains in effect, not to exceed \$7,500.00 for each violation.

(c) A holder of a State video franchise operating within the boundaries of the Town may appeal a penalty assessed by the Town Manager to the Town Council within 60 days of the initial

assessment. The Town Council shall hear all evidence and relevant testimony and may uphold, modify or vacate the penalty.

The Town Council's decision on the imposition of a penalty shall be final.

(d) The Town shall comply with any statutory requirement to remit all or a portion of collected fine revenue to the State, including but not limited to the requirement in Public Utilities Code Section 5900(g).

**Section 6.** Section 5.06.210 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code, to read as follows:

**5.06.210 Town response to State video franchise applications.**

(a) Applicants for State video franchises, or amendments to existing franchises, that will authorize the applicant to operate within the boundaries of the Town must concurrently provide complete copies to the Town of any application or amendments to applications filed with the Public Utilities Commission. At a minimum, one complete copy must be provided to the Town Manager.

(b) Within 30 days of receipt of notice of an application for a State video franchise that will authorize the applicant to operate within Apple Valley, the Town Manager shall provide any appropriate comments to the Public Utilities Commission regarding an application or an amendment to an application for a State video franchise.

**SECTION 7.** The Town Council hereby finds that this Ordinance is not subject to the California Environmental Quality Act (Pub. Resources Code, Sec. 21000 et seq.) ("CEQA") pursuant to Section 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and Section 15060(c)(3) (the activity is not a project as defined in Section 15378) of the State CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly.

**SECTION 8.** If any section, subsection, subdivision, paragraph, sentence, clause, or phrase added by this Ordinance, or any part thereof, is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Ordinance or any part thereof. The Town Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase thereof irrespective of the fact

that any one or more subsections, subdivisions, paragraphs, sentences, clauses, or phrases are declared unconstitutional, invalid, or ineffective.

**SECTION 9.** The Mayor shall sign this ordinance and the Town Clerk shall attest and certify to the passage and adoption of it and cause publication to occur in a newspaper of general circulation, printed, published, and circulated in the Town of Apple Valley in a manner permitted under Section 36933 of the Government Code of the State of California, and thirty (30) days thereafter it shall take effect and be in force.

**ADOPTED** by the Town Council and signed by the Mayor and attested by the Town Clerk this 28<sup>th</sup> day of February, 2012.

\_\_\_\_\_  
Barb Stanton, Mayor

ATTEST:

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La Vonda M-Pearson, Town Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

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John Brown, Town Attorney

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Mr. Frank Robinson, Town Manager