



# TOWN OF APPLE VALLEY

## TOWN COUNCIL STAFF REPORT

**To:** Honorable Mayor and Town Council **Date:** October 27, 2015

**From:** Marc Puckett **Item No:** 6  
Assistant Town Manager

**Subject:** ADOPT ORDINANCE NO. 475 - AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY, CALIFORNIA, AMENDING TITLE 5, CHAPTER 5.06 OF THE APPLE VALLEY MUNICIPAL CODE TO ESTABLISH A FEE TO SUPPORT PUBLIC, EDUCATIONAL AND GOVERNMENTAL ACCESS FACILITIES APPLICABLE TO STATE VIDEO SERVICE FRANCHISES AND TO MAKE OTHER CONFORMING AMENDMENTS

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

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

### RECOMMENDED ACTION:

That the Town Council adopt Ordinance No. 475.

### BACKGROUND:

At its September 22, 2015 meeting, the Town Council reviewed and introduced Ordinance No. 475, which updates the provisions of Chapter 5.06 applicable to State video franchise holders as noted herein.

### DISCUSSION:

Title 5, Chapter 5.06 of the Apple Valley Municipal Code sets out the applicable rules and standards governing cable service providers operating under local cable franchises within the Town. In addition, after the Digital Infrastructure and Video Competition Act ("DIVCA") went into effect on January 1, 2007, Chapter 5.06 was amended in 2012 by Ordinance No. 429, to establish franchise fees and customer service penalties for State video franchise holders providing video service within the Town.

The attached Ordinance is intended to update the provisions of Chapter 5.06 applicable to State video franchise holders as follows:

1. *PEG Fees.* DIVCA allows local governments to establish by ordinance a PEG fee payable by holders of State video franchises. As of January 1, 2007, the Town was not receiving any PEG fees from cable operators serving the Town. In these circumstances, a PEG fee of up to one percent (1%) of gross revenues may be established at any time. Per Council's direction in 2012, Ordinance No. 429 did not include a PEG fee. However, collection of a PEG fee is now desirable to fund costs related to the PEG channel the Town recently requested from Charter and Verizon to carry governmental programming such as Town Council meetings and other commission/committee meetings held at Town Hall, and related non-commercial programming and information of interest to Town residents. The proposed ordinance would amend Chapter 5.06 to require State video franchise holders to pay one percent (1%) of gross revenues. The proposed ordinance also adds related provisions requiring quarterly payments of franchise fees and PEG fees, and imposing a late charge on late payments.

2. *Encroachment Permits.* DIVCA requires that a local entity to either approve or deny an application for an encroachment permit from a holder of a State video franchise within sixty (60) days of receiving a completed application, and to adopt regulations prescribing procedures for the State video franchise holder to appeal any denial to the governing body of the local entity. The proposed ordinance would add provisions to Title 5, Chapter 5.06 of the Apple Valley Municipal Code that implement these requirements of DIVCA.

The proposed ordinance would be effective thirty (30) days after final adoption.

**FISCAL IMPACT:**

The Town is not currently collecting any PEG fees. The PEG fee will apply to Charter as soon as the ordinance goes into effect because that company is currently operating in Apple Valley under two (2) State video franchises. It will also apply to any new video provider with a State of California video franchise covering the Town of Apple Valley. The portions of Chapter 5.06 regulating State video franchise holders, including the PEG fee, will only apply to Verizon California when it converts to a State video franchise.

**STAFF RECOMMENDATION:**

Staff recommends that the Town Council, based on the foregoing, adopt Ordinance No. 475.

**ATTACHMENT:**

Proposed Ordinance No. 475

**ORDINANCE NO. 475**

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY, CALIFORNIA, AMENDING TITLE 5, CHAPTER 5.06 OF THE APPLE VALLEY MUNICIPAL CODE TO ESTABLISH A FEE TO SUPPORT PUBLIC, EDUCATIONAL AND GOVERNMENTAL ACCESS FACILITIES APPLICABLE TO STATE VIDEO SERVICE FRANCHISES AND TO MAKE OTHER CONFORMING AMENDMENTS**

**WHEREAS**, in 2006, the Digital Infrastructure and Video Competition Act was signed into law effective January 1, 2007, and codified at California Public Utilities Code section 5800, *et seq.*, (“DIVCA”); and

**WHEREAS**, the Town adopted Ordinance No. 429 on February 28, 2012, 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; and

**WHEREAS**, because on January 1, 2007, Verizon California Inc. and Charter Communications were each operating under local franchise agreements with the Town which franchises did not require payment of any fee to support public, educational and governmental access (“PEG”) facilities, DIVCA permits the local entity to establish at any time a PEG fee applicable to holders of State video franchises in the amount of up to one percent (1%) of gross revenues; and

**WHEREAS**, Ordinance No. 429 did not include a PEG fee; and

**WHEREAS**, the Town now wishes to establish a PEG fee in the amount of one percent (1%) of gross revenues applicable to State video franchise holders; and

**WHEREAS**, the Town now wishes to make other conforming amendments to Ordinance No. 429 related to payment of franchise fees and PEG fees and processing of encroachment permit applications of State video franchise holders.

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

**Section 1.** Findings. The above recitals are true and correct and are incorporated herein by this reference.

**Section 2.** The first sentence in Section 5.06.170 of Chapter 5.06 of the Apple Valley Municipal Code is hereby amended to read as follows:

Sections 5.06.160 through 5.06.250 of this Chapter are designed to regulate video service providers holding State video franchises and operating within the Town.

**Section 3.** Subsection 5.06.210(b) of Chapter 5.06 of the Apple Valley Municipal Code is hereby repealed and replaced in its entirety as follows:

(b) The Town Manager, or his or her duly authorized designee, shall promptly send any State franchise holder that notifies the Town that it intends to provide video service in the Town a copy of this Ordinance and a notice designating the person to whom the State franchise fee payments should be made.

**Section 4.** Section 5.06.220 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code to read as follows:

**5.06.220 – PEG fees.**

Every State franchise holder operating within the boundaries of the Town shall pay a PEG fee in the amount of one percent (1%) of the State franchise holder's gross revenues.

**Section 5.** Section 5.06.230 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code to read as follows:

**5.06.230 – Payment of fees.**

The State franchise fee required pursuant to Section 5.06.180, and the PEG fee required pursuant to Section 5.06.220, shall each be paid to the Town quarterly, in a manner consistent with California Public Utilities Code section 5860. The State franchise holder shall deliver to the Town, by check or other means specified by the Town, a payment for the State franchise fee and a separate payment for the PEG 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 State franchise fees, containing such information as the Town Manager, or his or her duly authorized designee, may require consistent with DIVCA.

**Section 6.** Section 5.06.240 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code to read as follows:

**5.06.240 – Late payments.**

In the event a State franchise holder fails to make payments required by this Chapter on or before the due dates specified in this Chapter, the Town 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%).

**Section 7.** Section 5.06.250 is hereby added to Chapter 5.06 of the Apple Valley Municipal Code to read as follows:

**5.06.250 – Permits.**

(a) Prior to commencing any work for which an encroachment permit is required, a State franchise holder shall apply for and obtain a permit from the Town. A permit application is complete when the State franchise holder has complied with all applicable laws and regulations, including but not limited to all Town administrative rules and regulations, and all applicable requirements of Division 13 of the California Public Resources Code, section 21000, and following, (the California Environmental Quality Act) and preparation of plans and specifications as required by the Town Engineer. For purposes of this Chapter, “Town Engineer” means the Town Engineer or his or her designee.

(b) The Town Engineer shall, in the exercise of reasonable discretion as permitted by state law, either approve or deny a State franchise holder's application for an encroachment permit within sixty (60) days of receiving a complete permit application from the State franchise holder.

(c) If the Town Engineer denies a State franchise holder's application for an encroachment permit, the Town Engineer 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.

(d) A State franchise holder that has been denied an encroachment permit by final decision of the Town Engineer may appeal to the Town Council within the time frame set forth and consistent with the provisions contained in Sections 2.04.100 to 2.04.130 of this Municipal Code. The Town Engineer shall transmit to the Council all maps, diagrams, records,

papers, and files that constitute the record in the action from which the appeal was taken.

(e) The issuance of an encroachment permit by the Town is not a franchise, and does not grant any vested rights in any location in the public rights of way, or in any particular manner of placement within the rights of way. A permit to place cabinets and similar appurtenances aboveground may be revoked and the permittee required to place facilities underground, upon reasonable notice to the permittee.

**Section 8.** CEQA. This Ordinance is categorically exempt from the California Environmental Quality Act (CEQA) because it is not a project and there is no possibility that this Ordinance may have a significant effect on the environment. The Town Council, therefore, directs that a Notice of Exemption be filed with the County Clerk of the County of San Bernardino in accordance with CEQA Guidelines.

**Section 9.** Severability. If any provision of this Ordinance or the application thereof to any entity, person or circumstance is held for any reason to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are severable. The Town Council hereby declare that it would have adopted this Ordinance, irrespective of the invalidity or unconstitutionality of any particular portion thereof.

**Section 10.** Effective Date. This Ordinance shall take effect and be in force thirty (30) days after its adoption.

**Section 11.** Notice of Adoption. The Town Clerk of the Town of Apple Valley shall certify to the adoption of this Ordinance and cause publication to occur in a newspaper of general circulation and published and circulated in the Town in a manner permitted under Section 36933 of the Government Code of the State of California.

**Section 12.** Except as specifically amended or revised by the provisions of this Ordinance, the provisions of the Apple Valley Municipal Code shall remain in effect.

**APPROVED** and **ADOPTED** by the Town Council and signed by the Mayor and attested to by the Town Clerk this 27<sup>th</sup> day of October 2015.

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Larry Cusack, Mayor

**ATTEST:**

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La Vonda M-Pearson, Town Clerk

**APPROVED AS TO FORM:**

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John Brown, Town Attorney

**APPROVED AS TO CONTENT:**

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Frank Robinson, Town Manager