

ORDINANCE 966B

ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LINCOLN REPEALING AND RE-ENACTING CHAPTER 5.20 TO THE LINCOLN MUNICIPAL CODE TO IMPLEMENT PROVISIONS OF THE DIGITAL INFRASTRUCTURE AND VIDEO COMPETITION ACT OF 2006, PUBLIC UTILITIES CODE SECTION 5800 ET SEQ, AND ESTABLISH A FEE TO SUPPORT PUBLIC ACCESS, EDUCATIONAL AND GOVERNMENTAL ("PEG") FACILITIES PAYABLE BY STATE VIDEO FRANCHISE HOLDERS UPON EXPIRATION OF ANY LOCAL INCUMBENT FRANCHISE

WHEREAS, prior to 2006, in accordance with federal, state and local law, the City of Lincoln traditionally regulated aspects of cable and video services within the City of Lincoln; and

WHEREAS, for many years the City awarded franchises for the provision of cable and video services within the City, and through its franchises the City sought to secure high customer service standards, including the provision of public benefits, such as public, educational and governmental broadcast channels; and

WHEREAS, effective January 1, 2007, the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), Public Utility Code §§ 5800, *et seq.*, authorized the State of California through the Public Utilities Commission to award statewide cable and video franchises that would allow cable and video companies to operate within the City of Lincoln without obtaining a City franchise; and

WHEREAS, DIVCA established a state video franchising system that replaced local cable franchising but also recognized the continued need to protect local revenues and control of public rights of way; and

WHEREAS, the City of Lincoln wishes to exercise the fullest authority permitted by DIVCA; and

WHEREAS, DIVCA provides that state video franchises are issued by the California Public Utilities Commission ("CPUC"), and have a stated term of 10 years; and

WHEREAS, under Public Utilities Code section 5840, upon expiration of any local incumbent franchise, each holder of a state video franchise shall pay a franchise fee of 5%, as set forth in DIVCA; and

WHEREAS, DIVCA provides that a local entity may, by ordinance, establish a fee to support public access, educational and governmental ("PEG") facilities payable by state video franchise holders; and

WHEREAS, in 2007, the City of Lincoln ("City") could have adopted an ordinance implementing its limited authority over state video franchise holders pursuant to DIVCA which included adoption of a PEG fee payable by state video franchise holders in the amount then paid by the incumbent cable operator; and

WHEREAS, the City currently has authority to collect, but does not collect, PEG fees from the state video franchise holders serving residents of the City; and

WHEREAS, the state video franchise held by AT&T expired on March 30, 2017, and the CPUC has already granted its renewal franchise effective on the expiration date; and

WHEREAS, the local franchise granted to Radiate Holdings (formerly Astound Broadband, WAVE Broadband, Starstream Communications) expires on October 26, 2018; and

WHEREAS, the local franchise granted to Consolidated Communications (formerly SureWest Televideo) expires on January 1, 2019; and

WHEREAS, the local franchise granted to Greenfield Communications expires on January 19, 2020; and

WHEREAS, DIVCA provides the ordinance establishing a PEG fee shall expire, and may be reauthorized, upon the expiration of the state franchise; and

WHEREAS, to the extent any action is required of the City, it is deemed to be in the best interests of the City to adopt an ordinance so that as each state video franchise expires and is renewed by the CPUC now and in future years, state video franchise holders continue to pay PEG fees when such payment is authorized by the City Council.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF LINCOLN does ordain as follows:

Section 1. The City Council hereby incorporates by reference the recitals set forth above.

Section 2. To the extent reauthorization is required by law, Lincoln Municipal Code Chapter 5.20, including the PEG fee in the amount of 1% of gross revenues, is adopted and authorized, which reauthorization shall be effective for so long as such reauthorization is required by law, upon the expiration of a state franchise as to each affected state video franchise holder.

Section 3. This Ordinance is not subject to the California Environmental Quality Act ("CEQA"), as codified at Public Resources Code §§ 21000, *et seq.*, and as further governed by 14 California Code of Regulations §§ 15000, *et seq.*, because it is not a project as contemplated by 14 C.C.R. § 15378. In addition, even if this Ordinance were subject to CEQA, the City Council finds this Ordinance would be exempt from the requirements of CEQA pursuant to 14 C.C.R. § 15061(b)(3), because there is no possibility it will have a significant effect on the environment.

Section 4. If any section, sub-section, sentence, clause, phrase or portion of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Ordinance. City Council hereby declares that it would have adopted the Ordinance and each section, sub-section, sentence, clause, phrase or portion thereof, irrespective of the fact that any one or more sections, sub-sections, sentences, clauses, phrases or portions to be declared invalid or unconstitutional.

Section 5. Within fifteen days of passage of this Ordinance, the City Clerk shall cause the full text of the Ordinance, with the names of those City Councilmembers voting for and against the Ordinance, to be published in the Lincoln News Messenger. In lieu of publishing the full text of the Ordinance, the City Clerk, if so directed by the City Attorney and within fifteen days, shall cause a summary of the Ordinance, prepared by the City Attorney and with the names of the City Councilmembers voting for and against the Ordinance, to be published in the Lincoln News Messenger, and shall post in the office of the City Clerk a certified copy of the City Councilmembers voting for and against the Ordinance. The publication of a summary of the Ordinance in lieu of the full text of the Ordinance is authorized only where the requirements of Government Code § 36933(c)(1) are met.

Section 6. Without limiting the foregoing, Chapter 5.20.000 is repealed and re-enacted as follows:

Chapter 5.20 STATE VIDEO SERVICE FRANCHISES

Section 5.20.010. Purpose.

This Chapter applies to all cable service or video service providers who are applying for, or have been awarded a franchise under Public Utilities Code §§ 5800, *et seq.*, the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA") to serve any area within the City of Lincoln, including cable service or video service providers who are otherwise subject to DIVCA. By this Chapter the City of Lincoln intends to exercise to the fullest extent possible all rights and privileges afforded to it by DIVCA and any other applicable law.

Section 5.20.020. Definitions and Interpretation of language.

For purposes of this Chapter, 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 Chapter shall be given the meaning set forth in Public Utilities Code §§ 5800, *et seq.*, as may be amended in the future. When not inconsistent with the context, words used in the present tense include the future; words in the plural include the singular; words in the singular include the plural; and "including" and "include" are not limiting. The word "shall" is always mandatory.

- A. "Access," "PEG access," "PEG use," or "PEG" mean the availability of a cable or video system for public, educational, or governmental use by various agencies, institutions, organizations, groups, and individuals, including the City of Lincoln and its exclusive City use channels or any existing agreement between the City and any incumbent cable operator, to acquire, create, and distribute programming not under a state franchise holder's editorial control.
- A. "City" means the City of Lincoln, California.
- B. "City Council" means the City Council of the City of Lincoln.
- C. "City Manager" means the City Manager of the City of Lincoln, or his or her designee.

- D. "Director" means the Director of Public Services of the City of Lincoln, or his or her designee.
- E. "State franchise holder," "holder of a state franchise," "holder of the state franchise," or "holder" mean any person or group of persons who has been issued a franchise by the California Public Utilities Commission to provide cable service or video service, as those terms are defined in Public Utilities Code § 5830, within any portion of the City of Lincoln.

Section 5.20.030 State Franchise Holder Fee.

Any state franchise holder operating within the City shall pay to the City a state franchise fee in the amount of 5% of gross revenues as defined by Public Utilities Code § 5860(d). Nothing in this section is intended to limit the City's ability to impose utility user taxes and other generally applicable taxes, fees, and charges that are applied in a nondiscriminatory and competitively neutral manner.

Section 5.20.040 State Franchise Holder PEG fees.

Any state franchise holder operating within the City shall pay to the City a public education and government ("PEG") fee in the amount of 1% of gross revenues, as set forth in Public Utilities Code § 5870(n) at such time as the City Council determines, by resolution, to begin imposing and collecting this PEG fee. City shall provide a minimum of sixty days' written notice to the state franchise holders then operating within the City of the imposition of the PEG fee and the effective date that the PEG fee will commence.

Section 5.20.050 PEG access channels

Any state franchise holder operating within the City shall designate a sufficient amount of capacity on its network to allow the provision of the same number of public, educational, and government (PEG) channels as were activated and provided as of January 1, 2007 within the City by the then incumbent cable operator. Nothing in this section prevents the City from requesting up to a total of three PEG channels pursuant to Public Utilities Code § 5870. Upon the receipt of such a request, the state franchise holder shall provide the channel(s) no later than three months from the date of the request, unless the state franchise holder can demonstrate that the provision of one or more of the channels is technically infeasible, as set forth in Section 5870.

Section 5.20.060. Interconnection for PEG programming.

Each holder of a State Franchise, and each incumbent cable operator operating under a City franchise issued pursuant to this Code, shall negotiate with each other in good faith to interconnect their networks for the purpose of providing PEG programming including, but not limited to, any exclusive City use channel. Interconnection may be accomplished by any means authorized under Public Utilities Code § 5870(h). Each holder of a State Franchise and any incumbent cable operator shall provide interconnection of PEG channels including any exclusive City use channel on reasonable terms and conditions and may not withhold the interconnection. If a holder of a State Franchise and an incumbent cable operator cannot reach a mutually acceptable interconnection agreement, the City may require the incumbent cable operator to allow the holder of the

State Franchise to interconnect its network with the incumbent cable operator's network at a technically feasible point on the State Franchise Holder's network as identified by the Holder or as otherwise permitted by applicable law. If no technically feasible point for interconnection is available, the holder of a State Franchise shall make an interconnection available to the channel originator and shall provide the facilities necessary for the interconnection. The cost of any interconnection shall be borne by the State Franchise Holder requesting the interconnection unless otherwise agreed to by the State Franchise Holder and the incumbent cable operator. To the extent not inconsistent with Public Utilities Code § 5870(h), the City Manager or the City Manager's designee may waive, modify or defer this requirement of interconnection in his or her sole discretion.

Section 5.20.070. Payment of fees.

The State Franchise Holder shall pay quarterly all fees required pursuant to this Chapter in a manner consistent with Public Utilities Code § 5860. The State Franchise Holder shall deliver to the City by check or other means agreeable to the City Manager, a separate payment for the state franchise fee and the PEG fee not later than 45 days after the end of each calendar quarter. Each payment made shall be accompanied by a report to the City Manager summarizing the basis for the calculation of the payment.

Section 5.20.080. Examination of State Franchisee's Business Records.

The City may examine the business records of the holder of a State Franchise in a manner consistent with Public Utilities Code § 5860(i) and Chapter 5.36.640 of this Code.

Section 5.20.090. Late payments.

In the event a State Franchise Holder fails to make a state franchise fee payment required by this Chapter on or before the due dates specified herein, 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 1% unless a different rate is set by applicable law or resolution adopted by the City Council.

Section 5.20.100. Lease of City property or network.

To the extent not inconsistent with Public Utilities Code § 5840(q)(2)(B), in the event a State Franchise Holder desires to lease access to City property or to a network owned or controlled by the City, the City may set terms and charge a fee for access to the property or City network separate and apart from any franchise fee or other fee charged to the State Franchise Holders pursuant to this Chapter or DIVCA . The City Council may set any such fee by resolution.

Section 5.20.110. Customer service and consumer protection standards.

Each State Franchise Holder shall comply with all applicable customer service and consumer protection standards, including to the extent not inconsistent with Public Utilities Code § 5900, all existing and subsequently enacted customer service and consumer protection standards established by local, state or federal law and regulation.

Section 5.20.120. Penalties for violations of standards.

The City shall monitor compliance with and enforce the provisions of this Chapter and DIVCA.

For any material breach as defined in Public Utilities Code § 5900 by a State Franchise Holder of applicable customer service and consumer protection standards, the City Manager or the City Manager's designee, in his or her sole discretion may impose the following fines or penalties:

For the first occurrence of a material breach 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.

For a second material breach 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.

For a third or further material breach 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.

Any penalties imposed by the City shall be imposed in a manner not inconsistent with Public Utilities Code § 5900.

To the extent not inconsistent with Public Utilities Code § 5900, the City, acting through its City Manager or his or her designee in its sole discretion, may waive, modify, or defer the imposition of a penalty.

Section 5.20.130. Encroachment Permits.

Prior to commencing any work upon, above or below any street, highway, sidewalk, parkway, alley or other public right of way of any kind whatsoever within the City, a State Franchise Holder shall apply for and obtain an encroachment permit in accordance with the provisions of this Chapter and Title 12 of the Code, and shall comply with all other applicable laws and regulations, including but not limited to all applicable requirements of Public Resources Code §§ 21000, *et seq.*, the California Environmental Quality Act.

The Director shall either approve or deny an application from a State Franchise Holder for an encroachment permit within thirty days of receiving a completed application.

An application for an encroachment permit is considered complete when the applicant has complied with all statutory requirements, including the California Environmental Quality Act (CEQA) process. Any City denial of an application for an encroachment permit shall be in writing and shall contain a reasonably detailed explanation for the denial.

A State Franchise Holder that has been denied a permit or whose permit has been revoked may appeal the denial or revocation to the City Council in accordance with Chapter 12.02.120, which procedures and terms shall govern the appeal.

Section 5.20.140. Identification required.

Employees, agents, contractors, and subcontractors of any State Franchise Holder shall at all times be properly identified as employees or agents of the State Franchise Holder while performing any work or other activity within the City on behalf of the State Franchise Holder. Identification shall include the name of the employee or agent. The name and telephone number of the State Franchise Holder shall appear on all trucks and vehicles used by such personnel.

Section 5.20.150. Emergency Alert Systems

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.

To the extent not inconsistent with Public Utilities Code § 5880, each State Franchise Holder shall incorporate into its network the capability to permit the City in times of emergency to override the audio portion of all channels simultaneously. In addition, if feasible, each State Franchise Holder may be required to designate a channel, which may be a PEG channel, to be used for emergency broadcasts of both audio and video signals. The State Franchise Holder shall cooperate with the City in the use and operation of the emergency alert override system.

Section 5.20.160. Notices.

Each State Franchise Holder or applicant for a state franchise shall file with the City Manager a copy of all applications that the State Franchise Holder or applicant is required to file with the Public Utilities Commission.

Unless otherwise specified in this Chapter, all notices or other documentation that a State Franchise Holder is required to provide to the City under this Chapter or the Public Utilities Code shall be provided to the City Manager.

Section 5.20.170. Rights reserved.

The rights reserved to the City of Lincoln under this Chapter are in addition to all other applicable rights of the City, whether granted or reserved by other provisions of the Lincoln Municipal Code or as otherwise authorized by federal or state law and no action, proceeding, or exercise of a right by the City of Lincoln shall affect any other rights which may be held by the City of Lincoln.

Section 5.20.180. Compliance with Law.

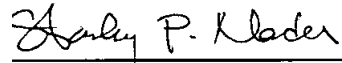
Nothing contained in this Chapter shall be construed to exempt a State Franchise Holder from compliance with all applicable ordinances, rules or regulations of the City of Lincoln now in effect or which may be adopted that are not inconsistent with this Chapter or Public Utilities Code §§ 5800, *et seq.*, including but not limited to the provisions of Chapter 12.04 of this Code. Any reference in this Chapter to these or other Chapters does not exclude the applicability of any other provision of federal, state or local law.

This ordinance Passed and Adopted at a regular meeting of the City Council of the City of Lincoln held on May 8, 2018, by the following vote:


AYES: COUNCILMEMBERS: Gilbert, Karleskint, Hydrick, Joiner, Nader

NOES: COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:


Stan Nader, Mayor

ATTEST:


Gwen Scanlon, City Clerk