

Mammoth Lakes Town Council Agenda Action Sheet

Council Meeting Date: December 3, 2014 **Date Prepared:** November 25, 2014

Prepared by: Daniel C. Holler, Town Manager and Andrew Morris, Town Attorney

Title: Consideration of an ordinance repealing and readopting the Town's cable ordinance – Municipal Code Chapter 5.32.

Agenda: Public Hearing

Recommended Motion: Waive the reading and introduce by title only an ordinance repealing and readopting Chapter 5.32 of the Town of Mammoth Lakes Municipal Code pertaining to regulation of cable television services.

Background Information: The "Digital Infrastructure and Video Competition Act of 2006" (DIVCA) law removed almost all of the Town's control over the services and operations of Suddenlink and other potential providers of cable television service. The Town cannot require any cable provider to update or upgrade its infrastructure, cannot regulate which cable providers operate in Mammoth Lakes, cannot regulate the types or prices of services offered, and cannot negotiate the amount of financial support to be provided to the Town's public/educational/governmental access ("PEG") channel. As a result, almost all of the Town's existing cable television ordinance is unenforceable or irrelevant.

The Town is permitted to continue collecting a franchise fee from cable operators equal to 5% of those operators' gross revenues generated in Mammoth Lakes. The Town can also collect an additional fee equal to 1% of gross revenues for the purpose of supporting PEG channel facilities. The Town is required to adopt both of these fees by ordinance. The Town is also required to enforce certain state-established customer service standards, and to adopt state-established penalties for violations of those standards. The Town cannot prohibit any state cable franchisee from using Town rights-of-way, but is allowed to regulate how the right-of-way is used. The attached draft ordinance establishes the fees the Town can collect, establishes customer service standards and penalties for violations, and establishes rules that will apply to cable franchisees' use of Town rights-of-way.

Funds Available: N/A

Account #:

Reviewed by:



Town Manager

X

Town Attorney

COUNCIL STAFF REPORT

Subject: Consideration of ordinance repealing and readopting the Town's cable ordinance – Municipal Code Chapter 5.32

Written by: Daniel Holler, Town Manager
Andy Morris, Town Attorney

RECOMMENDATION:

Waive the reading and introduce by title only an Ordinance repealing and readopting Chapter 5.32 of the Municipal Code pertaining to regulation of cable television service.

CONSIDERATION OF THE TOWN'S VISION, TOWN COUNCIL PRIORITIES, AND MANDATES:

- *The Town is required to take certain actions to implement updates to state law regarding cable franchises.*
- *Council priorities include the continuous improvement of the Town's technology, including that used to broadcast Council, Planning and Economic Development Commission, Recreation Commission, and other meetings.*

The proposed 1% PEG (Public/Education/Government) fee will be used to improve this technology resulting in increased use and quality of information being presented to the community.

BACKGROUND:

In 2006 the California Legislature passed a bill known as AB 2987 or the "Digital Infrastructure and Video Competition Act of 2006" ("DIVCA"). The law shifted control over cable television franchises from cities and counties to the California Public Utilities Commission, but allowed local franchise agreements that existed as of 2006 to remain in effect until they expired. Suddenlink's cable franchise with the Town is set to expire in January 2015, and the Town needs to be ready with an ordinance that reflects the requirements of the law.

ANALYSIS/DISCUSSION:

The DIVCA law removed almost all of the Town's control over the services and operations of Suddenlink and other potential providers of cable television service. The Town cannot require any cable provider to update or upgrade its infrastructure, cannot regulate which cable providers operate in Mammoth Lakes, cannot regulate the types or prices of services offered, and cannot negotiate the amount of financial support to be provided to the Town's public/educational/governmental access

("PEG") channel. As a result, almost all of the Town's existing cable television ordinance is unenforceable or irrelevant.

The Town is permitted to continue collecting a franchise fee from cable operators equal to 5% of those operators' gross revenues generated in Mammoth Lakes. The Town can also collect an additional fee equal to 1% of gross revenues for the purpose of supporting PEG channel facilities. The Town is required to adopt both of these fees by ordinance. The Town is also required to enforce certain state-established customer service standards, and to adopt state-established penalties for violations of those standards. The Town cannot prohibit any state cable franchisee from using Town rights-of-way, but is allowed to regulate how the right-of-way is used. The attached draft ordinance establishes the fees the Town can collect, establishes customer service standards and penalties for violations, and establishes rules that will apply to cable franchisees' use of Town rights-of-way.

OPTIONS ANALYSIS

Option 1: Waive the first reading and introduce by title only the ordinance repealing and readopting Chapter 5.32 of the Town of Mammoth Lakes Municipal Code pertaining to regulations of cable television services. This will remove the existing irrelevant and unenforceable cable ordinance from the Municipal Code and replace it with updated language that reflects the Town's rights and responsibilities under current law.

Option 2: Provide other direction to staff.

STAFFING CONSIDERATION:

Adoption of the draft ordinance should not affect the demands on the Town's staff.

FINANCIAL CONSIDERATIONS:

Adoption of the draft ordinance will continue the existing 5%-of-gross-revenues franchise fee received from Suddenlink, and will generate additional revenue to support the Town's PEG channel facilities through an additional 1%-of-gross-revenues fee.

LEGAL CONSIDERATIONS:

The Town Attorney has drafted the proposed ordinance, which complies with current law.

Attachment: Draft ordinance

ORDINANCE NUMBER 14-_____

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF
MAMMOTH LAKES, COUNTY OF MONO, STATE OF
CALIFORNIA, AMENDING THE MUNICIPAL CODE BY THE
AMENDMENT OF CHAPTER 5.32**

WHEREAS, the Town Council has previously adopted Chapter 5.32 of the Mammoth Lakes Municipal Code, a comprehensive set of ordinances regulating cable television service and the issuance of franchises to provide such service; and

WHEREAS, with the adoption of the Digital Infrastructure and Video Competition Act of 2006 (Public Utilities Code § 5800 et seq.), the California Legislature has removed cable franchising authority from the Town, prohibited the issuance by the Town of any new or renewed cable franchise, and preempted most forms of regulation by the Town of cable television or video service providers; and

WHEREAS, much of the existing Chapter 5.32 is now irrelevant or unenforceable due to the provisions of the Digital Infrastructure and Video Competition Act of 2006, but the adoption of certain requirements by ordinance is necessary in order to implement the provisions of the law.

**NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF
MAMMOTH LAKES, CALIFORNIA, DOES HEREBY ORDAIN AS FOLLOWS:**

Section 1. Recitals. The above recitals are all true and correct.

Section 2. Amendment of Chapter 5.32. The Town Council hereby amends the Mammoth Lakes Municipal Code by repealing Chapter 5.32 thereto, and readopting Chapter 5.32 as set forth in Exhibit "A" attached hereto and incorporated herein by reference.

Section 3. Effect of Amendment on Prior Acts. Nothing in this ordinance shall be deemed to excuse any noncompliance with, or to affect any right or obligation based upon or arising under, Chapter 5.32 as it existed prior to the effective date of this ordinance.

Section 4. Severability. If any section, subsection, subdivision, paragraph, sentence, clause or phrase in this ordinance, or any part thereof, is held invalid or unconstitutional, then such decision shall not affect the validity of the remaining sections or portions of this ordinance or part thereof. The Town Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance irrespective of the fact that any one or more sections, subdivisions, paragraphs, sentences, clauses or phrases may be declared invalid or unconstitutional.

Section 5. Effective Date. The Mayor shall sign and the Town Clerk shall certify passage and adoption of this ordinance, and shall cause the same to be published and posted pursuant to the provisions of law in this regard, and this ordinance shall take effect thirty days after its final passage.

ADOPTED, SIGNED and APPROVED this 17th day of December, 2014.

JO BACON, Mayor

ATTEST:

JAMIE GRAY, Town Clerk

EXHIBIT "A"

CHAPTER 5.32

CABLE TELEVISION AND VIDEO SERVICES

5.32.010 Purpose of Chapter

The purpose of this Chapter 5.32 is to implement the requirements of California's Digital Infrastructure and Video Competition Act of 2006 (the "Act"). The Act removed the Town's jurisdiction over most aspects of cable television and similar video services, but did require the Town to adopt certain requirements by ordinance to implement the Act's terms. The provisions of this title are designed to regulate video service providers holding state video franchises and operating within the Town. 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.

5.32.020 Franchise Required

No person or entity shall provide cable television service or video services for which a state-issued franchise is required under the Act without obtaining and maintaining a franchise therefor. No person or entity shall construct, install or maintain within any public right-of-way in the town, any equipment or facilities for provision of cable television service or video services without obtaining and maintaining a franchise therefor.

5.32.030 State Video Franchise Fee

For any state video franchise holder operating within the boundaries of the Town of Mammoth Lakes, there shall be a fee paid to the Town equal to five percent (5%) of the gross revenue of that state video franchise holder. In addition to such fee, there shall be an additional fee paid to the Town equal to one percent (1%) of the gross revenue of that state franchise holder for purposes of supporting PEG channel facilities consistent with state and federal law. Gross revenue, for the purposes of this section, shall have the definition set forth in California Public Utilities Code 5860.

5.32.040 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 of Mammoth Lakes to ensure compliance with Section 5.32.030 of this Code.

5.32.050 Customer Service Standards

(a) Any holder of a state video franchise operating within the boundaries of the Town of Mammoth Lakes shall comply with all applicable state and federal customer service and protection standards pertaining to the provision of video service, including without limitation the standards set forth in Government Code Sections 53055, 53055.1, 53055.2, and 53088.2.

(b) The Town Manager shall monitor the compliance of holders of a state video franchise operating within the boundaries of the Town of Mammoth Lakes with respect to state and federal customer service and protection standards. The Town Manager, or his or her 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 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, or such different penalties as may be established by state law:

(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 of Mammoth Lakes 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.

5.32.060 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 of Mammoth Lakes 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, the Town Manager will provide any appropriate comments to the Public Utilities Commission regarding an application or an amendment to an application for a state video franchise.

5.32.070 Notice Prior to Installation of Video Services Facilities

(a) Any holder of a state video franchise that proposes to install above-ground facilities in the public right-of-way shall, not less than 20 days prior to installing such facilities, provide written notice to the owner of the private or public property (excluding the public right-of-way) nearest to the proposed facility. For purposes of this subsection, "above-ground facilities" shall include only those facilities that are located on the ground or on a base or pedestal that is on the ground, and shall exclude aerial or pole-mounted facilities.

(b) Any franchisee to which this section applies shall provide the Town with a copy of the proposed form of notice to be used in compliance with subsection (a), not less than 10 days prior to mailing or delivering the notice. The Town may require the franchisee to amend the form of the notice. Once the Town has approved the form of the notice, the franchisee shall not be required to obtain additional approvals of notice from the Town, so long as the franchisee does not materially deviate from the form of notice approved by the Town.

5.32.080 System Construction

(a) No facilities governed by the Act shall be constructed without securing all encroachment permits necessary for the placement of facilities and equipment within public rights-of-way. The Town reserves all rights it has under state and federal law to regulate any state franchisee, including without limitation the Town's authority under Public Utilities Code section 7901.1.

(b) In those areas of Mammoth Lakes where the transmission lines and distribution facilities of public utilities providing telephone and electric power service are underground, any state franchisee shall likewise construct, operate, and maintain its transmission and distribution facilities underground.

(c) No changes in, extensions of, or construction of new poles, anchors, wires, cables, conduits, vaults, laterals or other fixtures and equipment (collectively, "Structures"), in, upon, along, across, under or over any street, alley, or right-of-way shall be commenced until the Town's public works director or his or her designee has been notified, and any required encroachment permit obtained. All construction and facilities shall comply with California Public Utilities Commission General Orders 95 (underground facilities) and 128 (overhead lines), as they may be amended or superseded.

(d) All transmission and distribution structures, lines and equipment erected by a state franchisee shall be located so as not to interfere with the proper use of the public rights-of-way, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of such rights-of-way, and not to materially interfere with existing public and municipal utility installations.

(e) In the event that any property or improvement of the Town or any other public entity or public utility in the public rights-of-way is disturbed or damaged by a state franchisee or any of its contractors, agents or employees in connection with undertaking any and all work pursuant to the rights granted to the state franchisee, the state franchisee shall promptly, at its sole cost and expense, restore to the owner's satisfaction such property or improvement which was so disturbed or damaged. If such property or improvement shall within two (2) years (or in the case of street improvement, until the street is resurfaced if resurfaced prior to the expiration of the two (2) years) of the date the restoration was completed, become uneven, unsettled or otherwise require additional restorative work, repair or replacement because of the initial disturbance or damage to the property by the state franchisee, then the state franchisee, as soon as reasonably possible, shall, promptly upon receipt of written notice from the Town or other owner and at the state franchisee's sole cost and expense, restore to the Town or other owner's satisfaction the property or improvement which was disturbed or damaged. Any such restoration by the state franchisee shall be made in accordance with such materials and specifications as may, from time to time, be established by the Town.

(f) Prior to performing any work in the public right-of-way, a state franchisee shall give appropriate notice to the "Underground Service Alert" ("USA"), or any similar type service provider as designated by the Town.

(g) There shall be no unreasonable or unnecessary obstruction of the public rights-of-way by a state franchisee in connection with any of the work provided for herein. The state franchisee shall maintain any barriers, signs and warning signals during any work performed on or about the public rights-of-way or adjacent thereto as may be necessary to reasonably avoid injury or damage to life and property.

(h) If the Town lawfully elects to alter or change the grade or location of any public right-of-way, the state franchisee shall, upon reasonable notice by the Town, and in a timely manner, remove, relay and relocate its poles, wires, cables, underground conduits, manholes and other fixtures at its own expense.

(i) A state franchisee shall not place poles, conduits or other fixtures above or below ground where the same will interfere with any gas, electric, telephone fixtures, water hydrants or other utility, and all such poles, conduits or other fixtures placed in any street shall be so placed as to comply with all ordinances of the Town.

(j) In accordance with applicable law, a state franchisee or any utility user of the public rights-of-way may be required by the Town to permit joint use of its poles and/or conduit located in the public rights-of-way, insofar as such joint use may be reasonably practicable and upon payment of a reasonable rental fee for such usage. In the absence of agreement regarding such joint use, each party shall be entitled to exercise any rights and defenses provided by applicable law.

(k) A state franchisee, on request of any person holding a moving permit issued by the Town, shall temporarily raise or lower its wires or fixtures to permit the moving of

buildings. The expense of such temporary raising or lowering of wires or fixtures shall be paid by the person requesting the same, and the state franchisee shall have the authority to require such payment in advance. The state franchisee shall be given not less than five (5) business days prior written notice to arrange for the temporary wire or equipment changes.

(l) A state franchisee shall have the authority to trim any trees or other natural growth overhanging the public rights-of-way so as to prevent the branches of such trees or other natural growth from coming in contact with the state franchisee's wires, cables and other equipment. The Town may require all trimming of trees and natural growth to be done under its supervision and direction.

5.32.090 Technical Standards

A state franchisee shall construct, install, operate and maintain any facilities and equipment authorized by its state franchise in a manner consistent with all applicable laws, ordinances, construction standards, governmental requirements, FCC technical standards, and any detailed standards required by the franchise.

5.32.100 Effect of Title on Former Ordinances

By adopting this Chapter 5.32, the Town Council does not waive or excuse any violation of Chapter 5.32 as it existed immediately prior to the effective date of the ordinance adopting this Chapter 5.32, or any obligation of any person or entity to which the former version of this Chapter 5.32 applied. To the extent not superseded by state or federal law, the former provisions of this Chapter 5.32 shall be deemed to have remained in effect continuously until the effective date of the ordinance adopting this Chapter 5.32.