




Office of the City Manager

ACTION CALENDAR  
May 5, 2009

To: Honorable Mayor and Members of the City Council  
From:  Phil Kamlarz, City Manager  
Submitted by: Claudette Ford, Director, Public Works  
Subject: Ordinance Repealing BMC Chapters 16.10, 16.11 and 9.56, and Adopting new BMC Chapter 16.10 Regulating Excavations in the Public Right of Way for Video and Telecommunications Systems

RECOMMENDATION

Adopt the first reading of an Ordinance repealing BMC Chapters 16.10, 16.11 and 9.56, and adopting a new Chapter 16.10, "Regulating Excavations in the Public Right of Way for Video and Telecommunications Systems."

SUMMARY

In December 2000, Council adopted Chapters 16.10 and then 16.11 of the Berkeley Municipal Code. Both chapters were ultimately invalidated and enjoined by the United States District Court for the Northern District of California, and then the Ninth Circuit Court of Appeals, on the grounds that they violated the Telecommunications Act of 1996. Since then, the City has not had an enforceable ordinance for regulating telecommunications construction in the PROW. In the meantime, the state legislature adopted Assembly Bill 2987 (also known as DIVCA), which preempts the ability of local governments to enter into franchises with cable TV (CATV) providers. DIVCA adopts the same substantive standards for local regulation of CATV facilities in the PROW that apply to telecommunications facilities, resulting in convergence of regulatory standards for both types of facilities. The proposed ordinance repeals BMC Chapters 16.10 and 16.11, as well as Chapter 9.56 (regulating CATV franchises), and adopts a new Chapter 16.10 to regulate both telecommunications and CATV facilities in the PROW, in compliance with the Federal Telecommunications Act of 1996, Assembly Bill 2987 (DIVCA), and the California Public Utility Code (CPUC).

FISCAL IMPACTS OF RECOMMENDATION

The City's ability to collect fees for cable and telecommunications construction in the PROW could be challenged without an enforceable ordinance on record. The proposed ordinance requires providers to apply for a permit to excavate (and any other applicable

permits), and pay fees no fewer than 30 days prior the construction start date, in accordance with the City's Master Fee Schedule.

AT&T has indicated that it plans to begin applying for PROW permits in 2009 to compete with Comcast by bringing the AT&T "U-verse" package (Internet, telephone, and television) to the Berkeley market. Once these permit applications are received, staff can provide a report to Council outlining the project scope and associated fees.

Construction of cable and telecommunications systems in the PROW influences which services are available in Berkeley, the level of competition between providers, and which franchise fees the City collects. Since 2005, the City has collected an annual average of approximately \$1,000,000 per year from Comcast. AT&T's entry into the Berkeley market could have the following fiscal impacts:

1. Expand service subscriptions, thereby increasing the total value of franchise fees collected by the City;
2. Result entirely in a shift of customers from Comcast to AT&T, causing little or no change in the total value of franchise fees collected by the City; and/or
3. Increase price competition between AT&T and Comcast to such an extent that the total value of franchise fees collected by the City decreases (though this is unlikely).

### BACKGROUND

In 1996, Congress passed the Federal Telecommunications Act (FTA) as a national policy framework to "promote competition and reduce regulation in order to secure lower prices and higher quality services" for telecommunications consumers. Although the FTA acknowledges a local government's authority to manage public rights of way (PROW), it specifically precludes states and municipalities from passing laws that "prohibit or have the effect of prohibiting" companies from providing telecommunications services.

In 1999, Qwest Communications Corporation (Qwest) won a competitive bid to provide expanded telecommunications capacity to Lawrence Berkeley National Laboratory (LBNL). In July 2000, Qwest applied for City permits to install conduit in the PROW. Later that month, Council declared a moratorium on telecommunications infrastructure work in the PROW. In December 2000, Council adopted an ordinance regulating PROW use by telecommunications carriers. Qwest filed suit against the City, arguing that the ordinance violated the FTA. In May 2001, the United States District Court for the Northern District of California ruled in favor of Qwest, prohibiting the City from enforcing its existing ordinance and prompting Council to adopt a revised ordinance (the current version of BMC Chapters 16.10 and 16.11). Qwest challenged the revised ordinance and won. In 2003, the Court ruled that BMC Chapters 16.10 and 16.11 violated the FTA because they imposed an "onerous burden on telecommunications providers seeking entry into the Berkeley telecommunications market". The City appealed the Court's decision, but in January 2006 the United States Court of Appeals for the Ninth Circuit upheld the District Court's decision.

While the Qwest litigation was pending, debate over how the FTA would affect

telecommunications franchises for video service providers led to California State Assembly Bill 2987, commonly known as DIVCA (the Digital Infrastructure and Video Competition Act of 2006). Before DIVCA, cable companies in California sold bundled packages of video, Internet, and telephone service under the authority of local cable franchise agreements negotiated with local agencies. Without cable franchises, telephone companies were unable to provide video service in most locations and could not compete with the bundled packages offered by cable companies. Citing the Federal Telecommunications Act (FTA), telephone companies argued that negotiating independent franchise agreements with each local agency would be time consuming, expensive, and an obstacle to fair competition. DIVCA was adopted to streamline and standardize the franchise process for all cable and telecommunications companies seeking to provide video services in California, and to outline the rights and responsibilities of local agencies under a state franchise, including:

- **PROW Management**: Municipalities must either approve or deny an application for an encroachment permit within 60 days of receiving a completed application, unless otherwise mutually agreed to by the parties. If an application is denied, an appeal process must be in place. The proposed ordinance includes policies and procedures for an appeal process.
- **Franchise Fees**: Telecommunications providers offering video services can be assessed a fee payable to municipalities, equal to 5% of gross revenues plus an additional 1% to fund public access, educational, and government (PEG) television. In 2008, Council adopted BMC Chapter 9.58 to collect franchise fees (including the extra 1% for PEG channels) from any telecommunications company providing video services in Berkeley.
- **Customer Service Standards**: Municipalities may adopt a schedule of penalty fees for breach of customer service standards, with a maximum penalty of \$500 per day. If a subsequent breach occurs within 12 months, penalties may be increased to \$1,000 per day. If a third or further breach occurs within those same 12 months, penalties may be increased to \$2,500 per day. Fifty percent of any penalty paid to the City is submitted to the CPUC Digital Divide Account. In 2008, Council adopted BMC Chapter 9.58, which includes a schedule for customer service penalty fees.

In 2007, the California Public Utilities Commission (CPUC) granted a state franchise to both Comcast and AT&T for the provision of video services in the City of Berkeley. Since Comcast updated its infrastructure under the previous franchise agreement, staff does not expect Comcast to apply for any wide scale permitting in the near future. However, AT&T has notified the City of intent to submit permit applications for PROW construction in 2009, to compete directly with Comcast in the Berkeley market. AT&T has recently begun or completed upgrades to its infrastructure in several nearby cities (including Richmond, Hayward, Fremont, and Oakland). A few Berkeley households on the border of Oakland are already able to access AT&T video services from facilities installed in Oakland's PROW (and the City has begun collecting associated franchise fees from AT&T).

On March 5, 2009, the Public Works Commission considered the proposed ordinance

and took the following action:

Motion/Second/Carried (8-0-0): (1) to request that AT&T hold a public meeting at the next PWC meeting on 4/02/09; (2) to request staff provide an after-the-fact report on the initial permit applications; (3) that the Commission expresses a statement of support for the new ordinance, that the process move forward with all due haste; and (4) that more public process is recommended during the permit application process, such as a longer period of time (perhaps 30 days), a noticing area larger than a radius of 300', and that notices be sent to both property owners and to residents.

Section 16.10.040 of the proposed ordinance has been modified as requested by the Public Works Commission (item (4) above).

#### PROPOSED ORDINANCE

In addition to providing for compliance with DIVCA, the proposed ordinance provides for a permit application procedure, the collection of cost-based fees, public notification, submission of construction, traffic control, graffiti mitigation plans by the provider, post-excavation obligations, maintenance and removal of the facilities, posting of financial security by the provider, and indemnity and insurance requirements (see Attachment 1).

The proposed ordinance requires providers to apply for a permit to excavate, and any other applicable permits, and pay fees no fewer than 30 days prior the construction start date. The application requires providers to submit plans that show the location and dimensions of all proposed facilities, existing and proposed landscaping, and to provide photographs or artist renderings that show the fully dimensioned size of any proposed facilities. Providers are also required to submit traffic control plans, graffiti mitigation plans and a public notification plan that requires notification by mail to all homeowners and residents within 500 feet of a proposed site not less than 30 days before the start of proposed construction, as well as notification by door hanger at least 10 days prior to the start of construction. In determining whether to grant a permit, the Director of Public Works considers pedestrian and public safety, the capacity of the PROW, disruption to the PROW, allowable alternatives that would be less disruptive, and the provider's completion of any required environmental review under the California Environmental Quality Act ("CEQA").

#### RATIONALE FOR RECOMMENDATION

The proposed ordinance is necessary to regulate CATV and telecommunications facilities in the PROW, and repeals invalid and superseded ordinances.

#### ALTERNATIVE ACTIONS CONSIDERED

If the proposed ordinance is not enacted, telecommunications providers would be able to install upgrades to their infrastructure in the PROW by applying for a Permit to Excavate and following the procedures outlined in the application, which does not allow for collection of fees by the City or provide adequate regulatory authority to the City.

CONTACT PERSONS

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