

RESOLUTION NO. 2009-30

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS
IMPOSING PENALTIES UNDER PUBLIC UTILITY CODE § 5900 ON
COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC DBA COMCAST**

WHEREAS, Comcast Cable Communications Management, LLC d/b/a Comcast operates a cable television system in the City through which it provides cable and video services to resident of the City; and

WHEREAS, prior to January 2, 2008, Comcast operated within the City, using the City's rights-of-way, pursuant to a local franchise issued by the City to a Comcast predecessor in 1984, which franchise was extended by the City through January 1, 2008; and

WHEREAS, on January 2, 2008 Comcast was issued a state franchise by the California Public Utilities Commission ("CPUC") pursuant to the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), California Public Utilities Code §§ 5800 *et seq.*; and

WHEREAS, under its state franchise issued by the CPUC on January 2, 2009, Comcast received authority to operate in numerous jurisdictions, including the City of Los Altos; and

WHEREAS, under the previous local franchise agreement between Comcast (and its predecessors) and the City, the cable provider was required to pay the City an annual franchise fee of 3% of its gross revenues; and

WHEREAS, under a Franchise Extension and Modification Agreement between the City and Comcast, dated as of and approved by the City Council on December 5, 2007, the franchise fee was increased from 3% to 5% of gross revenues, effective not later than December 1, 2007; and

WHEREAS, under DIVCA, Public Utility Code §§ 5840(q) the holder of a state franchise is required to pay a franchise fee of five percent of gross revenues to local jurisdictions in which the holder is operating, or a lower franchise fee if one is adopted by the local jurisdiction; and

WHEREAS, the City passed Ordinance 07-313 enacting Chapter 4.44 of the City's Municipal Ordinance, which imposed certain rules and regulations on holders of a state franchise issued pursuant to DIVCA; and

WHEREAS, the City adopted a five percent franchise fee applicable to holders of state franchises under Section 4.44.050 of the City's Municipal Code;

WHEREAS, Comcast has been paying the City a franchise fee of 5% of its gross revenues since January 2, 2008, when it began operating under a state franchise; and

WHEREAS, holders of video franchises are permitted under DIVCA to identify the franchise fee as a separate line item on a customer bill and pass the franchise fee through to the customer; and

WHEREAS, on several occasions, members of City staff have been contacted by residents who are Comcast customers, who have complained about an increase in franchise fees that are being charged to the customers; and

WHEREAS, City staff has investigated such complaints and learned, through Comcast, that the company began charging customers in the City a franchise fee of approximately 7.76% beginning in October, 2008, and has been charging this higher rate continuously since that date; and

WHEREAS, City staff has met with employees of Comcast to discuss the customer complaints regarding the higher franchise fees and Comcast explained that it was temporarily charging the higher rate to customers to make up for the first nine months of 2008, when the company was paying the City a 5% franchise fee but errantly passing through to customers only a 3% fee; and

WHEREAS, City staff has requested numerous times in writing that Comcast provide the City with legal authority that permitted the company temporarily to charge customers a higher franchise fee under the circumstances described herein; and

WHEREAS, City staff has requested numerous times in writing that Comcast provide the City with accounting information to demonstrate that the Company was not collecting more from customers in the City than it had under-collected during the first nine months of 2008; and

WHEREAS, Comcast has failed to provide the City with either the legal authority allowing the temporary increased fee or with any accounting information to demonstrate that the higher fee is being accurately assessed; and

WHEREAS, Comcast has informed the City that it intends to impose the 7.76% fee on customers in the City for the remainder of 2009; and

WHEREAS, if Comcast in fact imposes the higher fee through the end of 2008 it will have imposed a 7.76% fee for a period of 15 months to make up for a deficiency generated by charging only 3% for a period of nine months; and

WHEREAS, City staff has learned that Comcast has failed to provide an explanation for the higher fees on customer bills; and

WHEREAS, under DIVCA, Public Utility Code § 5900(a), holders of State franchises must comply with Government Code § 53088.2, which in turn provides in section (f) that "all video providers shall render bills that are accurate and understandable;" and

WHEREAS, § 5900(a) also provides that holders of a State franchise must comply with federal customer service standards, which in turn, pursuant to 47 C.F.R. § 76.1619, requires that "bills must be clear, concise and understandable. Bills must be fully itemized, with itemizations including, but not limited to, basic and premium service charges and equipment charges;" and

WHEREAS, Under DIVCA, Public Utility Code § 5900(c), the City is authorized to enforce customer service and consumer protection standards with respect to complaints received from City residents; and

WHEREAS, The City enforces the DIVCA customer service standards under Section 4.44.120 of the Municipal Code; and

WHEREAS, Under DIVCA, Public Utility Code § 5900(d), should the City determine that there is a material violation of any customer service requirements and that penalties should be imposed, it must schedule by ordinance or resolution a schedule of such penalties; and

WHEREAS, under DIVCA, Public Utility Code § 5900(e), a local jurisdiction shall give a holder of a state franchise written notice of any alleged material violations of any consumer service standards and the holder shall have 30 days from receipt of the notice to cure any violations; and

WHEREAS, on May 22, 2009, the City, through its outside legal counsel, Miller & Van Eaton, sent Comcast letter describing the alleged customer service violations described above, and requesting that Comcast cure the violations or provide the City with an explanation of why Comcast is not in material violation of the customer service standards described above, and notifying Comcast that the failure to cure or provide an explanation would result in the City imposing penalties, as permitted under DIVCA; and

WHEREAS, the City's May 22, 2009 letter was received by Comcast on May 28, 2009; and

WHEREAS, Comcast never responded to the City's May 22, 2009 letter; and

WHEREAS, under DIVCA, Public Utility Code § 5900(d), and Section 4.44.120 of the City's Municipal Code, the City is authorized to impose a penalty of up to \$500 for each day of each material breach, not to exceed \$1,500; and

WHEREAS, based on the City's investigation of the facts, its review of legal authority and the failure of Comcast to respond to the City's requests for legal authority and accounting information, as well as the failure of Comcast to provide an explanation for the higher franchise fee on customer bills, the City has concluded that Comcast is in material violation of the customer service standards described herein.

NOW, THEREFORE, THE CITY COUNCIL RESOLVES AS FOLLOWS:

1. The foregoing recitals are approved and incorporated herein by reference.
2. The City finds that Comcast is in material violation of the customer service standards described herein.
3. As a result of these material violations, the City finds that it is appropriate to impose penalties;
4. The City hereby imposes a penalty of \$500 for each day the violations described above remain outstanding, not to exceed a total of \$1,500.

I HEREBY CERTIFY that the foregoing is a true and correct copy of a Resolution passed and adopted by the City Council of the City of Los Altos at a meeting thereof on the 28th day of July 2009 by the following vote:

AYES:	PACKARD, CARPENTER, CASAS, BECKER, SATTERLEE
NOES:	NONE
ABSENT:	NONE
ABSTAIN:	NONE



Megan Satterlee, MAYOR

Attest:



Susan Kitchens, CITY CLERK