

## **SPECIAL CITY COUNCIL MEETING**

5:45 p.m., Monday, February 1, 2010

A Special Meeting of City Council was held at 5:45 p.m. on Monday, February 1, 2010 in Council Chambers of City Hall, 1207 Palm Boulevard, Isle of Palms, South Carolina. Attending the meeting were Councilmembers Bergwerf, Bettelli, Buckhannon, Duffy, Loftus, Piening, Stone and Thomas, Mayor Cronin, City Administrator Tucker, City Attorney Halversen, Assistant to the Administrator Dziuban and City Clerk Copeland. There was a quorum present to conduct business.

1. Mayor Cronin called the meeting to order and acknowledged that the press and public had been duly notified of the meeting in accordance with the Freedom of Information Act.

### **2. Presentation by Greg Fender of Local Government Services regarding City's Options related to Cable Television Franchise**

Mayor Cronin announced that Greg Fender of Local Government Services was present to inform the City Council about the requirement from the State of South Carolina that the City consent to the franchise agreement it has negotiated with Comcast Cable; he noted that the City has sixty-five (65) days in which to pass an ordinance either consenting to or refusing the agreement.

Mayor Cronin reviewed Mr. Fender's credentials as having worked with the Georgia Municipal Association for many years where he became their expert on the Georgia franchise laws, particularly cable franchise; he has also worked with the states of South Carolina, Mississippi, Arkansas and Texas as they negotiated franchise agreements. Using his twenty plus (20+) years' experience, Mr. Fender has also worked with seventy-five (75) municipal authorities in South Carolina as they work through the franchise process.

Administrator Tucker explained that the City had received the certified letter from the Secretary of State on December 23, 2009 – just as the City was closing for the holiday season. After the new year, she began her research about the letter – what it meant and what the City should do; she also worked with City Attorney Halversen, who had researched the new South Carolina law.

Mr. Fender stated that he intended to review the following areas related to franchise and franchise fees:

- Changes with franchising authority for local governments in South Carolina;
- Background and history on what has occurred across the United States that has impacted South Carolina legislation;
- Information on the background on franchise fees and compensation for the use of public rights-of-way by private companies; and
- Information on the City's rights under the South Carolina cable act.

Mr. Fender began his comments by stating that, "historically, franchising rights for cities have always been vested in federal law." Before 1984, cable companies were of the opinion that they were at the mercy of the cities for obtaining a franchise renewal; they had no expectation of continuing to operate. On the other hand, during the 1970s, there was the advent of the

specialty channels, such as ESPN, HBO, C-Span, etc, that made cable more desirable to the populace as these channels were seen as adding to quality of life. Because Congress was requesting that the cable companies make more of an investment to the nation's infrastructure, the cable companies wanted more assurance that their franchise agreements would be approved. The result was the 1984 Cable Act that established a process for local governments and cable companies to follow in terms of negotiating franchise renewals; under this law, a cable operator must submit its request for renewal three (3) years in advance of the expiration date so that negotiations can begin. Before 1984, the maximum that a cable company would pay for use of the right-of-way was three percent (3%) of gross revenue; cities lobbied that the value of the rights-of-way had increased and the law was amended to allow for a maximum of five percent (5%) of gross. Subsequent to that act, the cable companies decided to pass that franchise fee along to the customer, creating the impression that the local governments were imposing a tax on the consumer. Mr. Fender argued that the majority of cable users across the United States do pay the full five percent (5%) franchise fee and that all cable companies create their budgets anticipating a five percent (5%) franchise fee.

The 1992 Cable Act revamped parts of the 1984 Act; this act enabled local governments to regulate cable television rates and mandated that cable companies had to itemize their bills; as a result, some consumers learned that they were paying for services they had not ordered. In addition, the cable companies were allowed to identify, through the itemization, the municipal franchising authority for the first time.

Subsequent to a landmark federal case, known as the Dallas versus the FCC case, the Fifth Circuit Court of Appeals ruled that franchise fees were not a tax but a rent for the use of a right-of-way. If the cable company passes that cost of rent on the right-of-way on to the consumer and collects that rental income, the cable company must include the franchise fee collected in the total company revenue then apply the five percent (5%) to that revenue total for payment to the governing entity. The Federal government stated that, unless the City specifically excludes the franchise fee from the calculation of gross revenue, it must be included.

In September 2005, Texas was the first state to eliminate the cities' rights to franchise video services because the cable industry had developed a voice-over internet protocol, and the cable company had only to go to the state public service utilities commission to be certified to provide telephone services. AT&T and Verizon lobbied that, since the cable industry was invading the telephone industry, they wanted to be allowed to offer video services but not be forced to negotiate individual franchise agreements with each governmental entity. AT&T and Verizon prevailed, allowing them to negotiate franchise agreements with the state.

South Carolina passed a similar law in May 2006 that states, when a local franchise agreement expires, the incumbent operator goes to the Secretary of State's office to re-apply for the franchise. In South Carolina, cities have a constitutional right to the franchising authority; the cable company must seek the governmental entity's permission or authorization for the application submitted to the Secretary of State authorizing the cable company to obtain a franchise with the state. The law stipulates passage of an ordinance with two (2) readings in a sixty-five (65) day period of time.

The application asks the following three (3) questions:

- What is the franchise fee? If the entity does not respond, the franchise fee automatically goes down to two percent (2%).
- How many PEG channels does the entity currently have? (PEG channels are public education and government access channels.)
- Does the entity approve of the application? If an entity does not approve, it must have a valid reason for doing so.

Mr. Fender reflected that one (1) decision before City Council was on the approval of the franchise agreement between the State of South Carolina and Comcast Cable. He stated that he was an advocate for local governments charging the full value for the use of their rights-of-way, which, in this case, is five percent (5%).

Mr. Fender reported that the Federal Communications Commission (FCC) figures from 2008 indicate that thirty-two percent (32%) of American households use satellite dishes for television while sixty-eight (68%) have cable television. A key point to remember is that satellite providers do not use rights-of-way, but they do pay the federal government "huge" licensing fees.

Mr. Fender repeated that City Council was not imposing the fee on the citizens, but was imposing the fee on the company for the use of the public right-of-way. He added that, in coastal communities, it is difficult to calculate the franchise fees based on population because of the seasonal fluctuations; should the City increase its franchise fee to the five percent (5%) maximum, the increased revenue would be approximately fifty-two thousand dollars (\$52,000) annually. One important fact to remember about franchise fees is that they are returned to the community for use by the community for its citizens.

Concluding, Mr. Fender suggested that the Council look at the issue nationally since Comcast is present in almost every major city in the country; he indicated that, in the Comcast budget process, they are building into their pricing the assumption of a five percent (5%) franchise fee. When any community has a lower franchise fee, they are helping Comcast with their profit margins. He reported that all seventy-five (75) governmental entities he has worked with have increased their franchise fee to five percent (5%). Mr. Fender added that increasing City revenues in this manner lessens the City's reliance on property tax revenues.

Mayor Cronin thanked Mr. Fender for his time to educate the Council on this subject and added that the local municipalities – Charleston, Edisto, Mount Pleasant, Goose Creek - with whom Mr. Fender has worked, have approved a franchise fee of five percent (5%).

The Mayor noted that the budget for Franchise Fee revenue for the current budget year is seventy-eight thousand dollars (\$78,000) and that, last year, the City collected seventy-eight thousand two hundred forty-five dollars (\$78,245). He reported that there has been a growing trend over recent years for the consumer to buy more services from the cable companies, and the cable rates are continually rising.

Councilmember Loftus asked Mr. Fender if the City could ask other cable vendors to service the island to create competition. Mr. Fender responded that any vendor could enter the market at any time, but it is not financially viable for multiple vendors to be in a small market due to the

costs involved. He noted that, under the new law, the local governments could no longer grant or negotiate franchises; if another cable company wanted to enter this market, it must apply to the Secretary of State.

Councilmember Loftus suggested, hypothetically, that, if he had a one hundred dollar (\$100) cable bill and the franchise fee was three percent (3%), his total bill should be one hundred three dollars (\$103.00), but, if the franchise fee were five percent (5%), the total bill would be one hundred five dollars (\$105.00). Mr. Fender said that the bill could increase, but it was also possible that Comcast would not pass along the full five percent (5%) to the consumer due to a recent price increase.

Councilmember Loftus asked, if the Council chose not to increase the fee now, could it increase the fee next year, and Mr. Fender said that it could increase at any time with passage of an ordinance and notification to the Secretary of State.

Councilmember Stone asked if he were correct that there is no term attached to the state agreement; Mr. Fender said the Councilmember was correct.

**3. First Reading, by title only, of Ordinance 2010-03 – An Ordinance Granting Consent to Application for Franchise for Cable Service and Setting Franchise Fee.**

**MOTION: Councilmember Stone moved to approve Ordinance 2010-03 for First Reading by title only; Councilmember Bettelli seconded.**

Councilmember Stone repeated that the City Council was to approve the state's franchise agreement and to establish the Isle of Palms franchise rate. He looked to the City Administrator for confirmation that the City was currently imposing a three percent (3%) fee; she agreed and added that the maximum rate was five percent (5%). Councilmember Stone expressed his lack of support for an increase to five percent (5%) because he did think it was a tax and he did not see the need.

**AMENDMENT: Councilmember Loftus moved to amend Ordinance 2010-03 to keep the franchise fee at three percent (3%); Councilmember Bergwerf seconded.**

Councilmember Bettelli called into question amending the ordinance when the primary motion had stated that the ordinance would be approved "by title only." After conferring with the City Attorney, Mayor Cronin asked that all motions be withdrawn; Councilmember Loftus withdrew the amendment and Councilmember Stone withdrew the primary motion.

**MOTION: Councilmember Loftus moved to approve Ordinance 2010-03 for First Reading and to maintain the franchise fee at three percent (3%); Councilmember Buckhannon seconded.**

Councilmember Buckhannon repeated and concurred with Councilmember Stone's stance that the franchise fee is a tax.

Councilmember Piening expressed his opinion that the cable companies were going to charge what they were going to charge whether the franchise fee is three percent (3%) or five percent (5%); he added that the City should get the full value for its citizens.

Councilmember Duffy argued that the City was the people and the City did not need the money.

Mayor Cronin countered that the City's costs, to a large extent, were people, and those costs increase one or two percent (1-2%) every year causing the City to constantly be in need of new revenue sources. He expressed his support to increase the franchise fee to be consistent with the greater Charleston area.

Councilmember Loftus cited the many island residents on fixed incomes, the economic recession and the recently reported SCE&G rate increase as reasons not to increase the franchise fee.

**Call for the Question: The motion PASSED on a vote of 7 to 2; Mayor Cronin and Councilmember Piening cast the negative votes.**

**4. Personnel Committee Recommendation: Reclassify the position of Assistant Fire Chief to that of Fire Inspector and approval of the job description.**

Administrator Tucker reported that this was an action that has passed through both the Public Safety and Personnel Committees that takes the position of Assistant Fire Chief, which is already budgeted in the Fire Department, and changes that job classification and job description to that of Fire Inspector. Chief Graham has believed that the Department would benefit from having one (1) person licensed and assigned the responsibility for the inspections; other fire personnel would accompany the inspector to increase frequency in the buildings and to get training. Presently all inspections are being done under Chief Graham's license. Having one (1) person performing fire inspections would provide a consistency that has been lacking with multiple persons doing the inspections. There is no cost change for this change, only a reallocation of budgeted funds.

**MOTION: Councilmember Buckhannon moved to approve the reclassification of the position of Assistant Fire Chief to that of Fire Inspector and to approve the job description; Councilmember Bergwerf seconded.**

Councilmember Duffy expressed concern with the fact that there is inconsistency in the inspections; he opined that inconsistency indicated a lack of procedures or a lack of documentation and sharing of procedures.

Chief Graham stated that there were good procedures in place, but there were too many people doing the job; she noted that the Department follows the state codes and Fire Marshall recommendations. She noted that there are four (4) members of the Department who are qualified to perform fire inspections at this time, and other personnel are always being trained.

In response to Councilmember Stone's question about the Assistant Chief position, Chief Graham replied that the position was not needed because she was seldom away from the island, and there was a chain of command established in the Department in her absence.

**Call for the Question:        The motion PASSED UNANIMOUSLY.**

**5.     Adjourn**

**MOTION:       Councilmember Bettelli moved to adjourn the meeting at 7:02 p.m.;**  
**Councilmember Loftus seconded and the motion PASSED UNANIMOUSLY.**

Respectfully submitted:

Marie Copeland  
City Clerk