

ORDINANCE NO. 4, 2008

AN ORDINANCE ENACTING PART EIGHT, TITLE XI, CHAPTER 112 OF THE CODIFIED ORDINANCES OF THE CITY OF MONTGOMERY, OHIO, ENTITLED "VIDEO SERVICE AUTHORIZATIONS" AND ADDING PROVISIONS FOR VIDEO SERVICE AUTHORIZATIONS, ESTABLISHING FEES, DEFINING TERMS, AND AUTHORIZING THE CITY MANAGER OR DESIGNEE TO PROVIDE NOTICE TO THE VIDEO SERVICE PROVIDERS OFFERING VIDEO SERVICE IN THE CITY PURSUANT TO A STATE AUTHORIZATION AND DECLARING AN EMERGENCY

WHEREAS, the Ohio General Assembly enacted Sections 1332.21 through 1332.34 of the Ohio Revised Code, and such enactment provides for a "uniform regulatory framework" on a statewide basis for the provision of cable television and/or other video service; and

WHEREAS, Sections 1332.21 through 1332.34 of the Ohio Revised Code became effective on September 24, 2007; and

WHEREAS, Sections 1332.21 through 1332.34 of the Ohio Revised Code will substantially reduce the ability of the City of Montgomery ("City") to act as a traditional franchising authority under the Cable Communications Policy Act of 1984 as amended by the Telecommunications Act of 1996 (47 U.S.C. 521 et seq.), to regulate cable and/or video service offered in the City using facilities and equipment located in the City's public rights-of-way; and

WHEREAS, the City's cable television franchise agreement with Time Warner expires by its own terms on or about April 27, 2009 and pursuant to which Time Warner paid franchise fees in the amount of five percent (5%) of gross revenues which were defined by the franchise agreement to include, inter alia, advertising revenues; and

WHEREAS, pursuant to R.C. Section 1332.23, any new video service provider intending to provide video service to subscribers in the City must apply for and

obtain a video service authorization ("VSA") from the Director of the Ohio Department of Commerce; and

WHEREAS, upon being granted a VSA by the Director of the Ohio Department of Commerce, the applicant shall be considered a competitive video service provider ("VSP"); and

WHEREAS, R.C. Section 1332.23 also permits a cable operator with an effective franchise agreement to terminate its franchise with the City, at its option, by applying for a state VSA when a competitive video service provider either gives notice that it will begin providing service to subscribers in the City or actually begins providing service to subscribers in the City, or if the FCC determines that the cable operator is subject to "effective competition" in the City pursuant to 47 CFR 76.907; and

WHEREAS, Time Warner has filed with the State of Ohio Department of Commerce for a video service authorization as provided by R.C. Section 1332.23, thereby indicating the Company's desire not to pursue traditional cable television franchise agreements or other arrangements with Ohio Political Subdivisions; and

WHEREAS, Time Warner has filed, pursuant to 47 CFR 76.907, a Petition for Determination of Effective Competition for a significant number of jurisdictions in Ohio, including the City; and

WHEREAS, upon information and belief, City Staff expects Time Warner to apply with the Department of Commerce for a VSA to serve the City immediately upon receiving FCC approval of Effective Competition, thereby terminating its cable franchise with the City; and

WHEREAS, under R.C. Section 1332.32, a VSP that is providing service to

subscribers in the City pursuant to a state-issued VSA must pay the City a video service provider fee ("VSP Fee") based on a percentage of the provider's "gross revenues" derived from providing video service in the City, not to exceed five percent (5%) of such revenues; and

WHEREAS, R.C. Section 1332.32 requires that in any calendar quarter the percentage of gross revenues on which VSP Fees are paid must be the same as the percentage of gross revenues that the cable operator pays pursuant to a franchise agreement that is in effect (or alternatively if multiple franchises are in effect in a jurisdiction, the lowest such percentage paid a cable operator pursuant to a franchise agreement that is in effect shall be paid), or, if there is no effective franchise agreement under which franchise fees are payable, the VSP Fee shall be zero percent (0%) of gross revenues, unless the City determines by ordinance or resolution that the VSP Fee will be a higher percentage of gross revenues, not to exceed five percent (5 %) of gross revenues; and

WHEREAS, R.C. Section 1332.32(C)(2) further requires the City to provide all VSPs offering service in the City with notice of the VSP Fee requirements within ten (10) days of receiving notice from the VSP that it will begin offering service in the City, or the VSP is not required to pay the VSP Fee to the City; and

WHEREAS, R.C. Section 1332.32(B)(2)(g) provides that the VSP Fee is paid on a base of gross revenue received from subscribers having service addresses within the jurisdiction that consists of revenues as are defined in R.C. Section 1332.32(B)(1)(a-e) but specifically excludes revenues as defined in R.C. Section 1332.32(B)(2)(a-h), unless the City determines, by ordinance uniformly applicable to all VSPs, that advertising revenues

as defined by R.C. Section 1332.32(B)(2)(g) are also be included in the base of gross revenues on which the VSP Fee is paid; and

WHEREAS, R.C. Section 1332.32(B)(2)(g) requires the City to promptly notify affected VSPs of the ordinance determining to include advertising revenues in the base of gross revenues on which the VSP Fee is paid, but provides that the requirement to include advertising revenues in the base of gross revenues does not take effect until the first day of the first calendar quarter that begins more than thirty (30) days after giving such notice; and

WHEREAS, in order to provide timely notice to a VSP of the VSP Fee, it is necessary for this Council to determine now that the percentage of gross revenues that shall be paid as a VSP Fee is five percent (5%) and that advertising revenues in accordance with R.C. Section 1332.32(B)(2)(g) shall be included in the base of gross revenues on which the VSP Fee is paid, to authorize the City Manager or designee to provide notice of the VSP Fee to a VSP within ten (10) days of the City receiving notice that a VSP will begin providing service in the City; and

WHEREAS, R.C. Section 1332.30(A)(2) requires that the City provide written notice to a VSP that it shall be required within one-hundred and twenty (120) days of receipt of that notice to provide the same number of public, educational and government access ("PEG") channels under the same service tier conditions and subject to the same channel reclamation conditions as may be proscribed by R.C. Section 1332.30(A)(1)(a-b) for the current incumbent cable provider of video or cable service with the most recent obligation in the City or should no PEG channels currently be provided by an Incumbent Cable Provider with such an obligation in the City, the City may in writing request a VSP to

provide PEG channels in accordance with R.C. Section 1332.30(B)(1); and

WHEREAS, R.C. Section 1332.30(B)(2) allows any PEG channel provided under R.C. Section 1332.30(B)(1) to be reclaimed by the incumbent cable provider or VSP if it in accordance with R.C. Section 1332.30(A)(1)(a) is “not substantially utilized” and it is programmed with fewer than forty (40) hours of non-character generated content per week and less than sixty per-cent (60%) of the programming is non-repeat and locally produced; and

WHEREAS, because R.C. Section 1332.30(A)(1)(a) fails to provide guidance as to what “non-repeat and locally produced” shall mean, the City believes it necessary to define “non-repeat and locally produced” as the first three (3) playbacks of programming produced or provided by any local resident, the City, or any local public or private agency that provides services to residents of the greater Cincinnati metro area, or any transmission of a meeting or proceeding of any local, state, or federal governmental entity; and

WHEREAS, it is the desire of the City that all payments of VSP Fees be made directly to the City, quarterly, no later than sixty (60) days after the end of a calendar quarterly; and

WHEREAS, the PEG programming origination point for the City shall be located at the 10101 Montgomery Road, Montgomery, Ohio 45242 and building/location, unless and until the City shall designate otherwise; and

WHEREAS, R.C. Sections 1332.21 through 1332.34 contain numerous requirements that a VSP provide certain specific notifications to the City, but otherwise fail to adequately proscribe the specific manner in which such notice should be provided and the City believes that such notice should properly be provided in writing to the City

Manager by either certified mail, express mail or personal delivery, all evidenced by a return receipt; and

WHEREAS, in order to enable the City to treat incumbent cable providers and VSPs appropriately and adequately and properly address all the requirements and conditions of Sections 1332.21 through 1332.34 of the Ohio Revised Code as enacted by the Ohio General Assembly, the City believes it is necessary to enact Chapter 112 of the Codified Ordinances of the City of Montgomery entitled Video Service Authorizations; and

NOW THEREFORE, BE IT ORDAINED by the Council of the City of Montgomery, Hamilton County, Ohio, that:

SECTION 1: Part XI, Chapter 112 of the Codified Ordinances of the City of Montgomery entitled "Video Service Authorizations, all as written in "Exhibit A" attached hereto and hereby incorporated, be so enacted.

SECTION 2: With applications pending which could terminate the City's current franchising authority and to preserve and protect the City's limited local contract, it is necessary to implement this legislation as soon as possible. This Ordinance is hereby declared to be an emergency Ordinance necessary to preserve the public's health, safety and welfare, and as a result it shall take effect immediately upon passage.

PASSED: May 7, 2008

ATTEST: Susan J. Hamm
Susan J. Hamm, Clerk of Council

Gerri Harbison
Gerri Harbison, Mayor

APPROVED AS TO FORM:

Terrence M. Donnellon
Terrence M. Donnellon, Law Director

Chapter 112

Video Service Authorizations Ordinance

112.01	Title
112.02	Definitions
112.03	VSP Fee
112.04	VSP Fee Notice Provisions
112.05	VSP Access Provisions
112.06	Access Programming Requirement
112.07	Fee Payment Requirements
112.08	PEG Origination Points
112.09	Notice Requirement
112.10	Application to Incumbent Cable Providers
112.11	Penalty

§ 112.01 TITLE.

This Chapter shall be known and may be cited as the Video Service Authorizations Chapter.

§ 112.02 DEFINITIONS.

For the purpose of this Chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

Incumbent Cable Provider. Any person who on the effective date of this Chapter either is the holder of a cable franchise agreement with the City as granted pursuant to requirements of 47 U.S.C. 541 or provides cable service in the City under an expired franchise.

PEG. Activities or actions performed for the benefit of public, educational and government video programming by the City or its appointees.

Video Service. The service defined in R.C. Section 1332.21(J).

Video Service Authorization or VSA. The authorization granted to a video service provider in accordance with the requirements of R.C. Sections 1332.21 to 1332.34 et seq.

Video Service Provider Fee or VSP Fee. The fee paid by a VSP in accordance with the requirements of R.C. Section 1332.32.

Video Service Provider or VSP. A person, firm, or corporation granted a video service authorization under R.C. Sections 1332.21 to 1332.34 et seq.

§ 112.03 VSP FEE.

In accordance with the requirements of R.C. Section 1332.32, all VSPs providing video service in the City pursuant to a VSA obtained from the Director of the Ohio Department of Commerce shall pay a VSP Fee in the amount of five percent (5%) of gross revenues received from providing Video Service in the City, which gross revenue base shall include advertising revenues. The VSP Fee shall be paid quarterly, not later than sixty (60) days after the end of each calendar quarter.

§ 112.04 VSP FEE NOTICE PROVISIONS.

Upon receipt of notice from a VSP that it will begin providing Video Service in the City pursuant to a state-issued video service authorization, the City Manager or his/her designee is authorized and directed to provide such VSP with notice of the VSP Fee as determined by this Council in § 112.03, which notice shall be delivered in a manner that provides for proof of timely delivery.

§112.05 VSP ACCESS PROVISIONS.

Upon receipt of notice from a VSP that it will begin providing Video Service in the City pursuant to a VSA, the City Manager or his/her designee is authorized and directed to provide such VSP with notice that the VSP shall be required to provide the same number of PEG channels in the City under the same service tier conditions and subject to the same channel reclamation conditions as may be proscribed by R.C. Section 1332.30(A)(1)(a-b) for the Incumbent Cable Provider with the most recent obligation in the City, which notice shall be delivered in a manner that provides for proof of timely delivery and shall state the appropriate number of PEG channels and service tiers required to be provided by the VSP within the City within one-hundred and twenty (120) days after delivery of such notice. Additionally, should no PEG channels currently be provided by an Incumbent Cable Provider with such an obligation in the City, the City Manager may provide written notice to a VSP of its obligation to provide PEG channels in accordance with R.C. Section 1332.30(B)(1).

§ 112.06 ACCESS PROGRAMMING REQUIREMENT.

In accordance with the requirements of R.C. Section 1332.30(A)(1)(a) or R.C. Section 1332.30(B)(1) when PEG channels are provided to the City by an Incumbent Cable Provider or VSP, and such PEG channels are required to be programmed by the City with at least forty (40) hours of non-character generated content per week with at least sixty per-cent (60%) of the programming being non-repeat and locally produced. For the purposes of this Section "non-repeat and locally produced" shall mean, the first three (3) playbacks of programming produced or provided by any local resident, the City, or any local public or private agency that provides services to residents of the greater Cincinnati metro area, or any transmission of a meeting or proceeding of any local, state, or federal governmental entity

§ 112.07 FEE PAYMENT REQUIREMENTS.

Any VSP Fee required to be paid to the City by a VSP shall be made quarterly and be remitted directly to the City via a negotiable instrument made payable to the City of Montgomery, 10101 Montgomery Road, Montgomery, Ohio 45242, not later than sixty (60) days after the end of a calendar quarter.

§ 112.08 PEG ORIGINATION POINTS.

The PEG programming origination point of the City for the delivery of VSP access services shall be located at the 10101 Montgomery Road, Montgomery, Ohio 45242 building/location.

§ 112.09 NOTICE REQUIREMENT.

Any notice to the City that is required of a VSP in accordance with of R.C. Sections 1332.21 through 1332.34 shall be provided in written form to the City Manager either by certified mail, express mail or upon personal delivery, all evidenced by a return receipt.

§ 112.10 APPLICATION TO INCUMBENT CABLE PROVIDERS.

Nothing in this Section shall apply to Incumbent Cable Providers until they are granted a Video Service Authorization in accordance with R.C. 1332.21 to 1331.34 et seq.

§ 112.99 PENALTY.

Whoever violates any of the provisions of this chapter is guilty of a misdemeanor of the third degree and shall be fined not more than five hundred dollars (\$500.00) or imprisoned not more than sixty (60) days, or both. A separate offense shall be deemed committed each day during or on which a violation occurs or continues.