

DATE ISSUED: May 23, 2001

REPORT NO: 01-104

ATTENTION: Honorable Mayor and City Council

SUBJECT: Cable Modem Franchise Fee Payments to the City by Cox Communications.

SUMMARY

THIS IS AN INFORMATION ITEM ONLY. NO ACTION IS REQUIRED ON THE PART OF THE CITY COUNCIL.

BACKGROUND

Over the past several years Cox Communications and Time Warner Cable Television have deployed high-speed cable modem service for access to the Internet by system subscribers. Cable modem service is offered to subscribers through the use of both company's cable television systems operating in the public rights-of-way pursuant to the cable television franchise agreements maintained by each company with the City of San Diego. Cable modem monthly charges are in the range of \$40.00 per month and penetration rates in the City of San Diego are among the highest in the nation and growing monthly. Franchise fees paid to the City for cable modem services from Cox Communications alone equated to over \$268,000 last year.

Both Cox and Time Warner have been paying the City franchise fees on cable modem service under the authority of the cable television franchises each company maintains with the City. The cable television franchise agreements mandate a payment of 3% of gross revenues for the use of the public rights-of-way. On November 15, 2000, Cox ceased paying the City franchise fees on its cable modem service. Cox purportedly based its decision to cease payments to the City on the Ninth Circuit Court of Appeals case known as *AT&T Corp. v. City of Portland* 216 F.3d 871 (9th Cir. 2000) by declaring that cable modem services were defined as an "information services" not "cable television services." Cox Communications' decision to cease paying franchise fees impacted all cities where Cox is franchised under the Ninth Circuit Court's jurisdiction. Although the legal issues presented by *AT&T Corp. v. City of Portland* affect every cable operator in the Ninth Circuit, Cox is the only cable operator which has discontinued payment of franchise fees on cable modem revenues to date.

In response to Cox Communications' actions, the City has joined with a group of 10 local governments from San Diego, Orange, and Santa Barbara counties in an attempt to reach an interim settlement with Cox Communication while the regulatory issues are being addressed in the courts and the Federal Communication Commission. Outside counsel has been retained to represent this group of local governments.

DISCUSSION

To date, both the local government group and Cox Communications have issued their interim settlement positions on the payment of franchise fees for cable modem services. Specifically, the

cities emphasize that cable modem service should continue to be considered a “cable television service” regulated under existing cable television franchises until this issue is further resolved by the FCC or the courts. Similarly, it is staff’s position that if Cox continues to insist that such service is an “information service,” then the company would still need to obtain some form of franchise or license agreement to use the City rights-of-way. Otherwise, this action would jeopardize the integrity of the public rights-of-way and the company would be utilizing public property without just compensation. Both are inconsistent with the City’s Telecommunications Policy (Council Policy 900-13).

Based on the current circumstances, the Council may be asked to consider recommendations to create new licensing or franchising requirements on “information services” mandating that such service providers reasonably compensate the City for the use of the public rights-of-way. Service providers who are providing telecommunications services under certification by the State Public Utilities Commission will continue to be exempt from being franchised or licensed from the City in accordance with State laws.

Staff will keep the Council updated on developments concerning this issue.

Respectfully submitted,

Richard E. Wilken
Information Technology
& Communications Director

Approved: Howard Stapleton
Acting Chief Information Officer