



TOWN OF FAIRFAX

STAFF REPORT

TO: Mayor and Council

FROM: Garrett Toy, Town Manager ^{GT}

DATE: June 5, 2013

SUBJECT: Adopt resolution authorizing the Mayor to execute the First Amendment to the Agreement of the Formation of the Marin Telecommunications Agency

RECOMMENDATION

Adopt resolution authorizing the Mayor to Execute the First Amendment to the Agreement of the Formation of the Marin Telecommunications Agency.

DISCUSSION

At its December 12, 2012 meeting, the Board of Directors of the Marin Telecommunications Agency ("MTA") approved the First Amendment to the Agreement of Formation of the MTA. The Agreement of Formation was executed in 1998 by all of the members of the MTA (the County and all cities and towns in Marin except Novato). This Agreement provided that the net franchise fees received by the MTA (defined as the total franchisee fees received by the MTA less the operating budget of the Agency) must be distributed to the members based on each member's percentage share of the total number of subscribers of the MTA franchise. The franchise agreement between the MTA and Comcast, dated June 16, 2006, required Comcast to report its number of subscribers within the MTA franchise area. Therefore, in the past the MTA staff has received the necessary information from Comcast for calculating the distribution of the pro-rata share of franchise fees to each member.

However, AT&T was able to commence its video operations in Marin under a state franchise granted by the CPUC pursuant to the Digital Infrastructure and Video Competition Act of 2006 (known as "DIVCA"). Under DIVCA, state video franchisees such as AT&T, are not required to report their number of subscribers to local jurisdictions. Instead they are required to report their gross revenues for the purposes of calculating the local 5% franchise fee. Despite repeated efforts to obtain subscriber numbers from AT&T, they have refused to provide this information to the MTA. For this reason, the MTA has been unable to distribute the AT&T franchise fees to its members. At first, the MTA received a very small amount of franchise fees from AT&T, but these fees more recently have significantly grown and accumulated to over \$440,000 thru the third quarter of 2012.

Comcast and Horizon now operate under state franchises also. While these video providers continue to report subscriber numbers to the MTA, at any time, each of these operators could refuse to do so. Therefore, in order to be able to distribute the AT&T franchise fees and to ensure that there will be no future delay in the distribution of franchise fees from Comcast and Horizon, General Counsel for the MTA prepared the First Amendment to the Agreement of Formation.

The First Amendment amends the Agreement of Formation to provide that the distribution of net franchise fees to the members of the MTA will be based on the franchise fee revenue reports received from each provider which reports are required by DIVCA to be submitted to the MTA. Under this approach, each member will receive franchise fees based on the gross revenues generated by each video provider in its jurisdiction. This method of distribution actually provides a more accurate distribution of franchise fees to each member.

Under Section 12 of the Agreement of Formation, the governing body of each member of the MTA must approve an amendment to the Agreement. Therefore, staff recommends approval of this First Amendment by adoption of the attached resolution.

Councilmember Bragman requested staff attach the Marin IJ article outlining his position on the issue.

FISCAL IMPACT

Franchise fees contribute to the City's General Fund. Attachment A is a spreadsheet that shows the difference in the amount of the franchise fees that each member would receive from the Comcast franchise under the existing and proposed method of calculation. The current method of distributing franchise fees using each jurisdiction's number of subscribers as a percent of the total MTA subscribers results in allocations based on average revenue per subscriber. The new method uses actual revenue reported by the providers for each jurisdiction and this will impact Fairfax's Comcast franchise fee revenues (a loss of approximately \$1,800-\$1,900 per quarter) since Fairfax's revenue per subscriber is below MTA's overall average.

However, it is projected that the Comcast revenue decrease would be offset by the distribution of the AT&T franchise fee on an ongoing basis. In the short term, Fairfax would receive approximately \$7,400 as a lump sum franchise fee payment which would offset any losses this fiscal year. AT&T franchise fees to Fairfax going forward are projected to be in excess of 1,800-\$1,900 per quarter. The combination of one time and ongoing revenues from AT&T would mean Fairfax would not experience any losses of Comcast fees under this new revenue structure.

Marin's public access video provider faces funding shortfall

Posted:

marinij.com

The Community Media Center of Marin is struggling to cope with a projected budget deficit of about \$250,000 per year over the next four years.

"We may make it through that period if there isn't more revenue set aside, but it won't be pretty on the other end," said Michael Eisenmenger, the Media Center's executive director. He said if the center's expensive digital equipment isn't maintained and kept up to date the center will become antiquated.

The Marin Telecommunications Agency, a joint powers authority that includes all of Marin's municipalities with the exception of Novato, contracts with the media center, which is a separate nonprofit, to operate public access channels 26, 27 and 30; the media center also makes video training and equipment available to residents to create their own low-cost programs. The media center broadcasts council meetings in San Rafael, Fairfax, Mill Valley and the county of Marin. It may soon expand its reach to include Ross, San Anselmo and Larkspur.

Under a franchise agreement established by the state Public Utilities Commission, video providers such as Comcast, AT&T and Horizon must pay a minimum of 1 percent of their annual revenue in fees for public, educational and government (commonly referred to as PEG) programming. Under that arrangement Comcast, one of the largest providers of cable television in the country, would be paying about \$650,000 a year in PEG fees. Currently, however, Comcast, is paying half that.

Comcast spokesman Bryan Byrd said, "In April 2012, Comcast reached a mutual understanding/agreement with the Marin Telecommunications Agency to begin remitting one-half of the 1 percent PEG fee to the MTA."

Eisenmenger said, "The most recent Comcast settlement is a big setback. It's basically a loss of more than \$1.5 million that we were expecting through 2017." He said some video providers in other markets contribute more than 1 percent of their revenue in PEG fees.

Comcast, however, maintains it has fulfilled its financial obligation to the media center to date. In 2006, before the PUC franchise agreement became effective, Comcast signed an agreement with the Marin Telecommunications Agency. In that deal, Comcast agreed to pay \$3.1 million to cover its PEG obligations through the life of the 10-year contract — plus 5 percent of its yearly revenue in franchise fees to the telecommunications agency. Some of that money was used to outfit the Media Center of Marin in downtown San Rafael with the latest digital TV studio facilities, editing equipment and field camera equipment.

Byrd said, "We believe our initial \$3.1 million payment, on top of the 5 percent yearly franchise fee, plus the one-half of the 1 percent PEG fee provides the necessary resources for PEG in Marin County to thrive."

A state law that took effect soon after the Marin Telecommunications Agency signed its agreement with Comcast in 2006 removed the right of cities to issue new franchises to video providers; it gave that power to the PUC. The legislation also allowed video producers and cities with existing

agreements to switch to the new PUC agreement. The Marin Telecommunications Agency and Comcast did so in 2011.

Comcast, however, has refused to pay any additional PEG fees until it has recouped what it had already paid out by passing the cost along to its customers.

Bryd said, "Comcast is not required to remit the remaining one-half of the 1 percent PEG fee until the PEG 'obligation' under its previous local franchise is fully satisfied through recovery of the applicable amounts from customers."

The current estimate is that if Comcast's revenue remains steady that milestone will be reached in early 2017.

In the meantime, Eisenmenger said the media center, which also receives some PEG fees from AT&T and Horizon, is receiving a total of about \$400,000 per year in PEG fees while spending about \$650,000 a year. Including Eisenmenger, the center has four full-time employees.

Eisenmenger said if he must he will draw from the media center's \$1 million reserve fund; but he said that is problematic. By 2017, the center will have been in existence for eight years, "and by that point we will have needed to replace a lot of the original equipment," Eisenmenger said.

Larry Bragman, who is a board member of both the Marin Telecommunications Agency and the Community Media Center of Marin, said he would like the agency to consider using some of its franchise fees to tide the media center over until Comcast boosts what it's paying.

"MTA has accumulated about \$400,000 in AT&T franchise fees that have not been distributed," Bragman said. "It seems to me that given the financial crunch that the media center is facing that the MTA should consider re-allocating those franchise fees toward underwriting the media center."

Former San Anselmo councilwoman Barbara Thornton, the Marin Telecommunication Agency's executive officer, said that idea has not yet been discussed by the agency's full board. The agency's members annually divvy up more than \$3 million in franchise fees, Thornton said.

"Generally, the franchise fees are looked at very closely by the members," Thornton said. "They count on the franchise fees to go into their general funds to use for city priorities."

The Marin Telecommunications Agency and the Community Media Center of Marin are in the process of negotiating a new, three-year agreement, Thornton said. The current contract expires at the end of June.

Contact Richard Halstead via e-mail at rhalstead@marinij.com

RESOLUTION NO. 13-29

**A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX
AUTHORIZING THE MAYOR TO EXECUTE THE FIRST AMENDMENT TO THE
AGREEMENT OF FORMATION OF THE MARIN TELECOMMUNICATIONS AGENCY**

WHEREAS, the Town of Fairfax joined the Marin Telecommunications Agency (MTA) in January 1998 for the purpose of creating a joint powers authority for policy-making and coordination of telecommunication matters in Marin;

WHEREAS, at its December 12, 2012 meeting, the Board of Directors of the Marin Telecommunications Agency ("MTA" or "Agency") approved the First Amendment to the Agreement of Formation; and

WHEREAS, the First Amendment amends the Agreement of Formation to provide that the distribution of net franchise fees to the members of the MTA will be based on the franchise fee revenue reports received from each provider; and

WHEREAS, Town of Fairfax desires this First Amendment to the Formation Agreement;

NOW, THEREFORE, BE IT RESOLVED that the Town Council of the Town of Fairfax, does hereby authorize the Mayor of said town to execute the first amendment to the Agreement of Formation of the Marin Telecommunications Agency , a copy of which is attached hereto and by this reference made a part hereof.

The foregoing Resolution was duly introduced and adopted at a regular meeting of the Town Council of the Town of Fairfax held in said town on the 5th day of June 2013 by the following vote, to wit:

AYES:
NOES:
ABSENT:

JOHN REED, MAYOR

Attest:

Deputy Town Clerk

**FIRST AMENDMENT TO AGREEMENT OF FORMATION
MARIN TELECOMMUNICATIONS AGENCY**

This First Amendment to Agreement of Formation (“First Amendment”) is entered into as of _____, 2013 (the “First Amendment Effective Date”), and is made by and among the County of Marin and the Cities of Belvedere, Larkspur, Mill Valley, Sausalito and San Rafael, and the Towns of Corte Madera, Fairfax, Ross, San Anselmo and Tiburon (collectively, the “Constituent Jurisdictions”), with reference to the following:

RECITALS

A. The Constituent Jurisdictions entered into that certain Agreement of Formation (the “Agreement”) in 1997 for the purpose of creating the Marin Telecommunications Agency, a joint powers authority existing pursuant to California Government Code 6500 *et seq.* (the “Agency”). All capitalized terms used herein without definition shall have the same meanings assigned to them in the Agreement.

B. Due to changes in state law affecting the operation of cable franchises, certain provisions of the Agreement relating to the distribution of franchise fees among Constituent Jurisdictions are either obsolete or cannot be implemented due to legal limitations on the Agency’s ability to obtain certain information about subscribers from providers.

C. The Constituent Jurisdictions have agreed to revise the provisions of the Agreement with respect to such distributions, all as provided more particularly below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Constituent Jurisdictions agree as follows:

AGREEMENT

1. The Recitals above are hereby declared to be true and correct, and are hereby incorporated into this Amendment as if fully set forth below.

2. Section 6, Payments, is hereby deleted in its entirety and replaced by the following revised Section 6, Franchise Fee Payments to Constituent Jurisdictions:

(a) DIVCA State Franchises. The Constituent Jurisdictions acknowledge and agree that all franchise fees payable to local jurisdictions from franchises issued by the state pursuant to the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”) are being paid to the Agency. From the total amount of such fees paid to the Agency annually, the Agency shall deduct the amount of its annual operating budget and reserves, as set forth in the final budget approved by the Board of Directors pursuant to Section 2 above. The remaining amount shall be distributed to the Constituent Jurisdictions as the franchise fees are received by

the Agency each quarter in accordance with the franchise fee reports for each Constituent Jurisdiction received by the Agency from each video provider.

(b) Other Franchises. For any other franchises that the Agency is legally entitled to grant, franchise fees will be distributed among the Constituent Jurisdictions as may be determined by the Board of Directors in accordance with the procedure set forth in Section 2 for adopting the annual budget.

(c) Agency Statements Required. Each distribution shall be accompanied by a statement describing the amounts of all franchise fees received by the Agency for each Constituent Jurisdiction during the distribution period, the dates of receipt, and the amount of revenue required to fund the Agency Budget and reserves.

3. This First Amendment may be executed in any number of counterparts, each of which shall be deemed to be an original, but all together shall constitute but one and the same instrument.

Except as expressly modified by this First Amendment, all other terms and conditions of the Agreement remain in full force and effect.

[Signatures appear on following pages.]

IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the date first written above.

COUNTY OF MARIN

By: _____
Name: _____, Chairperson,
Board of Supervisors

ATTEST:

County Counsel

CITY OF BELVEDERE, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

City Clerk

CITY OF LARKSPUR, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

City Clerk

CITY OF MILLVALLEY, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

City Clerk

CITY OF SAUSALITO, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

City Clerk

CITY OF SAN RAFAEL, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

City Clerk

TOWN OF CORTE MADERA, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

Town Clerk

TOWN OF FAIRFAX, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

Town Clerk

TOWN OF ROSS, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

Town Clerk

TOWN OF SAN ANSELMO, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

Town Clerk

TOWN OF TIBURON, a municipal corporation

By: _____
Name: _____, Mayor

ATTEST:

Town Clerk

COMCAST MEMBER FRANCHISE REVENUE ANALYSIS -
 % OF TOTAL SUBSCRIBERS VS. ACTUAL REVENUES REPORTED BY VIDEO PROVIDERS

Member Agency	1Q12 Comcast				2Q12 Comcast			
	Current method using % of total subscribers (Avg. revenue per sub)	New Method using Comcast Revenue Report for each member (based on revenues)	Change with new Distribution method	% change from current method	Current method using % of total subscribers (Avg. revenue per sub)	New Method using Comcast Revenue Report for each member (based on revenues)	Change with new Distribution method	% change from current method
San Rafael	\$ 234,053.66	\$ 211,284.31	\$ (22,769.35)	-9.73%	\$ 238,599.76	\$ 217,220.72	\$ (21,379.04)	-8.96%
County	\$ 219,041.20	\$ 233,649.04	\$ 14,607.84	6.67%	\$ 223,100.98	\$ 236,815.77	\$ 13,714.79	6.15%
Corte Madera	\$ 39,067.52	\$ 38,919.33	\$ (148.19)	-0.38%	\$ 39,806.22	\$ 39,570.88	\$ (235.34)	-0.59%
Larkspur	\$ 64,404.89	\$ 62,105.63	\$ (2,299.26)	-3.57%	\$ 65,611.66	\$ 63,212.54	\$ (2,399.12)	-3.66%
Ross	\$ 9,902.23	\$ 12,773.01	\$ 2,870.78	28.99%	\$ 10,161.23	\$ 12,970.67	\$ 2,809.44	27.65%
Belvedere	\$ 11,118.05	\$ 13,704.52	\$ 2,586.47	23.26%	\$ 11,315.03	\$ 13,928.08	\$ 2,613.05	23.09%
Tiburon	\$ 40,554.04	\$ 46,204.97	\$ 5,650.93	13.93%	\$ 41,502.99	\$ 47,236.40	\$ 5,733.41	13.81%
Fairfax	\$ 31,886.62	\$ 29,965.89	\$ (1,920.73)	-6.02%	\$ 32,340.43	\$ 30,539.05	\$ (1,801.38)	-5.57%
San Anselmo	\$ 54,982.33	\$ 53,736.06	\$ (1,246.27)	-2.27%	\$ 55,576.48	\$ 54,525.27	\$ (1,051.21)	-1.89%
Mill Valley	\$ 67,990.59	\$ 70,755.94	\$ 2,765.35	4.07%	\$ 69,218.51	\$ 71,595.33	\$ 2,376.82	3.43%
Sausalito	\$40,862.74	\$ 40,765.16	\$ (97.58)	-0.24%	\$ 41,818.10	\$ 41,436.68	\$ (381.42)	-0.91%
TOTALS	\$813,863.86	\$ 813,863.86	\$ 0.00		\$ 829,051.39	\$ 829,051.39	\$ (0.00)	
Explanation of Report -								
This report presents the current method of distributing Comcast Franchise Fee revenues by use of each member's % of total subscribers applied to the total Comcast franchise fee revenues vs. each member's franchise fee revenues as reported by Comcast for each entity.								
The difference between each method is reflected along with the % difference in revenues between the two methods.								

COMCAST MEMBER FRANCHISE REVENUE ANALYSIS -
 % OF TOTAL SUBSCRIBERS VS. ACTUAL REVENUES REPORTED BY VIDEO PROVIDERS

Member Agency	3Q11 Comcast			4Q11 Comcast				
	Current method using % of total subscribers (Avg. revenue per sub)	New Method using Comcast Revenue Report for each member (based on revenues)	Change with new Distribution method	% change from current method	Current method using % of total subscribers (Avg. revenue per sub)	New Method using Comcast Revenue Report for each member (based on revenues)	Change with new Distribution method	% change from current method
San Rafael County	\$232,825.81	\$ 211,863.79	\$ (20,962.02)	-9.00%	\$ 235,422.94	\$ (21,341.71)	-9.07%	
Corte Madera	\$218,032.29	\$ 231,389.79	\$ 13,357.50	6.13%	\$ 219,644.45	\$ 14,047.06	6.40%	
Larkspur	\$39,071.04	\$ 38,951.05	\$ (119.99)	-0.31%	\$ 39,303.14	\$ (239.90)	-0.61%	
Ross	\$65,651.89	\$ 62,587.01	\$ (3,064.88)	-4.67%	\$ 66,061.71	\$ (3,414.32)	-5.17%	
Belvedere	\$9,840.19	\$ 12,646.90	\$ 2,806.71	28.52%	\$ 9,945.03	\$ 2,863.29	28.79%	
Tiburon	\$10,870.75	\$ 13,311.85	\$ 2,441.10	22.46%	\$ 10,937.15	\$ 2,513.83	22.98%	
Fairfax	\$40,073.11	\$ 45,364.27	\$ 5,291.16	13.20%	\$ 40,633.91	\$ 5,618.52	13.83%	
San Anselmo	\$32,037.59	\$ 30,132.83	\$ (1,904.76)	-5.95%	\$ 32,186.60	\$ (1,932.81)	-6.01%	
Mill Valley	\$54,985.36	\$ 54,008.42	\$ (976.94)	-1.78%	\$ 55,534.76	\$ (1,217.39)	-2.19%	
Sausalito	\$67,660.77	\$ 70,389.77	\$ 2,729.00	4.03%	\$ 68,184.27	\$ 2,794.37	4.10%	
TOTALS	\$40,358.06	\$ 40,761.19	\$ 403.13	1.00%	\$ 40,605.29	\$ 309.07	0.76%	
	\$811,406.86	\$ 811,406.87	\$ 0.01		\$ 818,459.26	\$ 0.00		
Explanation of Report -								
This report presents the current method of distributing Comcast Franchise Fee revenues by use of each member's % of total subscribers applied to the total Comcast franchise fee revenues vs. each member's franchise fee revenues as reported by Comcast for each entity.								
The difference between each method is reflected along with the % difference in revenues between the two methods.								

ATT Franchise Fees through 3Q12

Jurisdiction	4Q07	1Q08	2Q08	3Q08	4Q08	1Q09	2Q09	3Q09	4Q09	1Q10	2Q10
Belvedere										361.60	1,287.86
Corte Madera											
Fairfax											
Larkspur					45.14	150.50	208.67	268.43	443.41	452.31	595.13
County	396.55	557.79	897.25	1,546.36	2,532.05	3,598.22	5,574.30	8,059.41	10,414.11	11,628.10	13,170.90
Mill Valley			17.02	33.86	23.61	45.37	88.59	86.49	156.37	149.71	156.71
Ross											15.17
San Anselmo							0.03	3.04	11.10	23.72	184.51
San Rafael					6.86	6.63	42.86	932.33	2,655.20	3,850.29	5,270.42
Sausalito								32.53	22.38	282.41	490.46
Tiburon							14.24	26.02	21.02	39.03	39.49
MTA Total \$	396.55 \$	557.79 \$	914.27 \$	1,580.22 \$	2,607.66 \$	3,800.72 \$	5,928.69 \$	9,408.25 \$	13,723.59 \$	16,787.17 \$	21,210.65 \$
Note: AT&T Franchise Fees will be paid to MTA members when all Members have approved the First Amendment to MTA's Agreement of Formation.											

ATT Franchise Fees through 3Q12

Jurisdiction	3Q10	4Q10	1Q11	2Q11	3Q11	4Q11	1Q12	2Q12	3Q12	Cum Total
Belvedere						19.27	39.26		0.50	59.03
Corte Madera	1,747.76	2,077.71	2,418.98	2,537.49	3,628.46	4,059.19	4,021.26	3,979.79	4,182.65	30,302.75
Fairfax		13.64	25.07	187.83	391.34	793.77	800.07	1,055.80	1,180.01	4,447.53
Larkspur	809.72	1,248.4	1,748.54	1,875.12	3,134.60	3,915.32	3,896.66	4,370.59	4,599.50	27,762.04
County	14,453.70	15,020.46	16,178.22	16,391.55	19,382.52	22,452.05	20,088.94	21,428.82	21,354.65	225,125.95
Mill Valley	176.21	194.94	180.00	202.91	293.57	383.90	363.26	356.24	361.28	3,270.04
Ross	10.68	18.58	30.34	31.08	46.46	48.35	57.74	47.50	51.81	357.71
San Anselmo	420.13	664.18	1,066.63	1,634.56	2,277.35	3,386.62	3,317.95	3,666.68	3,695.25	20,351.75
San Rafael	6,456.37	7,599.12	8,627.30	9,821.31	11,658.68	14,193.67	13,549.58	14,305.92	14,606.99	113,583.53
Sausalito	743.09	931.05	1,058.39	1,169.03	1,333.48	1,625.95	1,515.21	1,753.74	1,838.30	12,796.02
Tiburon	52.89	42.42	61.03	46.51	24.89	29.42	42.89	53.77	65.01	558.63
MTA Total \$	24,870.55 \$	27,810.50 \$	31,394.50 \$	33,897.39 \$	42,171.35 \$	50,907.51 \$	47,692.82 \$	51,018.85 \$	51,935.95 \$	438,614.98 \$
Note: AT&T Franchise Fees will be paid to MTA members when all Members have approved the First Amendment to MTA's Agreement of Formation.										