

ORDINANCE NO. 14-07

**AN ORDINANCE OF THE CITY COUNCIL OF
THE CITY OF CASTLE PINES, COLORADO AMENDING CHAPTER 5
OF THE CASTLE PINES MUNICIPAL CODE TO ADOPT A
COMPETITIVE CABLE FRANCHISE APPLICATION, REVIEW AND
EVALUATION PROCESS**

WHEREAS, on December 20, 2006, the Federal Communications Commission (“FCC”) adopted a new rule, set forth in a Report and Order and Further Notice of Proposed Rulemaking that was released March 5, 2007, that among other things, provides a separate, nonexclusive process for the issuance of cable franchises for areas currently served by another cable operator (the “Competitive Franchise Application Rule” or “CFAR”); and

WHEREAS, the CFAR provides that local franchising authorities may require application information from an applicant for a competitive cable franchise, in addition to the information set forth in the CFAR; and

WHEREAS, the City of Castle Pines (“City”) has determined that in order to comprehensively evaluate whether or not to grant a competitive cable franchise, it will require certain information from applicants in addition to the information required by the CFAR; and

WHEREAS, to ensure compliance with the CFAR, the City additionally seeks to formally establish and codify the process for reviewing applications for competitive cable franchises, and the criteria upon which the final decision of the City will be based; and

WHEREAS, the application requirements and the processes for application review and determination set forth in this Ordinance are intended to comply with the FCC rules and regulations.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Castle Pines, Colorado:

Section 1. Amendment to Chapter 5 of the Castle Pines Municipal Code, entitled “Franchises and Communication Systems.” Chapter 5 of the Castle Pines Municipal Code is hereby amended by the addition of a new Article 5 entitled “Competitive Cable Franchise Application, Review and Evaluation” to read in its entirety as follows:

ARTICLE 5

Competitive Cable Franchise Application, Review and Evaluation

- Sec. 5-5-10. Legislative Intent.
- Sec. 5-5-20. Instructions and definitions.
- Sec. 5-5-30. Requisite information
- Sec. 5-5-40. Legal qualifications.
- Sec. 5-5-50. Financial qualifications.
- Sec. 5-5-60. Technical qualifications, planned services and operations.
- Sec. 5-5-70. Affidavit of Applicant.
- Sec. 5-5-80. Open records/confidentiality.
- Sec. 5-5-90. Application fee.
- Sec. 5-5-100. Review process.
- Sec. 5-5-110. Public hearing.
- Sec. 5-5-120. Review criteria.
- Sec. 5-5-130. Non-CFAR franchise applications.

ARTICLE 5

Competitive Cable Franchise Application, Review and Evaluation

Sec. 5-5-10. Legislative Intent.

- A. The “Competitive Franchise Application Rule” (CFAR), adopted on December 20, 2006, by the Federal Communications Commission (FCC), provides that local franchising authorities may require application information from an applicant for a competitive cable franchise, in addition to the information set forth in the CFAR.
- B. In order to comprehensively evaluate whether or not to grant a competitive cable franchise, the City will require certain information from applicants, in addition to the information required by the CFAR.
- C. To ensure compliance with the CFAR and provide notice to prospective applicants, the review process for applications for competitive cable franchises and the criteria upon which the final decision of the City will be based should be codified.
- D. The application requirements and the processes for application review and determination set forth in this Article are intended to comply with the new FCC rules.

Sec. 5-5-20. Applicability, Instructions and definitions.

- A. An applicant for a competitive cable franchise, as defined herein, shall include the requisite information set forth below, in writing, in its franchise application, in addition to any information required by 47 CFR §76.41 and applicable state and local laws and the application fee set by resolution of the City Council.
- B. The City shall accept and review only those applications that include complete responses to every requirement of this Article. Submission of an application that does not include the requisite information set forth in this Article and the application fee shall not commence the time period for granting or denying the application set forth in 47 C.F.R. §76.41(d). The Applicant shall submit additional or updated information as necessary to ensure the requisite information provided is complete and accurate throughout the City’s review of the application.
- C. Applications shall be made to the City Manager.
- D. Upon request, the City will promptly provide access to documents or information in its possession or control that are necessary for the completion of this application, provided that the Applicant does not otherwise have access to such documents or information and that such documents or information are subject to disclosure under Colorado open records laws.
- E. For the purposes of the application, the terms, phrases, and their derivations set forth below shall have the meanings given unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular

include the plural number. The word “shall” is always mandatory and not merely directory.

1. “Affiliated Entity” or “Affiliate” means any entity having ownership or control in common with the Grantee, in whole or in part, including, without limitation, Grantee’s Parent Corporations and any subsidiaries or affiliates of such Parent Corporations.
 2. “Applicant” means an applicant for a cable franchise in an area currently served by another cable operator or cable operators pursuant to the provisions of the Competitive Franchise Application Rule (“CFAR”) set forth in Part 76 of Title 47 of the Code of Federal Regulations, §76.41, and includes the Parent Corporation, its subsidiaries and Principals.
 3. “City” means the City of Castle Pines, a Colorado municipal corporation.
 4. “Control” is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.
 5. “EDGAR” shall mean the electronic data-gathering, analysis, and retrieval system.
 6. “Interest” includes officers, directors and shareholders owning five percent (5%) or more of the Applicant’s outstanding stock or any equivalent voting interest of a partnership or joint venture.
 7. “Parent Corporation” includes any entity with ownership or control of the Applicant.
 8. “Principal” includes any person, firm, corporation, partnership, joint venture, affiliates, or other entity, who or which owns or controls five percent (5%) or more of the voting stock (or any equivalent voting interest of a partnership or joint venture) of the Applicant.
 9. “Regulatory Authority” includes any governmental or quasi-governmental organization or entity with jurisdiction over all or any portion of the Applicant or its operations.
 10. “SEC” means the federal Securities and Exchange Commission.
- F. At the request of any applicant holding more than five (5) cable franchises and making cable service available to greater than 200,000 qualified subscribers within the State of Colorado, the City Manager may waive or modify in writing any requirements of the application due to competitive, proprietary, burdensome paperwork or otherwise confidential nature of the requirements for information disclosure. In lieu of a waiver, the City Manager may request a visual inspection of the requested data

Sec. 5-5-30. Requisite information.

- A. Identification and Ownership Information. The application shall include:

1. The name, address, telephone number and web site (if applicable) of the Applicant and the proposed franchisee (if different from Applicant); and
2. The name, address, primary telephone number and primary e-mail address of all individual(s) authorized to represent the Applicant before the City during its consideration of the franchise(s) requested, including the Applicant's primary contact and any additional authorized contacts.

B. Business Structure.

1. If a corporation, the Applicant shall provide:
 - (a) A list all officers and members of the Board of Directors, their principal affiliations and their addresses;
 - (b) A certificate of good standing indicating that the Applicant is licensed to do business in the State of Colorado; and
 - (c) A statement indicating whether the Applicant is directly or indirectly controlled by another corporation or legal entity. If so, Applicant shall attach an explanatory statement and respond to subsections 1(a) and (b) above concerning the controlling corporation.
2. If a partnership, the Applicant shall:
 - (a) Describe the structure of the partnership and the management roles of general partners; and
 - (b) State whether the Applicant is controlled directly or indirectly by any corporation or other legal entity. If so, Applicant shall attach an explanatory statement and respond to subsections 1(a) and (b), or 2(a) above, as applicable, concerning the controlling entity.

C. Experience.

1. Current Franchises. An Applicant shall list all cable systems in which it or any Affiliate owns more than fifty percent (50%) of the system or has a management role in a cable system. For each system Applicant shall include name of system, address, communities served, number of subscribers, number of homes passed, start and end date of franchise, and percent of penetration of homes passed as of most recently available date (indicate date).
2. Potential Franchises. An Applicant shall list communities where it or any Affiliate currently has a formal or informal request pending for an initial franchise or the approval of a transfer of ownership. The Applicant shall include the name of communities, date of application, and date of expected action.

D. Management Structure.

1. Every application for a competitive franchise shall include a management/organizational chart, showing the management structure of the

Applicant. A similar chart shall also be provided showing the relationship of the Applicant to all general partners, Parent Corporations, subsidiaries, Affiliates and all other subsidiaries of Parent Corporations, including a brief description of each entity's relationship to the Applicant.

Sec. 5-5-40. Legal qualifications.

A. Franchise Violations.

1. An Applicant shall state whether it or any Affiliate has been found in violation by a Regulatory Authority or franchising authority of any franchise ordinance or agreement, contract or regulation governing a cable system. If so, the Applicant shall identify the judicial or administrative proceeding, giving the date, name of tribunal and result or disposition of that proceeding.

B. Other Violations.

1. An Applicant shall state whether it has been found in violation by a Regulatory Authority of any other type (e.g. utility) of franchise, ordinance, agreement, permit, contract or regulation related to the provision of communications or utility services or the construction, maintenance or operation of any facilities used to provide such service(s). If so, the Applicant shall identify the judicial or administrative proceeding, giving the date, name of tribunal and result or disposition of that proceeding.

Sec. 5-5-50. Financial qualifications.

A. Unless SEC Forms 10K and 10Q are available on the EDGAR database, Applicants with existing operations shall provide audited financial statements, including statements of income, balance sheets and cash flow statements, together with any notes necessary to the understanding of the financial statements for the last three (3) fiscal years for the Applicant and any Parent Corporation.

B. Applicants that are new (start-up) entities shall provide pro forma projections for the next five (5) fiscal years, if available, but at a minimum the next three (3) fiscal years from the date of the application.

Sec. 5-5-60. Technical qualifications, planned services and operations.

A. The application shall describe the Applicant's planned initial and proposed cable services geographic area, including a map of all areas proposed to be served and proposed dates for offering service to each area. The application shall additionally state whether the Applicant proposes to provide cable services to the entire franchise area, and if so, a proposed timetable for meeting that goal;

B. If the Applicant has or asserts existing authority to access the public right of way in any of the initial or proposed service areas listed in Section 5(A) above, the Applicant shall state the basis for such authority or asserted authority and attach the relevant agreements or other documentation of such authority;

C. The Applicant shall describe with particularity its planned residential and non-residential cable services;

D. The Applicant shall describe with particularity its planned system technical design, upstream and downstream capacity and speed, provision for analog or digital services or packages, distribution of fiber, planned count of households per residential node, and any other information necessary to demonstrate that the Applicant's technology will be deployed so as to be able to successfully offer cable services in the proposed locations;

E. The Applicant shall describe its planned construction and extension or phase schedule, as applicable, including system extension plans or policy; and describe the current status of the Applicant's existing or proposed arrangements with area utilities, including pole attachments, vault, or conduit sharing agreements as applicable;

F. The Applicant shall describe its plan to ensure that the safety, functioning and appearance of property and convenience and safety of other persons not be adversely affected by installation or construction of the Applicant's facilities, and that property owners are justly compensated for any damages caused by the installation, construction, operation or removal of the facilities;

G. The Applicant shall describe its plan to comply with the subscriber privacy protections set forth in 47 U.S.C. §551, and the privacy protections of the City's local cable customer service standards.

Sec. 5-5-70. Affidavit of Applicant.

Each application shall be accompanied by an affidavit substantially in the form set forth below:

This application is submitted by the undersigned who has been duly authorized to make the representations within on behalf of the Applicant and certifies the representations are true and correct.

The Applicant recognizes that all representations are binding on it, that all application commitments are enforceable, and that material misrepresentations or omissions, or failure to adhere to any such representation may result in a denial of an application by the City.

The Applicant shall comply with all applicable local laws.

Consent is hereby given to the City, and its representatives to make inquiry into the legal, character, technical, financial and other qualifications of the Applicant by contacting any persons or organizations named herein as references, or by any other appropriate means.

Name of Applicant's Authorized Representative: _____

Affiant's Signature: _____

Official Position: _____

Date: _____

STATE OF COLORADO)
) ss.
COUNTY OF _____)

Subscribed and sworn to before me this ____ day of _____, 20__.

WITNESS MY HAND AND OFFICIAL SEAL.
My Commission expires:

NOTARY PUBLIC

Sec. 5-5-80. Open records/confidentiality.

Unless otherwise provided by law, information submitted as part of an application is open to public inspection and subject to the Colorado Open Records Act. It is the Applicant’s responsibility to be familiar with the Colorado Open Records Act. An Applicant may specifically identify any information it considers proprietary. In the event that the City receives a request from another party to disclose any information which the Applicant has deemed proprietary, the City will tender to the Applicant the defense of any request to compel disclosure. By submitting information which the Applicant deems proprietary or otherwise exempt from disclosure, the Applicant agrees to defend and hold harmless the City from any claim for disclosure including but not limited to any expenses including out-of-pocket costs and attorneys’ fees, as well as any judgment entered against the City for the attorney fees of the party requesting disclosure.

Sec. 5-5-90. Application fee.

The City shall, by resolution, set an application fee(s) sufficient to cover the reasonable cost of processing applications under this Article. Upon request of the Applicant, the City Manager is authorized to reduce or waive an application fee upon the City Manager’s finding of a public benefit. In evaluating such a request and determining whether a public benefit exists, the City Manager will consider the following factors: (1) the size of the proposed franchise area; (2) the number of potential subscribers in the proposed franchise area; (3) the financial hardship to the Applicant (including any Parent Corporation or Affiliate); and (4) other information relevant to the cost of processing the application, the Applicant’s ability to pay the fee, and/or the degree to which a reduction or waiver of the application fee will result in a benefit to the public.

Sec. 5-5-100. Review process.

A. Acceptance of Application.

1. Within ten (10) business days of receipt of an application, the City shall review the application to ensure all requisite information is included in the application.

2. If the application is not complete, the City will notify the Applicant in writing, listing the requisite information that is required to complete the application and notifying the Applicant that the time period for granting or denying the application set forth in 47 C.F.R. § 76.41(d) will not begin to run until such information is received.

3. If the application is complete, the City will notify the Applicant in writing that all requisite information has been received.

B. Staff Review. The City staff shall review all completed applications based on the review criteria set forth herein. If, during the review of an application, staff reasonably requires additional information from the Applicant, staff will promptly request the information from the Applicant, in writing, along with a notification that the time period for granting or denying the application set forth in 47 C.F.R. § 76.41(d) will be tolled until such information is received by the City. After completing the review, staff shall provide an analysis of the application to the City Council.

C. Franchise Negotiations. Within the time period set forth in 47 C.F.R. § 76.41(d), the City shall attempt to negotiate a cable franchise agreement with the applicant, and within that time period, schedule the application and any proposed franchise for public hearing as set forth herein.

Sec. 5-5-110. Public hearing.

The City shall hold a public hearing before acting on the application, affording participants a process substantially equivalent to that required by 47 U.S.C. §546(c)(2) governing renewal of cable franchises.

Sec. 5-5-120. Review criteria.

The City may deny an application if, based on the information provided in the application, at the public hearing and/or any terms of a proposed franchise agreement:

A. The Applicant does not have the financial, technical, or legal qualifications to provide cable service;

B. The Applicant will not provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; or

C. The Applicant's proposed terms do not comply with applicable federal, state and local laws and regulations including, but not limited to, local customer service standards, or relevant existing contractual obligations of the City.

Sec. 5-5-130. Non-CFAR franchise applications.

Notwithstanding any other provisions of this Article, any competitive cable services franchise applicant may elect to submit a cable franchise application to the City and/or engage in cable franchise negotiations without regard to the application of the FCC CFAR. In such cases, the City will negotiate the terms of a competitive cable franchise without regard to 47 CFR §76.41 and the other provisions of this Article. Agreement by any applicant to negotiate a franchise without regard to 47 CFR §76.41

and the other provisions of this Article shall not be deemed by the City to effect a waiver of any applicant's right under applicable law to trigger application of 47 CFR §76.41 and this Article, where applicable.

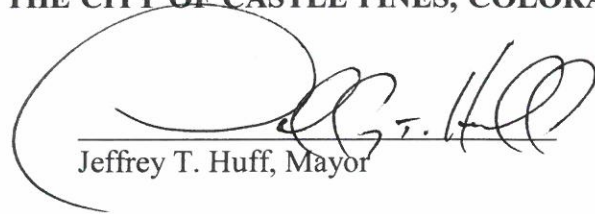
Section 2. Codification Amendments. The codifier of the City's Municipal Code, Colorado Code Publishing, is hereby authorized to make such numerical and formatting changes as may be necessary to incorporate the provisions of this Ordinance within the Castle Pines Municipal Code.

Section 3. Severability. If any portion of this Ordinance is found to be void or ineffective, it shall be deemed severed from this Ordinance and the remaining provisions shall remain valid and in full force and effect.

Section 4. Effective Date. This Ordinance shall take effect and be in force thirty (30) days after publication following final adoption.

INTRODUCED, READ, AND PASSED ON FIRST READING, AT A REGULAR MEETING OF THE CITY COUNCIL OF THE CITY OF CASTLE PINES, COLORADO THE 22ND DAY OF JULY, 2014.

READ, PASSED, AND ADOPTED ON SECOND READING, AT A REGULAR MEETING OF THE CITY COUNCIL OF THE CITY OF CASTLE PINES, COLORADO THE 12TH DAY OF AUGUST, 2014.


Jeffrey T. Huff, Mayor

ATTEST:

Approved as to form:


Diane Spomer, CMC, City Clerk
Linda C. Michow, City Attorney

CERTIFICATION OF PUBLICATION

I hereby attest and certify that the within and foregoing Ordinance was introduced and read on first reading at a noticed public meeting of the Castle Pines City Council on July 22, 2014; published by reference by title only in the *Douglas County News-Press*, together with the statement that "[t]he complete text of all ordinances is available through the City Offices and on the City's official website"; and finally passed and adopted by the City Council on August 12, 2014 following a duly noticed public meeting and ordered published by title only, with amendments if any, one time in the *Douglas County News-Press* on August 21, 2014.

ATTEST:


Diane Spomer, CMC, City Clerk