

TO: HONORABLE CITY COUNCIL

FROM: CITY MANAGER

**DEPARTMENT: ADMINISTRATIVE
SERVICES**

DATE: AUGUST 4, 2008

CMR: 336:08

SUBJECT: ADOPTION OF BUDGET AMENDMENT ORDINANCE FOR FISCAL YEAR 2008-09 TO PROVIDE AN ADDITIONAL FIBER OPTICS FUND APPROPRIATION OF \$300,000 FOR LEGAL AND TECHNICAL CONSULTANTS TO SUPPORT THE ULTRA-HIGH-SPEED BROADBAND SYSTEM NEGOTIATIONS; AUTHORIZATION TO CONTRACT FOR LEGAL SERVICES WITH THE LAW FIRM OF DAVIS WRIGHT TREMAINE LLP IN THE AMOUNT OF \$100,000 AND AUTHORIZATION TO CONTRACT WITH THE LAW FIRM OF SPIEGEL & MCDIARMID, LLP IN THE AMOUNT OF \$50,000

RECOMMENDATION

Staff recommends that the Council:

- 1) Adopt the attached Budget Amendment Ordinance (“BAO”) for Fiscal Year 2008-09 in the amount of \$300,000 to provide an additional Fiber Optics Fund appropriation for legal and telecommunications consultants to support the Ultra-High-Speed Broadband System negotiations.
- 2) Authorize entering into a contract for legal services with the law firm of Spiegel & McDiarmid, LLP in an amount not to exceed \$50,000 for services related to Fiber to the Premises negotiations.
- 3) Authorize entering into a contract for legal services with the law firm of Davis Wright Tremaine LLP in an amount not to exceed \$100,000 for services related to Fiber to the Premises negotiations.

BACKGROUND

On July 14, 2008, staff presented the 180 Consortium’s conceptual business plan for a fiber to the premises network in Palo Alto to the City Council. Based on its business model, the 180 Consortium concluded that there is a sound business case for building an Ultra-High-Speed Broadband System in the City. The Council directed staff to expedite negotiations with the 180 Consortium by entering into a Letter of Intent (“LOI”) by September 2008 that would lead to the execution of appropriate contracts, and thereby enable the timely construction and operation of a citywide, open-access fiber to the premises network as envisioned in the City’s RFP. The

Council also directed staff to return on August 4, 2008 with a request for funds necessary to provide the legal and technical expertise needed for expedited negotiations.

DISCUSSION

In accordance with Council direction, staff will negotiate the key terms and conditions of one or more contracts that will be embodied in a LOI with the 180 Consortium by September 2008. Following the Council's approval of the LOI, it is anticipated that the parties would negotiate and execute final agreements by October 2008. Staff is proposing that Council approve a BAO in the amount of \$300,000 to provide for the legal and technical telecommunications expertise necessary to negotiate the LOI and final contracts in an expedited manner.

Staff intends to retain experienced telecommunications legal counsel Tim Lay with the law firm of Spiegel & McDiarmid (in an amount not to exceed \$50,000), and Suzanne Toller, with the law firm of Davis Wright Tremaine LLP (in an amount not to exceed \$100,000), to support contract negotiations with the 180 Consortium.

Tim Lay is a law partner with Washington, DC-based Spiegel & McDiarmid. He specializes in representing local governments across the nation in telecommunications, cable television, franchising, municipal broadband, rights-of-way, tax, property, antitrust and constitutional law and other federal law matters. He presently represents the Kentucky Municipal Utilities Association on municipal broadband matters. Mr. Lay graduated from the University of Tennessee with highest honors; after he graduated magna cum laude from the University of Michigan Law School, he clerked for the Hon. John Godbold, Chief Judge of the U.S. Court of Appeals for the Fifth Circuit.

Suzanne Toller is a law partner with San Francisco-based Davis Wright Tremaine LLP and is also the chair of the firm's Telecommunications Practice group. She represents communications clients before the Federal Communications Commission and state Public Utility Commissions on a broad range of regulatory and legal matters, and develops public policy positions and legislative strategy on telecommunications issues. She also represents clients in local permitting actions, transactional matters and in civil litigation, including wireless cell site construction and breach of contract matters. Ms. Toller graduated from the University of California, San Diego and the Harvard Law School. Ms. Toller's regular rate is \$470 per hour. We were able to negotiate a discounted rate (less 8%) of \$432 per hour.

In addition, staff will utilize Columbia Telecommunications Corporation (CTC), a telecommunications engineering firm based in Kensington, Maryland (in the amount of approximately \$25,000). CTC has extensive experience assisting public sector clients nationwide with community broadband networking, including assessing broadband technical requirements, network planning and deployment. In the past, CTC has provided technical consulting services to the City on the development and construction of the Joint Powers' Institutional Network and the Comcast cable system upgrade.

Staff also will hire a consultant to undertake a Fiber Optics Fund Rate Study for the purpose of establishing a new bulk fiber rate (in the amount of approximately \$25,000) and potentially a consultant to expedite the work needed for compliance with the requirements of the California

Environmental Quality Act (in the amount of approximately \$25,000). The remaining funds of \$75,000 will enable staff to obtain additional consulting assistance on an “as-needed” basis to facilitate expedited LOI and contract negotiations. This level of budgetary authorization available will avoid delays should staff find additional consulting resources are needed to fast-track negotiations.

RESOURCE IMPACT

A BAO is necessary to transfer \$300,000 from the Fiber Optics Fund Rate Stabilization Reserve to the Fiber Optics Fund operating budget. The BAO will reduce the Fiber Optics Fund Rate Stabilization Reserve from \$ 3.098 million to \$ 2.798 million.

The negotiation of the LOI and final agreements will also require the continued devotion of significant staff time from the City Attorney’s Office, the Administrative Services Department, and the Utilities Department and, to a lesser extent time-wise, the Public Works Department and the Planning and Community Environment Department. Staff plans to return to Council at mid-year with a BAO to transfer this salary and benefit cost from the General Fund and the Electric Fund to the Fiber Optics Fund.

POLICY IMPLICATIONS

This report is consistent with Council direction.

ENVIRONMENTAL IMPACT

The actions covered by this report do not require review under the California Environmental Quality Act.

ATTACHMENT

Attachment A: BAO

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