



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Ed Shikada

**SUBJECT:** AT&T PROJECT LIGHTSPEED -  
RECOMMENDED CITY RESPONSE

**DATE:** June 15, 2006

Approved: \_\_\_\_\_

Date: \_\_\_\_\_

6/15/06

## RECOMMENDATION

Approve the following actions related to AT&T's proposed Project Lightspeed:

- a) Reject AT&T's current proposal for a "Public Benefits Agreement" to construct and operate a video programming system within the city of San José;
- b) Restate the City's willingness to expedite franchise negotiations with AT&T, and that any encroachment permits for the installation of video infrastructure will be conditioned upon AT&T's acknowledging the requirement of an agreement with the City prior to offering video services; and,
- c) Review this position upon completion of the current State legislative session.

## OUTCOME

City Council policy direction will enable staff to articulate a City position on Project Lightspeed to AT&T as well as to state and federal legislators.

## BACKGROUND

Information regarding AT&T's Project Lightspeed has been presented to the City Council on several occasions, most recently at a study session on May 11, 2006. At that study session, the City Council also received reports on state and federal legislation related to video programming regulation, and presentations from AT&T as well as Comcast representatives.

On May 30th, the California Assembly passed Assembly Bill 2987 by a vote of 77-0 with a commitment by the Speaker as author, to continue to work on major amendments impacting local government, AB 2987 currently would establish a statewide franchise for video systems and preempts local franchise authority. At the federal level, on June 8<sup>th</sup> the House of Representatives passed H.R. 5252, the Communications Opportunity, Promotion, and Enhancement Act of 2006 (COPE Act) by a vote of 321-101. The COPE Act would replace local franchising with a national franchise scheme for broadband and video service providers.

While supporting state and federal legislation, AT&T has continued pursuing City authorization to proceed with Project Lightspeed. On May 24th, AT&T provided staff with a new proposed “Public Benefits Agreement.” A summary of the proposed agreement and comparison with policy priorities previously presented to the City Council is provided in Attachment A. The complete proposed agreement is provided as Attachment B.

## ANALYSIS

At the May 11<sup>th</sup> study session, City Council members reiterated concerns in several areas, such as:

- meeting the needs and concerns of local residents for services (including services enabled by franchise fees), as well as managing impacts associated with infrastructure;
- ensuring long term commitment to services;
- staying in step with the League of California Cities; and,
- maintaining a consistent approach with competing providers.

Following this study session, the latest proposal received from AT&T reflects a longer potential term (up to five years) but remains significantly short of addressing the City’s policy priorities such as citywide buildout and public, educational and government (PEG) programming. This demonstrates a significant gap between AT&T’s position and terms acceptable to the City. In fact, current bills at both the state and federal levels would provide terms that are at least as favorable to the City as AT&T’s proposal.

We believe that this gap cannot be closed given the high level of State and Federal legislative activity on this issue. The telecommunications industry’s legislative success to date gives AT&T little incentive for substantive compromise on a local agreement.

At the State level, the legislative calendar requires that 2006 legislation to be passed by the legislature prior to their August 31 scheduled recess. For those bills passed, the Governor has until September 30, 2006, to sign or veto legislation. This deadline will provide some clarity as to the actions taken by the State legislature on a Statewide franchise to preempt local authority to regulate projects such as AT&T’s Project Lightspeed:

June 2	Last day for bills to pass their house of origin. AB 2987 (Nunez/Levine) passed the Assembly on May 31.
June 30	Deadline for bills to pass out of policy committees. AB 2987 set for hearing June 20 in Senate Energy, Utilities and Communications Committee.

August 18	Last day for fiscal committees to pass bills.
August 31	Last date for Assembly and Senate to pass bills to the Governor.
September 30	Deadline for Governor to sign or veto bills. Bills signed become effective January 1, 2007 unless an urgency statute.

Based on the legislative calendar and the poor prospect of reaching an agreement on acceptable business terms in the interim, staff recommends that the City reject AT&T's proposal and solidify the following City position:

- o the City remains willing to expedite franchise negotiations with AT&T (or any other provider of video programming services), and
- o any encroachment permits for the installation of video infrastructure will be conditioned upon AT&T's acknowledging the requirement of an agreement with the City prior to offering video services.

This position is more definitive than previously presented to AT&T, in that prior discussions considered the possibility of a non-franchise agreement that provided comparable terms. However, based on City Council feedback and the unresolved business terms, a non-franchise agreement appears problematic at this time.

### **ALTERNATIVES**

Staff has evaluated several options for response to AT&T's request, based on feedback received from the City Council to date:

1. Pursue a non-franchise agreement consistent with terms currently being followed by Comcast.

This approach would reflect a continuation of discussions to date between staff and AT&T. This approach is unlikely to be successful given that ongoing legislative activity provides AT&T little incentive to compromise and address the City's priorities.

2. Offer AT&T terms proposed by the City to Comcast for franchise renewal.

The terms proposed by the City to Comcast for franchise renewal reflect a significant increase in financial and service requirements, as compared to current Comcast operating terms. Since AT&T has been unwilling to meet current franchise operating terms, it is highly unlikely that AT&T would accept higher requirements.

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3. Reconsider terms acceptable to the City for any new cable franchise, and offer to both Comcast and AT&T.

A third option would be for the City to reconsider acceptable business terms, and offer a new franchise proposal to both Comcast and AT&T. This would provide the benefit of a consistent City position for all service providers, and the opportunity to secure a franchise that enhances certainty into the future.

However, as previously noted, the current legislative environment provides little incentive for either operator to compromise in order to secure a City franchise. As a result, developing a proposal that would be attractive to either operator is likely to require significant concession from the City's negotiating position to date. Given the complexity of franchise terms, this would also require a significant effort to develop such a proposal.

### **PUBLIC OUTREACH**

The policy framework and status of negotiations with AT&T for the deployment of Project Lightspeed has been discussed with the City Council on January 24, 2006, March 14, 2006, and at a study session on May 11, 2006. Interested stakeholders have been given the opportunity to provide input to the City Council's deliberations throughout this series of meetings.

### **COORDINATION**

This memorandum has been coordinated with the City Attorney's Office and the Office of Intergovernmental Relations.

### **CEQA**

Not a Project.



ED SHIKADA  
Deputy City Manager

Attachments

## SUMMARY OF AT&amp;T'S PROPOSED PUBLIC BENEFITS AGREEMENT

<b>Issue</b>	<b>AT&amp;T's Most Recent (5/24/06) Proposal</b>
Term of Agreement	Five years (through 12/31/2011), with early termination allowed after two years if justified by a change in state or federal law
Franchise Fees	AT&T will pay the City a per-subscriber fee of up to 5% of gross revenue
Franchise or Agreement	AT&T proposes a non-franchise "Public Benefits" Agreement
Local Authority	The City would issue AT&T encroachment permits for construction (including cabinets), and AT&T would operate Project Lightspeed under terms of the Agreement.
Public, Educational and Government (PEG) Contributions	AT&T will carry PEG broadcasts, though the City would be responsible for converting a cable signal onto their system. AT&T will pay an undefined per-subscriber PEG contribution.
Public Building Connections	Not addressed
Buildout	Not addressed
Utility Cabinet Size	AT&T's proposed "52B" cabinets would be placed as allowed under current City ordinance
Utility Cabinet Location	AT&T's proposed cabinets would be placed in consultation with City staff as allowed under current City ordinance

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**PUBLIC BENEFITS AGREEMENT**

THIS AGREEMENT ("Agreement") dated \_\_\_\_\_, 2006 ("Effective Date") is made by and between Pacific Bell Telephone Company, a California corporation doing business as AT&T California ("AT&T California" or "Company") and the City of San Jose, California, a Charter City ("City"). AT&T California and City shall sometimes be referred to separately as a "Party," and collectively as the "Parties."

**RECITALS**

A. AT&T California is an established provider of telecommunications services operating under a state franchise, and intends to provide enhanced broadband services including IP-enabled video services and programming to City residents over its network facilities.

B. AT&T California asserts that in California the franchise it has from the state pursuant to Section 7901 of the Public Utilities Code encompasses the network enhancements that AT&T California contemplates within the City and that AT&T California may offer broadband services, including IP-enabled video services and programming, within City without legal requirement for a franchise or license from City; and

C. AT&T California believes there is no legal authority by which it or its new broadband services to be provided over its network may be subject to a local franchise. The City acknowledges and believes in good faith that the law is not established that AT&T California, in offering these new broadband services over its network, is subject to a local franchise requirement; and

D. AT&T California believes, and City concurs, there is no definitive authority that AT&T California, by offering IP-enabled video services and programming, over its existing and enhanced network in City, is a "Cable Operator" as defined in Title VI of the Communications Act of 1934, as amended ("Title VI"), and, correspondingly, AT&T California believes, and City concurs, there is no definitive authority that the network facilities and services to be offered by AT&T California over such network facilities constitute a "Cable System" or "Cable Service" under Title VI; and

E. AT&T California believes, and City concurs, that there is no definitive authority that use by AT&T California of its network to provide IP-enabled video services and programming, among other services, constitutes construction of a "community antenna television system" as set forth in Section 53066 *et seq.* of the California Government Code; and

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F. The Parties, without determining whether the system or services that AT&T California will use in City to provide IP-enabled services are subject to Title VI or are subject to Section 53066, have entered into the Public Benefits Agreement which the Parties, in good faith, intend to be binding as a matter of contract between them and believe is in accord with such obligations as might be imposed by Title VI and the state law of California, if and to the extent such are applicable; and

G. Both Parties agree that the deployment of the IP Based Network and the provision of IP-enabled Video Services should not be delayed by possible litigation to establish the scope of Section 7901 or the application of the City's franchise ordinance to IP-enabled Video Services; and,

H. City and AT&T California further agree that litigation to resolve this issue would be complex and protracted, and that it is in the best interests of both Parties and the residents of City to reach a compromise of each other's positions and claims; and,

I. AT&T California intends to provide video service on a non-discriminatory basis, and without regard to the income or minority status of any resident or group of residents residing in the AT&T California Service Area. AT&T California intends to make video programming available, subject to technology or other economic infeasibility, to residential units within the general city boundaries, by use of IP Video or other alternative video programming technology; and

J. AT&T California recognizes the right of the City to impose reasonable conditions relative to time, place and manner of the construction, operation and maintenance of the IP Network in the City's ROW.

NOW, THEREFORE, in consideration of and reliance upon the respective representations, promises, concessions, terms and conditions contained herein, City and AT&T California agree as follows.

1. Term. The term of this Agreement shall be from the Effective Date of this Agreement through December 31, 2011. The term may be extended upon mutual agreement of the Parties.

a. The Parties agree to consult in the event that, after the Effective Date, any court, agency, commission, legislative body, or other authority of competent jurisdiction issues a finding that limits the validity or enforceability of this Agreement, in whole or in part. Should the finding be final, non-appealable and binding upon either City or Company, this Agreement shall be deemed modified or limited to the extent necessary to address the subject of the finding unless either Party, within thirty (30) days of receipt of the ruling, provides written notice to the other Party of election to terminate, in which case this Agreement shall terminate within six (6) months or such earlier period as the

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Parties mutually may agree. Where the effect of a finding is a modification, the Parties shall enter into good faith negotiations to modify this Agreement in the manner which best effectuates its overall purposes and the intentions of the Parties. Failure to reach a mutually satisfactory modification within ninety (90) days of the commencement of such efforts shall entitle either Party to terminate the Agreement on the provision of thirty (30) days' written notice.

b. Either Party may request to negotiate a modification to this Agreement that shall take effect immediately after the twenty-fourth (24<sup>th</sup>) month of the term of this Agreement if at any time any action by a court, agency, commission, legislative body, or other authority of competent jurisdiction repeals, modifies or clarifies state or federal law with respect to the rights, duties, privileges, exemptions, immunities and or authority of either City or AT&T California as it existed prior to the Effective Date, in whole or in part, relative to the provision of the IP-enabled Video Services product as the product is defined by AT&T which is the subject of this Agreement. In the event a Party requests modification to the Agreement as provided in this paragraph, should the Parties be unable to reach a mutually satisfactory modification within ninety (90) days of the commencement of such efforts, either Party may terminate the Agreement on the provision of thirty (30) days' written notice.

c. Where any court, agency, commission, legislative body, or other authority of competent jurisdiction issues a finding or takes action described in paragraphs 1.a. or 1.b. above, and such finding is not final and is subject to appeal, during the interval of such appeal the Parties may agree mutually to acts taken in mitigation of legal or administrative risks as may be presented should the finding or action be sustained upon appeal. Should the finding or action subsequently be repealed, reversed, amended or changed, City and Company shall act to restore this Agreement to operation as preceded the finding or action, in a manner consistent with such repeal, reversal, amendment or change and Company may discontinue any or all of the IP-Enabled Services and terminate this Agreement in the event that it is subject to a ruling of a court or agency of competent jurisdiction that directs or requires such result or that renders the continued provision of such Services commercially impracticable as an economic matter, notwithstanding the absence of a final judgment, in which case Company shall provide not less than ten (10) days' prior written notice to City before discontinuing such Services. Where Services have been terminated under such circumstances, Company shall have no obligation to restore Services or revive this Agreement in the event the finding later is reversed, overturned, modified or changed.

2. Compensation to City. During the term of this Agreement, AT&T California shall pay to City a fee of up to 5% of the gross revenues **[to be discussed]** from subscription fees collected from each subscriber to AT&T California's IP-enabled Video Services product delivered over the IP Network in the City's rights of way, such product to be defined by AT&T California when it is offered to the public. Gross revenue includes a pro rata portion of all revenue derived by the Company pursuant to

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compensation arrangements for advertising and Home Shopping Network sales derived from the operation of the Company's network to provide IP-enabled Video Services, as that product is defined by AT&T California when offered to the public, within the City. Advertising commissions paid to third parties (excluding any refunds, rebates, or discounts the Company may make to advertisers) shall not be netted against advertising revenue included in gross revenue. The allocation shall be based on the number of subscribers in the City divided by the total number of subscribers in relation to the relevant region or national compensation arrangement. The fee does not apply to revenues of products and services other than the IP-Enabled Video Services product as defined by AT&T California when offered to the public, or the revenues of a bundled product containing other offerings with the IP-Enabled Video Services product as defined by AT&T California when offered to the public. The fee will be identified and passed through on any subscriber bill by AT&T California, and all such fees collected will be forwarded to City quarterly on the last of each quarter after collection.

3. Educational and Governmental Programming. AT&T California shall provide access for the City's noncommercial, education and governmental ("EG") programming through AT&T California's IP-enabled Video Services (such IP-enabled Video Services product to be defined by AT&T California when it is offered to the public). City may be required to support a change in or addition to current City technology now in use for EG programming to make it compatible with AT&T California's IP enabled video technology. AT&T California's obligation herein will begin when its IP Video subscribers located within the municipal boundaries of the City reach 5,000 subscribers.

a. AT&T California will provide quarterly, within 30 days after the close of the quarter, to City [TO BE DISCUSSED] per subscriber per month of AT&T California's IP-enabled Video Service within the City. AT&T California shall have the right to charge its subscribers for this fee.

4. Service Standards. City shall not adopt or seek to enforce any additional or different customer service or other performance standards under §§ 53055.3, 53088.2(q), (r), (s), or under any other authority or provision of law. A verified and continuing pattern of noncompliance with the customer service standards set forth above shall constitute a material breach of this Agreement.

5. Service Area.

a. The Company will not deny access to its IP-enabled Video Services within the municipal boundaries of the City because of the income or minority status of the residents within the municipal boundaries of the City. The Company may, subject to the terms herein, satisfy its nondiscrimination and service area obligations through the use of direct-to-home satellite service or another alternative technology that provides comparable content, service, and functionality.

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c. In addition to the termination rights set forth above, the Company shall have the right to terminate this Agreement and all obligations hereunder upon ninety (90) days notice to the City, if (a) the Company concludes in its reasonable business judgment that IP Video Service in the City is no longer technically, economically or financially consistent with the Company's business objectives; (b) Title VI or California Government Code Section 53066 et seq. obligations, or any similar obligations not expressly provided for by this Agreement, are imposed on the Company; or (c) it becomes clear that the Company must offer or provide IP Video Service pursuant to a franchise (cable or otherwise) and/or franchise-like requirements or other local authorization.

6. Emergency Message. AT&T California shall provide an appropriate message through AT&T California's IP-enabled Video Services in order to capture and rebroadcast any Santa Clara emergency broadcast messages, that originate at the Santa Clara County Emergency Network, over the AT&T California IP based Video facilities to residents in the AT&T California IP Video within the City.

7. Obligations of City. During the term of this Agreement, City will not attempt to nor subject the provision of AT&T California's IP-enabled Video Services over the IP Network to regulation under its cable television franchise ordinance or similar ordinance unless authorized by Federal, State law or administrative regulation. In addition:

a. City agrees to subject the construction and installation of the IP Network to the process and review as set forth in Chapter I (Encroachments), where applicable, of Division C6 (Public Works and Flood Control) of Title C (Construction, Development and Land Use) of the \_\_\_\_\_ Municipal Code and to impose such conditions of approval as are appropriate and reasonable.

b. City agrees not to unreasonably block, restrict, or limit the construction and installation of the IP Network.

c. City agrees to process any and all applicable permits for the installation, construction, maintenance, repair, removal, and other activities associated with the IP Video upgrades in a timely manner.

8. Indemnification.

a. AT&T California agrees to indemnify, defend, and hold harmless City, its officers, agents, and employees, from and against any liability for damages and for any liability or claims resulting from tangible property damage or bodily injury (including accidental death), to the extent proximately caused by AT&T California's negligent construction, operation, or maintenance of its IP Network, provided that City shall give AT&T California written notice of its obligation to indemnify City within ten

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(10) days of receipt of a claim or action pursuant to this subsection. Notwithstanding the foregoing, AT&T California shall not indemnify City for any damages, liability or claims resulting from the negligence or willful misconduct of City, its officers, agents, employees, attorneys, consultants, independent contractors or third parties or for any activity or programming.

b. AT&T California agrees to indemnify, defend and hold harmless City, its officers, agents and employees in accordance with the provisions of Appendix B, which is made a part of this agreement.

c. With respect to AT&T California's indemnity obligations set forth above, AT&T California shall provide the defense of any claims brought against City by selecting counsel of AT&T California's choice to defend the claim, subject to the consent of City, which shall not be unreasonably withheld. Nothing herein shall be deemed to prevent City from cooperating with AT&T California and participating in the defense of any litigation by its own counsel at its own cost and expense, provided, however, that after consultation with City, AT&T California shall have the right to defend, settle or compromise any claim or action arising hereunder, and AT&T California shall have the authority to decide the appropriateness and the amount of any such settlement. In the event that the terms of any such settlement do not include the release of City and City does not consent to the terms of any such settlement or compromise, AT&T California shall not settle the claim or action, but its obligation to indemnify City shall in no event exceed the amount of such settlement.

d. City shall hold AT&T California harmless and shall be responsible for damages, liability or claims resulting from the negligence or willful misconduct of City.

e. City shall be responsible for its own acts of negligence or willful misconduct, or breaches of obligation committed by City for which City is legally responsible, subject to any and all defenses and limitations of liability provided by law. AT&T California shall not be required to indemnify City for acts of City which constitute willful misconduct or negligence on the part of City, its officers, employees, agents, attorneys, consultants, independent contractors or third parties.

9. Breach of Agreement. Should either Party claim that a breach of any part of this Agreement has occurred, that Party will provide prompt written notice to the other, specifying the nature of the breach; and upon receipt the other Party shall cure such breach within 30 days.

10. Dispute Resolution. Except as otherwise provided in this Agreement, the Parties shall make diligent good faith efforts to resolve all issues and disputes that arise in the administration of this Agreement through discussions between designated representatives of the Parties, and use of a mediator when such discussions have failed. In the event of no resolution, the Parties agree to submit such dispute to binding Arbitration in San Francisco, California before a single arbitrator in accordance with the Arbitration

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Procedures of the American Arbitration Association, and judgment of such Arbitrator upon such rendered decision may be entered in any court of competent jurisdiction thereof. Each Party shall bear its own costs of arbitration, including attorney fees.

11. Insurance. Upon the effective date of renewal AT&T California shall, at its sole expense, take out, and maintain during the life of this Agreement and furnish to the City, a policy of liability insurance as required by the State of California for Workers' Compensation, and a policy of liability insurance that shall conform to the provisions of Section 12.2 of Ordinance No. 335.

a. The amount of the liability insurance shall not be less than the following:

Combined Single Limit Coverage applying to Bodily and Personal Injury and Property Damage: Two Million Dollars (\$2,000,000) per occurrence.

b. The Following endorsements shall be attached to the liability policy:

(1) The policy shall cover on an "occurrence" basis, if reasonably available at comparable costs to "claims made" coverage.

(2) The policy shall cover Personal Injury as well as Bodily Injury.

(3) The policy shall cover blanket contractual liability subject to the standard universal exclusions of contractual liability included in the carrier's standard endorsement as to bodily injuries, personal injuries and property damage.

(4) Broad Form property damage liability shall be afforded.

(5) City shall be named additional insured on the policy.

(6) An endorsement shall be provided which states that the coverage is primary insurance and that no other insurance effected by the City will be called upon to contribute to a loss under this coverage.

(7) Standard form of cross-liability shall be afforded.

(8) An endorsement stating that the policy shall not be cancelled without thirty (30) days notice of such cancellation given to City.

c. AT&T California shall submit to City documentation of the required insurance including a certificate of insurance signed by the insurance agent and companies named, as well as all properly executed endorsements. City will accept self-insurance in lieu of commercial insurance policies. AT&T California shall issue City a statement of self-insurance for general liability (including bodily injury), Workers Compensation, and automobile liability.



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14. Assignment. AT&T California may not assign or transfer this Agreement or any interest therein, without the prior consent of City, which consent shall not be unreasonably withheld; except that AT&T California may assign or transfer this Agreement or any interest therein to an affiliated parent or subsidiary entity of AT&T California or other direct or indirect majority owned subsidiary of AT&T Inc. upon written notice and without prior consent of the City.

15. Entire Agreement. This Agreement constitutes the entire agreement between City and AT&T California with respect to the subject matter contained herein and supersedes all prior or contemporaneous discussions, agreements, and/or representations of or between City and AT&T regarding the subject matter hereof.

16. Waiver. Failure on the part of either Party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision.

17 Miscellaneous.

a. AT&T California and City each hereby warrants that it has the requisite power and authority to enter into this Agreement and to perform according to the terms hereof.

b. The headings used in this Agreement are inserted for convenience or reference only and are not intended to define, limit or affect the interpretation of any term or provision hereof. The singular shall include the plural; the masculine gender shall include the feminine and neutral gender.

c. AT&T California and City shall cooperate fully with one another in the execution of any and all other documents and in the completion of any additional actions including, without limitation, the processing of permits that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

d. Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties hereto toward any person or entity not a party to this Agreement, unless otherwise expressly set forth herein.

18. Binding Effect. This Agreement shall be binding upon and for the benefit of each of the Parties and their respective past and present principals, managers, City Council members, offices, directors, shareholders, agents, employees, attorneys, successors and assigns and any parents, subsidiaries or affiliated corporations or entities, as applicable.

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19. Counterpart Execution. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement. Signature pages may be transmitted by facsimile and any signature transmitted by facsimile will be given the same force and effect as an original signature.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this Agreement and made the same effective as of \_\_\_\_\_, 2006 ( "Effective date").

AT&T CALIFORNIA

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

CITY

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_