

ITEM DROPPED 11/21/06

ORDINANCE NO. 27904

AN ORDINANCE OF THE CITY OF SAN JOSE GRANTING A CABLE FRANCHISE TO COMCAST OF CALIFORNIA, II LLC TO CONSTRUCT AND OPERATE A CABLE SYSTEM TO PROVIDE CABLE SERVICE WITHIN A FRANCHISE AREA WITHIN THE CITY OF SAN JOSE; ESTABLISHING THE TERMS AND CONDITIONS OF THE FRANCHISE GRANT; AND ESTABLISHING CERTAIN REMEDIES FOR THE VIOLATION OF THE FRANCHISE

WHEREAS, Comcast of California II, LLC ("Comcast"), through its predecessors, submitted a proposal for renewal of its cable service franchise in San José, and the City commenced the administrative hearing required by 47 U.S.C. Section 546(c) to consider whether the company's franchise should be renewed based upon the proposal; and

WHEREAS, As a result of a change in state law, Comcast may be able to obtain a state franchise in 2008 on terms and conditions similar to those in its proposal, but its proposal provides for certain payments to be made at a time and in a lump sum beneficial to the City and its residents; and

WHEREAS, Accepting the formal proposal of the company would allow the City to obtain certain benefits now that would be delayed otherwise, and serves the public interest so long as certain conditions are satisfied; and

WHEREAS, this ordinance was found to be categorically exempt from environmental review, per the provisions of Section 15308 of the California Environmental Quality Act of 1970, as amended, on _____, 2006, under File No. _____.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

Section 1. The City hereby grants a franchise to Comcast for ten (10) years, the terms and conditions of which franchise are set forth in Attachment A to this ordinance, and incorporated herein as if set forth fully in this section. The grant of the franchise is subject to the provisions of Section 2-4 of this ordinance.

Section 2. The administrative proceeding commenced by the City shall terminate on the date the grant to Comcast becomes effective.

Section 3. Nothing in this ordinance or Attachment A, including section 2.5 or otherwise shall be read to release, by implication or otherwise, the claims pending against Comcast in City of San Jose vs. Comcast of California II, LLC, Case No. 1-05-CVO34650, and Sections 1 and 2 shall be void as if never adopted should any court of competent jurisdiction hold otherwise.

Section 4. City may amend or repeal this Ordinance at any time prior to the acceptance of the franchise by Comcast.

Section 5. The provisions of this Ordinance are not severable.

PASSED FOR PUBLICATION of title this 14th day of November, 2006, by the following vote:

AYES: CHAVEZ, CHIRCO, LeZOTTE, NGUYEN, PYLE,
REED, WILLIAMS, YEAGER; GONZALES

NOES: NONE

ABSENT: CAMPOS, CORTESE

DISQUALIFIED: NONE

RON GONZALES
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk

ATTACHMENT A
CABLE SERVICE FRANCHISE FOR THE CITY
OF SAN JOSE

Section 1. Definitions.

Except as otherwise provided herein, the definitions and word usage set forth in the Cable Ordinance shall govern the meaning of terms used in this Franchise. References to any City official or City office also refer to any official or office that succeeds to any or all of the responsibilities of the named official, whether by delegation, succession or otherwise. References to "Applicable Laws" shall be interpreted broadly to cover government actions, lawfully applied to Franchisee. In addition, the following definitions shall apply:

- 1.1. Access, PEG Access, or PEG Use. The availability of channel capacity on the Cable System, including any institutional network, for Public, Education or Government ("PEG") programming by various agencies, institutions, organizations, groups, and individuals, including the City and its Designated Access Providers, to acquire, create, and distribute video non-commercial programming not under Franchisee's editorial control, including, but not limited to:
 - 1.1.1. Public Access or Public Use means Access where organizations, groups, or individual members of the general public are the designated programmers or users having editorial control over their programming;
 - 1.1.2. Education Access or Education Use means Access where Schools are the designated programmers or users having editorial control over their programming;
 - 1.1.3. Government Access, or Government Use means Access where government institutions or their designees are the designated programmers or users having editorial control over their programming;
- 1.2. Cable Ordinance. San Jose City Municipal Code, Chapter 15.28.
- 1.3. Cable System. The term cable system has the same meaning as in the Cable Act, except that, as capitalized in this document, the term refers to Franchisee's Cable System.
- 1.4. Designated Access Provider. A non-commercial, non-profit entity or entities designated by the City to manage some or all of the PEG Channels, facilities and equipment.
- 1.5. Franchise Area. All parts of the City now existing or hereafter annexed.
- 1.6. Franchise. This Ordinance and any exhibits; or appendices hereto.
- 1.7. Franchisee. Comcast of California II, LLC or Comcast's lawful and permitted successors, assigns and transferees.

- 1.8. Standard Drop. An aerial connection extending no more than 150 feet from the exterior wall of the potential Subscriber's building to the nearest point on the Cable System from which Cable Service can be provided to that Subscriber.
- 1.9. School. Any publicly funded charter schools, and public primary and secondary schools located within the Franchise Area.
- 1.10. Subscriber Network. Fibers, coaxial cables and the electronic devices that are used in the provision of Cable Services and other lawfully authorized services to Subscribers.

Section 2. Grant of Franchise; Limits and Reservations.

2.1. Grant, Term and Effective Date.

- 2.1.1. A Franchise is hereby granted to Franchisee, subject to the conditions set forth in this Ordinance and the Cable Ordinance. This Franchise grants the right, subject to conditions, to install, construct, operate, maintain, and repair a Cable System in, over, along and under City public rights-of-way within a Franchise Area in the City of San Jose for the purpose of providing Cable Service, and other lawfully authorized services, commencing on the effective date of the Franchise through and including December 31, 2016, unless terminated prior to that date in accordance with the Franchise or Applicable Law.
- 2.1.2. The date this Ordinance becomes effective is referred to as the "Effective Date", *provided that*, the grant of the Franchise to Franchisee shall only become effective if all the conditions of Section 2.1.3 are satisfied.
- 2.1.3. The grant shall not become effective unless and until Franchisee has (a) filed an unconditional acceptance of the grant made by this Ordinance substantially in the form in Exhibit [A]; and (b) made all payments, posted all securities and guarantees, and supplied all information that it is required to supply prior to or upon the date the Franchise becomes effective. If Franchisee fails to satisfy these obligations within 30 days of the Effective Date , the Franchise grant shall be deemed rescinded.

2.2. Relation to Other Provisions of Law.

- 2.2.1. The Franchise issued by the City is subject to, and Franchisee must exercise all rights granted to it in accordance with Applicable Law, including the Cable Ordinance. This Franchise does not confer rights upon Franchisee other than as expressly provided herein, or as necessarily incident thereto, or as expressly provided under other Applicable Law. No privilege or power of eminent domain is bestowed by this grant. All rights

and powers of the City now existing or hereafter obtained are reserved except as expressly provided to the contrary in the Franchise. The City's rights of eminent domain are expressly preserved notwithstanding any other provision of this Franchise. Subject to the foregoing, Franchisee shall provide the Cable Services required hereunder throughout the Franchise Area during the Franchise Term and any holdover term, and shall make any Cable Services it provides over its Cable System available to all residents, in its Franchise Area, subject to applicable line extension/density requirements.

- 2.2.2. This Franchise and all rights granted under the Franchise are subject to the City's powers and specifically delegated regulatory authority. However, once the Franchise grant is effective, this Franchise is a contract and except as to those changes which are the result of the City's valid exercise of its police powers, neither party may take any unilateral action which changes the explicit mutual promises in this contract.
- 2.2.3. The Franchise shall be interpreted to convey rights and interests only as to those public rights-of-way in which the City has an actual interest and only as set out in the Franchise. The grant of the Franchise is not a warranty of title or interest in any right-of-way. The issuance of the Franchise does not deprive the City of any powers, rights or privileges it now has or may later acquire in the future to use, perform work on, construct, operate or repair public facilities or systems in, or regulate or control the use of the rights-of-way.
- 2.2.4. The Franchise is not in lieu of any other lawfully required permit or authorization. Without limiting the foregoing, Franchisee is obligated to obtain all applicable permits, to comply with the conditions of all permits; to comply with zoning laws; and to comply with Applicable Law governing the construction, operation or repair of the Cable System.
- 2.2.5. The fees and other payments made hereunder are not in lieu of any other fee, charge or tax, which may now exist or hereafter be imposed by the City. This provision does not prevent Franchisee from raising a claim that a fee, charge or tax imposed by the City is a cable franchise fee under federal or state law, or subject to federal franchise fee limitations or is otherwise unlawful.

2.3. Interpretation and Conflicts.

- 2.3.1. In the event of a conflict between the Cable Ordinance as it existed on the Effective Date , and this Franchise as of the Effective Date, the Franchise shall control. Nothing in this

Section 2.3 prevents Franchisee from challenging a particular amendment to the Cable Ordinance as an impairment of this Franchise.

2.4. Affiliates Must Comply. Any Affiliate or joint venture or partner of Franchisee involved in the management or operation of the Cable System in the City that would constitute a cable operator of the Cable System is subject to the limitations of, and shall comply with the terms and conditions of the Franchise. Franchisee shall be fully liable for any act or omission of an Affiliate that controls Franchisee or is responsible in any manner for the management of the Cable System that results in a breach of this Franchise or a violation of the Cable Ordinance, as if the act or omission was Franchisee's act or omission.

2.5. Relation to Prior Franchise. As of the date the Franchise grant hereunder goes into effect, the franchise granted originally to Gill Industries, Inc. dba Gillcable ("Gill") by San Jose Ordinance 2218, and accepted by Gill on January 2, 1986, is superseded and of no further force and effect. The City and Franchisee mutually release each other from any claims actually known as of the Effective Date, arising under the prior franchise during the time it was in effect; except that the City does not release Franchisee from its duty to indemnify the City against third party claims; or from claims arising out of Franchisee's rates and charges during the franchise term. This release expressly includes a mutual release of any claims the parties may have had against each other related to any transfer of the franchise from Gill to Franchisee, or the change of control over the ultimate parent of Franchisee from Tele-Communications, Inc. to AT&T Corp.

Franchisee shall provide to the same indemnity required under the franchise issued to Gill, and shall continue to maintain adequate insurance for injuries to persons or property that may have occurred during the prior franchise term.

2.6. Validity. Both parties waive any claim or defense that any provision of this Franchise is unenforceable or otherwise invalid or void as of the date the Franchise was signed. Neither party waives the right to challenge the validity of any other Applicable Law.

2.7. Effect of Franchise Acceptance. By accepting the Franchise, Franchisee:

2.7.1. Acknowledges and accepts the City's legal right to issue and enforce the Franchise;

2.7.2. Accepts and agrees to comply with each and every provision of this Franchise;

2.7.3. Agrees that the Franchise was granted pursuant to processes and procedures consistent with Applicable Law.

- 2.8. Franchisee Bears Its Own Costs. Unless otherwise specifically stated in this Franchise, all acts that Franchisee is required to perform under this Franchise or Applicable Law must be performed at Franchisee's expense, and at no cost to the City, provided that nothing contained in this Section 2.8 is intended to restrict or limit Franchisee's rights under Applicable Law to offset costs against Franchise Fees or to assess or pass through costs to its Subscribers.
- 2.9. No Waiver.
- 2.9.1. No course of dealing between Franchisee and the City, or any delay on the part of the City or Franchisee in exercising any rights shall operate as a waiver of any such rights, except to the extent expressly waived or by operation of law.
- 2.9.2. Waiver of a breach of this Franchise is not a waiver of any other breach, whether similar or different from that waived.
- 2.10. No Recourse. Without limiting such immunities as the City or other Persons may have under Applicable Law, a Franchisee will have no monetary recourse against the City or its officials, boards, commissions, agents or employees for any loss, costs, expense or damage arising out of (i) the construction, operation or repair of its Cable System, including in cases where the act or omission giving rise to the same was required under applicable law or directed by the City; or (ii) the acts or omissions of the City or any other entity using the public rights of way or other property under the City's control, except acts and omissions of the City that involve intentional misconduct by the City.
- 2.11. Severability. In the event that a court or agency or legislature of competent jurisdiction acts or declares that any provision of this Franchise is unenforceable according to its terms, or is otherwise void, said provision shall be considered a separate, distinct, and independent part of this Franchise, and such holding shall not affect the validity and enforceability of all other provisions hereof.
- 2.12 Level Playing Field. If the City issues a franchise to another party for the purposes of operating a Cable System in the City's Public Rights-of-Way, the material terms of that franchise, considered as a whole, shall not be substantially more favorable or substantially less burdensome than the Franchise issued to Franchisee hereunder.

Section 3. Transfers.

- 3.1. No Transfer Without City Approval. Franchisee agrees that the rights granted to it by the City may not be transferred without the prior consent of the City. An Application for a Transfer, containing all information required under Applicable Law, must be filed before a request for a Transfer will be considered by the City.
- 3.2. Application for Transfer To Be Considered In Accordance With Cable Ordinance. An Application for a Transfer will be considered in accordance with the standards set forth in the Cable Ordinance and Applicable Law. Requests for approval of a Transfer will not be unreasonably denied.

Section 4. Franchise Fee.

- 4.1. Payment to City. Franchisee shall pay the City a franchise fee in an amount equal to five percent (5%) of Gross Revenues derived by Franchisee, or any Affiliate of Franchise that is a cable operator of the Cable System from the operation of the Cable System to provide cable services. In the event Franchisee offers bundled services (i.e., a combination of cable and non-cable services) at discounted rates, Franchisee may not allocate discounts for bundled services in a way that unlawfully evades franchise fees.
- 4.2. Not in Lieu of Any Other Assessments, Tax or Fee. The franchise fee is in addition to all other fees, assessments, taxes or payments that Franchisee may be required to pay under any Federal, State, or local law, subject to any limitations set forth in Applicable Law, including, but not limited to, 47 U.S.C. § 542.
- 4.3. Payments. Franchise fees shall be paid in accordance with the schedule set forth in the Cable Ordinance, and late payments shall be subject to the additional charges set forth in the Cable Ordinance.
- 4.4. No Accord or Satisfaction. No acceptance of any payment by the City shall be construed as a release or an accord and satisfaction of any claim the City may have for further or additional sums payable as a franchise fee or for the performance of any other obligation of Franchisee.
- 4.5. Payment Records. The City may, from time to time, and upon reasonable advance written notice, inspect and audit any and all books and records reasonably required to determine whether Gross Revenues and franchise fees have been accurately computed and paid. If Franchisee believes a record requested is not reasonably required, it must immediately notify the City of its objection under the commercial rules of the American Arbitration Association seeking a declaration that the books and records are not reasonably required by the City. In the event Franchisee fails to initiate such an action, Franchisee shall produce the requested records. In addition to paying all fees owed plus interest, in the event that the City reviews Franchisee's franchise fee payments, and finds that Franchisee

has underpaid the fee owed for any year in an amount exceeding five percent (5%) of the franchise fees actually paid or One Hundred Thousand Dollars (\$100,000), whichever is less, Franchisee shall pay the reasonable cost of the City's review. Nothing in this paragraph prevents Franchisee from challenging the City's finding in a court of competent jurisdiction, or from recouping amounts paid to cover City's review costs, should Franchisee prevail on the challenge.

- 4.6. Consumer Disclosure. The amount of a Subscriber's total bill assessed as a franchise fee may be listed as a separate line item.

Section 5. Construction Provisions.

- 5.1 Provision of Service. Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

- 5.2. Construction Standards. Without limiting Section 5.1, Franchisee agrees at all times it will satisfy the following; minimum conditions:

5.2.1. Minimum Conditions. The construction, operation, and repair of the Cable System will be in accordance with all Applicable Law. At a minimum, Franchisee shall comply with IEEE standards, the National Electric Code, the National Electrical Safety Code and any other applicable safety codes. The most stringent applicable code or standard will apply in the event of any conflict (except insofar as that standard, if followed, would result in a system that could not meet requirements of Federal, State or local law). Franchisee will employ reasonable care at all times, within the meaning of Applicable Law, and will install and maintain in use commonly accepted methods and/or devices to reduce the likelihood of damage, injury, or nuisance to the public. The construction, operation, and maintenance of the Cable System shall be performed by experienced and properly trained maintenance and construction personnel.

5.2.2. Compliance with Laws. Franchisee must install, locate, relocate and remove its Cable System in accordance with the Franchise, the Cable Ordinance and all other Applicable Laws. Franchisee shall not place or maintain its Cable System, including any poles or other structures, in Public Rights-of-Way or on private property except in strict accordance with the requirements of the Franchise, the Cable Ordinance and all other Applicable Laws.

5.2.3. Relocation for Government. Except as provided below, Franchisee will protect, support, temporarily disconnect, relocate, or remove any of its property at the time and in the manner required by the City or any other governmental entity

for any governmental purpose. The requirement to relocate for the City shall not apply if such relocation relates to the City's construction of a Cable Communications System.

- 5.2.3.1. City shall provide written notice describing where the public work is to be performed at least fifteen (15) days prior to the deadline by which a cable communications system operator must protect, support, temporarily disconnect, relocate or remove its facilities. Franchisee may seek an extension of the time to perform the work where it cannot be performed in a week even with the exercise of due diligence, and such request for an extension will not be unreasonably refused. Provided that, in an emergency, or where a cable communications system creates or is contributing to an imminent danger to health, safety, or property, City may protect, support, temporarily disconnect, remove, or relocate any or all parts of the cable communications system without prior notice, and charge the cable communications system operator for reasonable, actual costs incurred.
- 5.2.3.3. Franchisee may abandon any property in Public Rights-of-Way that is in place upon written notice to the City and separate notice to the Director of Public Works. Abandonment shall be in a manner acceptable to the City Engineer. However, if, within ninety (90) days of the receipt of written notice of abandonment, the City determines, that the safety, appearance, functioning or use of the public right-of-way or public property and facilities in the public right-of-way or on public property will be adversely affected, the property must be removed by a date reasonably specified by the City in light of the amount of work to be performed.
- 5.2.3.4. If Franchisee abandons its property, Franchisee must, upon request, transfer ownership of the property to the City at no costs, and execute necessary quitclaim deeds, provided that nothing in this Section 5.2.3.4 prevents Franchisee from bringing an action in a court of competent jurisdiction if Franchisee believes that its property was not abandoned. Whether or not ownership is transferred, Franchisee must indemnify the City against future costs associated with mitigating or eliminating any hazard associated with the abandoned property.

- 5.2.4. Potholing. Franchisee must bear costs of potholing for any City project (whether undertaken by the City alone, or jointly).

Within thirty (30) days after receiving the City's written request, unless the City agrees otherwise, Franchisee will expose its subsurface Cable System facilities by potholing (digging a test hole) to a depth of one (1) foot below the bottom of such facilities.

5.2.5. Utility Relocations.

5.2.5.1. If any relaying, relocation or temporary removal is required to accommodate the construction, operation, or repair of the facilities of another Person authorized to use Public Rights-of-Way, Franchisee will, no later than after fifteen (15) days' advance written notice, or such other date as the Person may specify, effect the necessary changes requested by such Person. In cases where the requesting Person is required to bear the cost of relaying, relocation or temporary removal under Section 5.6.5.2, Franchisee may require the Person to agree, before the work is performed, to pay the reasonable actual cost of the work. If Franchisee does so, it must provide an estimate of the cost of the work and support for that estimate.

5.2.5.2. The City may direct Franchisee to remove, relay relocate or temporarily remove its facilities pending resolution of a dispute as to responsibility for costs upon posting of a bond by the Person requesting such relaying, relocation or temporary removal in the amount of Franchisee's estimated costs.

5.2.6. Permit Holders. Upon the request of a Person holding a valid permit, a Franchisee will temporarily raise or lower its wires by a time specified to permit the moving of buildings or other objects. The Franchisee shall be given not less than fifteen (15) days advance written notice to make the temporary wire changes. Costs will be borne as provided in the Cable Ordinance.

5.2.7 Repair of Disturbances and Damage. The Franchisee shall repair any disturbance or damage to private property caused by Franchisee's construction, operation or repair of the Cable System promptly and to a condition that complies with the then-current Municipal Code and that is as good or better than its prior condition. Franchisee shall repair any disturbance or damage to public property or to Public Rights-of-Way caused by Franchisee's construction, operation or repair of the Cable System to a condition as good or better than its prior condition, in a manner and within a time approved or specified by the Director of Public Works. Without limiting the foregoing, or provisions of Section 5.9, Franchisee agrees to compensate any entity whose property is

damaged in the course of the construction, operation or repair of the Cable System where the property is not restored by Franchisee to a condition as good or better than existed before the damage.

- 5.3. Notice of use. Copies of written agreements for use of Franchisee's conduits or poles in Public Rights-of-Way by third parties will be made available for review upon the City's request, subject to any confidentiality restrictions.
- 5.4. Contractors and Subcontractors. Franchisee shall ensure that any contractor or subcontractor used for work on construction, operation, or repair of the Cable System is properly licensed under laws of the State and all applicable local ordinances. Each contractor or subcontractor shall have the same obligations with respect to its work as Franchisee would have under this Franchise and Applicable Law if the work were performed by Franchisee. Franchisee shall be responsible for ensuring that the work of contractors and subcontractors is performed consistent with this Franchise and Applicable Law, shall be responsible for all acts or omissions of contractors or subcontractors, and shall be responsible for promptly correcting acts or omissions by any contractor or subcontractor. This section is not meant to alter the tort liability, if any, of Franchisee to third parties, or of any contractor or subcontractor to third parties or to Franchisee. Franchisee shall institute procedures adequate to ensure that the work performed by its contractors and subcontractors complies with the requirements of this Franchise and Applicable Law.

Section 6. Preservation of PEG Benefits and Status Quo.

Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

Section 7. System Facilities, Equipment and Services.

Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

7.1 General System Design.

Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

7.2 System Maintenance.

- 7.2.1 Franchisee may intentionally interrupt service on the Cable System only for required testing, maintenance or other good cause and

only for the shortest time possible and, except in emergency situations or to the extent necessary to fix the affected Subscriber's service problems, only after a minimum of forty-eight hours' prior notice to Subscribers and the City of the anticipated service interruption; provided, however, that no service interruption notice to the City shall be required for planned maintenance that (i) does not require more than two hours' interruption of service; or (ii) occurs between the hours of 1:00 a.m. and 6:00 a.m.

7.3 Inspection and Testing. The City shall have the right to inspect the Cable System during and after the upgrade to ensure compliance with the Cable Ordinance, this Franchise, and applicable provisions of local, State and Federal law. In the event Subscriber complaints or the City's investigation indicates to City that there is a substantial non-compliance with technical requirements, City may, upon reasonable notice, require Franchisee (i) to perform tests of the Cable System; and (ii) to prepare a report to the City on the results of those tests, including a statement identifying any substantial technical non-compliance found and the actions taken to correct those problems. This provision is subject to any limitations on the City's authority under Applicable Law.

7.4 FCC-Mandated Testing. Franchisee shall notify the City in advance of conducting any Proof-of-Performance test required by the FCC, so that the City may observe the testing. Upon request, the City shall be provided the test results and any supporting documentation regarding the tests and testing equipment and procedures.

Section 8. I-NET.

Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

Section 9. Interconnections.

Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

Section 10. Subscriber Network Channels and Facilities for PEG Use.

Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

10.1 Miscellaneous PEG Requirements.

Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

- 10.2 Cable Outlets for Educational and Government Facilities. Shall be as provided in the Formal Proposal for Renewal of Cable Television Franchise submitted by AT&T Broadband of California dated September 11, 2002 on file with the City Clerk.

Section 11. Operation and Reporting Provisions.

- 11.1. Open Books and Records. Without limiting its obligations under Section 2, Franchisee agrees that it will collect and make available books and records for inspection and copying by the City in accordance with the Cable Ordinance.
- 11.1.1. Production. Books and records shall be produced to the City at City Hall, or such other location as the parties may agree. If Franchisee objects to a request for books and records, and the City does not agree that they need not be produced, Franchisee must produce the books and records unless it has initiated and is pursuing an arbitration to obtain an Order restricting the request. The arbitration shall be conducted in accordance with the commercial rules of the American Arbitration Association and shall be non-binding. In the event Franchisee disputes the result of the arbitration it must initiate and pursue an action to obtain an order restricting the request from a court of competent jurisdiction or produce and books and records requested. Notwithstanding any provision of the Cable Ordinance, if it is not reasonable for the requested documents to be moved because (i) they are too voluminous; (ii) for security reasons; or (iii) the requested records contain trade secrets, then Franchisee may request that City inspection and copying of such records take place at some other location mutually agreed to by the City and Franchisee, and City shall not unreasonably refuse to accede to the request provided that:
- 11.1.2. Franchisee must make necessary arrangements for copying documents selected by the City after its review; and
- 11.1.3. Franchisee must pay all reasonable travel and additional copying expenses incurred by the City (above those that would have been incurred had the documents been produced in the City) in inspecting those documents or having those documents inspected by its designee.

- 11.1.4 The parties agree that any amounts paid pursuant to this Section 11.2 are not a franchise fee within the meaning of 47 U.S.C. § 542 and fall within one of the exceptions listed in 47 U.S.C. §542(g)(2).
- 11.2. Reports Required. Franchisee shall file reports in accordance with the Cable Ordinance.
- 11.3. Records Maintained. Franchisee shall maintain records sufficient to comply with the requirements of the Cable Ordinance, and to show compliance with all the provisions of this Franchise.
- 11.4. Retention of Records; Relation to Privacy Rights. Franchisee shall take all steps required, if any, to ensure that it is able to provide the City all information which must be provided to the City or that may be requested by the City under Applicable Law or this Franchise, including by providing appropriate Subscriber privacy notices. Nothing in this section shall be read to require a Franchisee to violate 47 U.S.C. § 551 or other Applicable Law governing privacy. Franchisee shall be responsible for redacting any data that State or Federal law prevents it from providing to the City. Records shall be kept for at least two (2) years, except that service call logs may be retained for three (3) years, so long as the information contained therein is reflected in other documents.

Section 12. Customer Service Standards. Franchisee shall meet or exceed the customer service standards of the Cable Ordinance and Applicable Law.

Section 13. Rate Regulation. The City may regulate Franchisee's rate and charges, and order refunds of unreasonable rates charged, to the extent allowed by Applicable Law. All rates that are regulated by the City must be reasonable, and, except as Applicable Law provides otherwise, can only be established or changed with the prior approval of the City. Failure of Franchisee to comply with rate orders issued by the City shall constitute a material breach of the Franchise, subjecting Franchisee to liquidated damages as set forth in Section 15.4.1.5.

Section 14. Insurance; Surety; Indemnification.

14.1 Insurance.

- 14.1.1 Franchisee agrees to maintain adequate insurance during the entire term of the Franchise against claims for injuries to persons or damage to property which in any way relate to, arise from, or are connected with the holding of the Franchise or the construction, operation or repair of the Cable System by Franchisee, its agents, representatives, contractors, subcontractors and employees. Franchisee must keep insurance in effect in accordance with the minimum insurance scope the City may set from time to time. The City may for good cause change insurance requirements once every three

years after providing Franchisee notice and the opportunity to comment upon the proposed changes.

14.1.2 The initial minimum amounts, form, quality and proof of insurance that must be provided and maintained through the Franchise term are set forth in Exhibit [B]. Franchisee warrants that its insurance policies comply in all respects with the requirements of Exhibit [B]. Copies of the policies will be provided upon request.

14.1.3 The insurance requirements are material terms of this Franchise.

14.2 Indemnification.

14.2.1 To the extent permitted by Applicable Law, Franchisee will, at its sole cost and expense, fully indemnify, hold harmless, and faithfully defend the City, its officials, boards, commissions, commissioners, agents, and employees, against any and all claims, suits, causes of action, proceedings, and judgments for damages or equitable relief in any way arising out of:

14.2.1.1 Construction, repair, or operation of the Franchisee's Cable System;

14.2.1.2 Any claim against the Franchisee for invasion of the right of privacy, defamation of any Person, firm or corporation;

14.2.1.3 Violation or infringement of any copyright, trade mark, trade name, service mark, or patent, or of any other right of any Person, firm, or corporation, including a failure by the Franchisee to secure consents from the owners, authorized distributors, or licensees of programs to be delivered by the Cable System;

14.2.1.4 The conduct of the Franchisee's business in the City; or

14.2.1.5. Franchisee's enjoyment or exercise of its Franchise, regardless of whether the act or omission complained of is authorized, allowed, or prohibited by Applicable Law or this Franchise.

14.2.2. Notwithstanding the foregoing Section 14.2.1, Franchisee need not indemnify the City in cases where liability is:

14.2.2. 1. Solely caused by the active negligence or willful misconduct of the person or persons covered by the indemnity;

14.2.2.2 Results from communications contributed or produced by the City and transmitted over the Cable System; or

14.2.2.3 Results from communications carried on any Channel set-aside for PEG Use, or Channels leased pursuant to 47 U.S.C. § 532, except for communications contributed or produced by Franchisee.

14.2.3 The City will notify Franchisee promptly in writing of its duty to indemnify in any case subject to the indemnity in which Franchisee is not a named defendant or plaintiff. Franchisee will employ competent counsel.

14.3 No Limit of Liability. The provisions of this Section 14 shall not be construed to limit the liability of Franchisee for damages.

14.4 Governmental Immunities. Nothing in this Section 14 is intended to waive, limit or expand any of the City's governmental immunities.

Section 15. Performance Guarantees and Remedies.

15.1 Security Fund.

15.1.1 In satisfaction of the security fund requirements of the Cable Ordinance, Sec. 15.28.430, as the same existed on the Effective Date of this Franchise, Franchisee shall provide a letter of credit in the amount of One Hundred Thousand Dollars (\$100,000). The letter of credit maybe drawn upon in accordance with the Cable Ordinance as it existed on the Effective Date of this Franchise. The City may require Franchisee to increase the amount of the letter of credit once every three years to reflect increases in the U.S. City Average of the Consumer Price Index.

15.1.2 Franchisee shall provide proof that the letter of credit complies with this Franchise and with all other requirements of the Cable Ordinance.

15.1.3 Upon termination of the Franchise, the City shall authorize the Franchisee to terminate the letter of credit within one hundred eighty (180) days of Franchise termination, provided that there is then no outstanding obligation secured by the letter of credit; provided that the letter of credit shall be deemed forfeited if the Franchise is revoked for cause or the Cable System is abandoned.

15.2. Performance Bond.

15.2.1 Before undertaking the Cable System upgrade required by this Franchise, Franchisee shall obtain a performance bond in the amount of Three Hundred Thousand Dollars (\$300,000).

- 15.2.2 The performance bond shall:
 - 15.2.2.1 Secure the faithful performance of all work required by the Franchise, including, but not limited to, completion of the I-NET;
 - 15.2.2.2 Provide for restoration of the Public Rights-of Way and other property that may be affected by the construction, operation or repair of the Cable System.
- 15.2.3 The bond shall state that the City may also recover against the bond any amount recoverable against the Security Fund where such amount exceeds that available under the Security Fund.
- 15.2.4 The bond shall provide that, in the event Franchisee fails to complete the Cable System construction, upgrade, other work in the Public Rights-of-Way, or work required by the Franchise, in a safe, timely, and competent manner, or otherwise fails to comply with its obligations under the Franchise or Applicable Law, there shall be recoverable, jointly and severally from the principal and surety of the bond, any damages or loss suffered by the City as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of Franchisee, or the cost of completing or repairing the Cable System construction, upgrade, or other work in the Public Rights-of-Way, plus a reasonable allowance for attorneys' fees, up to the full amount of the bond.
- 15.2.5 The performance bond shall provide that it shall be forfeited to the City under following conditions:
 - 15.2.5.1. Franchisee abandons the Cable System; or
 - 15.2.5.2 Franchise is revoked for cause.
- 15.2.6 The performance bond shall be issued by a surety with an A-1 or better rating of insurance in Best's Key Rating Guide, Property/Casualty Edition; shall be subject to the approval of the City; and shall contain the following endorsement: "This bond may not be canceled, or allowed to lapse, until sixty (60) days after receipt by the City, by certified mail, return receipt requested, of a written notice from the issuer of the bond of intent to cancel or not to renew."
- 15.2.7 In addition to the performance bond required by Section 15.2.1, Franchisee shall obtain, prior to any Cable System construction, or other work in Public Rights-of-Way, bonds in the amounts and subject to such terms established by the City consistent with its normal practices, based upon the work to be performed. The City will respond to the application to reduce

such bonds in accordance with its ordinary practices for bond reduction.

- 15.3 Material Term. The required performance bond and letter of credit are material terms of this Franchise.
- 15.4 Liquidated Damages.
- 15.4.1. Because Franchisee's failure to comply with provisions of its Franchise will result in injury to the City, and because it will be difficult to estimate the extent of such injury, the City and Franchisee agree to the following liquidated damages for the following violations, which represent both parties' best estimate of the damages to the City resulting from the specified injury. To maintain that estimate, the parties agree that the liquidated damage amounts are in 2002 dollars and shall be increased once every three years by the increase in the U.S. City Average of the Consumer Price Index. Thus, treating 2002 as the base year, indexed as 100, and assuming that by 2003 the index had increased a total of 15%, liquidated damages amounts would be increased by 15%. The parties further agree that the damages specified are to the City, and are recoverable by the City. Damages accrue from the date Franchisee receives written notice of the violation from the City and any cure period has expired without a cure; provided that, nothing herein prevents Franchisee from raising a defense to the imposition of liquidated damages from the date of violation based upon laches, waiver, statute of limitations, or any other similar defense. Liquidated damages are not Franchise Fees.
- 15.4.1.1 For failure to complete construction of the Subscriber Network in accordance with the Franchise: sixty-five cents (\$0.65/day) for each affected subscriber for each day the violation continues.
- 15.4.1.2 For transferring the Franchise without required approval: Two Hundred Dollars (\$200)/day for each violation for each day the violation continues.
- 15.4.1.3 For failure to comply with requirements for PEG Use of the Cable System for which damages to the City are not readily ascertainable: Five Hundred Dollars (\$500)/day for each violation for each day the violation continues.
- 15.4.1.4 For violation of customer service standards: One Hundred Fifty Dollars (\$150) per violation, except for violations of customer service standards, such as telephone answering standards, where the operator's compliance is not measured in terms of its response to

individual customers, Two Thousand Dollars (\$2,000) a quarter for any quarter during which it fails to meet applicable performance standards; and

15.4.1.5 For all other material violations of the Franchise for which actual damages may not be ascertainable: Two Hundred (\$200)/day for each violation for each day the violation continues.

15.4.2 The City may order Franchisee to pay liquidated damages. Before doing so, the City must provide Franchisee notice of the alleged violation, and provide Franchisee with reasonable opportunity to cure, which in no event will be less than thirty (30) days. Additionally, Franchisee shall be provided with an opportunity to be heard and to show either that a violation has not occurred or that damages should not be imposed.

15.5 Revocation or Termination of Franchise. In addition to all other rights of the City under this Franchise, the City shall have the right to revoke the Franchise for the reasons specified in the Cable Ordinance as of the effective date of this Franchise, pursuant to the revocation procedures specified in the Cable Ordinance. Provided that, any amendments to the Cable Ordinance must provide the same level of due process as is provided under the procedures provided for under the Cable Ordinance as the same existed on the Effective Date of this Franchise.

15.6 Relation to Insurance and Indemnity Requirements. Recovery by the City of any amounts under insurance, the construction/performance bond, the letter of credit, or otherwise does not limit Franchisee's duty to indemnify the City in any way; nor shall such recovery relieve Franchisee of its obligations under the Franchise, limit the amounts owed to the City, or in any respect prevent the City from exercising any other right or remedy it may have.

Section 16. Rights of Individuals Protected.

16.1 General Obligations. Franchisee shall comply with all provisions of the Cable Ordinance and Applicable Law regarding nondiscrimination, privacy and protection from exposure to indecent or obscene programming.

16.2 Respect for Property. No cable, line, wire, amplifier, converter or other piece of equipment owned or controlled by Franchisee shall be installed by Franchisee inside a dwelling or other occupied structure without first securing the written permission of the owner or the lawful occupant of the property involved (except in those cases where Franchisee is permitted by Federal or State law or regulations to install such facilities and equipment inside the structure without permission).

- 16.3 Non-discrimination. Without limiting Section 16.1, Franchisee agrees as follows:
- 16.3.1 Franchisee will not deny service, deny access, or otherwise discriminate against Subscribers, PEG programmers, or residents of the City on the basis of race, color, creed, national origin, sex, age, conditions of physical handicap, religion, ethnic background, marital status, or sexual orientation. Franchisee will comply at all times with all Applicable Law relating to non-discrimination.
 - 16.3.2 Franchisee will not discriminate among Persons or the City or take any retaliatory action against a Person or the City because of the exercise of any right the Person or the City may have under Applicable Law, nor may Franchisee require a Person or the City to waive such rights as a condition of taking service.
 - 16.3.3 Franchisee will not deny access or levy different rates and charges on any group of potential residential cable Subscribers because of the income of the residents of the local area in which such group resides.
 - 16.3.4 Except to the extent the City may not enforce such a requirement, a Franchisee is prohibited from discriminating in its rates or charges or from granting undue preferences to any Subscriber, potential Subscriber, or group of Subscribers or potential Subscribers.
 - 16.3.4.1 Franchisee may, however, offer bona fide promotional discounts in order to attract or maintain Subscribers, so long as such discounts are offered on a non-discriminatory basis to similar classes of Subscribers throughout the Franchise Area.
 - 16.3.4.2 Franchisee may, however, offer such other discounts as it is expressly entitled to provide under Applicable Law.
 - 16.3.5 Franchisee will comply with all Applicable Law governing equal employment opportunities.

Section 17. Continuity of Service.

- 17.1 It is the right of each Subscriber in Franchisee's Franchise Area to receive all available Cable Services from Franchisee as long as the Subscriber's financial and other obligations to Franchisee are satisfied.
- 17.2 Franchisee shall ensure that all Subscribers receive continuous uninterrupted Cable Service. At the City's request, Franchisee shall operate its System for a temporary period (the "transition period") following the termination of its Franchise or any transfer as necessary to

maintain Cable Service to Subscribers, and shall cooperate with the City to assure an orderly transition from it to another entity. The transition period shall be no longer than the reasonable period required to select another entity and to build a replacement Cable System, and shall not be longer than equal to agreed rebuild period months, unless extended by the City for good cause. During the transition period, Franchisee will continue to be obligated to comply with the terms and conditions of this Franchise and Applicable Laws and regulations, and will be deemed to have the necessary authorization required from the City to enable it to provide Cable Service.

- 17.3 If Franchisee abandons its Cable System during the Franchise term or any transition period, or fails to operate its Cable System in accordance with the terms set forth in Section 17.4 below, the City, at its option, may operate the Cable System or designate another entity to operate the Cable System temporarily until Franchisee agrees to restore and restores continuous Cable Service in compliance with the Franchise and the Cable Ordinance or until the Franchise is revoked and a new entity selected by the City is providing Cable Service.
- 17.4 The City shall be entitled to exercise its rights under Section 17.3 if the:
- 17.4.1 Franchisee fails to provide Cable Service in accordance with its Franchise over a substantial portion of the Franchise Area for ninety-six (96) consecutive hours, unless such failure is due to force majeure or other cause beyond Franchisee's control or the City authorizes a longer interruption of service; or
- 17.4.2. Franchisee, for any period, willfully and without cause refuses to provide Cable Service in accordance with its Franchise over a substantial portion of the Franchise Area.
- 17.5 Rights Upon Franchise Termination or Revocation. If the City revokes the Franchise or the Franchise otherwise terminates, the City shall have the following rights, in addition to the rights specified in this Franchise or under Applicable Law:
- 17.5.1 The City may require Franchisee to remove its facilities and equipment at the former Franchisee's expense. If Franchisee fails to do so within a reasonable period of time, the City may have the removal done at Franchisee's and/or surety's expense, subject to any right of abandonment that may be provided for under Applicable Law.
- 17.5.2 The City, by the City Council resolution, may acquire ownership or effect a Transfer of the Cable System at fair market value, or, if the Franchise terminates or is revoked for cause in accordance with the Cable Ordinance, at an equitable price. The terms "equitable price" and "fair market value" shall be interpreted in accordance with 47 U.S.C. § 547.

17.5.3 Section 17.5.2 does not apply to an abandonment. If a Cable System or any part thereof is abandoned by Franchisee, the City may require Franchisee to transfer title to the abandoned portions to it at no charge, free and clear of encumbrances, and the same will become the City's property and the City may keep, sell, assign, or transfer all or part of the assets of the Cable System, or otherwise dispose of those assets as it sees fit.

Section 18. Miscellaneous Provisions.

- 18.1 Compliance With Laws. Franchisee shall comply with all applicable Federal, State and local laws and regulations as they become effective, unless otherwise stated herein.
- 18.2 Governing Law. This Franchise shall be governed and construed in accordance with the statutes and laws of the State of California.
- 18.3 No Pledging of City's Credit. Under no circumstances shall Franchisee have the authority or power to pledge the credit of City or incur any obligation in the name of City. Franchisee shall save and hold harmless the City, its City Council, its officers, employees, boards and commissions for expenses arising out of any unauthorized pledges of City's credit by Franchisee under this Franchise.
- 18.4 Venue. In the event that suit shall be brought by either Party, the Parties agree that venue shall be exclusively vested in the Santa Clara County Superior Court, or, where otherwise appropriate, exclusively in the United States District Court for the Northern District of California.
- 18.5 Conflict of Interest. Franchisee certifies that to the best of its knowledge, no City employee or officer of any public agency has any pecuniary interest in the business of Franchisee and that no person associated with Franchisee has any interest that would conflict in any manner or degree with the performance of this Franchise. Franchisee represents that it presently has no interest and shall not acquire an interest, direct or indirect, which could conflict in any manner or degree with the provisions of California Government Code Section 87100 et seq., and certifies that it does not know of any facts which constitute a violation of said provisions. Franchisee will advise City if a conflict arises; provided, however, nothing herein shall be deemed to create a duty for Franchisee to disclose any publicly traded securities of Franchisee which may be held by any such City employee or officer and which are obtained through ordinary public market transactions, without any financial or special assistance from Franchisee.
- 18.6 Force Majeure. Franchisee shall not be deemed in default with provisions of its Franchise where performance was rendered impossible or impracticable by war or riots, civil disturbances, floods or other causes beyond Franchisee's control or the unforeseeable unavailability of labor or materials. The acts or omissions of Affiliates are not beyond

Franchisee's control, and the knowledge of Affiliates shall be imputed to Franchisee. The Franchise shall not be revoked nor shall Franchisee be required to pay liquidated damages for such noncompliance, provided that Franchisee takes immediate and diligent steps to bring itself back into compliance and to comply as soon as possible under the circumstances with its Franchise without unduly endangering the health, safety and integrity of Franchisee's employees or property, or the health, safety and integrity of the public, Public Rights-of-Way, public property, or private property.

- 18.7 Notices. Unless otherwise expressly stated herein, notices required under this Franchise shall be mailed first class, postage prepaid, or sent overnight delivery to the addressees below. Each party may change its designee by providing written notice to the other party, but each party may only designate one entity to receive notice.

18.7.1. Notices to the Franchisee shall be mailed to:

Comcast of California II, LC

18.7.2 Notices to the City shall be mailed to:

City of San Jose—City Manager
Attention City Manager
200 East Santa Clara Street, 17th Floor Tower
San Jose, California 95113

- 18.8 Calculation of Time. Unless otherwise indicated, when the performance or doing of any act, duty, matter or payment is required hereunder and a period of time or duration for the completion thereof is prescribed and is fixed herein, the time shall be computed so as to exclude the first and include the last day of the prescribed or fixed period of duration/time.

- 18.9 Time of Essence; Maintenance of Records of Essence. In determining whether Franchisee has substantially complied with its Franchise, the parties agree that time is of the essence to this Franchise. The maintenance of records and provision of reports in accordance with the Franchise is also of the essence to this Franchise.

- 18.10 Captions. The captions and headings of this Franchise are for convenience and reference purposes only and shall not affect in any way the meaning and interpretation of any provisions of this Franchise.

EXHIBIT A

ACCEPTANCE

Comcast of California II, LLC, hereby accepts unconditionally and agrees to be bound by all the terms and conditions of the Franchise granted by Ordinance No. _____, as adopted by the San Jose City Council.

COMCAST OF CALIFORNIA, II LLC, a
California corporation

By _____
Name:
Title:

By _____
Name:
Title: