

REVISED 11/21/06
ORDINANCE NO. 27906

**AN ORDINANCE OF THE CITY OF SAN JOSE
APPROVING AN AMENDMENT OF THE TERMS OF
ORDINANCE NO. 22128, GRANTING A NONEXCLUSIVE
CABLE TELEVISION FRANCHISE TO COMCAST OF
CALIFORNIA, SUCCESSOR TO GILL INDUSTRIES, INC.,
DBA GILLCABLE, RENEWING, AMENDING AND
EXTENDING THE FRANCHISE**

WHEREAS, the City of San Jose ("City") granted to Gill Industries, Inc., dba Gillcable, that certain nonexclusive cable television franchise under Ordinance No. 22128, adopted by the City Council on or about December 17, 1985 (the "Franchise"), which Franchise, by its own terms, was set to expire on December 31, 2000; and

WHEREAS, the City and Comcast of California II, LLC ("Comcast"), the successor-in-interest to Gill Industries, Inc. under the Franchise, have participated in negotiations pertaining to the renewal of a nonexclusive cable franchise; and

WHEREAS, the Digital Infrastructure and Video Competition Act of 2006 (the "State Franchise Act") is to go into effect on January 1, 2007, which will allow cable providers to obtain a state franchise to provide cable service in California; and

WHEREAS, the Franchise has been extended on several occasions but is now expired; and

WHEREAS, Comcast and City desire to have an existing cable franchise in place by December 31, 2006; and

WHEREAS, the City has determined that this Ordinance serves the public interest;

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

Part A

SECTION 1. The terms of the Franchise granted by the City under Ordinance No. 22128, are hereby amended and restated as provided herein and shall be in effect from the date of acceptance of this Franchise by Comcast until December 31, 2016, unless either Grantor or Grantee exercises its right to terminate this Ordinance earlier as permitted by the State Franchise Act .

Part B

SECTION 1. That, subject to the provisions of this Ordinance, the provisions of the San Jose Municipal Code, and the provisions of the Charter of the City of San Jose, the City of San Jose (hereinafter "Grantor") does hereby renew the nonexclusive franchise of Comcast of California II, LLC, successor to Gill Industries, Inc., (hereafter "Grantee") to operate and carry on within the City of San Jose the business of providing cable service over a cable system.

SECTION 2. Citation of Ordinance

This ordinance may be cited as the "Comcast Franchise Ordinance."

SECTION 3. Rules of Construction

This ordinance shall be construed liberally in order to effectuate its purposes. Unless otherwise specifically prescribed in this ordinance, the following provisions shall govern its interpretation and construction:

- A. Time is of the essence of this ordinance. Grantee shall not be relieved of its obligation to comply promptly with any provision of this ordinance by any failure of Grantor to enforce prompt compliance with any of its provisions.

- B. Any right or power conferred, or duty imposed upon any officer, employee, department or Commission of Grantor is subject to transfer by operation of law to any other officer, employee department or Commission of Grantor.
- C. This Ordinance shall not be construed to limit or restrict the otherwise lawful public safety right of way authority of the Grantor to enact generally applicable laws. In particular, this ordinance does not relieve Grantee of the obligation to comply with any lawful exercise of Grantor's power to enact generally applicable public safety requirements related to street work, street excavation permits, undergrounding of utility facilities, or the use, removal or relocation of property in the streets.
- D. Provisions of this ordinance shall be construed in accordance with Chapter 15.28 of the San Jose Municipal Code, hereafter "Chapter 15.28." To the extent that the provisions of this Ordinance and the provisions of Chapter 15.28 conflict, the terms and provisions of this granting Ordinance shall control.

SECTION 4. Purpose and Intent

It is the purpose and intent of this ordinance to approve the extension and renewal of Grantee's nonexclusive franchise to engage in the business of operating a Cable Communication System (hereafter "cable system") in the City upon terms and conditions of Chapter 15.28.

SECTION 5. Conditions Precedent

- A. Prior to consideration of this ordinance by the City Council, Grantee shall submit an application for extension and renewal of franchise according to the requirements of Section 15.28.210 of Chapter 15.28. Grantor acknowledges that the foregoing condition precedent has been satisfied.

- B. This ordinance shall become effective on the thirty-first (31st) day after the passage of this ordinance provided that, prior to such date, Grantee has 1) filed with the City Clerk a written instrument, in form satisfactory to the City Attorney, addressed to the Grantor accepting the extension and renewal of franchise as required by Section 15.28.310 of Chapter 15.28; 2) filed with the City Clerk a corporate surety bond or other mutually acceptable security in the principle sum of Fifty Thousand Dollars (\$50,000.00) as required by Section 15.28.320 of Chapter 15.28; and 3) presented evidence to the City Clerk, satisfactory to the City Attorney, of the insurance required under Section 15.28.330 of Chapter 15.28.
- C. Notwithstanding Section 5(B), this Ordinance shall not become effective prior to: 1) the date Grantor terminates the formal franchise renewal proceeding it commenced on or about January 31, 2003; and 2) the effective date of a settlement agreement between Grantor and Grantee that provides a final resolution of the liquidated damages claim Grantor filed against Grantee in the Superior Court of California, County of Santa Clara on January 26, 2005.

SECTION 6. System Expansion

- A. Grantee shall provide cable television service to all residential dwelling units located within the franchise area as provided in this franchise and the Settlement Agreement dated December 18, 2000.
- B. Grantee shall complete construction and offer service to all dwelling units, including apartments, condominiums and mobile home parks in the City without regard to the number or percentage of potential subscribers in a particular apartment or condominium building, or mobile home park. Provided, however, that nothing in this section shall require Grantee to install service facilities or otherwise make service available if:

1. An owner, manager, lessee, principal occupant, or other person or entity with apparent authority over a given dwelling unit (or group of dwelling units) refuses to allow access upon reasonable terms or otherwise indicates a desire not to be served;
 2. A dwelling unit (or group of dwelling units) is already served or under contract to be served by another multi-channel television service or other form of subscription television service; or
 3. The cost of installing service facilities for a given dwelling unit (or group of dwelling units) exceeds Four Hundred Dollars (\$400.00) per unit.
- C. In any case where Grantee is not required to install service facilities or provide service due to excessive cost as defined in subparagraph (3) above, service facilities shall nonetheless be provided by Grantee if the person or entity with apparent authority over the dwelling unit (or group of dwelling units) involved in a given case agrees in writing to pay all costs associated with installing service facilities which exceed Four Hundred Dollars (\$400.00) per dwelling unit.

SECTION 7. PEG Access and Institutional Network Obligations

A. PEG Channels

1. The Grantee shall provide the Grantor, if requested, with 5 public or educational or government ("PEG") access channels, although Grantee reserves the right to utilize for its own purposes any channels or portion of such channels not utilized for PEG purposes.
2. The Grantee shall provide the Grantor an additional PEG channel when the nonduplicated locally produced video programming televised on a given channel exceeds 56 hours per week as measured on a quarterly

basis. The additional channel shall not be used for any purpose other than to continue programming additional government, education, or public access television. For the purposes of this Section, "locally produced video programming" means programming produced or provided by any local resident, the Grantee, or any local public or private agency that provides services to residents of the franchise area; or any transmission of a meeting or proceeding of any local, state, or federal governmental entity.

3. No time shall be used on PEG channels to cablecast "commercial matter." The term "commercial matter" shall mean time used to sell a product or service. Also, neither the Grantor nor any entity designated by the Grantor ("Designated Entity") to manage PEG channels shall sell time to users in return for the right to cablecast programming, but fees may be charged to defray PEG costs. The foregoing shall not be interpreted to prohibit sponsorship announcements comparable to those that might be carried on a noncommercial broadcast station, or to prevent schools from charging course fees, and then delivering the course via the PEG channels, or to prohibit solicitation for financial support for the provision of PEG access by Grantor or a Designated Entity and for charitable, educational or governmental purposes.

B. Grant for PEG

Within 30 days after the effective date of this Ordinance, the Grantor shall pay to the Grantee a grant of \$1 million (\$1,000,000), which Grantee may use for any PEG purposes.

C. Capital Grant for Access Facilities

1. The Grantee shall pay to Grantor an annual capital grant of one percent (1%) of gross revenues, as defined in Section 15(C), from the effective

date of this amendment until the expiration of the term of this franchise. Such capital grant shall be subject to the offset set forth in Section 7(C)(2) below.

2. Within 30 days after the effective date of this amendment to the Ordinance, the Grantor may request a partial prepayment of the annual capital grant set forth in Section 7(C)(1) in an amount not to exceed \$1,250,000 (the "Prepaid Amount"). Grantee shall pay such Prepaid Amount within 60 days after Grantor's request. Thereafter, Grantee shall offset \$125,000 per year against the annual capital grant payable pursuant to Section 7(C)(1) (or, if applicable, pursuant to any federal or state certificate, franchise or other authority subsequently awarded or granted to Grantee with respect to the franchise area) until the Prepaid Amount is fully offset. Grantor and Grantee agree that this Section 7(C)(2) shall survive the termination of the franchise granted by this Ordinance and remain binding on the parties until such time as the Prepaid Amount is fully offset against any PEG grant obligation Grantee may have under this Ordinance or a State franchise.
3. Payments pursuant to this Section 7(C) shall be made payable to the Grantor or Designated Entities designated by the Grantor for such payments at such times as franchise fee payments are due pursuant to Section 15. The Grantor agrees that grants provided pursuant to this Section 7(C) shall be used solely for capital expenditures in support of PEG access facilities, unless otherwise permitted under applicable federal and state law.

D. Fiber Links

1. Grantee shall continue to provide and maintain all existing links and equipment provided as of November 1, 2006 by Grantee and utilized to

transport PEG programming. The above will include a modulator at each origination point, transmission of signals to the headend, translation to cable channel, and transmission throughout Grantee's system on dedicated municipal access channel capacity, to the extent such equipment and services are provided by Grantee as of November 1, 2006.

2. Grantee shall provide Grantor with backbone fiber and fiber to individual sites designated by Grantor for its internal, non-commercial use, provided that Grantee's obligation pursuant to this Section 7(D)(2) shall not exceed \$500,000. The \$500,000 benefit provided in this Section 7(D) (2) shall be for new or additional work performed after the effective date of this Franchise by Grantee on an incremental cost basis. Grantor shall designate such individual sites within 1 year of the effective date of this Amendment. Parties shall cooperate for purposes of allowing Grantor use of available excess fiber in the existing Cable System.

E. Reservation of Rights.

1. Notwithstanding any other provision in this Section 7, if a person provides the Grantor notice pursuant to the Digital Infrastructure and Video Competition Act of 2006 (the "State Franchise Act") that it seeks to provide video service in the franchise area pursuant to or applies for and is granted a state franchise, or if Grantor grants a person a franchise to provide video service, including, but not limited to, cable service, in the City, Grantee shall not be required to provide PEG channels or support, or I-Net support, in excess of that which such person is required to provide pursuant to its state franchise (including any provisions grandfathering any rights or obligations of either party) or franchise granted by the Grantor as of the effective date of such franchise.

2. If Grantee exercises any right it may have pursuant to the State Franchise Act to terminate its franchise and written acceptance of the obligations under this Ordinance and provide video service in the franchise area pursuant to a state franchise (including any provisions grandfathering any rights or obligations of either party), or if the Grantor exercises any right it has to terminate this Ordinance and require Grantee to obtain a state franchise in order to continue to provide video service in the franchise area, nothing in this Ordinance shall be interpreted to require Grantee to provide PEG channels or support, or I-Net support, in excess of that Grantee would be required to provide pursuant to the State Franchise Act.

SECTION 8. Service Drops to Schools and Public Buildings

Grantee shall provide one drop and one outlet at no cost for installation, maintenance and basic service to all municipal buildings and public schools. Drops in excess of one hundred fifty (150) feet in length, or underground drops, may be charged at cost for time and materials. Any additional outlets and installation and maintenance of same shall be at the sole cost of the respective public entity. Some portions of basic service may be withheld if not allowed by copyright or contractual obligations of Grantee to its suppliers.

SECTION 9. Transitional Period for Community Access

- A. Grantee will continue to provide all existing local production facilities and equipment to individuals and groups for the purpose of producing programming for the community access channel for a period of 18 months after the effective date of this amendment to the Ordinance.
- B. Grantee shall exercise no editorial control over the editorial content of any programming on the community, educational or municipal access channels, except that Grantee is not prohibited by the terms of this extension and renewal

from refusing to transmit any obscene or otherwise illegal material, or any material the transmission of which would subject Grantee to civil or criminal liability.

SECTION 10. Mutual Release

Grantor and Grantee mutually release each other from any claims actually known as of the effective date of this Ordinance Amendment. This release expressly includes, but is not limited to, a mutual release of any claims the parties may have had against each other related to: (a) any transfer of the franchise or any change of control of the ultimate parent of the Grantee; (b) any breach of the December 18, 2000 Settlement Agreement between the Grantor and Grantee regarding Grantee's rebuild of its cable system; or (c) the Grantor's formal renewal administrative proceeding commenced on January 31, 2003, and any matters that have been or could have been the subject matter thereof.

SECTION 11. Maps of Installed Facilities

- A. Grantee shall maintain, on its premises, an accurate set of maps showing all cable television equipment installed in the streets, alleys and public places of the City. Such plans shall be made available for inspection by City officials on request to the Drafting/Design Department during normal business hours (8:30 AM through 4:40 PM, Monday through Friday).
- B. Grantee shall also furnish to Grantor copies of cable locator books as they are periodically revised. These documents will be accompanied by a disclaimer recommending direct contact with Grantee for most current information on cable television equipment locations.
- C. Grantee and Grantor shall actively cooperate with other users of the public rights-of-way to prevent accidental damage from occurring as a result of subsequent construction.

SECTION 12. Provision of Reports

Grantee shall, upon request, prepare and furnish to the City Manager at the times and in the form and content prescribed by said officer, such reports with respect to its operation, affairs transactions or property, as may be reasonably necessary or appropriate to the performance of any of the rights, functions or duties of the City or any of its officers in connection with the franchise. Reports furnished to any other governmental agency shall be made available for inspection or review on request.

SECTION 13. System Outage and Subscriber Complaint Service; Notices to Subscribers

- A. Grantee will maintain a subscriber complaint service operated from Grantee's main office, and qualified technicians will be permanent members of Grantee's staff.

- B. Routine handling of customer service requests will be the responsibility of local staff as follows:
 - 1. A call involving loss of reception on all channels will be dispatched to the field within twenty-four (24) hours via two-way radio. If the loss of reception on all channels affects five (5) or more customers, at any time of the day or night, repairs will be commenced promptly and pursued diligently. Total loss of reception involving less than five (5) customers will be corrected on the same day received, if so requested by subscriber, except if reported after 2:00 p.m., in which case correction may be postponed to the following day. The majority of all outages (total loss of reception on all channels) will be corrected in four (4) to eight (8) hours or less.

2. The majority of calls involving degraded reception or single outage will be handled on the same business day if received prior to 2:00 p.m. In all cases, such service calls will be handled no later than the following day.
 3. Requests for repairs made after hours or on weekends shall be answered by an answering service or staff. Outage calls affecting five (5) or more subscribers will be referred promptly to the standby technician for resolution in accordance with subparagraph (B) (1) of this paragraph. Calls involving degraded service will be reported by the answering service the next day. The staff will call the customer to schedule service calls in accordance with subparagraph (2) above.
 4. Customers shall be notified by Grantee of Service and Complaint policy at the time of initial installation and at least yearly thereafter. Such notification shall include: Grantee's telephone number for requesting service, hours and conditions of service, and procedure for registering complaints for unsatisfactory service. Grantee shall also annually notify subscribers of Grantee's policy regarding Senior Citizen discounts for basic service.
- C. Grantee shall maintain a data base or "log", listing date of consumer complaints, identifying the subscriber and describing the nature of the complaint, and when and what action was taken by the Grantee in response thereto. This log shall be kept at Grantee's local office for the term of this extension and renewal, and shall be available for inspection by the City Manager or any other duly authorized representative of the City during regular business hours without further notice.
- D. In the event of service interruption of more than twenty-four (24) consecutive hours, or unresolved service complaint not caused by the subscriber resulting in a degraded signal for more than twenty-four (24) consecutive hours, Grantee shall, at the request of the subscriber, credit the subscriber's account on a pro

rata basis as an offset to the monthly billing charge. Grantee may, if the Grantee deems appropriate, credit the subscriber's account for the full period of outages of less than twenty-four (24) hours on a case-by-case basis. The subscriber must allow, within a reasonable time, the service technicians access to the problem if located on the subscriber's property, or forfeit any claim for refund due for service outage.

- E. Grantee will not be responsible for problems created by subscribers or for problems caused by subscriber-owned equipment.
- F. The service standards listed in this section are meant as guidelines and should be adhered to in at least eighty percent (80%) of cases under normal conditions. Neither isolated cases of non-conformance nor failure to meet these standards during extreme conditions shall constitute violations of the terms of this extension and renewal.

SECTION 14. Term

The term of this franchise extension and renewal shall be to December 31, 2016, unless either Grantor or Grantee exercises its right to terminate this Ordinance earlier as permitted by the State Act.

SECTION 15. Franchise Fees

Grantee shall pay to Grantor an annual franchise fee, in such amounts, at such times and in such manner specified by Chapter 15.28, Part 7 of the San Jose Municipal Code, according to the following schedule:

- A. Grantee shall pay a franchise of five percent (5%) of gross revenues.

- B. For the purpose of this Section, “gross revenues” shall have the meaning set forth in Section 5860 of the State Franchise Act (Public Utilities Code Section 5860).

SECTION 16. Reservation of Rights

Grantor and Grantee reserve all rights each possesses under applicable law that are not expressly waived herein, including, but not limited to, any rights the parties may have under the State Franchise Act to terminate the franchise granted pursuant to this Ordinance and any rights Grantee has to obtain a state franchise to continue to provide video service in the franchise area. Moreover, Grantor and Grantee reserve all rights each may possess pursuant to any General Order(s) and rules the California Public Utilities Commission may adopt implementing the State Act before or after the effective date of this amendment to the Ordinance. Notwithstanding any provisions to the contrary under local law, including Chapter 15.28 of the San Jose Municipal Code, nothing herein shall be interpreted to require Grantee to comply with any amendments to the Cable Ordinance or any other ordinances Grantor may adopt after the effective date of this Ordinance except to the extent expressly permitted in Section 3(C) of this Ordinance.

SECTION 17. Severability

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held illegal, invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions hereof, Grantor hereby declares that it would have passed this Ordinance irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared illegal, invalid or unconstitutional. The invalidity of any portion of this Ordinance shall not abate, reduce or otherwise affect any consideration or other obligation required of Grantee by the franchise granted hereunder.

SECTION 18. Notices

Every direction, notice or order to be served upon Grantee shall be sent by certified mail to the local office. Every notice to be served upon Grantor shall be delivered, or sent by certified mail to the City Clerk.

SECTION 19. Effective Date

This ordinance shall be in force and take effect thirty-one (31) days from and after the date of its final adoption, providing the Grantee has complied with the provisions of Section 5(B) of this extension and renewal.

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

ACCEPTANCE OF EXTENSION OF FRANCHISE

Pursuant to Section 5(b) of the recently passed Ordinance Approving An Amendment Of The Terms Of Ordinance No. 22128, Granting A Nonexclusive Cable Television Franchise To Comcast Of California, Successor To Gill Industries, Inc., Dba Gillcable, Renewing, Amending And Extending The Franchise, Comcast of California hereby expressly accepts in writing the extension and renewal of the franchise upon the terms and conditions set forth in said granting Ordinance, including those incorporated by reference therein, and does hereby agree to be bound by and comply with, and do all things required of the grantee by, said granting Ordinance and Chapter 15.28 of the San Jose Municipal Code.

COMCAST OF CALIFORNIA, INC.

By:_____