

ORDINANCE 4035

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING COMCAST OF CALIFORNIA/COLORADO/WASHINGTON I, INC. A CABLE TELEVISION FRANCHISE

The City Council of the City of Kirkland do ordain as follows:

Section 1. The City Manager is authorized to execute the agreement attached hereto as Exhibit A entitled "The City of Kirkland, Washington Cable Television Franchise" between the City of Kirkland and Comcast of California/Colorado/Washington I, Inc., the terms of which are incorporated herein by reference as if fully set forth.

Section 2. This ordinance shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.017, Kirkland Municipal Code in the summary form attached to the original of this ordinance and by this reference approved by the City Council.

Passed by majority vote of the Kirkland City Council in open meeting this 21st day of February, 2006.

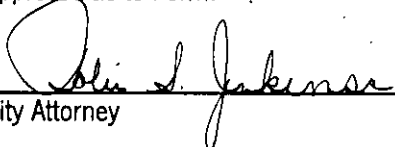
Signed in authentication thereof this 21st day of February, 2006.

  
\_\_\_\_\_  
MAYOR

Attest:

  
\_\_\_\_\_  
City Clerk

Approved as to Form:

  
\_\_\_\_\_  
City Attorney

**THE CITY OF KIRKLAND, WASHINGTON**  
**CABLE TELEVISION FRANCHISE**

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**EXHIBIT A - REMOTE PEG ORIGINATION SITES**

## CABLE TELEVISION FRANCHISE

This Cable Television Franchise ("Franchise") is entered into in Kirkland, Washington, this \_\_\_\_ day of \_\_\_\_\_, 2006, by and between the City of Kirkland, Washington, a municipal corporation, (hereinafter "City") and Comcast of California/Colorado/Washington I, Inc. (hereinafter "Grantee"). The City and Grantee are sometimes referred to hereinafter collectively as the "parties."

WHEREAS, the City has reviewed Grantee's performance under the prior franchise and the quality of service during the prior franchise term, has identified the future cable-related needs and interests of the City and its citizens, has considered the financial, technical and legal qualifications of Grantee, and has determined that Grantee's plans for constructing, operating and maintaining its Cable System are adequate, in a full public proceeding affording due process to all concerned; and

WHEREAS, the public has had adequate notice and opportunity to comment on Grantee's proposal to provide cable television service within the City; and

WHEREAS, the City has a legitimate and necessary regulatory role in ensuring the availability of cable service in the franchise area; and

WHEREAS, the Grantee's cable system should offer a broad range of programming services; and

WHEREAS, flexibility to respond to changes in technology and subscriber interests within the cable service market should be an essential characteristic of this Franchise; and

WHEREAS, the City is authorized by applicable law to grant one or more nonexclusive franchises to construct, operate and maintain a cable system or systems within the boundaries of the City.

NOW, THEREFORE, in consideration of the mutual promises made herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the City and Grantee do hereby agree as follows:

### SECTION 1. DEFINITIONS

For the purposes of this Franchise and the Exhibit attached hereto the following terms, phrases, words and their derivations shall have the meanings given herein and as provided in the Kirkland Municipal Code. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined shall be given their common and ordinary meaning. The word "shall" is always mandatory and not merely directory.

1.1 "Access" means the availability for noncommercial use by various governmental and educational agencies, institutions, organizations, and other groups and individuals in the community,

including the City and its designees, of particular channels on the Cable System to distribute programming to subscribers, as permitted under applicable law.

(A) **"Public Access"** means Access where the public is the primary user.

(B) **"Educational Access"** means Access where Schools are the primary users having editorial control over programming and services.

(C) **"Government Access"** or **"Governmental Access"** means Access where governmental institutions or their designees are the primary users having editorial control over programming and services.

(D) **"PEG"** means Public, Educational and Governmental Access.

1.2 **"Affiliate"** when used in connection with Grantee means any Person who owns or controls, is owned or controlled by, or is under common ownership or control with, Grantee.

1.3 **"Bad Debt"** means amounts lawfully owed by a subscriber and accrued as revenues on the books of Grantee, but not collected after reasonable efforts by Grantee.

1.4 **"Cable Operator"** means any Person or groups of Persons, including Grantee, who provides Cable Service over a Cable System and directly or through one or more Affiliates owns a significant interest in such Cable System or who otherwise control(s) or is(are) responsible for, through any arrangement, the management and operation of such a Cable System.

1.5 **"Cable Service"** means the one-way transmission to subscribers of Video Programming, or other programming service and subscriber interaction, if any, which is required for the selection or use of such Video Programming or other programming service.

1.6 **"Channel"** means a portion of the frequency band capable of carrying a television channel, whether delivered in an analog or digital format.

1.7 **"City"** means the City of Kirkland, Washington, a municipal corporation.

1.8 **"Designated Access Provider"** means the entity or entities designated by the City to manage or co-manage Access channels and Access facilities. The City may be a Designated Access Provider.

1.9 **"Dwelling Unit"** means any residential building, or each portion thereof that has independent living facilities, including provisions for cooking, sanitation and sleeping and that is designed for residential occupancy.

1.10 **"FCC"** means the Federal Communications Commission or its lawful successor.



**1.11 "Franchise"** means this document which is executed between the City and Grantee, containing the specific provisions of the authorization granted and the contractual agreement created thereby.

**1.12 "Fully Allocated Costs"** means the City's proportionate share of all direct and actual material and labor costs (excluding profit) of designing, engineering, constructing, relocating or placing additional ducts, conduit or related structures by Grantee for the City alongside or together with ducts, conduit or structures by and for Grantee.

**1.13 "Gross Revenues"** means any and all revenues derived directly or indirectly by the Grantee or its Affiliates from the operation of the Cable System to provide Cable Services within the Franchise Area. Fees, payments or other consideration received by the Grantee from programmers for carriage of programming on the Cable System and advertising sales commissions shall be included as part of Gross Revenues if they are recognized as revenues under generally accepted accounting principles ("GAAP"). Gross Revenues shall not include (i) Bad Debt, provided however that all or part of any such Bad Debt that is written off but subsequently collected shall be included in Gross Revenues in the period collected; or (ii) any taxes on services furnished by the Grantee which are imposed directly on any Subscriber by the State, City or other governmental unit and which are collected by the Grantee on behalf of said governmental unit; or (iii) the Access capital advance in subsection 9.6 or capital contributions in subsection 9.7. Franchise fees are not a tax and are included in Gross Revenues.

**1.14 "Incremental Costs"** means the direct and actual material and labor costs (excluding profit) of designing, engineering, constructing, relocating or placing additional ducts, conduit or related structures by Grantee for the City, excluding the cost of design, engineering, trenching, boring, pipe bedding, backfilling, compacting, restoring the surface, and other charges, costs or expenses that Grantee would incur anyway to construct, relocate or place its own ducts, conduit or related structures.

**1.15 "Leased Access Channel"** means any Channel or portion thereof that is commercially available for programming in accordance with Section 612 of the Cable Act.

**1.16 "Person"** means an individual, partnership, association, trust, corporation or any other form of entity.

**1.17 "School"** means any state accredited K-12 public educational institution.

**1.18 "State"** means the State of Washington.

**1.19 "System" or "Cable System"** means a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (1) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves subscribers without using any public right-of-way; (3) a facility of a common carrier which is subject, in whole

or in part, to the provisions of Title II of the federal Communications Act (47 U.S.C. 201 et seq.), except that such facility shall be considered a cable system (other than for purposes of 47 U.S.C. 541(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (4) an open video system that complies with 47 U.S.C. 573 and federal regulations; or (5) any facilities of any electric utility used solely for operating its electric utility systems. When used herein, System or Cable System refers to Grantee's Cable System in the franchise area.

**1.20 "Video Programming"** means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

## **SECTION 2. GRANT OF FRANCHISE**

### **2.1 Grant**

(A) The City hereby grants to Grantee a nonexclusive and revocable authorization to make reasonable and lawful use of the rights-of-way within the franchise area to construct, operate, maintain, upgrade and reconstruct a System for the purpose of providing Cable Services, subject to the terms and conditions set forth in this Franchise. This Franchise shall constitute both a right and an obligation to provide the Cable Services required by, and to fulfill the obligations set forth in, the provisions of this Franchise.

(B) Grantee, through this Franchise, is granted the right to operate its System using the rights-of-way within the franchise area. Such use must be in compliance with the Kirkland Municipal Code (including, but not limited to, Chapter 26.20 which is specifically incorporated herein by reference). In the event of a conflict between the Kirkland Municipal Code and this Franchise, this Franchise shall control. Additionally, nothing in this Franchise shall be deemed to waive the requirements of ordinances of general applicability lawfully enacted, or hereafter lawfully enacted, by the City. Grantee reserves the right to challenge provisions of any ordinance or other enactment of the City that conflicts with its contractual rights hereunder.

(C) Grantee promises and guarantees, as a condition of exercising the privileges granted by this Franchise, that any Affiliate of the Grantee offering Cable Service over the Cable System in the franchise area will also comply with the terms and conditions of this Franchise.

(D) No rights shall pass to Grantee by implication. Without limiting the foregoing, by way of example and not limitation, this Franchise shall not include or be a substitute for:

(1) Any other permit or authorization lawfully required for the purpose of conducting business within the City pursuant to the ordinances and laws of the City; or

(2) Any permit, agreement or authorization lawfully required by the City for rights-of-way users in connection with operations on or in rights-of-way or public property including, by way of example and not limitation, street cut permits; or

(3) Any permits or agreements for occupying any other property of the City to which access is not specifically granted by this Franchise including, without limitation, permits and agreements for placing devices on poles, in conduits or in or on other structures.

(E) This Franchise is intended to convey limited rights and interests only as to those rights-of-ways in which the City has an actual interest. It is not a warranty of title or interest in any rights-of-way; it does not provide the Grantee with any interest in any particular location within the rights-of-way; and it does not confer rights other than as expressly provided in the grant hereof.

(F) This Franchise expressly authorizes Grantee to provide Cable Services over its Cable System. This Franchise is not a bar to imposition of any lawful conditions on Grantee with respect to non-Cable services. This Franchise does not relieve Grantee of any obligation it may have to obtain from the City an authorization to provide non-Cable services or relieve Grantee of its obligation to comply with any such authorization(s) that may be lawfully required. However, this Franchise shall not be read as a concession by Grantee that it needs authorization to provide non-Cable services.

## **2.2 Use of Rights-of-Way**

(A) Subject to the City's regulatory authority, Grantee may erect, install, construct, repair, replace, reconstruct, and retain in, on, over, under, upon, across, and along the rights-of-way within the franchise area, such wires, cables (both coaxial and fiber optic), conductors, ducts, conduit, vaults, manholes, amplifiers, pedestals, attachments and other property and equipment as are necessary and appurtenant to the operation of the System for the provision of Cable Services within the franchise area.

(B) Grantee must comply with City regulations related to the placement of System facilities in the rights-of-way, and must install System facilities in a manner that minimizes interference with the use of the right-of-way by others, including others that may be installing communications facilities. If necessary to protect the public health, safety and welfare, the City may condition permits accordingly. Further, the City may require removal of any facility that is not installed in compliance with the regulations enacted by the City at the time of installation. If Grantee does not take corrective action after written notice and an opportunity to cure are provided, then the City may remove the facility and bill Grantee for those costs directly related to the removal of the cable facility.

## **2.3 Duration**

The term of this Franchise and all rights, privileges, obligations and restrictions pertaining thereto shall be ten (10) years from the effective date of this Franchise, unless terminated or shortened as hereinafter provided.

## **2.4 Effective Date**

(A) This Franchise and the rights, privileges, and authority granted hereunder and the contractual relationship established hereby shall take effect and be in force from and after the effective date of this Franchise.

(B) The effective date of this Franchise shall be the latter of the dates on which it is accepted in writing by Grantee and the City.

### **2.5 Franchise Nonexclusive**

This Franchise shall be nonexclusive. The City may at any time grant authorization to use the rights-of-way for any purpose not incompatible with Grantee's authority under this Franchise and for such additional franchises for cable systems as the City deems appropriate.

### **2.6 Other Franchises**

In the event the City enters into a franchise, permit, license, authorization or other agreement of any kind with any other Person or entity other than the Grantee to use the rights-of-way for the purpose of constructing or operating a System or providing Cable Service to any part of the franchise area in which the Grantee is providing Cable Service under the terms and conditions of this Franchise, the terms and conditions thereof, taken as a whole, shall be substantially similar and shall be neither more favorable nor less burdensome to such Person than those contained herein in order that one cable operator not be granted an unfair competitive advantage over another.

In furtherance of the foregoing, the City and Grantee recognize and acknowledge that other cable franchises granted by the City might contain provisions and conditions that are different than the provisions and conditions that the Grantee has negotiated and accepted in this Franchise. Nothing in this Franchise shall be construed so as to require identical provisions and conditions in other cable franchises granted by the City.

At any time prior to the commencement of Grantee's thirty-six (36) month renewal window provided by Section 626 of the Cable Act, that a non-wireless facilities based entity, legally authorized by state or federal law, makes available for purchase by Subscribers or customers, Cable Services within the Franchise Area without a franchise or other similar lawful authorization granted by the City, then the term of Grantee's Franchise shall, upon ninety (90) days written notice from Grantee, be shortened so that the Franchise shall be deemed to expire on a date thirty six (36) months from the first day of the month following the date on which the competitor begins providing Cable Services to the public. Grantee shall immediately thereafter secure franchise renewal rights pursuant to Section 626 of the Cable Act with no further notice to the City required. The City and Grantee shall then enter into proceedings consistent with Section 626 for renewal of this Franchise. The City and Grantee shall have all rights and obligations provided under said Section 626. Notwithstanding anything to the contrary, in no event, however, shall the term of this Franchise be reduced to less than seven (7) years from the effective date of this Franchise.

### **2.7 Familiarity with Franchise**

Grantee acknowledges and warrants by acceptance of the rights, privileges and agreement granted herein, that it has carefully read and fully comprehends the terms and conditions of this Franchise and is willing to and does accept all lawful and reasonable risks of the meaning of the provisions, terms and conditions herein. The Grantee further acknowledges and states that it has fully studied and considered the requirements and provisions of this Franchise, and finds that the same are commercially practicable at this time.

**2.8 Effect of Acceptance**

By accepting the Franchise, the Grantee: (1) acknowledges and accepts the City's legal right to issue and enforce the Franchise; (2) accepts and agrees to comply with each and every provision of this Franchise, subject to applicable law; and (3) agrees that the Franchise was granted pursuant to processes and procedures consistent with applicable law, and that it will not raise any claim to the contrary.

**SECTION 3. FRANCHISE FEES AND FINANCIAL CONTROLS****3.1 Franchise Fees**

As compensation for the use of the City's rights-of-way, Grantee shall pay as a franchise fee to the City, throughout the duration of this Franchise, an amount equal to five percent (5%) of Grantee's gross revenues. Accrual of such franchise fees shall commence as of the effective date of this Franchise.

**3.2 Payments**

Grantee's franchise fee payments to the City shall be computed for the preceding quarter. Each payment shall be due and payable no later than thirty (30) days after the end of the preceding quarter. The quarters shall end respectively on the last day of March, June, September and December.

**3.3 Acceptance of Payment**

No acceptance of any payment shall be construed as an accord by the City that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable or for the performance of any other obligation of Grantee. However, the period for recovery of franchise fees payable hereunder is limited to three (3) years from the date on which payment by the Grantee was due.

**3.4 Franchise Fee Reports**

Each payment shall be accompanied by a written report to the City on a form approved by the City, verified by an authorized representative of Grantee, containing an accurate statement in summarized form, as well as in detail, of Grantee's gross revenues and the computation of the payment amount.

**3.5 Audits**

On an annual basis, upon thirty (30) days prior written notice, the City shall have the right to conduct an independent audit of Grantee's records if necessary for the enforcement of this Franchise and to recompute any amounts determined to be payable under this Franchise. If Grantee cooperates in making all relevant records available to the City, the City will attempt to complete each audit within six (6) months. Any undisputed amounts due to the City as a result of the audit shall be paid within sixty (60) days following written notice to Grantee by the City, which notice shall include a copy of the audit findings. If the audit shows that there has been an underpayment of franchise fees by ten percent (10%) or more in a calendar year, then the Grantee shall pay the cost of the audit.

If Grantee disputes all or part of the audit findings, then that matter may be referred to non-binding arbitration by either of the parties. Each party shall bear one-half of the cost and expenses of the

arbitration proceedings. The decision of the arbitrator(s) shall be subject to judicial review at the request of either party.

### **3.6 Financial Records**

Grantee agrees to meet with a representative of the City upon request to review Grantee's methodology of record-keeping, financial reporting and the computing of franchise fees as necessary for the enforcement of this Franchise.

### **3.7 Late Payments**

In the event any payment due the City is not timely made, Grantee shall pay, in addition to the amount due, interest at the maximum allowed rate as provided under State law until the date the City receives the payment.

### **3.8 Underpayments**

If franchise fee underpayments are discovered as a result of an audit, Grantee shall pay, in addition to the amount due, interest at the maximum allowed rate as provided under State law, calculated from the date the underpayment was originally due until the date the City receives the payment.

### **3.9 Maximum Franchise Fees**

The parties acknowledge that, at present, applicable federal law limits the City to collection of a franchise fee of five percent (5%) of gross revenues in a 12-month period. In the event that at any time throughout the term of this Franchise, the City is authorized to collect an amount in excess of five percent (5%) of Grantee's gross revenues and the City elects to do so, then this Franchise shall be amended by the parties consistent with such change provided however that all other Cable Operators within the franchise area are treated similarly. Conversely, in the event that at any time throughout the term of this Franchise, the City may only collect an amount which is less than five percent (5%) of Grantee's gross revenues for franchise fees due to a change in federal law, then this Franchise shall be amended by the parties consistent with such change to provide for such lesser percentage.

### **3.10 Additional Commitments Not Franchise Fees**

No term or condition in this Franchise shall in any way modify or affect Grantee's obligation to pay franchise fees. Although the total sum of franchise fee payments and additional commitments set forth elsewhere in this Franchise may total more than five percent (5%) of Grantee's gross revenues in any 12-month period, Grantee agrees that the additional commitments herein are not franchise fees, nor are they to be offset or credited against any franchise fee payments due to the City, nor do they represent an increase in franchise fees to be passed through to subscribers.

### **3.11 Alternative Compensation**

In the event the obligation of Grantee to compensate the City through franchise fee payments is lawfully suspended or eliminated, in whole or part, then Grantee shall pay to the City such other compensation as is required by law.

**3.12 Payment on Termination**

If this Franchise is terminated, the Grantee shall file with the City within one hundred twenty (120) days of the date of the termination, a financial statement, certified by an independent certified public accountant, showing the gross revenues received by the Grantee since the end of the previous fiscal year. Within thirty (30) days of the filing of the certified statement with the City, Grantee shall fulfill any remaining franchise required financial obligations. If the Grantee fails to pay its remaining financial obligations as required in this Franchise, the City may satisfy the same by accessing the funds available through any security provided by the Grantee.

**3.13 Tax Liability**

The franchise fees shall be in addition to any and all taxes or other levies or assessments which are now or hereafter required to be paid by businesses in general by any law of the City, the State or the United States including, without limitation, sales, use, utility and other taxes, business license fees or other payments. Payment of the franchise fees under this Franchise shall not exempt Grantee from the payment of any other license fee, permit fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City.

**3.14 Cable and Non-Cable Services**

In the event that Grantee offers cable services and non-cable services to its subscribers in the City, and those services are included in one monthly bill to each subscriber, then Grantee shall clearly itemize each of the respective services on the bill. The rates for cable service shall accurately reflect the rate card rates less discounts, if any exist.

**SECTION 4. ADMINISTRATION AND REGULATION****4.1 Authority**

The City shall be vested with the power and right to administer and enforce the requirements of this Franchise and the regulations and requirements of applicable law, including the Cable Act, or to delegate that power and right, or any part thereof, to the extent permitted under law, to any agent in the sole discretion of the City.

Nothing in this Franchise shall expand or limit the City's right of eminent domain under State law.

The Grantee and the City shall be entitled to all rights and be bound by all changes in local, State and federal law that occur subsequent to the effective date of this Franchise. The Grantee and the City acknowledge that their rights and obligations under this Franchise are explicitly subject to all such changes.

**4.2 Rate Regulation**

All of Grantee's rates and charges related to or regarding Cable Services shall be subject to regulation by the City to the full extent authorized by applicable federal, State and local laws.

**4.3 No Rate Discrimination**

All of Grantee rates and charges shall be published (in the form of a publicly-available rate card), and shall be nondiscriminatory for all Persons of similar classes, under similar circumstances and

conditions. Grantee's rates and charges shall not result in a disadvantage for any subscriber or class of subscribers, including those who only subscribe to Cable Services offered by the Grantee as compared with those subscribers who subscribe to Cable Services and one or more other types of services the Grantee might offer. Grantee shall permit subscribers to make any in-residence connections the subscriber chooses without additional charge and without penalizing the subscriber therefore. However, if any in-home connection requires service from Grantee due to poor signal quality, signal leakage or other factors, caused by improper installation of such in-home wiring or faulty materials of such in-home wiring, the subscriber may be charged appropriate service charges by Grantee. Nothing herein shall be construed to prohibit:

- (A) The temporary reduction or waiving of rates or charges in conjunction with valid promotional campaigns;
- (B) The offering of reasonable discounts to similarly situated Persons; or
- (C) The offering of bulk discounts for Multiple Dwelling Units.

The Grantee shall offer a discount to those individuals who are low income (according to City guidelines) and who are also either permanently disabled or 65 years of age or older and who are the legal owners or tenants of the dwelling unit. Such discounts will consist of thirty percent (30%) off of Basic or the Basic portion of Expanded Basic when not discounted by inclusion in other promotional or programming package rates at which time the promotional or programming package rate will apply. Grantee has voluntarily initiated this discount program and will make it available throughout the term of this Franchise.

#### **4.4 Leased Access Channel Rates**

Upon request, Grantee shall provide a complete schedule of current rates and charges for any and all Leased Access Channels, or portions of such Channels, provided by Grantee. The schedule shall include a description of the price by day-part.

#### **4.5 Late Fees**

(A) For purposes of this subsection, any assessment, charge, cost, fee or sum, however characterized, that the Grantee imposes upon a subscriber solely for late payment of a bill is a late fee and shall be applied in accordance with applicable local, State and federal laws.

(B) The Grantee's late fee and disconnection policies and practices shall be nondiscriminatory, and such policies and practices, and any fees imposed pursuant to this subsection, shall apply equally in all parts of the City without regard to the neighborhood or income level of the subscribers.

#### **4.6 Reserved Authority**

The City reserves all of its rights and authority arising from the Cable Act and any other relevant provisions of federal, state or local laws.



#### 4.7 Time Limits Strictly Construed

Whenever this Franchise sets forth a time for any act to be performed by Grantee, such time shall be deemed to be of the essence, and any failure of Grantee to perform within the allotted time may be considered a breach of this Franchise.

### SECTION 5. INDEMNIFICATION AND INSURANCE REQUIREMENTS

#### 5.1 Indemnification

(A) General Indemnification. Grantee shall indemnify, defend and hold harmless the City, and its officers, officials, boards, commissions, agents and employees ( while acting in an official capacity) from any action, claim, damage, loss, liability, cost or expense, including court and appeal costs and attorneys' fees and expenses, arising from the death of, injury, casualty or accident to, as applicable, a Person, equipment or property arising out of, or by reason of, any construction, excavation, operation, maintenance, repair, reconstruction, upgrade, rebuild, upkeep or removal of the Cable System, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee, its agents or employees. Grantee shall consult and cooperate with the City while conducting its defense of the City.

(B) Procedures and Defense. The City shall give the Grantee timely written notice of any claim or of the commencement of any action, suit or other proceeding covered by the indemnity in this Section. If a claim or action arises, the City or any other indemnified party shall then tender the defense of the claim to Grantee within six (6) business days of receipt of such notice, which defense shall be at Grantee's expense. The City may participate in the defense of a claim and, in any event, Grantee may not agree to any settlement of claims financially affecting the City without the City's prior written approval, which approval shall not be unreasonably withheld.

(C) Expenses. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the City and the counsel selected by Grantee to represent the City, Grantee shall pay the expenses incurred by the City in defending itself with regard to any action, suit or proceeding indemnified by Grantee. The City's expenses shall include all out-of-pocket expenses that are necessary for the City's defense, such as consultants' fees, and shall also include the reasonable value of any services rendered by the City Attorney or his/her assistants or any employees of the City or its agents but shall not include outside attorneys' fees for services that are unnecessarily duplicative of services provided the City by Grantee.

(D) Indemnification of the Grantee. To the extent permitted by law, the City shall indemnify, defend and hold harmless the Grantee for claims arising out of the City's use of the Government Access Channels and Emergency Alert System usage by the City.

(E) The grant of this Franchise shall have no effect on the Grantee's duty under the prior franchise to indemnify or insure the City against acts and omissions occurring during the period that the prior franchise was in effect, nor shall it have any effect upon Grantee's liability to pay all franchise fees which were due and owed under a prior franchise.

## 5.2 Insurance Requirements

(A) General Requirement. Grantee must have adequate insurance during the entire term of this Franchise (and for a period of twelve [12] months thereafter) to protect the City against claims for death or injuries to Persons or damages to property or equipment which in any way relate to, arise from or are connected with this Franchise, or involve Grantee, its agents, representatives, contractors, subcontractors and their employees.

(B) Minimum Insurance Limits. Grantee must keep insurance in effect in accordance with the minimum insurance limits herein set forth:

(1) Commercial General Liability: Two million dollars (\$2,000,000) per occurrence and two million dollars (\$2,000,000) general aggregate for bodily injury, personal injury and property damage.

(2) Automobile Liability: Two million dollars (\$2,000,000) combined single limit per accident for bodily injury and property damage.

(3) Workers Compensation Insurance: In accordance with State law requirements.

(4) Excess Liability or Umbrella Coverage: One million dollars (\$1,000,000).

The amounts listed above are the minimum deemed necessary by the City to protect the City's interests in this matter. The City has made no recommendation to the Grantee as to the amount of insurance coverage necessary to protect the Grantee's interests. Any decision by the Grantee to carry or not carry insurance amounts in excess of the above is solely that of the Grantee.

### C. Endorsements.

(1) All policies shall contain, or shall be endorsed so that:

(a) The City shall be designated as an additional insured;

(b) Any insurance or self-insurance maintained by the City, its officers, officials, boards, commissions, employees and agents shall be in excess of the Grantee's primary insurance and shall not contribute to it; and

(c) The policy shall contain a severability of interests provision. Grantee's insurance shall apply separately to each insured against whom a claim is made or lawsuit is brought, except with respect to the limits of the insurer's liability.

(2) The insurance provided herein shall not be cancelled or the limits reduced so as to be out of compliance with the requirements of this Section without forty-five (45) days written notice first being given to the City. If the insurance is cancelled Grantee shall provide a replacement policy. Grantee agrees to maintain continuous uninterrupted

insurance coverage, in the amounts required, for the duration of this Franchise (and as specified above, thereafter).

(D) Acceptability of Insurers. The insurance obtained by Grantee shall be placed with insurers with a Best's rating of no less than "A VII".

(E) Verification of Coverage. The Grantee shall furnish the City with certificates of insurance. The certificate for each insurance policy is to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificate for each insurance policy must be on standard forms or on such forms as are consistent with standard industry practices, and are to be provided to the City upon acceptance of this Franchise. The Grantee hereby warrants that its insurance policies satisfy the requirements of this Franchise.

### 5.3 Letter of Credit

(A) If there is an uncured breach by Grantee of a material provision of this Franchise or a pattern of repeated violations of any provision(s) of this Franchise, then Grantee shall, upon written request, establish and provide to the City, as security for the faithful performance by Grantee of all of the provisions of this Franchise, a letter of credit from a financial institution satisfactory to the City in the amount of twenty-five thousand dollars (\$25,000).

(B) If a letter of credit is furnished pursuant to subsection (A), the letter of credit shall then be maintained at that same amount throughout the remaining term of this Franchise.

(C) After written notice has been provided to Grantee and expiration of any applicable cure period, the letter of credit may be drawn upon by the City for purposes including, but not limited to, the following:

- (1) Failure of Grantee to pay the City sums due under this Franchise;
- (2) Reimbursement of costs and expenses borne by the City to correct Franchise violations not corrected by Grantee;
- (3) Monetary remedies or damages assessed against Grantee as provided in this Franchise.

(D) Within thirty (30) days following notice that a withdrawal has occurred, Grantee shall restore the letter of credit to the full amount required by subsection (A). Grantee's maintenance of the letter of credit shall not be construed to excuse unfaithful performance by Grantee or limit the liability of Grantee to the amount of the letter of credit or otherwise limit the City's recourse to any other remedy available at law or in equity.

(E) Grantee shall have the right to appeal to the City Council for reimbursement in the event Grantee believes that the letter of credit was drawn upon improperly. Grantee shall also have the right of judicial appeal if Grantee believes the letter of credit has not been properly drawn upon in accordance with this Franchise. Any funds the City erroneously or wrongfully withdraws from

the letter of credit shall be returned to Grantee with interest, from the date of withdrawal at the maximum allowed rate as provided under State law.

#### **5.4 Bonds**

(A) Grantee shall comply with all bonding requirements provided for in the Kirkland Municipal Code related to construction activity.

(B) Grantee's maintenance of the bond(s) shall not be construed to excuse unfaithful performance by Grantee or limit the liability of Grantee to the amount of the bond(s) or otherwise limit the City's recourse to any other remedy available at law or in equity.

### **SECTION 6. CUSTOMER SERVICE**

#### **6.1 Customer Service Standards**

Grantee shall comply with Customer Service Standards as the same may be adopted and amended from time to time by the City Council. Grantee reserves the right to challenge any customer service standard that it believes is inconsistent with its contractual rights granted under this Franchise or State or Federal law.

#### **6.2 Subscriber Privacy**

Grantee will comply with privacy rights of subscribers in accordance with federal, State and local laws.

### **SECTION 7. REPORTS AND RECORDS**

#### **7.1 Open Records**

The City shall have access to, and the right to inspect, any books and records of Grantee and its Affiliates if necessary for the enforcement of the provisions of this Franchise. Grantee shall not deny the City access to any of Grantee's records on the basis that Grantee's records are under the control of any Affiliate or a third Person. The City may, in writing, request copies of any such records or books, and Grantee shall provide such copies within thirty (30) days of receipt of such request, provided that such copies are not considered confidential or proprietary under applicable law. One copy of all such reports and records required under this or any other section of the Franchise shall be furnished to the City at the sole expense of Grantee. If the requested books and records are too voluminous, or for security reasons cannot be copied or removed, then Grantee may request that the City inspect them at Grantee's local office. If any books or records of Grantee are not kept in a local office and not made available in copies to the City upon written request as set forth above, and if the City determines that an examination of such records is necessary for the enforcement of this Franchise, then all reasonable travel expenses incurred in making such examination shall be paid by Grantee.

#### **7.2 Confidentiality**

The City agrees to keep confidential any proprietary or confidential books or records of Grantee to the extent permitted by law. Grantee shall be responsible for clearly and conspicuously identifying the records as confidential or proprietary, and shall provide a brief written explanation as to why

such information is confidential or proprietary and how it may be treated as such under State or federal law. If the City receives a request from any Person for disclosure of any information designated by Grantee as confidential, the City shall, so far as consistent with applicable law, advise Grantee and provide Grantee with a copy of such request by the Person demanding access to such information within six (6) business days of its receipt.

### **7.3 Records Required**

Grantee shall provide to the City, upon request:

- (A) A complete set of route maps showing the location of the Cable System in the franchise area;
- (B) A copy of all FCC filings issued by Grantee or its Affiliates which relate to the operation of the System in the franchise area;
- (C) A list of Grantee's Cable Services, rates and Channel line-up;
- (D) A compilation of subscriber complaints, actions taken and resolution, and a log of service calls; and Grantee shall make available at its local office for inspection, as-built maps of the Cable System in the franchise area.

### **7.4 Submittal of Documents**

Upon written request, Grantee shall submit to the City copies of any applications, notifications, communications and documents of any kind, submitted by Grantee or its Affiliates to any federal, State or local courts, regulatory agencies and other government bodies if such documents directly relate to the operations of Grantee's System within the franchise area. Grantee shall submit such documents to the City no later than forty-five (45) days after receipt of the City's request, and Grantee shall not claim confidential, privileged or proprietary rights to such documents unless under federal, State, or local law such documents have been determined to be confidential by a court of competent jurisdiction, or a federal or State agency.

### **7.5 Reports**

Within ninety (90) days of receipt of a written request by the City, Grantee shall submit to the City a written report, which shall include, but not necessarily be limited to, the following information:

- (A) A gross revenue statement for the preceding year and all deductions and computations for the period. Such statement shall be reviewed by a certified public accountant, who may also be the chief financial officer or controller of Grantee, prior to submission to the City;
- (B) A summary of the previous year's activities regarding the development of the Cable System, including, but not limited to, beginning and ending plant miles constructed, any technological changes occurring in the Cable System and the number of subscribers for each class of Cable Service (i.e., Basic, Expanded Basic Service, premium, etc.);
- (C) A description of planned construction, if any, for the current year; and

- (D) An executive summary of subscriber complaints received in the previous year.

#### **7.6 False Statements**

Any intentional false or misleading statement or representation in any report required by this Franchise shall be deemed a material breach of this Franchise and may subject Grantee to all remedies, legal or equitable, which are available to the City under this Franchise or otherwise.

#### **7.7 Failure to Report**

The failure or neglect of Grantee to file any of the information required under this Franchise (not including clerical errors or errors made in good faith) may, at the City's option, be deemed a breach of this Franchise.

### **SECTION 8. PROGRAMMING**

#### **8.1 Broad Programming Categories**

Grantee shall provide at least the following initial broad categories of programming to the extent such categories are reasonably available:

- (A) Educational programming;
- (B) News, weather and information;
- (C) Sports;
- (D) General entertainment including movies;
- (E) Children, family oriented;
- (F) Arts, culture and performing arts;
- (G) Foreign language programming; and
- (H) Science/documentary.

#### **8.2 Deletion of Broad Programming Categories**

(A) Grantee shall not delete or so limit as to effectively delete any broad category of programming within its control without prior written notice to the City.

(B) In the event of a modification proceeding under federal law, the mix and quality of Cable Services provided by Grantee on the effective date of this Franchise shall be maintained.

#### **8.3 Ascertainment of Customer Satisfaction**

Upon written request of the City, but not more frequently than once every three (3) years, the Grantee shall conduct a statistically valid telephone survey of its subscribers. The Grantee shall

consult and cooperate with the City in developing survey questions. The City may suggest new or modified questions, which the Grantee, in the reasonable exercise of its discretion, will add to the telephone survey. Upon completion of the telephone survey of subscribers in the City, but no later than one month thereafter, Grantee shall provide the results thereof to the City. Nothing herein shall be construed to limit the right of the City to conduct its own surveys at its own expense.

#### **8.4 Obscenity**

Grantee shall not transmit, or permit to be transmitted, over any Channel subject to its editorial control any programming which is obscene under applicable federal, State or local laws, statutes, regulations or standards now existing or hereafter adopted.

#### **8.5 Parental Control Device**

Upon request by any subscriber, Grantee shall make available a parental control or lockout device, traps or filters to enable a subscriber to control access to any or all Channels. Grantee shall inform its subscribers of the availability of the lockout device at the time of their initial subscription and periodically thereafter. Such devices, traps or filters will be provided at no charge to the subscriber, unless otherwise provided by federal law.

#### **8.6 Services for the Disabled**

Grantee shall comply with the Americans With Disabilities Act and any amendments or successor legislation thereto.

### **SECTION 9. ACCESS**

#### **9.1 Access Channels**

For the purpose of meeting the community's need for Access programming, Grantee shall make available, at its expense throughout the term of this Franchise, the following Access Channels throughout the franchise area:

one (1) Public Access Channel, provided that it is carried on a regional basis, and recognizing that the Grantee does not exercise any editorial control over the programming content of this channel;

one (1) Educational Access Channel for the Puget Sound Educational Service District and Lake Washington School District; and

two (2) Government Access Channels.

If Grantee makes a change in its Cable System and related equipment and facilities, or in its signal delivery technology, which directly or indirectly affects the signal quality or method or type of transmission of Access programming or services, Grantee shall take all necessary technical steps and provide necessary technical assistance, including the acquisition of all necessary equipment, up to the point of demarcation to ensure that the capabilities of the Access Channels and delivery of access programming are not diminished or adversely affected by such change.

## **9.2 Management and Control of Access Channels**

(A) The City may authorize Designated Access Providers to control, operate and manage the use of any and all Access facilities made available by Grantee under this Franchise, including, without limitation, the operation of access channels. The City or its designee may formulate rules for the operation of the access channels, consistent with this Franchise.

(B) Grantee shall cooperate with the City and its Designated Access Providers in the use of the System and Access facilities for the provision of PEG channels.

## **9.3 Additional Access Channels**

In addition to the access channels referenced in subsection 9.1 above, the City may require Grantee to make available at no charge additional access channels, as established by the triggers set forth below.

One (1) additional channel shall be made available for Educational Access and one (1) additional channel shall be made available for Governmental Access when any of the initial channels required above respectively is used for original programming (excluding character generated and filler programming, e.g., AM/FM radio programming) during fifty percent (50%) of the hours between 10:00 AM and 10:00 PM, five (5) days per week, during any consecutive eight (8) week period. The programming shall generally be distinct and non-repetitive of the previous channel. Based upon this criteria, the Grantee shall, within three (3) months following a written request by the City, make available additional access channels up to the total number specified herein.

## **9.4 Location of Access Channels**

Subject to must carry requirements, Grantee will endeavor to continue carriage of the City's programming on Channels 21 and 75 and the Puget Sound Educational Service District and Lake Washington School District's programming on Channel 26. Grantee shall use its best efforts to provide one hundred twenty (120) days and at least sixty (60) days advance written notice to the City prior to any relocation of the PEG channels. In connection with the movement of any of the City's Government Access Channels to other Channel numbers, Grantee shall provide a bill message on subscribers' bills along with a message on subscribers' converter boxes.

## **9.5 Access Interconnections**

Grantee may interconnect the Access channels of the Cable System with the Access channels of any other contiguous cable system that is owned or operated by Grantee or its Affiliates provided that the City has received authorization for use of the Access programming originating in the neighboring community. Interconnection of Access channels may be accomplished by direct fiber optic or cable connection or by other appropriate methods.

## **9.6 Capital Advance**

Upon receipt of a written request by the City, Grantee shall, within forty-five (45) days thereafter, pay to the City a capital advance in the amount of \$185,000. This is an advance payment of the Capital Contribution set forth in subsection 9.7, below. This advance may only be used by the City for capital expenditures related to Access programming. This advance shall in no way be considered in lieu of franchise fees and shall not reduce in any way the franchise fees owed to the City under



this Franchise. To the extent allowed by federal law, this capital advance may be treated as an external cost by Grantee and itemized on subscribers' bills.

#### **9.7 Capital Contribution**

Grantee shall recover the capital advance from customers at a rate not greater than \$.25 per customer per month. Once Grantee has fully recovered the capital advance described above, the City may, upon sixty (60) days notice, request in writing that the Grantee continue its collection of the \$.25 per customer per month in access fees, and forward them to the City as capital contributions to be used by the City as it deems fit for those Access Channels described in subsection 9.1. The capital contributions may only be used for capital expenditures related to the Access Channels. The monthly amount collected from customers may be reduced, as determined by the City Council. The capital contribution shall be paid quarterly to the City. Grantee shall not be responsible for paying the capital contribution with respect to gratis or bad debt accounts. Upon written request, Grantee shall provide a report to the City no more frequently than annually, regarding such gratis or bad debt accounts. To the extent allowed by federal law, the capital contribution may be treated as an external cost by Grantee and itemized on subscribers' bills. The City shall have discretion to allocate the capital contribution in accordance with applicable law. To the extent the City makes Access capital investments using City funds prior to receiving the capital advance or capital contribution funds, the City is entitled to apply the subsequent capital advance or capital contribution payments from Grantee toward such City capital investments. The City shall submit to the Grantee, within ninety (90) days of the end of each calendar year, a report of the City's capital expenditures from the capital advance and/or the capital contributions.

The City and Grantee agree that any Capital Contribution shall be referred to on subscribers' bills as a "PEG fee" or language substantially similar thereto.

With regard to the Government Access Channels, the City will dedicate the time, personnel and other resources needed to operate those Access Channels.

#### **9.8 Access Channels On Lowest Tier**

All Access channels provided to subscribers under this Franchise shall be included on the Basic Service tier.

#### **9.9 Access Channel Signal**

Grantee shall not exercise editorial control over the programming of any Access Channel. Grantee will not interrupt the signal provided on any Access Channel except during circumstances beyond Grantee's control or if necessary for testing or planned system maintenance purposes.

#### **9.10 Technical Quality**

The Grantee shall maintain all Access Channels and Interconnections at the same level of technical quality and reliability as that for the rest of its System. The Grantee shall provide routine maintenance and repair and replace, if necessary, any of Grantee's equipment required to carry a quality signal to and from the City's (and Designated Access Providers') and the Grantee's facilities for the Access Channels.

### **9.11 Underutilized Access Channels**

Grantee and the City agree that it is their mutual goal to fully and efficiently use the Channel capacity of the Cable System, which may include allowing the Grantee to use underutilized time on the dedicated Access Channels. If Grantee believes that any Access Channel has underutilized time, Grantee may file a request with the City to use that time. In response to the request, the City will consider a combination of factors, including, but not limited to, the community's needs and interests, and the source, quantity, type and schedule of the programming carried on the Access Channel. The City will also consider, taking into account the mission of Access programming, whether it is feasible for the Designated Access Providers to cluster Access programming into blocks of time such that the Channel space can be compatibly shared between the Designated Access Provider and the Grantee and/or if several Designated Access Providers can combine their programming onto a single Access Channel. The City shall render its decision regarding the matter within thirty (30) days of receiving the request. Should the City find that the access channel or a portion of the Access Channel may be used by the Grantee, then Grantee may begin using such time sixty (60) days after receipt of the decision. The Grantee's request shall not be unreasonably denied. Any permission granted pursuant to this subsection for use of an Access Channel or a portion thereof shall be considered temporary.

At such time as a Designated Access Provider believes that it has the resources and ability to utilize the Access Channel time that is temporarily being used by the Grantee pursuant to this subsection, a Designated Access Provider may request that the City return such Channel or portion of the Channel for Access purposes. In response to the request, the City will consider a combination of factors, including, but not limited to, the community's needs and interests, and the source, quantity, type and schedule of the programming proposed to be carried on the access channel as well as the applicant's ability and resources to acquire or produce the proposed Access programming. The City will also consider, taking into account the mission of the Access programming, whether it is feasible for the Designated Access Providers to cluster Access programming into blocks of time such that the Channel space can be compatibly shared between the Designated Access Provider and the Grantee and/or if several Designated Access Providers can combine their programming onto a single access channel. The City shall render its decision regarding the matter within thirty (30) days of receiving the request. Should the City find that the evidence exists to support the return of the Access Channel or a portion of the access channel to the Designated Access Provider, then Grantee shall surrender the access channel or the requested time on the access channel, as applicable, within thirty (30) days of receiving the decision. The Designated Access Provider's request shall not be unreasonably denied.

### **9.12 Information About Access Programming**

The Grantee, upon request, shall provide the City the opportunity to include one (1) bill insertion per year. The City shall be responsible for the cost of printing its bill insertion, the cost of inserting the information into Grantee's bills and for any incremental postage costs. Bill insertions must conform to Grantee's reasonable mailing requirements. The Grantee shall be provided an opportunity to review and approve all Access bill insertions, which approval shall not be unreasonably withheld.

### **9.13 Return Lines**

(A) Prior to the commencement of this Franchise, Grantee built a fiber optic return line to its headend from City Hall to enable the distribution of Governmental Access programming to residential subscribers on the Governmental Access Channels. Grantee shall maintain and repair, if necessary, this return line throughout the term of this Franchise.

(B) For purposes of enabling the City to produce live PEG Access programming from remote locations throughout the City, the City intends to construct and maintain new fiber optic return lines from the PEG Access origination sites listed in Exhibit A to the production facility located at City Hall. All return line construction costs shall be paid by the City or the Designated Access Provider. Funds provided via the capital advance and the monthly Capital Contributions referenced in subsections 9.6 and 9.7 may be used for such projects.

## **SECTION 10. GENERAL RIGHT-OF-WAY USE AND CONSTRUCTION**

### **10.1 Right to Construct**

Subject to generally applicable laws, regulations, rules, resolutions and ordinances of the City and the provisions of this Franchise, Grantee may perform all construction in the rights-of-way for any facility needed for the maintenance, operation or extension of Grantee's Cable System.

### **10.2 Right-of-Way Meetings**

Subject to receiving advance notice, Grantee shall make reasonable efforts to attend and participate in meetings of the City regarding right-of-way issues that may impact the Cable System.

### **10.3 General Standards**

All work authorized and required hereunder shall be done in a safe, thorough and workmanlike manner. All installations of equipment shall be durable and installed in accordance with good engineering practices and of sufficient height to comply with all federal, State and local laws and regulations.

Grantee shall promptly respond to any construction issues raised by the City and remedy any construction related problems in a timely and responsive manner.

### **10.4 Joint Trenching/Boring**

To the extent it makes economic sense, Grantee shall joint trench or share bores or cuts and work with other providers (such as, but not limited to, telecommunications, gas and electric companies), licensees, permittees and franchisees so as to reduce the number of right-of-way cuts within the City.

### **10.5 Movement of Facilities During Emergencies**

In the case of fire, disaster or other emergency, the City may move, remove or disconnect Grantee's facilities and equipment located in the right-of-way or on any other property of the City. The City shall provide reasonable notice to the Grantee prior to taking such action and shall provide the Grantee with the opportunity to perform such action unless, in the City's sole judgment, the imminent threat to public health, safety or welfare makes such notice impractical.

**10.6 One Call**

Grantee will maintain membership in good standing with the Utilities Underground Location Center or other similar or successor organization which is designated to coordinate underground equipment locations and installations. Grantee shall abide by the State's "Underground Utilities" statutes (Chapter 19.122 RCW) and will further comply with and adhere to City regulations related to the one call locator service program.

**10.7 Permits Required for Construction**

Prior to doing any work in the right-of way or other public property, Grantee shall apply for and obtain any permits necessary from the City. As part of the permitting process, the City may impose such conditions and regulations as are necessary for protecting any structures in such rights-of-way, for restoration of such rights-of-way and for protection of the public and the continuity of pedestrian or vehicular traffic. Grantee shall pay all generally applicable fees for the requisite City permits.

**10.8 Emergency Permits**

In the event that emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may initiate such emergency repairs, and shall apply for appropriate permits within forty-eight (48) hours after completion of the repair.

**10.9 Compliance with Applicable Codes**

(A) City Codes. Grantee shall comply with all lawful and applicable City codes, including, without limitation, construction codes, building codes, the Fire Code and zoning codes and regulations that do not conflict with Grantee's contractual rights under this Franchise.

(B) Regulations and Safety Codes. Grantee shall comply with all lawful and applicable federal, State and City safety requirements, rules, regulations, laws and practices. By way of illustration and not limitation, Grantee shall comply with the National Electric Code, National Electrical Safety Code and Occupational Safety and Health Administration (OSHA) Standards.

**10.10 GIS Mapping**

Grantee shall comply with any generally applicable ordinances, rules and regulations of the City regarding geographic information systems mapping for users of the rights-of-way. At the time of the effective date of this Franchise, paper copies of route maps will be deemed to satisfy the requirements of this subsection. However, if applicable law allows the City to keep electronic copies confidential, then Grantee shall use its best efforts to provide electronic versions to the City.

**10.11 Least Interference**

Work in the right-of-way, or on other public property, shall be done in a manner that causes the least interference with the rights and reasonable convenience of adjacent property owners. Grantee's Cable System shall be constructed and maintained in such a manner as not to interfere with sewers, water pipes or any other property of the City, or with any other pipes, wires, conduits, pedestals, structures or other facilities that may have been laid in the rights-of-way by, or under, the City's authority. The Grantee's Cable System shall be located, erected and maintained so as not to endanger the lives of Persons, or to interfere with new improvements the City may deem proper to make or to unnecessarily hinder or obstruct the free use of the rights-of-way or other public property,

and shall not interfere with travel and use of public places by persons during the construction, repair, operation or removal thereof. In the event of unreasonable interference, the City may require the removal or relocation of Grantee's lines, cables, equipment and other appurtenances from the property in question at Grantee's expense.

#### **10.12 Prevent Injury/Safety**

Grantee shall provide and use any equipment and facilities necessary to control and carry Grantee's signals so as to prevent injury to the City's property or property belonging to any Person. Grantee, at its own expense, shall repair, renew, change and improve its facilities to keep them in good repair, and safe and presentable condition. All excavations made by Grantee in the rights-of-way shall be properly safeguarded for the prevention of accidents.

#### **10.13 Notice to Private Property Owners**

Except in the case of an emergency involving public safety or an outage, or service interruption to a large number of subscribers, Grantee shall give reasonable advance notice to private property owners of construction work on or in adjacent rights-of-way.

#### **10.14 Underground Construction**

In those areas and portions of the City where the transmission or distribution facilities of the public utility providing telephone service and those of the facility providing electric service are underground, or when placed underground, then Grantee shall likewise construct, operate and maintain all of its transmission and distribution facilities in the same area underground upon City approval. Such activities shall be made in concurrence and cooperation with the other affected utilities. Amplifiers and associated equipment in Grantee's transmission and distribution lines may be in appropriate housing upon the surface of the ground. Nothing in this Section shall be construed to require the Grantee to construct, operate, or maintain underground any ground-mounted appurtenances such as pedestals, provided that such facilities must be placed in accordance with the City Code and any permit requirements.

#### **10.15 Relocation**

In the event of a City-driven facilities relocations project that requires conversion of overhead facilities to underground, such as projects that may include, but not be limited to: road widening, surface grade changes or sidewalk installation, Grantee agrees to bear the costs of converting Grantee's cable system from an overhead system to an underground system as follows:

(1) Engineering -- To ensure proper space and availability in the supplied joint trench, Grantee shall pay for the work (time and materials) necessary to complete cable system related engineering and coordination with the other utilities involved in the project.

(2) Cost(s) -- Grantee shall pay its proportionate share of the cost of labor and materials necessary to place its cables, conduits and vaults/pedestals in the supplied joint trench and/or stand-alone cable trench. If, however, the City's costs for Grantee are not agreeable to Grantee, then Grantee shall have the right to hire its own contractor(s) to complete the work within the joint trench.

(3) If Grantee decides to use its own contractor(s) to complete its portion of the work, then Grantee and its contractor(s) are responsible for coordinating with the City to provide reasonable notice and time to complete the placement of Grantee's cables, conduits and vaults/pedestals in the trench. If the Grantee fails to complete the above work within the time prescribed and to the City's reasonable satisfaction, the City may cause such work to be done and bill the reasonable cost of the work to the Grantee, including all reasonable costs and expenses incurred by the City due to Grantee's delay. In such an event, the City shall not be liable for any damage to any portion of the Grantee's Cable System. Within forty-five (45) days of receipt of an itemized list of those costs, the Grantee shall pay the City.

(4) Within the underground conversion area, Grantee shall cooperate with the City and its contractor on any on-site coordination. The City shall be responsible for traffic control, trenching, backfill, and restoration of all work performed by its contractor. The Grantee shall be responsible for traffic control, trenching, backfill, and restoration of all work performed by its contractor for stand-alone cable trenches.

In the event a Local Improvement District (LID) has been created to fund a relocation or conversion project, Grantee shall be reimbursed by the LID for all expenses incurred as a result of the project.

The Grantee shall, upon reasonable prior written request of any private third party, relocate its wires or cables underground; provided that (i) the Grantee may impose a charge for all time and material costs associated with the project to the private third party for the relocation of its facilities, and such charge may be required to be paid in advance of the relocation of its wires or cables, and (ii) if a permit is required, Grantee's permit application is approved by the City.

The Grantee shall utilize existing poles and conduit wherever possible. New poles will not be allowed.

This Franchise does not grant, give or convey to the Grantee the right or privilege to install its facilities in any manner on specific utility poles or equipment of the City or of any private third party. In the event an underground conversion of cable facilities is required as part of a street improvement condition of a new land use development that is not associated with a City designated capital improvement project, this Franchise shall in no way limit the Grantee's right to recoup its direct costs associated with the conditioned underground conversion of the Cable System from the private third party responsible for the project.

#### **10.16 Additional Ducts and Conduits**

The Grantee and the City recognize that situations may occur in the future where the City may desire to place its own fiber optic cable in trenches or bores opened by the Grantee. The Grantee agrees to cooperate with the City in any construction that involves trenching or boring, provided that the City has first provided reasonable notice to the Grantee in some manner that it is interested in sharing the trenches or bores in the area where the Grantee's construction is occurring. The Grantee shall allow the City to lay City conduit and fiber optic cable in the Grantee's trenches and bores, provided that the City shares pro rata in the cost of the trenching and boring with Grantee. The City shall be responsible for maintaining its respective conduit and fiber optic cable, which is buried in the

Grantee's trenches and bores. The City agrees that any conduit or fiber optic cables placed in these projects shall not now or throughout the term of this Franchise be utilized to provide cable services that are similar to or in competition with the cable services provided by Grantee.

(A) If Grantee is constructing, relocating, or placing ducts or conduits in the rights-of-way and upon request by the City, additional duct or conduit and related structures necessary to access the duct or conduit shall be provided for the City, subject to the following conditions:

(1) The City shall enter into a contract with the Grantee consistent with RCW 80.36.150. The contract rates to be charged should include recovery of the incremental costs of the Grantee. If the City makes the additional duct or conduit and related access structures available to any other entity for the purposes of providing Cable Service for hire, sale or resale to the general public, the rates to be charged, as set forth in the contract with the Grantee shall recover at least the fully allocated costs of the Grantee. The Grantee shall state both contract rates in the contract. The City shall inform the Grantee of the use, and any change in use, (if such use pertains to cable service) of the requested duct or conduit and related access structures to determine the applicable rate to be paid by the City.

(2) The City shall not require that the additional duct or conduit space be connected to the access structures and vaults of the Grantee.

(3) The value of the additional duct or conduit requested by the City shall not be considered a public works construction contract.

(B) Upon written request by the City for a cost estimate to share a trench or bore within a right-of-way, Grantee shall prepare such estimate and present the same to the City within sixty (60) days thereafter regarding the incremental costs and fully allocated costs of providing the City with ducts, conduits and related structures necessary to access the conduit or duct and of the date such construction, relocation or placement will begin. If Grantee and the City disagree regarding the appropriateness of the proposed incremental and fully allocated costs, the parties may negotiate.

(C) The City may require Grantee to furnish such additional duct or conduit and the related structures necessary to access the conduit or duct for the incremental costs by so notifying Grantee no later than sixty (60) days after the information referred to in subsection (B) is provided by Grantee or a court.

(D) If the City requires Grantee to furnish additional duct, conduit or related structures pursuant to this subsection, the Grantee shall construct the facilities to the same standards as Grantee's other new facilities, and shall turn such additional duct, conduit or related structures over to the City upon completion of same and satisfactory inspection thereof by the City.

(E) Any duct or conduit and related structures necessary to access the duct or conduit that are furnished by the Grantee to the City pursuant to this Section may be used by the City for any commercial or noncommercial purposes, and there shall be no restrictions thereon (with the exception that the City shall not provide cable services).

**10.17 Restoration of Property**

(A) The Grantee shall protect public and private property from damage. If damage occurs, the Grantee shall promptly notify the property owner within twenty-four (24) hours.

(B) In the event Grantee disturbs or damages any right-of-way or other public property, Grantee shall promptly restore the right-of-way or property to at least its prior condition, normal wear and tear excepted.

(C) Grantee shall warrant any street cut work performed by or for Grantee in the right-of-way or on other public property for the greater of one (1) year or for the life of the asphalt street patch until overlay occurs, provided that no action by a third party materially affects the integrity of Grantee's street cut work, unless a different period is required by the City Code. If street cut work is not satisfactorily performed by the Grantee within a reasonable time, the City may, after prior notice to the Grantee, or without notice where the disturbance or damage may create a risk to public health or safety, cause the work to be done and recover the reasonable cost of the work from the Grantee. Within forty-five (45) days of receipt of an itemized list of those costs, including the costs of labor, materials and equipment, the Grantee shall pay the City.

(D) Upon completion of the work that caused any disturbance or damage, Grantee shall promptly commence restoration of the property, and will use its best efforts to complete the restoration within twenty-four (24) hours, considering the nature of the work that must be performed.

**10.18 Discontinuing Use**

Whenever Grantee intends to discontinue using any facility within the rights-of-way, Grantee shall notify the City of its intention. Grantee may remove the facility or request that the City permit it to remain in place. Notwithstanding Grantee's request that any such facility remain in place, the City may require Grantee to remove the facility from the right-of-way or modify the facility to protect the public health, welfare or safety. The City may require Grantee to perform a reasonable combination of modification and removal of the facility. Grantee shall complete such removal and/or modification respectively in accordance with a schedule reasonably set by the City. Until such time as Grantee removes or modifies the facility as reasonably directed by the City, or until the rights to and responsibility for the facility are accepted by another Person having authority to use, construct and/or maintain such facility, Grantee shall retain all liability for such facility and shall remain responsible for all necessary repairs and relocations of the facility in the same manner and degree as if the facility were in active use.

**10.19 Movement of Cable System Facilities For City Purposes**

Nothing in this Franchise shall prevent the City from constructing any public work or capital improvement. Further, the City shall have the right to require Grantee to relocate, remove, replace, modify or disconnect Grantee's facilities and equipment located in the rights-of-way or on any other property of the City in the event of an emergency or when necessary to protect the health, safety or welfare of the general public, and such work shall be performed at Grantee's expense. The City shall provide reasonable notice to Grantee, not to be less than thirty (30) days, for all City capital



improvement projects under \$150,000. In the event of any City capital improvement project of \$150,000 or more which requires the removal, replacement, modification or disconnection of Grantee's facilities or equipment, the City shall provide at least ninety (90) days written notice to Grantee. Following notice by the City, Grantee shall relocate, remove, replace, modify or disconnect any of its facilities or equipment within any right-of-way, or on any other property of the City. If the City requires Grantee to relocate its facilities located within the rights-of-way, the City shall make a reasonable effort to provide Grantee with an alternate location within the rights-of-way. If funds are generally made available to users of the rights-of-way for such relocation, Grantee shall be entitled to its pro rata share of such funds.

If the Grantee fails to complete the above work within the time prescribed and to the City's reasonable satisfaction, the City may cause such work to be done and bill the reasonable cost of the work to the Grantee, including all reasonable costs and expenses incurred by the City due to Grantee's delay. In such event, the City shall not be liable for any damage to any portion of Grantee's Cable System. Within forty-five (45) days of receipt of an itemized list of those costs, the Grantee shall pay the City.

This subsection does not apply to the relocation of aerial facilities to an underground location.

#### **10.20 Movement of Cable System Facilities for Other Franchise or Permit Holders**

If any removal, replacement, modification or disconnection of the Cable System is required to accommodate the construction, operation or repair of the facilities or equipment of another City franchise or permit holder, Grantee shall, after at least forty-five (45) days advance written notice, take action to effect the necessary changes requested by the responsible entity. Grantee may require that the costs associated with the removal, replacement, modification or disconnection of the Cable System be paid by the benefited party, and Grantee may require a reasonable deposit of the estimated payment in advance.

#### **10.21 Reservation of City Use of Right-of-Way**

Nothing in this Franchise shall prevent the City from constructing sewers; grading, paving, repairing or altering any right-of-way; laying down, repairing or removing water mains; installing conduit or fiber optic cable; or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as not to obstruct, injure or prevent the use and operation of Grantee's Cable System.

#### **10.22 Tree Trimming**

Grantee may prune or cause to be pruned, using proper pruning practices, any tree in the rights-of-way which interferes with Grantee's Cable System. Grantee shall comply with any City regulations regarding tree trimming. Except in emergencies, Grantee may not prune trees at a point below thirty (30) feet above sidewalk grade until one (1) week written notice has been given to the owner or occupant of the premises abutting the right-of-way in or over which the tree is growing. The owner or occupant of the abutting premises may prune such tree at his or her own expense during this one (1) week period. If the owner or occupant fails to do so, Grantee may prune such tree at its own expense. For purposes of this subsection, emergencies exist when it is necessary to prune to protect the public or Grantee's facilities from imminent danger only.

**10.23 Inspection of Construction and Facilities**

The City may inspect any of Grantee's facilities, equipment or construction within the rights-of-way and on other public property in the Franchise Area. If an unsafe condition is found to exist, the City, in addition to taking any other action permitted under applicable law, may order Grantee, in writing, to make the necessary repairs and alterations specified therein forthwith to correct the unsafe condition within a reasonable amount of time established by the City. The City has the right to inspect, repair and correct the unsafe condition if Grantee fails to do so, and to reasonably charge Grantee therefore.

**10.24 Stop Work**

(A) On notice from the City that any work is being performed contrary to the provisions of this Franchise, or in an unsafe or dangerous manner as reasonably determined by the City, or in violation of the terms of any regulations or permits issued, then the work may immediately be stopped by the City.

(B) The stop work order shall:

- (1) Be in writing;
- (2) Be given to the person doing the work, or be posted on the work site;
- (3) Indicate the nature of the alleged violation or unsafe condition; and
- (4) Establish conditions under which work may be resumed.

Once field data entry into the City's permit system is available to inspectors, if a stop work order is issued for work being done pursuant to an approved permit, Grantee shall be notified within twenty-four (24) hours of such issuance.

**10.25 Nonconforming or Unauthorized Conditions**

Whenever the City determines that the Grantee has taken any action or caused any condition within the franchise area in violation of the City Code that results in or produces any unsafe, nonconforming or unauthorized condition, the City may order the correction or discontinuance of such condition or any activity causing such condition, or order the taking of any other remedial action, pursuant to applicable provisions of the City Code.

**10.26 Work of Contractors and Subcontractors**

Grantee's contractors and subcontractors shall be licensed and bonded in accordance with the City's generally applicable regulations. Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by Grantee. Grantee shall be responsible for all work performed by its contractors and subcontractors and others performing work on its behalf as if the work were performed by it, and shall ensure that all such work is performed in compliance with this Franchise and other applicable laws, and shall be jointly and severally liable for all damages and correcting all damage caused by them. It is Grantee's responsibility to ensure

that contractors, subcontractors or other Persons performing work on Grantee's behalf are familiar with the requirements of this Franchise and other applicable laws governing the work performed by them.

## **SECTION 11. TECHNICAL STANDARDS**

### **11.1 Subscriber Network**

(A) Grantee's current hybrid fiber coaxial Cable System has the capacity to distribute video programming throughout the City. The Cable System is two-way capable and supports a range of Cable Services offered by Grantee.

(B) Equipment must be installed so that all closed captioned programming received by the Cable System shall include the closed captioned signal, so long as the closed captioned signal is provided consistent with FCC standards. Equipment must also be installed so that all signals received in stereo are retransmitted in stereo.

(C) Grantee will take prompt corrective action if it finds that any facility or equipment related to the Cable System is not operating as expected, or if it finds that the facility or equipment does not comply with the requirements of this Franchise or applicable law.

(D) Grantee's construction decisions shall be based solely upon legitimate engineering decisions and shall not take into consideration the income level of any particular community within the franchise area.

### **11.2 Hearing on Services**

The City may hold a hearing at any time to review whether or not the Cable Services offered by the Grantee in the City are meeting demonstrated community needs and interests, taking into account the cost of meeting those needs and interests. The parties recognize that, as of the effective date of this Franchise, the City is not permitted to require the provision of specific video programming pursuant to this subsection.

### **11.3 Technical Performance**

The technical performance of the Cable System shall meet or exceed all applicable federal technical standards, as they may be amended from time to time, regardless of the transmission technology utilized. The City shall have the full authority permitted by applicable law to enforce compliance with these technical standards.

### **11.4 Cable System Performance Testing**

(A) Grantee shall perform all tests required by the FCC on its Cable System. Upon written request, all FCC required tests may be witnessed by representatives of the City.

(B) Grantee shall maintain written records of all Cable System test results performed by or for Grantee. Copies of such test results will be available as part of its public file available for inspection at Grantee's local office.

(C) Grantee shall promptly take such corrective measures as are necessary to correct any performance deficiencies fully and to prevent their recurrence as far as possible. Sites shall be re-tested following correction.

#### 11.5 Additional Tests

(A) Where there exists a pattern of evidence which in the judgment of the City casts doubt upon the reliability or technical quality of the Cable System, the City shall have the right and authority, upon thirty (30) days prior written notice, to require Grantee to conduct additional tests and analyze and report on the performance of the Cable System. Grantee shall fully cooperate with the City in performing such tests and shall prepare a report, if requested, within thirty (30) days after testing. Such report shall include the following information:

- (1) the nature of the complaint or problem which precipitated the special tests;
- (2) the Cable System component tested;
- (3) the equipment used and procedures employed in testing;
- (4) the method, if any, in which such complaint or problem was resolved; and
- (5) any other information pertinent to said tests and analysis, which may be required.

### SECTION 12. SERVICE EXTENSION AND SERVICE TO PUBLIC BUILDINGS

#### 12.1 Service Availability

(A) In General. Subject to the density provisions described in Section 12.1(D) below, Grantee shall provide Cable Service within seven (7) business days of a request by any potential residential subscriber within the City provided, however, that service can be installed via a standard installation, as described below. For purposes of this subsection, a request shall be deemed made on the date of signing a service agreement, receipt of funds by Grantee, receipt of a written request by Grantee or receipt by Grantee of a verified verbal request. Grantee shall provide such service:

- (1) With no line extension charge except as specifically authorized elsewhere in this Section.
- (2) At a nondiscriminatory installation charge for a standard installation, consisting of a one hundred twenty-five (125) foot aerial drop from the cable plant in the right-of-way to the exterior demarcation point for residential subscribers, with additional charges for non-standard installations computed according to a nondiscriminatory methodology for such installations.
- (3) At nondiscriminatory monthly rates in accordance with applicable laws.

(B) Provision of Cable Service. Grantee shall not arbitrarily refuse to provide Cable Service to any Person within its franchise area. Notwithstanding the foregoing, Grantee may introduce new or expanded Cable Services on a geographically phased basis, where such services require an upgrade of the Cable System.

(C) Service to Multiple Dwelling Units. The Grantee shall provide Cable Service to Multiple Dwelling Units in accordance with this Franchise and separately negotiated agreements between the property owner(s) and the Grantee.

(D) Customer Charges for Extensions of Service. For unusual circumstances, such as the existence of more than one hundred twenty-five (125) feet of aerial distance from the distribution cable to connection of service to customers, or a density of less than twenty-five (25) dwelling units per 5280 cable-bearing strand feet of aerial distribution cable, or a density of less than sixty (60) dwelling units per 5280 cable-bearing trench feet of underground distribution cable, service may be made available on the basis of a capital contribution in aid of construction, including cost of material, labor and easements. For the purpose of determining the amount of capital contribution in aid of construction to be borne by the Grantee and customers in the area in which service may be expanded, the Grantee will contribute an amount equal to the construction and other costs per mile, multiplied by a fraction whose numerator equals the actual number of dwelling units per 5280 cable-bearing strand or trench feet respectively of its distribution cable and whose denominator equals twenty-five (25) or sixty (60), as applicable. Potential customers who request service hereunder will bear the remainder of the construction and other costs on a pro rata basis. The Grantee may require that the payment of the capital contribution in aid of construction borne by such potential customers be paid in advance.

## **12.2 Connection of Public Facilities**

Grantee shall, without charge, provide a standard installation and one outlet of Basic Service and Expanded Basic Service and any necessary converters to all City owned (or leased) and occupied buildings (including, but not limited to, City Hall, the Municipal Courthouse, fire stations and police stations), Schools, Access facilities and public libraries. If the distance is greater than one hundred twenty-five (125) aerial feet, the City or other entity may agree to pay the incremental cost of such drop line in excess of one hundred twenty-five (125) aerial feet, including the cost of excess labor and materials. Such Cable Service shall not be extended to areas of City buildings where the Grantee would normally enter into a commercial contract to provide such Cable Service (i.e., a golf course).

The Cable Service provided in accordance with this subsection shall not be distributed beyond the originally installed outlet without authorization from the Grantee. If additional outlets are requested, the building owner and/or occupant shall be required to pay the usual installation fees associated therewith; however, there shall be no additional charge for the Cable Service. Outlets of Cable Service provided in accordance with this subsection may be used to distribute Cable Services throughout such buildings, provided such distribution can be accomplished without causing Cable System disruption and general technical standards are maintained. Such outlets may only be used for lawful purposes.

The Cable Service described in this subsection is being provided by Grantee for the betterment of the community and shall be provided throughout the term of the Franchise. The City gratefully acknowledges this provision of free Cable Service by the Grantee.

The Cable Service provided shall not be used for commercial purposes, and the City shall take reasonable steps to limit display in public areas. In addition, the City shall take reasonable precautions to prevent any inappropriate use of the Cable Service or the Cable System that could result in damage to the Cable System.

### **SECTION 13. FRANCHISE VIOLATIONS**

#### **13.1 Procedure for Remediating Non-Material Franchise Violations**

(A) If the City believes that Grantee has failed to perform any non-material obligation under this Franchise, the City shall notify Grantee in writing, stating with reasonable specificity the nature of the alleged default. Grantee shall have thirty (30) days from the receipt of such notice to:

(1) respond to the City, contesting the City's assertion that a default has occurred, and request a meeting in accordance with subsection (B), below; or

(2) cure the default; or

(3) notify the City that Grantee cannot cure the default within thirty (30) days, because of the nature of the default. In the event the default cannot be cured within thirty (30) days, Grantee shall promptly take all reasonable steps to cure the default and notify the City in writing and in detail as to the exact steps that will be taken and the projected completion date. In such case, the City may set a meeting in accordance with subsection (B) below to determine whether additional time beyond the thirty (30) days specified above is indeed needed, and whether Grantee's proposed completion schedule and steps are reasonable.

(B) If Grantee does not cure the alleged default within the cure period stated above, or denies the default and requests a meeting in accordance with subsection (A)(1), or the City orders a meeting in accordance with subsection (A)(3), the City shall set a meeting to investigate said issues and the existence of the alleged default. The City shall notify Grantee of the meeting in writing and such meeting shall take place no less than thirty (30) days after Grantee's receipt of notice of the meeting. At the meeting, Grantee shall be provided an opportunity to be heard and to present evidence in its defense.

(C) If, after the meeting, the City determines that a default exists, Grantee and the City may agree on a plan and schedule to cure the default. Absent such agreement, the City shall order Grantee to correct or remedy the default or breach within such reasonable timeframe as the City shall determine. In the event Grantee does not cure the default within such time to the City's reasonable satisfaction, the City may:

- (1) Recommend the revocation of this Franchise pursuant to the procedures in subsection 13.2; or
- (2) Recommend any other legal or equitable remedy available under this Franchise or any applicable law.

### **13.2 Revocation**

(A) The City may revoke this Franchise and rescind all rights and privileges associated with this Franchise in any of the following circumstances:

- (1) If Grantee fails to perform any material obligation under this Franchise;
- (2) If Grantee willfully fails for more than three (3) days to provide continuous Cable Service;
- (3) If Grantee attempts to evade any material provision of this Franchise or to practice any fraud or deceit upon the City or subscribers;
- (4) If Grantee becomes insolvent, or if there is an assignment for the benefit of Grantee's creditors;
- (5) If Grantee willfully misrepresents material facts in the negotiation of this Franchise; or
- (6) If Grantee repeatedly breaches a material provision of the Customer Service Standards.

(B) Prior to forfeiture or termination of the Franchise, the City shall give written notice to the Grantee of its intent to revoke the Franchise. The notice shall set forth the exact nature of the noncompliance. Grantee shall have forty-five (45) days from receipt of such notice to object in writing and to state its reasons for such objection and provide any explanation or cure the alleged default.

In the event the City does not receive a timely and satisfactory response from Grantee, it may then seek a termination of the Franchise in accordance with this subsection.

(C) The City Council shall designate a Hearing Examiner as the hearing officer to conduct a public hearing to determine if revocation of the Franchise is warranted and to make a recommendation to the City Council. The City Council shall act as the final decision maker for the City.

- (1) At least thirty-five (35) days prior to the public hearing, the City Clerk shall issue a public hearing notice that shall establish the issue(s) to be addressed in the public hearing; provide the time, date and location of the hearing; provide that the City shall hear any persons interested therein; and provide that the Grantee shall be afforded fair opportunity

for full participation, including the right to introduce evidence, to require the production of evidence, to be represented by counsel and to question witnesses.

(2) The Hearing Examiner shall hear testimony, take evidence, hear oral argument and receive written briefs. A transcript shall be made of such proceeding and the cost shall be shared equally between the parties. The Hearing Examiner shall create for the City Council a complete record of the public hearing including all exhibits introduced at the hearing and an electronic sound recording.

(3) Within twenty (20) days after the close of the hearing, the Hearing Examiner shall issue a written decision that shall include the recommendation of the Hearing Examiner on the revocation and termination of the Franchise, findings of fact upon which the recommendation is based and the conclusions derived from those findings.

(D) The City Council shall, at a public meeting, consider and take final action on the recommendation of the Hearing Examiner. The City Council shall consider the complete record developed before the Hearing Examiner and the recommendation of the Hearing Examiner.

(E) At the public meeting, the City Council shall:

(1) Accept the recommendation of the Hearing Examiner; or

(2) Reject the recommendation of the Hearing Examiner; or

(3) Remand the decision to the Hearing Examiner for an additional hearing limited to specific issues identified by the City Council (and if so, at the conclusion of such additional hearing, again follow the other applicable procedures enumerated herein).

(F) The City Council shall adopt an ordinance that accepts, rejects or remands the recommendation of the Hearing Examiner by a majority vote of the members of the City Council. If the decision of the City Council is to revoke and terminate the Franchise, then the ordinance shall declare that the Franchise is revoked and terminated, and any form of surety is forfeited. The City Council's written decision shall include findings of fact and conclusions derived from those facts which support the decision of the City Council. The City Council may by reference adopt some or all of the findings and conclusions of the Hearing Examiner.

(G) Grantee shall be bound by the City Council's decision to revoke the Franchise unless an appeal to a court of competent jurisdiction is filed within forty-five (45) days of the date of the City Council's decision.



**13.3 Procedures in the Event of Termination**

(A) If this Franchise lawfully terminates, the City may, subject to applicable law:

(1) Require Grantee to maintain and operate its Cable System on a month-to-month basis until the Cable System is sold; or

(2) Purchase Grantee's Cable System in accordance with the procedures set forth in subsection 13.4, below.

(B) The City may order the removal of the above-ground Cable System facilities and such underground facilities from the City at Grantee's sole expense within a reasonable period of time as determined by the City. In removing its plant, structures and equipment, Grantee shall refill, at its own expense, any excavation that is made by it and shall leave all rights-of-way and public places in as good a condition as that prevailing prior to Grantee's removal of its equipment and without affecting electrical or telephone wires or attachments. The indemnification and insurance provisions, and the letter of credit, if any, shall remain in full force and effect during the period of removal.

(C) If Grantee fails to complete any removal required by subsection 13.3 (B) to the City's satisfaction, after written notice to Grantee, the City may cause the work to be done and Grantee shall reimburse the City for the costs and expenses incurred within thirty (30) days after receipt of an itemized list of the costs and expenses, or the City may recover the costs and expenses through the letter of credit, if any, or other surety if Grantee has not paid such amount within the foregoing time period.

**13.4 Purchase of Cable System**

(A) If at any time this Franchise lawfully terminates, the City shall have the option to purchase the Cable System subject to the requirements of federal law.

(B) The City may, at any time after Franchise termination, offer in writing to purchase Grantee's Cable System. In any case where the City elects to purchase the Cable System, the purchase shall be closed within one hundred twenty (120) days of the date of the City's audit of a balance sheet and current profit and loss statement of Grantee's Cable System. The City shall, as applicable, pay for the Cable System by wire transfer or certified funds, and Grantee shall deliver appropriate bills of sale and other instruments of conveyance.

(C) For the purposes of this subsection, the price for the Cable System shall be determined as follows:

(1) In the case of the expiration of the Franchise without renewal, at fair market value determined on the basis of Grantee's Cable System valued as a going concern, but with no value allocated to the Franchise itself. In order to obtain the fair market value, this valuation shall be reduced by the amount of any lien, encumbrance, or other obligation of Grantee which the City may assume.

- (2) In the case of revocation for cause, the equitable price of Grantee's Cable System.

### **13.5 Receivership and Foreclosure**

(A) At the option of the City, subject to applicable law, this Franchise may be revoked after the appointment of a receiver or trustee to take over and conduct the business of Grantee whether in a receivership, reorganization, bankruptcy or other action or proceeding, unless:

- (1) The receivership or trusteeship is timely vacated; or

(2) The receiver or trustee has timely and fully complied with all the terms and provisions of this Franchise, and has remedied all defaults under the Franchise. Additionally, the receiver or trustee shall have executed an agreement duly approved by the court having jurisdiction, by which the receiver or trustee assumes and agrees to be bound by each and every term, provision and limitation of this Franchise.

(B) If there is a foreclosure or other involuntary sale of the Cable System, the City may serve notice of revocation on Grantee and to the purchaser at the sale, and the rights and privileges of Grantee under this Franchise shall be revoked forty-five (45) days after service of such notice, unless:

(1) The City has approved the transfer of the Franchise, in accordance with the procedures set forth in this Franchise and as provided by law; and

(2) The purchaser has covenanted and agreed with the City to assume and be bound by all of the terms and conditions of this Franchise.

### **13.6 Alternative Remedies**

No provision of this Franchise shall be deemed to bar the City or the Grantee from seeking appropriate judicial relief. Neither the existence of other remedies identified in this Franchise nor the exercise thereof shall be deemed to bar or otherwise limit the right of the City to recover monetary damages for violations by Grantee, or to seek and obtain judicial enforcement of Grantee's obligations by means of specific performance, injunctive relief or mandate, or any other remedy at law or in equity.

### **13.7 Assessment of Monetary Damages**

The City and Grantee recognize the delays, expense and unique difficulties involved in proving in a legal proceeding the actual loss suffered by the City as a result of Grantee's breach of certain provisions of this Franchise. Accordingly, instead of requiring such proof, the City and Grantee agree that Grantee shall pay to the City, at the discretion of the City, the sums set forth below for each day or part thereof that Grantee shall be in breach of specific provisions of this Franchise. Such amounts are agreed to by both parties as a reasonable estimate of the actual damages the City would suffer in the event of Grantee's breach of such provisions of this Franchise.

Subject to the City's giving written notice to the Grantee and a thirty (30) day right to cure period, the City may assess against Grantee monetary damages as follows: one hundred dollars (\$100.00) per day for material departure from the FCC technical performance standards; one hundred dollars (\$100.00) per day for failure to follow the undergrounding requirements of this Franchise; one hundred dollars (\$100.00) per day for failure to timely remedy any construction related problem; one hundred dollars (\$100.00) per day for failure to provide the access channels or any equipment related thereto which is required hereunder; one hundred dollars (\$100.00) per day for each material violation of the Customer Service Standards; fifty dollars (\$50.00) per day for failure to provide reports or notices as required by this Franchise; and up to one hundred dollars (\$100.00) per day for any material breaches or defaults not previously listed.

Monetary damages as defined by this subsection may be assessed for no more than seventy-five (75) calendar days for any individual incident, after which time the City may implement other remedies as defined in this Franchise and under applicable law.

### **13.8 Effect of Abandonment**

If the Grantee abandons its Cable System during the Franchise term, the City, at its option, may obtain an injunction, or operate the Cable System or designate another entity to operate the Cable System temporarily until either the Grantee restores service pursuant to the terms of the Franchise, or until the Franchise is revoked and a new franchisee is selected by the City. If the City operates the Cable System or designates another entity to operate the Cable System, the Grantee shall reimburse the City or the City's designee, as applicable, for all reasonable costs, expenses and damages incurred.

## **SECTION 14. FRANCHISE RENEWAL**

(A) The City and Grantee agree that any proceedings undertaken by the City that relate to the renewal of the Franchise shall be governed by and comply with the provisions of Section 626 of the Cable Act, unless the procedures or substantive protections set forth therein shall be deemed to be preempted and/or superseded by any subsequent provision of federal or State law.

(B) In addition to the procedures set forth in said Section 626(a), the City agrees to notify Grantee of the completion of its assessments regarding the identification of future cable-related community needs and interests, as well as the past performance of Grantee under the then current Franchise term. Notwithstanding anything to the contrary set forth herein, Grantee and the City agree that at any time during the term of the then current Franchise, while affording the public adequate notice and opportunity for comment, the City and Grantee may agree to undertake and finalize negotiations regarding renewal of the then current Franchise and the City may grant a renewal thereof. Grantee and the City consider the terms set forth in this subsection to be consistent with the express provisions of Section 626 of the Cable Act.

## **SECTION 15. FRANCHISE TRANSFER**

(A) The Cable System and this Franchise shall not be sold, assigned, transferred, leased or disposed of, either in whole or in part, either by involuntary sale or by voluntary sale, merger or

consolidation; nor shall title thereto, either legal or equitable, or any right, interest or property therein pass to or vest in any Person without the prior written consent of the City, which consent shall not be unreasonably withheld. If such consent is given, such consent shall not be deemed to waive any rights of the City to subsequently enforce noncompliance issues relating to this Franchise.

(B) The Grantee shall promptly notify the City of any actual or proposed change in, or transfer of, or acquisition by any other party of control of the Grantee. The word "control" as used herein is not limited to majority stock ownership but includes actual working control in whatever manner exercised. Every change, transfer or acquisition of control of the Grantee shall make this Franchise subject to cancellation unless and until the City shall have consented thereto.

(C) The parties to the sale, transfer or change of control shall make a written request to the City for its approval of a sale, transfer or change of control and shall furnish all information required by law.

(D) In seeking the City's consent to any change in ownership or control, the proposed transferee or controlling party shall indicate whether, as applicable, it:

(1) Has ever been convicted or held liable for acts involving deceit including any violation of federal, State or local law, or is currently under an indictment, investigation or complaint charging such acts;

(2) Has ever had a judgment in an action for fraud, deceit, or misrepresentation entered against it by any court of competent jurisdiction;

(3) Has pending any material legal claim, lawsuit, or administrative proceeding arising out of or involving a cable system;

(4) Is financially solvent, by submitting financial data, including financial statements as required by FCC Form 394; and

(5) Has the legal, financial and technical capability to enable it to maintain and operate the Cable System for the remaining term of the Franchise.

(E) In reviewing a request for sale, transfer or change of control, the City may inquire into the legal, technical and financial qualifications of the prospective controlling party or transferee, and Grantee shall assist the City in so inquiring. The City may condition said sale, transfer or change of control upon such terms and conditions as it deems reasonably appropriate and as are consistent with federal law; provided, however, any such terms and conditions so attached shall be related to the legal, technical and financial qualifications of the prospective controlling party or transferee. Additionally, such Person shall effect changes as promptly as practicable in the operation of the Cable System, if any changes are necessary to cure any violations or defaults presently in effect or ongoing.

(F) The City shall act by ordinance or resolution on the request within one hundred twenty (120) days of the request, provided it has received all information required by law, such as a complete FCC Form 394. Subject to the foregoing, if the City fails to render a final decision on the request within one hundred twenty (120) days, such request shall be deemed granted unless the requesting party and the City agree to an extension of time.

(G) Within sixty (60) days of any transfer, sale or change of control, if approved or deemed granted by the City, Grantee shall file with the City a copy of the deed, agreement, lease or other written instrument evidencing such sale or transfer of ownership or control, certified and sworn to as correct by Grantee and the transferee or new controlling entity. In the case of a sale or transfer of ownership or change of control, the transferee or the new controlling entity shall file its written acceptance agreeing to be bound by all of the provisions of this Franchise, subject to applicable law. In the event of a change in control, in which the Grantee is not replaced by another entity, the Grantee will continue to be bound by all of the provisions of the Franchise and will not be required to file an additional written acceptance.

(H) Notwithstanding anything to the contrary in this Section, the prior approval of the City shall not be required for any sale, assignment or transfer of the Franchise or Cable System to an intra-company Affiliate; provided that the proposed assignee or transferee must show legal, technical and financial responsibility as may be determined necessary by the City and must agree in writing to comply with all of the provisions of the Franchise, subject to applicable law. Further, Grantee may pledge the assets of the Cable System for the purpose of financing without the consent of the City; provided that such pledge of assets shall not impair or mitigate Grantee's responsibilities and capabilities to meet all of its obligations under the provisions of this Franchise.

## **SECTION 16. MISCELLANEOUS PROVISIONS**

### **16.1 Local Employment Efforts**

Grantee shall use reasonable efforts to utilize qualified local contractors, including minority business enterprises and woman business enterprises, whenever the Grantee employs contractors to perform work under this Franchise.

### **16.2 Notices**

Throughout the term of this Franchise, each party shall maintain and file with the other a local address for the service of notices by mail. All notices shall be sent to such respective address, and such notices shall be effective upon the date of mailing. At the effective date of this Franchise:

Grantee's address shall be:

Comcast of California/Colorado/Washington I, Inc.  
P.O. Box 97007  
Redmond, WA 98073-9707  
Attention: Franchising Department

With a copy to:

Comcast of California/Colorado/Washington I, Inc.  
P.O. Box 3042  
Bothell, WA 98041-3042  
Attention: Franchising Department

City's address shall be:

City of Kirkland  
123 5th Avenue  
Kirkland, Washington 98033  
Attention: City Clerk

**16.3 Cumulative Rights**

Subject to applicable law, all rights and remedies given to the City by this Franchise or retained by the City herein shall be in addition to and cumulative with any and all other rights and remedies, existing or implied, now or hereafter available to the City, at law or in equity, and such rights and remedies shall not be exclusive, but each and every right and remedy specifically given by this Franchise or otherwise existing may be exercised from time to time and as often and in such order as may be deemed expedient by the City, and the exercise of one or more rights or remedies shall not be deemed a waiver of the right to exercise at the same time or thereafter any other right or remedy.

**16.4 Costs to be Borne by Grantee**

Grantee shall reimburse the City for all costs of publication of this Franchise, and any notices prior to any public hearing regarding this Franchise, within forty-five (45) days of receipt of a statement from the City stating the amount owed.

**16.5 Binding Effect**

This Franchise shall be binding upon the parties hereto, their permitted successors and assigns.

**16.6 Authority to Amend**

In addition to certain amendment provisions of subsection 3.9, this Franchise may also be amended at any time by mutual written agreement between the parties.

**16.7 Venue**

Venue for any dispute related to this Franchise shall be in King County Superior Court.

**16.8 Governing Laws**

This Franchise shall be governed, construed and enforced in accordance with the laws of the State of Washington (as amended), the Cable Act as amended, any applicable rules, regulations and orders of the FCC, and any other applicable local, State and federal laws, rules, regulations, legislation or orders (as such now exist, are later amended or subsequently adopted).

**16.9 Captions**

The captions and headings of this Franchise are for convenience and reference purposes only and shall not affect in any way the meaning or interpretation of any provision of this Franchise.

**16.10 No Joint Venture**

Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in any manner which would indicate any such relationship with the other.

**16.11 Waiver**

The failure of the City at any time to require performance by Grantee of any provision hereof shall in no way affect the right of the City hereafter to enforce the same, nor shall the waiver by the City of any breach of any provision hereof be taken or held to be a waiver of any succeeding breach of such provision, or as a waiver of the provision itself or any other provision.

**16.12 Severability**

If any Section, subsection, paragraph or provision of this Franchise is determined to be illegal, invalid or unconstitutional by any court or agency of competent jurisdiction, such determination shall have no effect on the validity of any other Section, subsection, paragraph or provision of this Franchise, all of which will remain in full force and effect for the term of the Franchise.

**16.13 Entire Agreement**

This Franchise and Exhibit represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersede all prior oral and written negotiations between the parties.

**16.14 Force Majeure**

In the event Grantee is prevented or delayed in the performance of any of its obligations under this Franchise by a reason beyond the control of Grantee, Grantee shall have a reasonable time, under the circumstances, to perform the affected obligation under this Franchise or to procure a substitute for such obligation which is satisfactory to the City. Those conditions which are not within the control of Grantee include, but are not limited to, natural disasters, civil disturbances, severe or unusual weather conditions which have a direct and substantial impact on the Grantee's ability to provide Cable Services in the City, work delays caused by waiting for utility providers to service or perform make-ready services on their utility poles or other facilities to which the Grantee's Cable System is attached, and Grantee's inability to obtain federal, State or railroad permits despite Grantee's best efforts to do so.

If Grantee believes that a reason beyond its control has prevented or delayed its compliance with the provisions of this Franchise, Grantee shall provide documentation as reasonably required by the City to substantiate the Grantee's claim. If Grantee has not yet cured the deficiency, Grantee shall also provide the City with its proposed plan for remediation, including the timing for such cure.

**16.15 Attorneys' Fees**

If any action or suit arises in connection with this Franchise, the prevailing or substantially prevailing party (either the City or Grantee, as the case may be) shall be entitled to recover all of its reasonable attorneys' fees, costs and expenses in connection therewith, in addition to such other relief as the court may deem proper.

**16.16 Actions of the City or Grantee**

In any action by the City or Grantee mandated or permitted under the terms hereof, it shall act in a reasonable, expeditious and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.

**16.17 Acceptance**

Within forty-five (45) days of receipt of the Franchise after its execution by the City, this Franchise shall be accepted by Grantee by filing with the City Clerk an unconditional, written acceptance of all of the terms, provisions and conditions of this Franchise. The failure of Grantee to file such an acceptance shall be deemed a rejection by Grantee, and this Franchise shall then be voidable at the discretion of the City.

IN WITNESS WHEREOF, this Franchise is signed in the name of the City of Kirkland, Washington, this \_\_\_ day of \_\_\_\_\_, 2006.

CITY OF KIRKLAND

By \_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney



Accepted and approved this \_\_\_ day of \_\_\_\_\_, 2006.

Comcast of California/Colorado/Washington I, Inc.

By \_\_\_\_\_  
Its \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Secretary

**EXHIBIT A**

**REMOTE PEG ORIENTATION SITES**

1. Peter Kirk Park, 202 Third Street
2. Marina Park, 25 Lakeshore Plaza Drive
3. Teen Union Building (Teen Center), 348 Kirkland Avenue
4. Kirkland Senior Center, 352 Kirkland Avenue
5. Kirkland Performance Center, 350 Kirkland Avenue
6. Juanita Beach Park, 2201 Market Street
7. McAuliffe Park, 10824 NE 116th Street
8. Heritage Hall, 111 Waverly Way

PUBLICATION SUMMARY  
OF ORDINANCE 4035


AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING COMCAST OF CALIFORNIA/COLORADO/WASHINGTON I, INC. A CABLE TELEVISION FRANCHISE

SECTION 1. Authorizes the City Manager to execute a Cable Television Franchise with Comcast of California/Colorado/Washington I, Inc., a copy of which is attached to the Ordinance and incorporated by reference as if fully set forth.

SECTION 2. Authorizes publication of the ordinance by summary, which summary is approved by the City Council pursuant to Section 1.08.017 Kirkland Municipal Code and establishes the effective date as five days after publication of summary.

The full text of this Ordinance will be mailed without charge to any person upon request made to the City Clerk for the City of Kirkland. The Ordinance was passed by the Kirkland City Council at its meeting on the 21st day of February, 2006.

I certify that the foregoing is a summary of Ordinance 4035 approved by the Kirkland City Council for summary publication.

  
\_\_\_\_\_  
City Clerk