

ORDINANCE NO. **185004 As Amended**

- \* Grant a temporary, revocable permit to Comcast of Oregon II, Inc. to operate a Cable System.  
(Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

1. The City of Portland, Oregon, (the "City"), and Comcast of Oregon II, Inc., ("Comcast"), have negotiated final agreement on the terms and conditions of a ten-year franchise for Comcast of Oregon II, Inc. to use the City streets to provide cable services. On October 24, 2011, the Mt. Hood Cable Regulatory Commission adopted Resolution 2011-03 recommending to the Council a renewal cable franchise with Comcast, with exhibits, side letter of agreement and accompanying documents.
2. The City will shortly begin considering approval of the proposed renewal cable franchise, following the formal Portland City Charter procedure of public notice and hearing. This process will begin with the publication of a notice of proposed franchise, together with the publication of the entire proposed agreement in the City's official newspaper. The process mandated by the Portland City Charter for adopting a proposed franchise may take up to four months or more, from the date of initial publication.
3. Comcast has asked the City, in writing, if the City could proceed with issuing a temporary, revocable permit allowing the company to provide cable services using the public right-of-way without interruption. Comcast's letter acknowledges that the parties have otherwise reached final agreement on franchise terms and conditions. Comcast's letter further acknowledges that its rights under a revocable permit would end upon the permit's expiration, if not otherwise superseded by the proposed franchise. A copy of Comcast's letter is attached to this Ordinance as Exhibit A, and is hereby incorporated by reference.
4. The temporary, revocable permit to be issued under this Ordinance is substantially similar to the substantive terms and conditions set forth in the proposed franchise agreement to be entered into between the City and Comcast.
5. The parties have negotiated side letters addressing details of performing various franchise obligations. The Council should authorize the Commissioner-in-Charge of the Office for Community Technology to sign these letters on behalf of the City of Portland.

**Section 1. NATURE AND TERM OF GRANT**

1.1 Issuance of Temporary, Revocable Permit. Grant of Permit. The City of Portland (City), does hereby grant to Comcast of Oregon II, Inc., ("Comcast"), a corporation qualified to do business in the State of Oregon and to its successors and assigns, as approved by the City under Section 16 of this Permit, a temporary, revocable permit to construct, operate and maintain a cable system, with all necessary Facilities, in, under, and over the surface of the City's Streets.

1.2 This Permit is issued to Comcast subject to the terms and conditions set forth in this Permit. Throughout this Permit, the City of Portland, Oregon, shall be referred to as the "City", and Comcast shall be referred to as the "Permittee".

1.3 Duration of Permit. The term of this Permit, and all rights and obligations pertaining thereto, shall be effective for either: (1) a period of only one year, as measured from its effective date; or, (2) until the City grants a franchise to the Permittee and the franchise becomes effective, whichever event occurs sooner. The effective date of this Permit shall be upon passage of this ordinance by the City Council, unless the Permittee fails to file an unconditional written acceptance of this Permit in accordance with Section 21 of this Permit, in which event this Permit shall thereupon be null and void. The passage date of this Permit is set forth on the last page of the original ordinance, as stamped by the Council Clerk.

1.4 This Permit is temporary and revocable, and no expenditure of money, lapse of time, act, event, or other occurrence shall give the Permittee any rights, vested or otherwise, to occupy or use the City's streets, or shall operate as an estoppel against, or a waiver by, the City. Upon expiration to the term of this Permit, or its revocation by the City Council, the Permittee shall remove its Cable System and other facilities from the City Streets, or waive its rights to such Cable System and other facilities. Any such removal shall be directed by, and to the satisfaction of, the City Engineer.

1.5 Permit Not Exclusive; Competitive Parity.

(A) This Permit is not exclusive. The City expressly reserves the right, and may be required by federal law, to grant rights or franchises to other Persons, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Permittee hereunder, by franchise, permit or otherwise.

(B) Authorization of Cable franchises.

(1) If, after the effective date of this Permit, the City grants any additional authority for cable services to use the Streets pursuant to Section 1.5(A), and there are material differences with Permittee's obligations under this Permit relating to PEG Access Channels, PEG/I-Net Capital support, franchise fees, customer service standards and reports, reports and records contained in Section 13, and the provision of duct under Section 15.8, the parties agree that the corresponding obligations in this Permit will be modified to substantially reflect the franchise obligations under the competitive cable franchise of the newly awarded franchised cable operator. The modification process shall only be initiated by written notice by the Permittee to the City regarding specified franchise obligations. Permittee's notice shall address the following: (a) identifying the specific terms or conditions in the competitive cable services franchise which are materially different from Permittee's obligations under this Permit; (b) identifying the Permit terms and conditions for which Permittee is seeking amendments; (c) providing text for any proposed Permit amendments to the City, with a written explanation of why the proposed amendments are necessary and consistent. Permittee agrees to also address all relevant factors, evidence and circumstances in its written notice. The parties agree that this provision shall not require identical word for word provisions so long as the regulatory and financial burdens on each entity are materially equivalent. The parties agree that they will attempt in good faith to negotiate the form of these modifications. If the parties fail to reach agreement in informal negotiations, either party may initiate mediation in accordance with Section 20.3 or by arbitration in accordance with Section 20.2.

(2) Term Reduction. In the alternative to franchise modification as provided under Section 1.5(B)(1), in the event of a competitive entry as provided in Section 1.5(B)(1), Permittee may elect at any time prior to the commencement of the Permittee's thirty-six (36) month renewal window provided by 47 USC §546 to file a written notice indicating an election to shorten the term of this Permit, and thereafter the term of Permittee's Permit shall, ninety (90) days from the Permittee's written notice, be shortened so that the Permit shall be deemed to expire on a date thirty six (36) months from the first day

of the month following the date of Permittee's notice. Permittee shall immediately thereafter secure franchise renewal rights pursuant to 47 USC §546 with no further notice to the City required. The City and Permittee shall then enter into proceedings consistent with § 546 for renewal of this Permit. The City and Permittee shall have all rights and obligations provided under said § 546.

(3) Solely for the purposes of Section 1.5(B), "Cable Services" shall mean the one-way transmission of video programming, or other programming service for commercial purposes, including any subscriber interaction necessary for the selection or use of such programming.

(C) (1) Nothing in Section 1.5(B) shall be construed as limiting, restricting or preventing the City from issuing any franchise, permit, license or other form of agreement for all of Permittee's Permit Area or any portion thereof, that provides for equal or greater requirements or for a similar or higher level of Cable Services to Residential Subscribers, than that required of Permittee under this Permit.

(2) Permittee agrees and acknowledges that, solely for the purposes of Section 1.5(B), the provisions of any other franchise issued or administered by the City with respect to the provision of Cable Services and in effect as of the effective date of this Permit, are reasonably non-discriminatory and competitively neutral.

1.6 Charter and General Ordinances to Apply. To the extent authorized by law, this Permit is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of the Permittee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland, (1942 compilation, as revised in part by subsequent amendments), are hereby incorporated by reference and made a part of this Permit, to the extent authorized by law. Nothing in this Permit shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

## **Section 2. INTERGOVERNMENTAL AGREEMENT/ CABLE REGULATORY COMMISSION**

2.1 Intergovernmental Agreement. The City has provided for regulation of this Permit through a cable regulatory commission ("Commission") created through an Intergovernmental Agreement (attached as Exhibit B). The City has agreed to be bound by the decisions and actions taken by the Commission pursuant to powers, duties, and responsibilities delegated to the Commission under the Intergovernmental Agreement. Unless specifically stated otherwise in this Permit, the Commission shall be the representative and agent of the City in dealing with Permittee under the terms of this Permit. In fulfilling the terms of this Permit, Permittee is expected to rely upon, look to, communicate with, and comply with the decisions and orders of the Commission, its agents, and employees on all cable matters with respect to which the City has lawfully delegated the exercise of the City's authority under this Permit. Nothing in this Permit is intended to empower the Commission to act contrary to the provisions of the Intergovernmental Agreement. The City retains all powers not expressly delegated to the Commission.

## **Section 3. DEFINITIONS**

3.1 (A) Captions. Throughout this Permit, captions to Sections are intended solely to facilitate reading and to reference the Sections and provisions of this Permit. The captions shall not affect the meaning and interpretation of this Permit.

(B) Definitions. For the purpose of this Permit, and all Exhibits attached hereto, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

3.2 "Access" means the availability for use of the Cable System in accordance with the Permit by various agencies, institutions, organizations, groups and individuals in the community to acquire, create, and distribute Programming not intended to generate income which may be subject to federal, state, or local income taxes and not under the Permittee's editorial control, including, but not limited to:

(A) "Public Access" means Access where organizations, groups or individual members of the general public, on a nondiscriminatory basis, are the primary or designated Programmers or users having editorial control over their Programming;

(B) "Educational Access" means Access where educational institutions are the primary or designated Programmers or users having editorial control over their Programming;

(C) "Government Access" means Access where governmental institutions are the primary or designated Programmers or users having editorial control over their Programming; and

(D) "PEG Access" means Public Access, Educational Access, and Government Access, collectively.

3.3 "Access Channel" means any Channel designated for Access purposes or otherwise made available to facilitate or transmit PEG Access Programming.

3.4 "Access Resources" means the Channels, services, facilities, equipment, technical components and/or financial support provided under this Permit, which is used or useable by and for PEG Access.

3.5 "Activation" or "Activated" means the status of any Capacity or part of the Cable System in which any Residential Service, Institutional Service or Access Resource requiring the use of that Capacity or part is made available, in accordance with the Permit, without further installation, adjustment, modification or testing of Cable System equipment.

3.6 "Affiliated Entity" means any entity having ownership or control in common with the Permittee, in whole or in part, including, without limitation, Permittee's Parent Corporations and any subsidiaries or affiliates of such Parent Corporations.

3.7 "Annual" or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Permit.

3.8 "Basic Service" is the level of Programming service which includes, at a minimum, all Broadcast Channels, all PEG Access Channels required in this Permit, and any additional Programming added by the Permittee, and is made available to all Cable Services Subscribers in the Permit Area.

3.9 "Broadcast Channels" means local commercial television stations, qualified low power stations and qualified local noncommercial educational television stations, as referenced under 47 USC § 534 and 535.

3.10 "Cable Regulatory Commission" means the Mt. Hood Cable Regulatory Commission, or its successor agency as designated by ordinance of the City Council.

3.11 "Cable Services" shall have the meaning provided under Federal law and regulations.

3.12 "Cable System" shall have the meaning provided under Federal law and regulations.

3.13 "Capacity" means the capability of the Cable System to carry Signals within a given format (e.g. at the time of the effective date of this Permit, RF Capacity may be described in terms of portions of the total radio frequency bandwidth by specifying a number of MHz).

3.14 "Capital" or "Capital Costs" means the expenditure of funds for services, products or other resources, whose useful life can be expected to exceed a period of one year or longer.

3.15 "Channel" means a time or frequency slot or technical equivalent on the Cable System, discretely identified and capable of carrying full motion color video and audio, and may include other non-video subcarriers and digital information.

3.16 "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

3.17 "City Council" means the Council of the City of Portland.

3.18 "Designated Access Provider" means the entity or entities designated by the City under Section 5.1.

3.19 "Downstream" means the direction of Signals from the Headend to Subscribers or Interconnect points served by the Cable System.

3.20 "Dwelling Unit" means any building, or portion thereof, that has independent living facilities, including provisions for cooking, sanitation and sleeping, and that is lawfully occupied for residential purposes. Buildings with more than one set of facilities for cooking shall be considered multiple dwelling units unless the additional facilities are clearly accessory.

3.21 "Expanded Basic Service Tier" is the most commonly-subscribed to tier of service and does not include the Basic Service Tier or pay per-view or pay-per-program services.

3.22 "Facility" means any tangible component of the Cable System.

3.23 "FCC" means the Federal Communications Commission.

3.24 "Fiber" means a transmission medium of optical fiber cable capable of carrying Signals by means of lightwave impulses.

3.25 "Permit" means this Permit, as fully executed by the City Council and the Permittee.

3.26 "Permit Area" means the territory within the boundaries of the City of Portland.

3.27 "Gross Revenues" means all amounts, in whatever form and from all sources, derived from the operation of Permittee's Cable System to provide Cable Services within the City, by the Permittee or by

any Affiliated Entity only to the extent such amounts are earned from the operation of Permittee's Cable System within the City. "Gross Revenues" shall include, without limitation, amounts for the Basic Service Tier, any other programming service tiers, Pay Services, audio services, Subscriber installations and transactions, Leased Access, advertising, equipment rentals and all other revenues derived from the operation of Permittee's Cable System to provide Cable Services within the City. Permittee shall report Gross Revenues to the City using the accrual method of accounting, consistent with Generally Accepted Accounting Principles ("GAAP"). Nothing in this Section shall impair the City's ability to challenge Permittee's interpretation of GAAP. Revenues which are not directly attributable to specific customers, such as advertising revenue and home shopping commissions, shall be allocated to systems and jurisdictions on a per subscriber basis measured in a consistent manner from period to period. "Gross Revenues" shall also include amounts earned during any period regardless of whether: (1) the amounts are paid in cash, in trade or by means of some other benefit to the Permittee or any Affiliated Entity; (2) the goods or services with which the revenue is associated are provided at cost or the revenue amount can be matched against an equivalent expenditure; and (3) the amounts are initially recorded by the Permittee or an Affiliated Entity. "Gross Revenues" shall not be net of (1) any operating expense; (2) any accrual, including, without limitation, any accrual for commissions; or (3) any other expenditure, regardless of whether such expense, accrual or expenditure reflects a cash payment. "Gross Revenues", however, shall not be double counted. Revenues of both Permittee and an Affiliated Entity that represent a transfer of funds between the Permittee and the Affiliated Entity, and that would otherwise constitute Gross Revenues of both the Permittee and the Affiliated Entity, shall be counted only once for purposes of determining Gross Revenues. Similarly, operating expenses of the Permittee which are payable from Permittee's revenue to an Affiliated Entity and which may otherwise constitute revenue of the Affiliated Entity, shall not constitute additional Gross Revenues for purposes of this Permit. "Gross Revenues" shall include amounts earned by Affiliated Entities only to the extent that Permittee could, in concept, have earned such types of revenue in connection with the operation of Permittee's Cable System and recorded such types of revenue in its books and Records directly but for the existence of Affiliated Entities. "Gross Revenues" shall not include sales or other similar taxes imposed by law on Subscribers which the Permittee is not obligated to collect, nor amounts received from I-Net Institutions for use of the Institutional Network.

3.28 "Hazardous Substances" has the meaning given by ORS 465.200(16) (2009)

3.29 "Headend" means Permittee's Facility for reception and dissemination of Signals on the Cable System, including cable, antennas, wires, satellite dishes, monitors, switchers, modulators, processors, equipment for the Interconnection of the Cable System with adjacent cable systems or other separate communications network, and all other related equipment and Facilities.

3.30 "Incremental" costs means the amount actually expended by Permittee in meeting an obligation under this Permit which Permittee would not otherwise have expended in order to operate and conduct the business of its Cable System or to meet another obligation of this Permit.

3.31 "Interconnect" or "Interconnection" means the provision by Permittee of technical, engineering, physical, financial, and all other necessary components to provide and adequately maintain a physical linking of Permittee's Cable System with any other designated cable system or any separate communications network so that services of technically adequate quality may be sent to and received from such other systems to the extent required by this Franchise.

3.32 "Institutional Network" or "I-Net" means Capacity on the Cable System facilities used to provide one-way and bi-directional communication services to and among I-Net Subscribers pursuant to 47 USC § 531 and § 541. The facilities include all equipment on Permittee's side of the demarcation

point at the I-Net Site's termination panel required to make the Capacity available including but not limited to Fiber, coaxial cable, switching, patching, electronic transmitting, receiving, and Signal conversion necessary for effective use of the I-Net.

3.33 "I-Net Institution" means any public primary and secondary school and community colleges, which have received the appropriate accreditation from the State of Oregon; public libraries; Designated Access Providers; and any agency of local government, excluding state or federal governments, except that the Oregon Judicial Department and Oregon Department of Justice shall be included as I-Net Institutions.

3.34 "I-Net Services" means one-way and bi-directional communications services provided over the Institutional Network to and among I-Net Institutions.

3.35 "I-Net Site" means a site within the Permit Area identified by the City to receive I-Net Services over the Institutional Network in accordance with this Permit.

3.36 "I-Net Subscriber" means an I-Net Institution receiving I-Net Services.

3.37 "Parent Corporation" means Comcast Communications, Inc. and includes any other existing or future corporations with greater than fifty percent ownership or control over Permittee.

3.38 "Pay Service" means video Signals delivered to Subscribers on a per program, per Channel, or other separate subscription basis for a fee or charge over and above the regular charges for other Permittee tiers of service.

3.39 "Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.

3.40 "Programmer" means any Person responsible for Programming on the Cable System, including, without limitation, any Person who produces or otherwise provides Programming for transmission on the Cable System.

3.41 "Programming" means television programs, audio, video or other patterns of Signals to be transmitted on the Cable System, and includes all programs or patterns of Signals transmitted, or capable of being transmitted, on the Cable System.

3.42 "Record" means written or graphic materials, however produced or reproduced, or any other tangible permanent record, including, without limitation, all letters, correspondence, memoranda, minutes, notes, summaries or accounts of telephone conversations, summaries or accounts of personal conversations or interviews, reports, notebooks, sketches, summaries or accounts of meetings or conferences, opinions or reports of consultants or experts, invoices, billings, statements of accounts, studies, appraisals, analyses, contracts, agreements, charts, graphs, photographs and any other writings or recordings of every kind and description, including magnetic media, and all sound recordings, to the extent related to the enforcement or administration of this Permit.

3.43 "Residential Network" means the Cable System designed principally for the delivery of Cable Service to individual Dwelling Units.

3.44 "Residential Subscriber" means any Subscriber receiving Cable Services delivered to single or multiple Dwelling Units.

3.45 "Section" means a provision of this Permit, unless specified as part of another document.

3.46 "Signal" means any analog or digital electrical or light impulses carried on the Cable System, whether one-way or bi-directional.

3.47 "Streets" means the surface of any public street, road, alley or highway, within the City, used or intended to be used by the general public for general transportation purposes to the extent the City has the right to allow the Permittee to use them, and the space above and below.

3.48 "Subscriber" means any Person who is lawfully receiving, for any purpose or reason, any Cable Services provided by Permittee by means of or in connection with the Cable System, whether or not a fee is paid for such service.

3.49 "Upstream" means the direction of Signals transmitted to the Headend from remote points on the Cable System or from Interconnection points on the Cable System.

#### **Section 4. FRANCHISE AREA**

4.1 Cable Services. Subject to the provisions of this Permit, Permittee shall provide Cable Services and I-Net Services authorized by this Permit and applicable law within the Permit Area.

#### **Section 5. PEG ACCESS**

##### **5.1 Designated PEG Access Providers.**

(A) The City may designate up to six (6) PEG Access providers, including itself for Government Access purposes, to control and manage the use of any or all Access Resources provided by Permittee under this Permit. To the extent of such designation by the City, the Designated Access Provider shall have sole and exclusive responsibility for operating and managing such Access Resources.

(B) Permittee shall cooperate with Designated Access Providers in the use of the Cable System and Access Resources. Permittee shall enter into operating agreements as may be necessary to facilitate and coordinate the provision of PEG Access, provided that all such operating agreements shall not be inconsistent with the terms of this Permit.

##### **5.2 Access Channel Capacity on the Residential Network.**

(A) Access Channels Universally Available. All Access Channels required by this Permit shall be included by Permittee in Basic Service, and in accordance with Sections 5.2(C) through (F), and be fully available and accessible to every Cable Services Subscriber.

(B) Access Channel Origination Points. The City may designate up to six (6) points of origination for Access Channels located within the Cable Services Permit Area. Permittee shall provide the technical capability to transmit Signals for Access Channels from the designated origination points in place on the effective date of this Permit to Permittee's Headend for distribution on the Residential Network.



(C) Simulcast Analog and Digital Channels. Prior to digital transition under Section 5.2(D), Permittee shall provide not less than eight (8) Activated Downstream Channels, for PEG Access use, in Permittee's Basic Service. Permittee shall simultaneously carry each Access Channel under this Section in both analog and digital format Basic Service, for a total of 16 Activated Downstream Channels, until Permittee no longer offers analog format Basic Service. Permittee shall carry all components of the standard definition Access Channel Signals provided by the Designated Access Provider including, but not limited to, closed captioning, stereo audio and other elements associated with the Programming.

(D) Digital Channels After Digital Transition. At such time Permittee no longer offers Basic Service in an analog format, Permittee shall continue to provide not less than eight (8) Activated Downstream Channels for PEG Access use in a standard digital format in Permittee's Basic Service. Permittee shall carry all components of the standard definition Access Channel Signals provided by the Designated Access Provider including, but not limited to, closed captioning, stereo audio and other elements associated with the Programming. The Designated Access Provider shall be responsible for providing the Access Channel Signal in a standard definition format to the demarcation point at the designated point of origination for the Access Channel. Permittee shall transport and distribute the Access Channel Signal on its Cable System and shall not discriminate against PEG Access Channels with respect to the functionality, signal quality, and features from those of the local Broadcast digital format Channels carried on the Cable System. With respect to signal quality, Permittee shall not be required to carry a PEG Access Channel in a higher quality format than that of the Channel Signal delivered to Permittee, but Permittee shall distribute the Access Channel Signal without degradation. Upon reasonable written request by a Designated Access Provider, Permittee shall verify Signal delivery to Subscribers with the Designated Access Provider, consistent with the requirements of this Section 5.2(D).

(E) HD Channel Signal Option. After July 1, 2012, and with at least 120 day written notice to Permittee, a Designated Access Provider may provide Access Channel Signals in only HD format to the demarcation point at the designated point of origination for the Access Channel, and as such the Designated Access Provider will no longer provide the Access Channel Signals in a standard definition digital format. Permittee shall provide all necessary transmission equipment from the Designated Access Provider Channel origination point, at its Headend and throughout its distribution system, in order to deliver the Access Channels in accordance with Sections 5.2(C), (D), (F) and (G). Upon reasonable written request by Designated Access Provider, Permittee shall verify Signal delivery to Subscribers with the Designated Access Provider, consistent with the requirements of Section 5.2(E). Solely for purposes of this Section 5.2(E), Access Channel Signals delivered in HD to Permittee shall not require Permittee to deliver such HD signals to Subscribers.

(F) HD Channels Upon Digital Transition. At such time Permittee no longer offers Basic Service in an analog format, Permittee shall simultaneously carry two (2) of the existing Access Channels in high definition (HD) format Channels on the Downstream Residential Network for PEG Access use, in addition to simultaneously carrying the standard digital Access Channels provided under Section 5.2(D). Permittee shall carry all components of the HD format Access Channel Signals provided by the Designated Access Provider including, but not limited to, closed captioning, stereo audio and other elements associated with the Programming. The Designated Access Provider shall be responsible for providing the Access Channel Signal in an HD format to the demarcation point at the designated point of origination for the Access Channel. Permittee shall transport and distribute the Access Programming without degradation. Consistent with this requirement, Permittee shall provide all necessary equipment outside the demarcation point at the Designated Access Provider Channel origination point, at its Headend and throughout its distribution system to deliver the Access Channel(s)

in the HD format to Subscribers. Permittee shall not discriminate against PEG Access Channels with respect to the functionality, signal quality, and features from those of the local Broadcast HD Channels carried on the Cable System. With respect to signal quality, Permittee shall not be required to carry a PEG Access Channel in a higher quality format than that of the Channel Signal delivered to Permittee, but Permittee shall distribute the Access Channel Signal without degradation. Permittee shall verify Signal delivery to Subscribers with the Designated Access Provider, consistent with the requirements of this Section 5.2(F), in a manner and on a timetable as to ensure that the HD format Access Channels are included in Permittee's program services offered to Subscribers at the time that analog format Basic Service is no longer available to Subscribers.

(G) Additional HD Access Channels.

- (1) Permittee shall provide and Activate up to two (2) more of the existing Access Channels in HD format Access Channels, for a total of four (4) HD format Access Channels subject to the conditions in Section 5.2(G)(4), 12 months after Permittee transitions to digital-only format.
- (2) Permittee shall provide and Activate up to two (2) more of the existing Access Channels in HD format Access Channels, for a total of six (6) HD format Access Channels, subject to the conditions in Section 5.2(G)(4), 24 months after Permittee transitions to digital-only format.
- (3) Permittee shall provide and Activate up to two (2) more of the existing Access Channels in HD format Access Channels, for a total of eight (8) HD format Access Channels, subject to the conditions in Section 5.2(G)(4), 36 months after Permittee transitions to digital-only format.
- (4) Activation of HD format Access Channels under Section 5.2(G) shall occur under the following conditions:

(a) The City shall notify Permittee in writing of its need to Activate the HD format Access Channels under this Section 5.2(G) and shall provide notice to Permittee that the following criteria have been met:

- (1) At least 80% (eighty percent) of the Access Programming carried on the SD format Channel, which the City has identified as the Channel to be carried in an HD format Channel, has been produced in an HD format for any three-month time period prior to the notice provided under this Section; and
- (2) Not more than 50% (fifty percent) of the Access Programming carried on the SD format Channel, which the City has identified as the Channel to be carried in an HD format Channel, is character-generated only Programming for any three-month time period prior to the notice provided under this Section.

(b) The HD format Access Channels provided under Section 5.2(G) are in addition to the SD format of those Access Channels provided for in Section 5.2(D).

(c) Permittee shall have no more than 120 days from the date of the written notice under Section 5.2(G)(4)(a) to fully Activate the Access Channels from the Designated Access Provider to Subscribers in the HD format. Permittee shall verify HD Channel Signal delivery to Subscribers with the Designated Access Provider, consistent with the requirements of Section 5.2(F).

(d) The City acknowledges that receipt of HD format Access Channels may require Subscribers to buy or lease special equipment, or pay additional HD charges applicable to all HD services.

(H) Audio. Access Channels shall include stereo audio or other forms of audio carried within the Access Channel. For example, any PEG Access Programming provided to Permittee with SAP (Second Audio Program) shall be provided to Subscribers with the SAP feed intact. For digital Access Channels, any PEG Access Programming provided to Permittee with SAP or MAP (Multiple Audio Program) shall be provided to Subscribers with the SAP or MAP feeds intact, except to the extent Federal, State or Local law or regulation prescribes otherwise.

(I) PEG Access Capacity not Offset. The PEG Access Capacity set forth in Section 5 does not include, nor is it to be offset against, I-Net Capacity as set forth in Section 6.

(J) Advances in Channel Technology. If Permittee incorporates new or emerging improvements (such as 3D display) in Channel delivery or display on Permittee Channels made available to Residential Subscribers, the City or a Designated Access Provider may submit a written request to meet with the Permittee. Without further obligation, following receipt of such request, Permittee will participate in discussions of these improvements or enhancements with the City and the Designated Access Providers. These discussions shall address potential options for improvements and enhancements on the delivery of PEG Channels to subscribers in comparable format, including possible technical means and costs of incorporating such improvements or enhancements for the PEG Channels.

### 5.3 Access Channel Assignments.

(A) Permittee shall provide Channel assignments for PEG Access and narrowcast such Access Channels to the specific geographic areas as follows:

- |                                     |   |
|-------------------------------------|---|
| (1) Channel 11 - public access      | (Permit Area)   |
| (2) Channel 21 - public access      | (Permit Area)   |
| (3) Channel 22 - public access      | (Permit Area)   |
| (4) Channel 23 - public access      | (Permit Area)   |
| (5) Channel 30 - government access  | (Permit Area)   |
| (6) Channel 27 - educational access | (Portland Community College service area and Mt. Hood Community College service area discretely)                  |
| (7) Channel 28 - educational access | (Portland Public Schools service area and other public schools' service areas within Multnomah County discretely) |
| (8) Channel 29 - public access      | (Permit Area)   |

(B) PEG Access Channel assignments, as provided under Section 5.3(A), may be adjusted or altered only with the specific written approval, in advance, by the City. Access Channel types, (i.e.

Public, Educational, Government), as provided under this Section, may be adjusted by Designated Access Providers upon approval by the City.

(C) If Permittee no longer offers Basic Service in an analog format and Permittee provides Access Channels in a digital only format in accordance with Section 5.2(D), Permittee may reassign Access Channels under Section 5.2(D) at its discretion, subject to the following: Permittee shall place the Access Channels within reasonable proximity to each other and to local Broadcast Channels in the Cable System's channel lineup. If this is not feasible, as demonstrated by Permittee to the satisfaction of the City, Permittee shall work with the City to determine placement of Access Channels that is equitable to channel assignment obligations in this Section 5.3(C). The City shall consider the evolving interactive guides and navigation features available on a Subscriber's set-top unit that may make channel number assignments and placement less important in the future, as viewers may find Access Programming through a search function.

(D) When HD format Access Channels are activated in accordance with Section 5.2(E) & (F), Permittee shall place the HD format Access Channels within the channel block for the HD format Channels in reasonable proximity to each other and to the local Broadcast HD Channels. If this is not feasible, as demonstrated by Permittee to the satisfaction of the City, Permittee shall work with the City to determine placement of Access Channels that is equitable to channel assignment obligations in this Section 5.3(D). The City shall consider the evolving interactive guides and navigation features available on a Subscriber's set-top unit that may make channel number assignments and placement less important in the future, as viewers may find Access Programming through a search function.

(E) If at any time during the duration of this Permit, Permittee reassigns Access Channel numbers, Permittee shall provide at least 60 days advance notice to the City and the Designated Access Providers. Permittee shall ensure that Subscribers are notified of such reassignment in accordance with the notice requirements under Section 10. Permittee shall also use its customer messaging function of its set-top unit to provide customers the new channel assignments at least 30 days prior to the change and for at least 30 days after the change. In conjunction with any reassignment of any Access Channels, Permittee shall provide a minimum of \$5,000 compensation to a Designated Access Provider for costs associated with the change, or, alternatively at Permittee's sole discretion, \$9,000 of in-kind airtime on advertiser supported Channels (e.g. USA, TNT, TBS, Discovery, or other comparable Channel) for the purpose of airing a 30-second public service announcement produced by a Designated Access Provider. The City shall coordinate with the Designated Access Provider and Permittee for such airing. All compensation, whether in cash or in-kind, shall be paid on a per-event basis, regardless of the number of channels affected by the change.

#### 5.4 Access Interconnections.

(A) Permittee shall continue and maintain all Interconnections of Access Channels in effect on the effective date of this Permit, and as otherwise provided in this Permit, unless otherwise authorized or modified by the City. Permittee shall provide Activated Interconnection of the Headend to Designated Access Providers for shared PEG Access Programming on Access Channels. The Interconnections shall provide the bi-directional capability to transmit PEG Access Programming among Designated Access Providers and other PEG Access Programming carried by contiguous cable systems in Washington County and Clackamas County, Oregon, and Clark County, Washington. Permittee shall provide Activated Capacity sufficient to enable Signal transmission to and from all Interconnection points on the Cable System.

(B) Upon request by the City, and based on a demonstrated need, Permittee shall work in good faith with the City to interconnect with other cable operators at a designated meet point and not at Permittee's headend or hubs in order to hand off PEG Access Channel Signals for the purposes of sharing PEG Programming throughout the Permit Area. Such interconnection shall preserve the technical quality of the PEG Access Channels without degradation to Permittee's demarcation at the designated meet point of the Interconnect. The City shall not require such interconnection without the prior consent of Permittee, which shall not be unreasonably withheld. Permittee shall not be obligated to interconnect with any cable system providing competitive Cable Services within the Permit Area, except that Permittee shall use reasonable efforts to agree with a competitive Cable Services provider on reasonable terms, conditions and costs of a viable interconnection of the PEG Access Channel Signals. Any Incremental, direct Capital costs incurred by Permittee to interconnect shall be paid by the City from the PEG/I-Net Fee.

(C) The City shall designate the Access provider with the right to control and schedule the operation of all Interconnects of Access Channels with other systems.

(D) Permittee shall take all necessary technical steps to ensure that technically acceptable signal quality and routing systems are continuously provided for all Access Interconnections. Signal quality and routing systems acceptability will be based on meeting applicable IEEE, NAB, FCC or other industry standards.

#### 5.5 Live Programming Origination Capabilities.

(A) Permittee shall provide, at a minimum, the transmission capability for Designated Access Providers to originate discrete, live Programming from:

- (1) Designated Access Providers,
- (2) Any location on the I-Net;
- (3) Existing, hardwired live origination sites, as listed in Exhibit C to this Permit;
- (4) New live origination sites, as constructed under Section 5.5(B); and,
- (4) Any available Programming origination points on any cable system with which the PEG Access Channels are Interconnected, provided other cable operators permit.

(B) The City may designate new live origination sites, in addition to those listed in Exhibit C. Permittee shall construct and the City shall fund Capital costs of new live origination sites in accordance with the procedures under Section 6.4(D)(2).

(C) The Cable System shall provide functional ability to transmit digital Programming Upstream from each location and return the Programming on Downstream Channels and on all Access Channel Interconnects. Such transmission capability shall be at a minimum, digital, optical, transport capable of transporting the Designated Access Provider's Programming in the format specified by the Designated Access Provider without degradation from at least eight locations simultaneously. The transmission equipment utilized to provide the live origination capability shall be chosen in consultation with the Designated Access Provider. Permittee shall install, test and verify proper Activation with the Designated Access Provider no later than 30 days after the date of a written request to the Permittee concerning live origination from a new location or using a new digital format, and no later than 15 days

for live origination using an existing format and from an existing location. Such testing shall, at a minimum, include transmission of color bars, video and audio meeting all required technical quality standards, as documented by Permittee with the Designated Access Provider before the site is considered Activated.

(D) Additionally, all hardwired live origination sites, including the sites in Exhibit C and those added by Permittee following the Permit effective date, upon written request of City, shall be tested for all applicable standards and Activation status. Test results shall be documented and reviewed with the City and Designated Access Providers. Where test results indicate, as determined by the City or a Designated Access Provider, that a live origination site does not meet applicable standards, corrective action shall be implemented by the Permittee with continuous efforts made until all problems have been corrected and the site meets applicable standards.

5.6 Charges. All of the Channels, Cable System Capacity, Access Resources and other elements needed for Permittee to provide PEG Access as required under this Section 5 shall be provided without charge to the City or to any Designated Access Provider, except as specifically provided for in Section 5.

5.7 Change in Technology. In the event Permittee makes any change in the Cable System and related equipment and Access Resources or in Permittee's Access Channel Signal delivery technology, which directly or indirectly substantially affect the Signal quality or transmission of Access Programming, Permittee shall at its own expense take necessary technical steps or provide necessary technical assistance, including the acquisition of all necessary equipment, to ensure that the capabilities of Designated Access Providers or Access Programmers are not diminished or adversely affected by such change. In no case, shall the Signal quality or transmission of Access Programming diminish compared to the quality being achieved prior to the change in technology, provided that this requirement shall not prohibit Permittee from implementing new technologies also utilized for commercial channels carried on its Cable System. Technical quality shall continue to meet all applicable standards contained in Section 5.

5.8 Change in Designated Access Provider Location. Permittee shall provide all obligations in Section 5 to the Designated Access Provider locations in place on the effective date of this Permit. If the City designates new Access providers under Section 5.2(B), or if a current Designated Access Provider moves its site or location at its own instigation after the effective date of this Permit, the Designated Access Provider and/or the City will fund the Incremental, direct costs to construct the Cable System from the new site or location to the nearest Activated I-Net Fiber node, or fiber provisioned I-Net node site, or distribution hub.

#### 5.9 Technical Quality.

(A) Permittee shall maintain all Access Channels and Interconnections of Access Channels at the same level of technical quality and reliability required by this Permit and all other applicable laws, rules and regulations for Residential Subscriber Channels. Permittee shall not discriminate against PEG Access Channels with respect to the functionality, signal quality, and features from those of the local Broadcast Channels that Permittee carries. Access Channels and Interconnections shall be tested semi-annually, consistent with Permittee's FCC Proof-of-Performance testing, at representative points throughout the Cable System for compliance with all applicable standards. Documentation of such tests shall be provided to the City and the Designated Access Providers. Permittee shall promptly resolve any non-compliance issues.

(B) Permittee shall respond promptly, but no later than 24 hours, to resolve technical quality problems after notification by a Designated Access Provider.

(C) Permittee shall have no responsibility for the technical quality of the Access Programming distributed on the Access Channels.

(D) Use of the Cable System by Designated Access Providers shall not interfere with the technical quality or reliability of the Cable System.

5.10 Recognition of Permittee for PEG Contributions. The City shall work with the Permittee and the Designated Access Providers to ensure that the contributions of the Permittee relating to Access Resources under this Permit are appropriately acknowledged.

## **Section 6. INSTITUTIONAL NETWORK**

6.1 "Fiber Optic". For purposes of Section 6, "Fiber Optic" means a transmission medium of optical fiber cable, along with all associated electronics and equipment capable of carrying Signals by means of electric lightwave impulses.

6.2 "Transport Hub". For purposes of Section 6, "Transport Hub" means an intermediate location in the Cable System between the Headend and the Fiber nodes, where Signals are routed to the individual Fiber nodes of the system.

6.3 Existing Institutional Network. The Parties acknowledge that, as of the effective date of this Permit, the Institutional Network is operating and utilizing Fiber Optic technology. Permittee shall continue to own, operate and maintain its I-Net as constructed and Activated, for I-Net Institution use, in accordance with the Permit. Permittee's existing Institutional Network assets, as of the effective date of this Permit, including but not limited to, Fiber, electronics, and other resources, are included in Exhibit D. Specific provisions related to fees, performance and operations of the I-Net and I-Net Services are set forth in a separate agreement between Permittee and the City.

### **6.4 I-Net Upgrades and Expansion.**

(A) Permittee and the City shall cooperate in upgrading or expanding the existing I-Net, in accordance with this Permit, to meet demonstrated I-Net Institution needs for use of the I-Net. Any such I-Net upgrades or expansions shall be made available for I-Net Institutions use in accordance with this Permit. It is the intention of the City that the Incremental, direct Capital Costs related to upgrading, expanding or replacing the I-Net be reimbursed from the PEG/I-Net Fee set aside under Section 7.1. I-Net upgrades, expansions and replacements, along with related Incremental, direct Capital Costs, shall be subject to the City's approval in accordance with this Section 6.4.

#### **(B) New I-Net Fiber in Conjunction with Cable System Construction.**

(1) Subject to the City's approval, which shall not be unreasonable withheld, Permittee shall include up to six single mode Fiber strands as directed by the City dedicated for I-Net use whenever Permittee undertakes construction, following the effective date of the Permit, of Fiber Optic facilities for its Cable System within the Permit Area. Permittee shall promptly notify the City about planned construction under this Section 6.4(B). City shall have up to twenty (20) business days to notify Permittee about the number of Fiber stands to include for I-Net use. Permittee shall provide documentation for the Incremental, direct Capital Cost estimate related to the Fiber dedicated for I-Net

use, which may include a burdened cost charge of up to 15 percent (15%) of the internal labor portion of the Capital Cost; and a timeline for completion of the Fiber construction. Documentation for the cost estimate may be a simple calculation of Incremental unit cost for the dedicated I-Net Fiber, based on the cost and size of the Cable System installed Fiber.

(2) Upon completion of construction of any I-Net Fiber route, Permittee shall provide the City with an invoice, including accounting and documentation, of actual Incremental, direct Capital Costs directly related to completing the I-Net Fiber. The total amount of the invoice shall be no more than the cost estimate provided by Permittee, except that it may also include remaining Incremental, direct Capital Costs that are less than ten percent (10%) of the original cost estimate.

(3) Upon submission by the Permittee of an invoice, and upon certification by the City that the invoice is in accordance with Section 6.4(B), the City shall promptly reimburse Permittee the amount as specified in the invoice.

(C) I-Net Capital Plans and Proposals.

(1) At the City's request or at the option of the Permittee, Permittee shall provide Institutional Network Capital plans and proposals, including, but not limited to, proposed expansions, upgrades or replacements. Permittee shall consult with the City and I-Net Subscribers in developing such plans and proposals, which shall be subject to approval by the City, which approval shall not be unreasonably withheld.

(2) Permittee shall provide detailed documentation of any I-Net Capital plans or proposals which shall include, as applicable, demonstrated need of I-Net Institutions, equipment lists, diagrams illustrating the network topology, descriptions of the I-Net configuration and characteristics, and other topics. Permittee shall also provide a detailed cost estimate for proposed Incremental, direct Capital Costs necessary to implement any I-Net plan or proposal, which may include a burdened cost charge of up to 15 percent of the internal labor portion of the Capital Cost. Proposed costs under this Section 6.4(C) must tangibly benefit I-Net Subscribers and shall include costs as provided in Section 6.4(C)(2) related to the proposed I-Net project, but shall not be disqualified by the City if they also accomplish a business purpose of Permittee.

(3) I-Net plans, upgrades, replacements, expansions or other I-Net related proposed projects that have been approved by the City shall be completed by Permittee in a timely manner.

(4) Following completion and Activation of an I-Net project, Permittee shall provide the City with an invoice, including accounting and documentation, of actual Incremental, direct Capital costs directly related to completing the approved I-Net project. The total amount of the invoice shall be no more than the cost estimate provided by Permittee, except that it may also include remaining Incremental, direct Capital Costs that are less than ten percent (10%) of the original cost estimate.

(5) Upon submission by the Permittee of an invoice, and upon certification by the City that the invoice is in accordance with Section 6.4(C), the City shall promptly reimburse Permittee the amount as specified in the invoice.

(D) I-Net Site Construction and Activation. The City may designate I-Net Sites for connection and Activation for use by I-Net Institutions in accordance with this Permit. Permittee shall construct, Activate and connect I-Net Sites, in accordance with Section 6.4(D).



(1) Connection. A connection of a designated I-Net Site shall be deemed complete when no other installation of equipment by Permittee is necessary for Activation and Permittee has:

- (a) Installed four strands, or an amount as otherwise agreed pursuant to Section 6.4(D)(1)(d), of Fiber from the Fiber node serving the site into a location within the I-Net site, as reasonably determined by the I-Net Institution based on a design for the site as mutually approved by Permittee and the I-Net Institution. The I-Net Fiber shall provide a continuous path from the I-Net Site to its corresponding Transport Hub, passing through the Fiber node;
- (b) Terminated the I-Net Fiber at the I-Net site on the Permittee-provided wall-mounted termination panel; and
- (c) Upon request, install a coaxial cable drop terminated in the I-Net Site.
- (d) Permittee and the City shall cooperate on variations to the requirements of Section 6.4(D)(1) in order to meet specific needs of an I-Net Institution's use of the I-Net.

(2) New Site Connections.

- (a) The City shall request a cost estimate to connect a new site to the I-Net. Permittee shall provide to the City, within 30 days of the request, a detailed cost estimate for Incremental, direct Capital costs necessary to complete the proposed I-Net Site in accordance with Section 6.4(D)(1). Reimbursable costs to construct the site may include only Permittee's external labor, materials, equipment and internal labor Capital costs directly related to completion of the I-Net Site connection. Permittee may also include a burdened cost charge of 15 percent (15%) of the total cost for internal labor.
- (b) The City shall notify Permittee if the proposed I-Net Site should be completed based on the cost estimate provided for the site. Permittee shall complete the I-Net Site connection within 90 days of the City's notification. If the actions or inactions of a third party prevent Permittee from completing the site connection within the 90 days, Permittee shall notify the City of the specific reason for the delay and shall work in good faith to promptly complete the connection.
- (c) Upon completion of the I-Net Site, Permittee shall submit an invoice, including accounting and documentation, for the actual costs directly related to completing the I-Net connection for an approved site. The invoice shall be no more than the I-Net Site's cost estimate approved by the City, plus additional cost amounts equaling ten percent (10%) or less of the approved cost estimate for the site. Upon submission by the Permittee of an invoice, and upon certification by the City that the invoice is in accordance with Section 6.4(D)(2), the City shall promptly reimburse Permittee the amount as specified in the invoice.

(3) Activation. Permittee shall Activate and make I-Net Service available to I-Net Institutions within 30 days of site connection completion in accordance with Section 6.4(D)(1). An I-Net Site connection shall be deemed Activated when Permittee has:

(a) terminated the Fiber at the Transport Hub on the I-Net backbone switch and at the wall mounted termination panel; and

(b) performed testing, in cooperation with the I-Net Subscriber, to verify correct system operation.

(E) Joint Use of Fiber or Conduit. So long as it is technically feasible and does not interfere with normal operations of the Cable System, the City and the Permittee shall cooperate to use existing conduit or Fiber for the purpose of expanding the I-Net to achieve the most economical coverage.

(F) Use of I-Net Assets by Permittee. Permittee may use I-Net Fiber for a business purpose so long as such use does not materially impair, in any way, the performance of Permittee's obligations under this Permit.

### 6.5 I-Net Services.

(A) Permittee shall provide and maintain, at a minimum, the following I-Net Services:

(1) Transport services, including Layers One (Physical) and Layer Two (Data Link) of the Open Systems Interconnection (OSI) Model.

(2) Managed core network service (MCNS) on Fiber Optic facilities owned by Permittee. The MCNS is the managed transport services between and among Permittee's I-Net Transport Hubs and between the core network and the two City I-Net Interconnect locations. MCNS shall include two (2) I-Net Interconnections with the City's facilities constituting the Integrated Regional Network Enterprise network ("IRNE") on Fiber Optic facilities identified in Exhibit D. The Interconnection shall extend the MCNS to the City's network, and shall be terminated on a Fiber termination panel by Permittee in the City's sites at a physical location mutually agreed upon by Permittee and the City. For purposes of Section 6.5(A)(2), "Integrated Regional Network Enterprise" or "IRNE" means a communications network owned and operated by the City of Portland.

(3) I-Net distribution network service (IDNS). Permittee shall provision IDNS on I-Net Fiber to each I-Net Site. IDNS shall be provisioned from Fiber Optic switch interfacing at Permittee's Transport Hubs and terminating at the demarcation point at an Activated I-Net Site.

(B) The City's provision of communications network services to I-Net Institutions does not preclude other I-Net Institutions from receiving the same or similar services from Permittee, including, but not limited to, services described in Section 6.5.

(C) I-Net Subscribers shall not re-sell, lease, or assign use of I-Net bandwidth capacity or I-Net Services to any commercial third party or for any purpose generating income that might be taxed at the federal, state or local levels.

(D) All service agreements between Permittee and I-Net Institutions for I-Net bandwidth capacity and I-Net Services shall, at a minimum, meet the requirements of this Permit. If an I-Net Institution and Permittee are unable to mutually agree on the terms of an I-Net service agreement, the City shall make a final determination consistent with the terms of this Permit.

6.6 Maintenance and Performance Standards. Permittee shall provide I-Net Subscribers with a reliable level of service, repair and maintenance comparable to that which the Permittee makes available

to commercial users for comparable services. Specific performance, maintenance and operations standards are set forth in the agreement referenced in Section 6.3.

6.7 I-Net Usage Fees. Permittee may charge for I-Net Services, in accordance with the fees set forth in the agreement referenced in Section 6.3.

6.8 I-Net Interconnections.

(A) Permittee shall continue and maintain I-Net Interconnections in existence on the effective date of this Permit.

(B) Permittee shall continue in effect without a service charge a routing system satisfactory to the City for carriage of Signals to and from the institutional networks of the Permittee in Washington, Multnomah and Clackamas Counties, Oregon and Clark County, Washington. Nothing in this Section 6.8 shall be construed as requiring Permittee to directly provide I-Net Services under this Permit outside of the Permit Area.

(C) Upon request by the City, Permittee shall Interconnect its I-Net to any City-owned communications systems, insofar as such Interconnection is technically feasible, the City shall reimburse Permittee for the Incremental, direct Capital costs of such Interconnection in accordance with the reimbursement process in Section 6.4(C).

6.9 I-Net not Common Carrier. Nothing in this Permit or in this Section 6 shall be deemed by the City or Permittee to subject Permittee's operations, or I-Net Services provided by Permittee under authority of this Permit, to regulation as a common carrier within the meaning of applicable state or federal law.

6.10 Effect of City Provision of Commercial Services in Competition with Permittee.

(A) In the event that the City, or one of its agents, elects to provide commercial Cable Services or I-Net Services to Residential or business customers in competition with Permittee, on a wholesale or retail basis, during the term of this Permit, Permittee's Institutional Network obligations under this Section 6 and Permittee's I-Net obligations to provide funds in support of I-Net Capital Costs under Section 7 of this Permit shall terminate upon physical activation and offering of such service in the manner provided in this Section. In the event the City determines to offer such services during the term of this Permit, the City will provide Permittee with a minimum of 24 months advance written notice prior to activating service. Such notice period shall be for the purposes of negotiating a reasonable good-faith transition schedule and alternative service arrangements, including commercial contracts, for existing I-Net Subscribers prior to the date of such activation. Upon offering or physically activating and providing any Cable Service or I-Net Service by the City or its agents to Residential or business customers in competition with Permittee on a wholesale or retail basis, Permittee shall have the right to discontinue I-Net Services under Section 6.5, and discontinue payment of one percent (1%) of the three percent (3%) I-Net Capital funding provided in Section 7 of this Permit. An "offering" of services under this Section 6.10 shall not include a survey or inquiry as to potential customer interest, but shall reference a binding commitment to provide services upon acceptance. As used in this Section, "competition with Permittee" shall not be deemed to include any non-commercial services provided by the City to itself, to any Designated Access Provider, or to any I-Net Institution.

(B) Permittee agrees and acknowledges that the City's existing communications networks and the provision of communications services in effect as of the effective date of this Permit are not in

competition with Permittee within the meaning of this Section 6.10.

## **Section 7. PEG ACCESS AND I-NET CAPITAL FUNDING**

7.1 PEG and I-Net Capital Fee. Permittee shall pay to the City three percent (3%) of Permittee's Gross Revenues Annually (PEG/I-Net Fee).

(A) The PEG/I-Net Fee shall be allocated to provide support for Capital Costs related to PEG Access and the I-Net. The PEG/I-Net Fee shall not be paid to another cable operator in the Permit Area for equipment to be owned by that cable operator or an affiliate.

(B) The City shall provide Permittee with a report Annually describing the allocation of the PEG/I-Net Fee, containing sufficient detail to demonstrate that the funds under Section 7.1 are used in compliance with the terms of this Permit. The City shall Annually submit the report to Permittee no later than December 31.

(C) The City intends to use one percent (1%) of funds paid under Section 7.1 to provide support for Designated Access Provider Capital Costs; one percent (1%) for Capital Costs in the form of grants related to use of Access Resources or the I-Net; and one percent (1%) to fund Capital Costs related to the I-Net and its use.

(D) The City shall work with the Permittee and recipients of the PEG/I-Net Fee to ensure that the contributions of the Permittee relating to grant or I-Net resources under this Permit are appropriately acknowledged.

7.2 Payments. Following the effective date of this Permit, Permittee shall make quarterly payments of PEG/I-Net Fees to the City, under Section 7, for the preceding quarter-year period ending September 30, December 31, March 31, and June 30. Each quarterly payment shall be due and payable no later than forty-five (45) days after the quarter ending date.

7.3 Quarterly Reports. Each payment shall be accompanied by a written report, verified by an authorized representative of Permittee, containing an accurate statement in summarized form, as well as in detail, of Permittee's Gross Revenues and the computation of the payment amount.

7.4 Interest on Late Payments. Payments not received within forty-five (45) days from the quarter ending date shall be assessed in accordance with Section 12.3.

7.5 PEG Access Support not Permit Fees; Applicable Federal Law. Permittee agrees that financial support for Access Capital Costs arising from or relating to the obligations set forth in Section 7 shall in no way modify or otherwise affect Permittee's obligations to pay permit fees to the City. Permittee agrees that although the sum of permit fees and the payments set forth in Section 7 may total more than five percent of Permittee's Gross Revenues in any 12-month period, the additional commitments are not to be offset or otherwise credited in any way against any permit fee payments under this Permit.

7.6 Review of Records. Permittee may conduct a financial review or audit for the purpose of verifying whether use of the PEG/I-Net Fee is in accordance with this Permit. Permittee shall notify the City in writing at least thirty (30) days prior to the date of an audit or review and identify the relevant financial records of City and the Designated Access Provider that Permittee wants to review. The time period of the review or audit shall be for PEG/I-Net Fee payments received no more than thirty-six (36) months prior to the date the Permittee notifies the City of its intent to perform an audit or review. The

City and recipients of the PEG/I-Net Fee shall make such documents available for inspection and copying. Documents shall be reviewed during normal business hours at a time and place made available by the City or the Designated Access Provider.

Permittee shall promptly provide the City with written notice of the audit or review's conclusions. The City shall have sixty (60) days to provide a written response. If the City disputes Permittee's conclusions, the parties shall attempt in good faith to reach a mutually acceptable resolution. If the parties are unable to agree, either party may submit the issue to arbitration under Section 20.2. If the conclusions become final, determining that any PEG/I-Net Fee has not been used in accordance with this Permit, then within 30 days, one of the following actions shall occur:

(A) If the City determines that the recipient has access to sufficient unrestricted funds, the City may require either:

(1) That the recipient expend its unrestricted funds to achieve the stated purposes of the original PEG/I-Net funding not spent in accordance with this Permit; or,

(2) Upon demand, the recipient shall return the full amount of the PEG/I-Net funding amount not spent in accordance with this Permit to the PEG/I-Net funding account.

(B) If the City determines that the recipient does not have access to sufficient unrestricted funds, the City may decide to either:

(1) Directly reimburse the PEG/I-Net funding account for the amount not spent in accordance with this Permit; or,

(2) Allow the Permittee to reduce future PEG/I-Net Fee payments by the amount not spent in accordance with this Permit.

(C) The decision as to which of these options to exercise, under Sections 7.6(A) and (B), shall be at the City's sole discretion.

**7.7 Undedicated I-Net Funds.** The restrictions upon the City's use of the one percent (1%) paid by Permittee to the City to fund Capital Costs related to the I-Net and its use ("I-Net Capital Funds") under Section 7 will survive the termination of this Permit for any cause. Any encumbered or dedicated I-Net Capital funds must be expended within four years of receipt by the City. Within 30 days after December 31, 2015 and December 31, 2020, the City shall document any unencumbered and undedicated amounts in City accounts from I-Net Capital funds paid to the City through June 30, 2015 and through June 30, 2020, respectively. If the amount of unencumbered and undedicated I-Net Capital Funds is in excess of twice the total amount paid to the City and intended for I-Net purposes for the fiscal year period July 1, 2014 through June 30, 2015 or July 1, 2019 through June 30, 2020, respectively, the City will return the excess of such I-Net Capital Funds to Permittee for the purpose of refunding these amounts to cable subscribers or to apply such funds to offset Capital construction costs of line extensions that exceed Permittee's Capital contribution obligations under Section 8.4, for the purpose of distributing Cable Services, including PEG programming, within the Permit Area.

## **Section 8. SERVICE**

**8.1 Non-Discriminatory Rates and Charges.** Permittee shall provide Cable Services to all Subscribers in the Permit Area under non-discriminatory rates and reasonable terms and conditions. Permittee shall

not arbitrarily refuse to provide Cable Services to any Person within the Permit Area, in accordance with Section 10.6.

8.2 Standard Installation. For purposes of Section 8, "Standard Installation" means an installation of a drop no more than 125 feet between the Dwelling Unit and the nearest point of access on the Street from which the Cable System is designed to serve the site, which qualifies a Residential Subscriber for installation at standard rates. Except as otherwise provided in Section 8.3, Permittee shall provide Standard Installation within 60 days of a service request to any potential Residential Subscriber throughout the Permit Area at Permittee's published rates and charges. For purposes of this Section, a request shall be deemed made on the date of signing a service agreement, receipt of funds by the Permittee, receipt of a written request by the Permittee or receipt by the Permittee of a verified oral request.

8.3 Non-Standard Installations. In general, Permittee shall have no obligation to provide service necessitating a service drop extension beyond a Standard Installation unless the potential Residential Subscriber requesting service contractually agrees to pay construction costs based on the following formula:

(A) Permittee shall provide service at its Standard Installation rate for the initial 125 feet of service drop extension.

(B) Permittee and the Residential Subscriber shall share equally the actual cost of the service drop extension for the distance over 125 feet but less than 250 feet.

(C) The Residential Subscriber shall pay all costs for the service drop extension for the distance greater than 250 feet.

8.4 Line-Extension Aid to Construction. For those Persons not eligible for installations pursuant to Section 8.2 and 8.3, Permittee shall have no obligation to provide Cable Service causing direct and incremental line extension costs in excess of 50 times the standard monthly charge for Expanded Basic Service Tier or its equivalent, unless the Person requesting service contractually agrees to pay such costs, based on the following formula:

(A) Permittee shall provide installation at its standard installation rate if the direct and incremental line extension costs are equal to or less than 50 times the standard monthly charge for Expanded Basic Service Tier.

(B) In all other cases the Person shall pay the standard installation rate plus all direct and incremental line extension costs in excess of 50 times the standard monthly charge for Expanded Basic Service Tier.

8.5 Monthly Service and Installation of Schools. Permittee shall provide without charge Basic Service, the Expanded Basic Service Tier and one Standard Installation to all schools in the Permit Area. Solely for purposes of this Section 8.5, Expanded Basic Service Tier means Digital Starter or its functional equivalent along with a single digital transport adapter. Non-standard installations shall be subject to Section 8.3. For purposes of Section 8.5, schools mean any public and private primary and secondary schools (K through 12), which have received the appropriate accreditation from the State of Oregon.

## **Section 9. CABLE SYSTEM UPGRADE**

### **9.1 Technology Assessment.**

(A) The City may notify Permittee on or after January 1, 2017, that the City will conduct a technology assessment of Permittee's Cable System. The technology assessment may include, but is not be limited to, determining whether Permittee's Cable System technology and performance are consistent with current technical practices and range and level of services existing in the fifteen (15) largest U.S. cable systems owned and operated by Permittee's Parent Corporation pursuant to franchises that have been renewed or extended since January 1, 2012.

(B) Permittee shall cooperate with the City to provide necessary non-confidential and proprietary information upon the City's reasonable request as part of the technology assessment.

(C) At the discretion of the City, findings from the technology assessment may be included in any proceeding commenced for the purpose of identifying future cable-related community needs and interests undertaken by the City pursuant to 47 U.S.C. §546.

## **Section 10. CONSUMER PROTECTION**

### **10.1 City's Cable Television Consumer Protection Policy.**

(A) Permittee shall comply with the City's Cable Television Consumer Protection Policy set forth in Portland City Code Chapter 3.115.

(B) With Permittee and the City both reserving their respective rights under applicable law, the City and Permittee agree that certain requirements of the Cable Television Consumer Protection Policy shall be interpreted in the manner set forth in Exhibit E to this Permit, and that the interpretations set forth in this Exhibit shall control on the related requirements set forth in the Cable Television Consumer Protection policy as adopted by the City Council.

10.2 Subscriber Contracts. Permittee shall not enter into contracts with Subscribers which are inconsistent in any material sense with the requirements of this Permit.

10.3 Obscenity. Permittee shall not transmit, or permit to be transmitted, over any Channel subject to its editorial control any Programming which is obscene under applicable law. Permittee shall be deemed to have transmitted or permitted a transmission of obscene Programming only if a court of competent jurisdiction has found that Permittee's officers or employees, acting in their authorized capacity, have knowingly permitted Programming which is obscene under applicable law to be transmitted over any Channel that is subject to Permittee's editorial control.

10.4 Parental Control Device. Upon request by any Subscriber, Permittee shall make available a parental control or lockout device to enable a Subscriber to control access to both the audio and video portions of any or all Channels. Permittee shall inform its Subscribers of the availability of the lockout device at the time of their initial subscription and periodically thereafter.

10.5 Regulation of Rates and Charges. All Permittee Residential Subscriber rates and charges related to or regarding Cable Services shall be subject to regulation by the City to the full extent authorized by the City Charter and by applicable federal, state and local laws and City ordinances.

10.6 Rate Discrimination. All Permittee Residential Subscriber rates and charges shall be published and non-discriminatory as to all Persons and organizations of similar classes, under similar circumstances and conditions. Permittee shall establish similar rates and charges for all Residential Subscribers receiving similar services, regardless of race, color, religion, age, sex, marital or economic status, national origin, sexual orientation, physical or mental disability, income of the residents, or geographic location within the Permittee's Permit Area. Nothing in Section 10.6 shall be construed to prohibit:

- (A) The temporary reduction or waiving of rates and charges in conjunction with promotional campaigns;
- (B) Permittee from offering reasonable discounts to senior citizens or discounts to economically disadvantaged citizens;
- (C) Permittee establishing different and nondiscriminatory rates and charges and classes of services for commercial subscribers, as well as different, nondiscriminatory monthly rates for classes of commercial subscribers; or
- (D) Permittee from establishing reduced bulk rates for Residential Subscribers residing in multiple dwelling units.

10.7 Filing of Rates and Charges. Permittee shall maintain on file with the City a complete and current schedule of applicable Residential Subscriber rates and charges for Cable Services provided under this Permit, in a form satisfactory to the City. Nothing in this Section 10.7 shall be construed to require the Permittee to file rates and charges under temporary reductions or waivers of rates and charges in conjunction with promotional campaigns. As used solely in this Section 10.7, no rate or charge shall be considered temporary if Residential Subscribers have the ability over a period greater than six (6) consecutive months to purchase Cable Services at such rate or charge.

10.8 Changes in Rates and Charges.

(A) Permittee shall provide written notice to the City and Subscribers at least 30 days in advance of any increase in rates and charges. Notice to the City of proposed increases in rates and charges shall be filed in a form satisfactory to the City.

(B) Unless the City has lawfully required prior review of Permittee's rate increase in accordance with the requirements and conditions of applicable law, Permittee's rate increase shall become effective on the date identified in the form filed by the Permittee, provided that the effective date shall not be earlier than the 31st day after such filing.

10.9 ADA Accessible Equipment and Services. To the extent authorized by law, the City reserves the right to require and regulate the installation or rental of equipment which facilitates the reception of Basic Service by hearing impaired individuals. Permittee shall notify Subscribers of the availability of ADA equipment and services and shall provide such equipment and services in accordance with federal and state laws.

10.10 Discriminatory Practices. Permittee shall not deny Cable Service, or otherwise discriminate against Subscribers, Programmers or any other Persons on the basis of race, color, religion, age, sex, national origin, sexual orientation or physical or mental disability. Permittee shall comply at all times with all other applicable federal, state or local laws, rules and regulations relating to non-discrimination.



10.11 Unauthorized Monitoring or Cable Tapping. For the purposes of Section 10.11, "Tap" means to observe or monitor video, audio, digital or other non-video Signals, or any combination of such Signals carried on the Cable System, where the observer is neither of the communicating parties, whether the exchange is observed by visual or electronic means, for any purpose whatsoever.

(A) Neither the Permittee, nor any of its agents, employees, officials or permittees, or any other Person, agency or entity, shall Tap any cable, line, Signal input device or subscriber outlet or receiver in any manner inconsistent with applicable law.

(B) Permittee may Tap a cable, line, Signal input device or Subscriber outlet or receiver to 1) determine the number of viewers watching a program where the identities of the viewers are not determined; 2) perform Cable System maintenance and verify technical performance; and 3) identify theft of services, without the Subscriber's written consent.

10.12 Privacy. The City and Permittee shall maintain constant vigilance with regard to possible abuses of the right of privacy or other human rights of any Residential Subscriber, Programmer or any other Person lawfully receiving Cable Services resulting from any device or Signal associated with the Cable System. Permittee shall not use the two-way communications capability of the Cable System for unauthorized or illegal Subscriber surveillance of any kind.

10.13 Permission of Property Owner or Tenant. Permittee shall not install or attach any of its Facilities to any residence or other property without first securing the permission of the owner or tenant of any property involved, except where there is an existing utility easement reserved by plat or other conveyance or unless such installation or attachment is otherwise authorized by law. Nothing in this Permit, however, shall excuse the Permittee from obtaining permission from anyone who has the right to approve or disapprove the attachment. If such permission or easement is later revoked, unless Permittee is otherwise lawfully entitled to maintain its Facilities, whether by the original or a subsequent owner or by operation of law, the Permittee, on the owner's request, shall promptly remove any of its Facilities and promptly restore the property to a condition similar to its prior condition. Permittee shall perform all such installations and removals in a workmanlike manner and shall be responsible for any damage to residences or other property caused by the installation or the removal.

10.14 Sale of Subscriber Lists and Personalized Data. Permittee shall be subject to the provisions of federal law regarding limitations on Permittee's collection and use of personalized data, and other issues involving the protection of Subscriber privacy.

10.15 Contact Information on Subscribers' Bills. Permittee shall include on Subscribers' bills the contact information for the City. Permittee shall also provide to Subscribers the City's contact information at the time of Cable Service installation and at least Annually thereafter.

## **Section 11. RESIDENTIAL NETWORK**

### **11.1 Channel Capacity.**

(A) Prior to the Effective Date of this Permit, Permittee upgraded its Cable System to a Fiber to the Fiber node Cable System architecture, with Fiber Optic cable deployed from Permittee's Headend to Permittee's Fiber nodes, tying into Permittee's coaxial Cable System already serving Subscribers. Active and passive devices currently are passing a minimum of 860 MHz (with a minimum passband of between 50 and 860 MHz) providing to Residential Subscribers at least 200 or more activated minimum

Downstream video Channels and minimum Activated Upstream digital Channel Capacity of 35 MHz accessible from any node, any Residential Subscriber, any Access facility, and any I-Net Site in the Permit Area. This Upstream Capacity requires no additional installation of equipment for use except on users' premises.

(B) Permittee agrees to maintain the Cable System in a manner consistent with, or in excess of these specifications throughout the term of the Permit with sufficient capability and technical quality to enable the implementation and performance of all the requirements of this Permit, including the Exhibits hereto, and in a manner which meets or exceeds FCC technical quality standards at 47 C.F.R. § 76 Subpart K, regardless of the particular format in which a Signal is transmitted.

11.2 Leased Access Channels. Permittee shall meet the leased access channel requirements under 47 USC § 532.

### 11.3 Technical and Safety Standards.

(A) Permittee shall comply with FCC Rules and Regulations, Part 76, Subpart K (Technical Standards), now in effect or as may be amended from time to time.

(B) Permittee shall at all times employ the standard of care attendant to the risks involved and shall install and maintain in use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injury or nuisance to the public or to employees of the Permittee.

(C) Permittee shall install and maintain its Cable System in accordance with the applicable requirements of the National Electrical Safety Code, and in such manner that the Cable System shall not interfere with any installations of the City or any public utility or Institutional utility, or any franchisee, licensee or permittee of the City.

(D) Permittee shall provide and put in use such equipment and appliances as shall control on a closed circuit basis and effectually carry all electric currents and Permittee television and other system Signal impulses in a manner so as to prevent injury to the wires, pipes, structures, and property belonging to the City or to any Person within the City.

(E) Permittee, at its own expense, shall repair, renew, change, and improve its Cable System from time to time as may be necessary to accomplish these purposes.

### 11.4 Performance Testing.

(A) Permittee shall perform the following tests on its Cable System:

(1) All tests required by the FCC; and

(2) All other tests reasonably necessary to determine compliance with technical standards adopted by the FCC at any time during the term of this Permit or in response to subscriber complaints.

(B) At a minimum, the Permittee's tests shall include:

(1) Proof of performance when activating any new construction;

(2) Semi-annual compliance and proof of performance tests in conformance with generally accepted industry guidelines;

(3) Cable System tests and intervals required by FCC regulations.

(C) Permittee shall maintain written Records of all results of its Cable System tests as required by this Permit, performed by or for the Permittee. Such test results shall be available for inspection by the City upon request.

(D) Tests may be witnessed by representatives of the City, and, upon request, Permittee shall inform the City of the time and place of each test. The City may conduct independent tests of the system for which the Permittee shall give its fullest cooperation. Permittee shall be required to take prompt corrective measures to correct any system deficiencies and to prevent their recurrence.

**11.5 Specific Technical Facilities or Capabilities.** The following specific technical facilities or capabilities shall be provided on the Cable System by the Permittee:

(A) **100% Emergency Standby Power.** Permittee shall maintain standby power generating capacity at the Cable System Headend and throughout the trunk and distribution networks as is in place on the effective date of this Permit. All standby power systems shall be rated to provide at least four (4) hours duration. In addition, Permittee shall have a plan in place, along with all resources necessary for implementing such plan, for dealing with outages of more than four hours. This outage plan and evidence of requisite implementation resources shall be presented to the City upon request.

(B) **Emergency Alert Systems.** Permittee shall comply with all applicable federal and state regulations regarding emergency alert systems, including equipment standards and procedures for alerting capacities. The City may identify authorized emergency officials for activating the emergency alert system. The City may also develop a local plan containing methods of emergency alert system message distribution, subject to applicable federal and state laws.

**11.6 Quality and Workmanship.** The Cable System constructed or erected by Permittee shall be of good quality and workmanship and shall be maintained in good repair and efficiency.

**11.7 Inspection of Construction.** The City shall have the right to inspect any construction or installation work performed under this Permit. The City shall have the right to make such tests as it deems necessary to ensure compliance with the terms of this Permit and applicable provisions of law.

## **Section 12. COMPENSATION AND AUDITING**

**12.1 Amount of Compensation.** As compensation for the benefits and privileges under this Permit and in consideration of permission to use the Streets of the City, the Permittee shall pay as a permit fee to the City, throughout the duration of this Permit, an amount equal to five (5%) percent of Permittee's Gross Revenues.

### **12.2 Payments and Quarterly Reports.**

(A) **Payments.** Permittee's permit fee payments to the City shall be computed quarterly following the effective date of this Permit for the preceding quarter year period ending September 30, December 31, March 31, and June 30. Each quarterly payment shall be due and payable no later than forty-five (45) days after the quarter ending date.

(B) Quarterly Reports. Each payment shall be accompanied by a written report to the City, verified by an authorized representative of Permittee, containing an accurate statement in summarized form, as well as in detail, of Permittee's Gross Revenues and the computation of the payment amount.

12.3 Interest on Late Payments. Payments not received within forty-five (45) days from the quarter ending date shall be assessed interest compounded at the rate of one percent (1%) per month from the due date.

12.4 Bundled Services. If Cable Services subject to the permit fee required under this Section 12.4 are provided to Subscribers in conjunction with non-cable services, Permittee shall not allocate revenue between Cable Services and non-cable services for the purpose of evading or substantially reducing Permittee's permit fee obligations to the City.

12.5 Cost of Publication. Permittee shall pay the cost of publication of this Permit and any amendments thereto, if such publication is required by the City Charter.

12.6 Maximum Legal Compensation. The parties acknowledge that, at present, applicable federal law limits the City to collection of a maximum permissible franchise fee of five percent (5%) of Gross Revenues. In the event that at any time during the duration of this Permit, the City is authorized to collect an amount in excess of five percent (5%) of Gross Revenues, then the City may request a modification of this Permit under the provisions of Section 20.15.

12.7 Additional Commitments not Permit Fees. No term or condition in this Permit shall in any way modify or affect the Permittee's obligation to pay permit fees related to Cable Services in accordance with applicable law. Although the total sum of such permit fee payments and additional commitments set forth elsewhere in this Permit may total more than five percent (5%) of Permittee's Gross Revenues in any 12-month period, Permittee agrees that the additional commitments in this Permit are not franchise fees as defined under 47 U.S.C. § 542, nor are they to be offset or credited against any permit fee payments due to the City so long as such commitments are exercised by the City in a manner consistent with this Permit. Except as otherwise authorized by 47 U.S.C. § 542, and the regulations promulgated thereunder, Permittee shall not pass these additional commitments through to subscribers.

12.8 Acceptance of Payment and Recomputation. No acceptance of any payment pursuant to Section 7.1 or Section 12.1 shall be construed as an accord 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.

#### 12.9 Audits and Reviews.

(A) Acceptance of Payment and Recomputation. No acceptance of any payment pursuant to Section 7.1 or Section 12.1 of this Permit shall be construed as an accord 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. All amounts paid under Section 7.1 or Section 12.1 of this Permit shall be subject to audit by the City, provided that only payments which occurred during a period of thirty-six (36) months prior to the date the City notifies Permittee of its intent to perform an audit shall be subject to such audit. Permittee agrees to pay the City for:

(1) Interest on any underpayment of an amount due under Section 7.1 or Section 12.1 of this Permit that is disclosed as the result of an audit, such interest to be calculated at one percent (1%)

over the existing prime rate as set by the Wells Fargo Bank, National Association, or its successor and assigns as designated by the City, compounded quarterly from the date on which the payment was due. If such payment is not received within thirty (30) days of notice from the City, then interest shall be compounded daily from the date on which the payment was due until the date the City receives the payment.

(2) Five percent (5%) of the underpayment shall be due within thirty (30) days of written notice from the City, if the City's audit discloses that the Permittee has paid ninety-five percent (95%) or less of the principal amount owing for the period under audit. If such payment is not received within thirty (30) days of written notice from the City, then interest shall be compounded daily from the date on which the payment was due until the date on which the City receives the payment, such interest to be calculated at one percent (1%) over the existing prime rate as set by the Wells Fargo Bank, National Association, or its successors and assigns as designated by the City.

(B) Authority to Audit.

(1) The City and its agents and representatives shall have authority to arrange for and conduct audits under Section 12.9, within the Portland metropolitan region, upon no less than thirty (30) days prior written notice, and during normal business hours. Within the limitations established by Section 12.9, the City may determine the scope of audit in each instance.

(2) Permittee agrees to reimburse the City for:

(a) The reasonable costs of such audit if the audit discloses that the Permittee has paid 95% or less of the fees owing under Sections 7.1 and 12.1 for the period at issue; or

(b) One half of the reasonable costs of such audit if the audit discloses that the Permittee had paid more than 95% but less than 98% of the fees owing under Sections 7.1 and 12.1 for the period at issue.

(3) Permittee shall reimburse the City within 30 days of receipt of an invoice from the City showing such costs were actually incurred and were directly related to the audit. Permittee's obligation to reimburse auditing costs under this Section 12.9 shall not exceed \$15,000.00 per audit.

12.10 Liability for Licenses and Taxes. Payment of the permit fee and other financial obligations under this Permit shall not exempt Permittee from the payment of any license fee, tax or charge on the business, occupation, property or income of Permittee that may be imposed by the City, except as may otherwise be provided in the ordinance or ordinances imposing such other license fee, tax or charge. The City's right to impose any such license fee, tax or charge shall be subject to any limitations on the City under applicable law.

## **Section 13. RECORDS AND REPORTS**

13.1 Open Records. Permittee shall manage all of its operations in accordance with a policy of keeping its Records open and accessible to the City. The City shall have the right to inspect all Records of the Permittee and Affiliated Entities at any time during normal business hours at a Permittee business operations site within Multnomah, Clackamas or Washington counties, Oregon, and upon reasonable notice to determine compliance by Permittee with its obligations under this Permit. Permittee shall not deny the City access to Permittee's Records on the basis that Permittee's Records are under the control of an Affiliated Entity or a third party, rather than the Permittee. In the case of Affiliated Entities not under

common control with Permittee, Permittee shall not be subject to the remedies set forth in Section 19.1(A) if such Affiliated Entity does not permit inspection of its Records, and Permittee has;

(A) made available for inspection all of its Records relevant to the determination of compliance; and

(B) exercised all reasonable efforts to persuade such Affiliated Entity to make such Records available for inspection.

13.2 Information and Reports. Permittee shall provide a current copy of the following information at the intervals indicated:

(A) Cable System structure and operating information:

(1) Total Cable System mileage and overall homes passed (Annually);

(2) The number of Basic Service Subscribers, other programming service tier subscribers, Pay Service Subscribers and pay-to-basic percentages (Annually);

(3) Schedule of all Cable Services and Programming services, tiers and/or packages, and Channel assignments, provided on the Cable System (Annually and upon change);

(4) A schedule of all Permittee's rates and charges (Annually and upon change);

(5) A monthly Cable Services sample customer bill within the Permit Area, including copies of all communications of a general nature related to Cable Services sent to Subscribers with the bill (monthly);

(6) Copies of other communications of a general nature sent to Subscribers related to Cable Services, excluding communications sent to individual Subscribers which name that Subscriber (at the same time communications are sent to Subscribers); and,

(7) A copy of Subscriber privacy policies and the Subscribers service agreements, including terms and conditions (Annually and upon change).

(B) Permittee shall provide an audited statement or, in lieu of such audited statement, a statement certified by an officer of the company, of Gross Revenues for the Permit Area from the previous year, no later than one hundred twenty (120) days after the end of its fiscal year. The statement shall contain such information as may be required from time to time by the City, and at least the following, unless the City waives the requirement: a listing of all categories of Gross Revenues, and the revenue associated with such categories, in sufficient detail and with sufficient explanation to enable the City to understand the statement and to verify the accuracy of payments to the City. The report shall include an explanation of any deductions made from Gross Revenues in the calculation of payments.

13.3 General Reports. The City shall have the right to request, in writing, information as is appropriate and reasonable to determine whether Permittee is in compliance with this Permit. Permittee shall provide the City such information in a format as Permittee customarily prepares such report or information. Permittee shall fully cooperate with the City and shall provide such information and documents as necessary and reasonable for the City to evaluate compliance. Permittee reserves the right

to object to any request made under this Section 13.3 as unnecessary, unreasonable or inappropriate under the circumstances.

13.4 Format. The City, after consultation with Permittee, may specify the form and details of all Permittee's reports required under this Permit.

13.5 Reports of Regulatory Violations. Upon written request, Permittee shall provide copies to the City of any communications to and from federal, state or local courts, regulatory agencies or other governmental bodies addressed to Permittee regarding any alleged, apparent or acknowledged violation by Permittee of any applicable federal or state law specifically related to the operation of Permittee's Cable System or Permittee's provision of Cable Services within the Permit Area. Permittee shall submit such communications to the City no later than thirty (30) days after such request. Permittee shall not claim confidential, privileged or proprietary rights to such documents unless under applicable 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 or a request for confidential treatment is pending.

#### 13.6 Public Records.

(A) Permittee acknowledges that information submitted by Permittee to the City may be open to public inspection under the Oregon Public Records Law. Permittee is responsible for becoming familiar with and understanding the provisions of the Oregon Public Records Law.

(B) Permittee may identify information submitted to the City as confidential, if Permittee reasonably believes such information is qualified for an exemption recognized under the Oregon Public Records Law. Permittee shall prominently mark each page, or portion thereof, for which it is claiming confidentiality as "Confidential" prior to submitting such information to the City. When submitting such information to the City, Permittee shall submit documentation to the Commission that specifically identifies the applicable exemption under the Oregon Public Records Law, and stating the reason(s) Permittee believes the information is exempt from public inspection. After reviewing the Permittee's request for confidentiality, and determining whether the identified exemptions are applicable, the City shall take reasonable steps to protect the confidential nature of any such information, consistent with the Oregon Public Records Law, including only disclosing such information to employees, representatives, and agents thereof that have a need to know or in order to enforce the provisions of this Permit.

(C) Within five (5) working days of receiving a public records request to inspect any such request, the City shall provide the Permittee with written notice of the request, including a copy of the request. Permittee shall have five (5) working days within which to provide a written response to the City, before the City may disclose any of the requested confidential information. If the City determines that it will be necessary to reveal the information, the City shall promptly notify the Permittee, and do so at least five (5) working days prior to the information being released. The City shall retain final discretion to determine whether to release the requested information in response to any public records request, as recognized under the Oregon Public Records Law.

### **Section 14. GENERAL INDEMNIFICATION AND INSURANCE**

#### 14.1 Indemnification.

(A) General Indemnification. Permittee shall indemnify, defend and hold harmless the City, its officers, agents, boards and employees, from any liability for claims, damages, costs or expenses, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or

accident to person or property, including, without limitation: copyright infringement; defamation; damages arising out of or by reason of any construction, excavation, operation, maintenance, reconstruction or any other act done under this Permit, by or for Permittee, its agents, or its employees; or by reason of any neglect or omission of Permittee to keep its system in a safe condition. Permittee's indemnification obligation shall not extend to liability directly arising out of any negligence or willful misconduct by the City or its officers, agents, boards or employees. The City shall provide Permittee prompt notice of any such claim which Permittee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done without the prior written approval of the City which approval shall not be unreasonable withheld. Permittee shall consult and cooperate with the City while conducting its defense of the City and the City shall fully cooperate with the Permittee.

(B) Indemnification for Relocation. Permittee shall indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Permittee's failure to remove, adjust or relocate any of its Facilities in the Streets in a timely manner in accordance with a relocation schedule furnished Permittee by the City's duly authorized agent in writing, unless Permittee's failure arises directly from the City's negligence or willful misconduct.

(C) Indemnification – Hazardous Substances. Permittee agrees to forever indemnify the City, its officers, agents and employees, from and against any claims, costs and expenses of any kind, whether direct or indirect, or pursuant to any state or federal law, statute, regulation or order, for the removal or remediation of any leaks, spills, contamination or residues of Hazardous Substances, directly attributable to Permittee's structures or other Facilities in the Streets.

#### 14.2 Insurance.

(A) Permittee shall maintain in full force and effect, at its own cost and expense, continuously during the Permit Term, the following insurance coverage:

(1) Commercial General Liability Insurance in the amount of two million dollars (\$2,000,000) combined single limit for property damage and bodily injury. Such insurance shall cover the construction, operation and maintenance of the Cable System, and the conduct of Permittee's Cable Service business in the Permit Area.

(2) Automobile Liability Insurance in the amount of one million dollars (\$1,000,000) combined single limit for bodily injury and property damage coverage.

(3) Workers' Compensation Insurance meeting all legal requirements of the State of Oregon.

(4) Employers' Liability Insurance in the following amounts: (A) Bodily Injury by Accident: one hundred thousand dollars (\$100,000); and (B) Bodily Injury by Disease: one hundred thousand dollars (\$100,000) employee limit; five hundred thousand dollars (\$500,000) policy limit.

(5) The limits of the insurance as provided in this Section 14 shall be subject to any changes as to the maximum limits imposed on municipalities of the State of Oregon during the term of this Permit.



(B) The City and the Commission shall each be designated as an additional insured under each of the insurance policies required in this Section 14.2 by endorsement on the policies, except Workers' Compensation and Employer's Liability Insurance.

(C) Permittee shall not cancel any required insurance policy, nor shall Permittee allow the required insurance to lapse, without obtaining alternative insurance in conformance with this Agreement. For any of the insurance policies identifying the City and the Commission as additional insureds, as provided under this Section 14.2, the Permittee shall notify the City and the Commission within five (5) business days of any notice of non-renewal, any cancelation, or any material adverse change in coverage. If the insurance is canceled or materially altered so as to be out of compliance with the requirements of this Section 14.2 during the term of this Permit, Permittee shall provide a replacement policy.

(D) Each of the required insurance policies shall be with insurers authorized or permitted to do business in the State of Oregon, with an A-: VII or better rating for financial condition and financial performance by Best's Key Rating Guide, Property/Casualty Edition, or an equivalent rating entity.

(E) The insurance shall be without prejudice to coverage otherwise existing and shall name the City, and its officers, agents, and employees as additional insureds as their interest may appear, except the Workers' Compensation and Employer's Liability Insurance.

(F) Permittee shall provide the Commission, within fifteen (15) days of the Effective Date of this Permit, a certificate of insurance certifying the coverage required above, which certificate shall be subject to the approval of the City's Legal Counsel as to whether the certificate and the insurance certified is consistent with the requirements of this Section 14.2. Failure to maintain adequate insurance as required under this Section 14.2 shall be cause for revocation of this Permit by the City as set forth in Section 19.

(G) The City shall require as a condition of any separate agreement between the City and a Designated Access Provider, that the Designated Access Provider shall include the Permittee as a named insured in the Designated Access Provider's liability insurance policy with respect to any claim for injury, damage, loss, liability, cost or expense arising from Programming or other transmission placed by the Designated Access Provider on PEG Access Channels or the Institutional Network (but not if arising out of or by reason of any act done by the Permittee or its officers, agents or employees).

#### 14.3 Faithful Performance Bond.

(A) Upon the effective date of this Permit, the Permittee shall furnish proof of the posting of a faithful performance bond running to the City with good and sufficient surety approved by the City, in the penal sum of Five Hundred Thousand Dollars (\$500,000.00), conditioned that the Permittee shall well and truly observe, fulfill and perform each term and condition of this Permit. Such bond shall be maintained by the Permittee throughout the term of this Permit.

(B) Permittee shall pay all premiums charged for any bond required under Section 14.3, and unless the City Council specifically directs otherwise, shall keep the same in full force and effect at all times through the later of either:

(1) The remaining term of this Permit; or

(2) If required by the City, the removal of all of Permittee's system installed in the City's Streets.

(C) The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without 30 days written notice first being given to the City Auditor. The bond shall be subject to the approval of the City Attorney as to its adequacy under the requirements of this Section 14.3. During the term of the bond, Permittee shall file with the City Auditor a duplicate copy of the bond along with written evidence of payment of the required premiums unless the bond otherwise provides that the bond shall not expire or be terminated without 30 days prior written notice to the City.

(D) Subject to the City's prior approval, Permittee may provide an irrevocable letter of credit or other form of financial assurance in lieu of a faithful performance bond. The alternative form of financial assurance shall give the City substantially the same rights and guarantees provided by a faithful performance bond.

(E) In lieu of the performance bond required under Section 14.3, the Permittee may elect to provide to the City a fully executed Guarantee in Lieu of Bond of Comcast Communications, Inc., in the form provided in Exhibit F to this Permit. In the event of such election, the duly executed Guarantee in Lieu of Bond shall be filed by the Permittee within thirty (30) days. Any performance bond required under Section 14.3(A) shall remain in effect until replaced by such Guarantee in Lieu of Bond.

14.4 Construction Bond. During all times when Permittee is performing any construction work in or under the Streets requiring a street opening permit, Permittee shall post a faithful performance bond or irrevocable letter of credit, as is required for street opening permits, running to the City, with good and sufficient surety approved by the City, in the sum required by the City's permit. The bond or letter of credit shall be conditioned that the Permittee shall well and truly observe, fulfill and perform each term and condition of the Permit. Permittee shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated upon final approval of Permittee's construction work in or under the Streets by the City Engineer. Upon such approval, the City agrees to sign all documents necessary to release the bond in accordance with the terms of this Section 14.4. During the duration of the construction work, Permittee shall file with the City Auditor a copy of the bond or letter of credit, along with written evidence of the required premiums. The bond or letter of credit shall be subject to the approval of the City Attorney as to its adequacy under the requirements of Section 14.4.

## **Section 15. GENERAL STREET USE AND CONSTRUCTION**

### **15.1 Construction**

(A) Subject to applicable regulations of the City, Permittee may perform all construction necessary for the operation of its Cable System. All work within Streets incident to Permittee's Cable System shall, regardless of who performs the construction, be and remain the Permittee's responsibility. Permittee shall apply for and obtain all permits necessary for construction or installation of any Facilities, and for excavating and laying any Facilities, within the Streets. Permittee shall pay all applicable fees upon issuance of the requisite construction permits by the City to Permittee.

(1) Prior to beginning any new construction in the Streets, Permittee shall provide the City Engineer through the permitting process with an initial construction schedule for work in the Streets and the estimated total cost of such work together with its permit application. When construction of Permittee's Cable System in the Streets is completed, Permittee shall provide the City with maps showing the location of its installed Facilities in the Streets, as built. Such maps shall be in a form acceptable to the City Engineer.

(2) As of the effective date of this Permit, and annually thereafter in the event of any alterations, Permittee shall provide a map to the City Engineer and the City's Office of Cable Communications and Permit Management, or its successor, showing the location of Permittee's Facilities in the Streets on a scale of three thousand five hundred feet (3,500') per inch or whatever scale the City and Permittee agree upon. Permittee shall also provide such maps in an electronic format acceptable to the City and the Permittee. The level of detail in maps provided by Permittee shall be limited to that which is needed for the City's administration of the Streets in order to protect Permittee's confidential business information and the security of Permittee's Cable System.

(C) Permittee may make excavations in Streets for any Facility needed for the maintenance or extension of the Permittee's Cable System. Prior to doing such work, Permittee shall apply for, and obtain, appropriate permits from the City, and give appropriate notices to any other franchisees, licensees or permittees of the City, or bureaus of the City, or other units of government owning or maintaining pipes, wires, conduits or other facilities which may be affected by the proposed excavation.

(D) In the event that emergency repairs are necessary, Permittee shall immediately notify the City of the need for such repairs. Permittee may initiate such emergency repairs, and shall apply for appropriate permits within 48 hours after discovery of the emergency. Permittee shall comply with all applicable City regulations relating to such excavations or construction, including the payment of permit or license fees.

15.2 Locates. Permittee shall comply with the requirements of ORS 757.542-757.562 and ORS 757.993 (2009), and the rules and regulations promulgated thereunder in OAR Chapter 952.

15.3 Relocation. The City shall have the right to require Permittee to change the location of its Cable System within the Streets when the public convenience requires such change, and the expense thereof shall be paid by Permittee (however payment by Permittee shall in no way limit Permittee's right, if any, to seek reimbursement for such costs from any third-party). If in ordering relocation, the City imposes additional specifications regarding materials or design for Permittee's Facilities, the additional marginal increase shall not be considered relocation costs that are the Permittee's responsibility. The City Engineer shall have unlimited discretion in determining the reasonable relocation schedule, based upon the City Engineer's consideration of the total circumstances of the project schedule. If after receiving the City Engineer's relocation schedule, Permittee identifies in writing that the work associated with relocating Permittee's Facilities will be of such size or scope that Permittee believes that it is probable that Permittee will not be able to complete the work within the schedule, Permittee may request a meeting with the City Engineer to discuss whether modification of the relocation schedule, alternate construction methods or alternate locations are reasonably possible given other project constraints. The City Engineer, working with City bureaus, will consider Permittee's safety, reliability and cost concerns while considering potential effects on project schedules, project budget and any other relevant matters. However, the City Engineer will retain full authority and discretion to make any final decisions regarding any modifications to the relocation schedule, based upon the City Engineer's consideration of

the total circumstances of the project schedule. The City shall provide the Permittee with the standard notice given under the circumstances to other Persons franchised, permitted, licensed or otherwise granted authority by the City. Should Permittee fail to remove or relocate any such Facilities by the date established by the City Engineer's schedule, the City may cause and/or effect such removal or relocation by qualified workers and the expense thereof shall be paid by Permittee, including all direct, indirect and/or consequential costs and expenses incurred by the City due to Permittee's delay (however payment by Permittee shall in no way limit Permittee's right, if any, to seek reimbursement for such costs from any third-party). If the City requires Permittee to relocate its Facilities located within the Streets, the City will make a reasonable effort to provide Permittee with an alternate location for its Facilities within the Streets, or if an alternate location is unavailable, will make the City's project management personnel available to meet with affected property owners and explain City project needs in support of Permittee's efforts to secure an alternate location on private property.

#### 15.4 Restoration of Streets.

(A) Whenever Permittee disturbs the surface of any Street for any purpose, Permittee shall promptly restore the Street to at least the prior condition or the legally required standard, whichever is better and to the satisfaction of the City Engineer. When any opening is made by Permittee in a hard surface pavement in any Street, Permittee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer.

(B) If Permittee excavates the surface of any Street, Permittee shall be responsible for restoration and maintenance of the Street and its surface within the area affected by the excavation to the extent required by the Street use permit. The City may, after providing notice to Permittee, refill and/or repave any opening made by Permittee in the Street, and the expense thereof shall be paid by Permittee. The City reserves the right, after providing notice to Permittee, to remove and/or repair any work done by Permittee which, in the determination of the City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by the Permittee. All excavations made by Permittee in the Streets shall be properly safeguarded for the prevention of accidents. All of Permittee's work under this Section 15.4 shall be done in strict compliance with all rules, regulations and ordinances of the City.

#### 15.5 Maintenance and Workmanship.

(A) Permittee's Cable System shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits, structures or other facilities that may have been laid in the Streets by or under the City's authority.

(B) Permittee shall provide and use any equipment and appliances necessary to control and carry Permittee's Signals so as to prevent injury to the City's property or property belonging to any Person within the City. Permittee, at its own expense, shall repair, renew, change and improve its Facilities from time to time as may be necessary to accomplish this purpose.

(C) Permittee shall not construct its Cable System in any manner that requires any Subscriber to install any cable, wire, conduits or other facilities, under or over a Street.

15.6 Acquisition of Facilities. Upon Permittee's acquisition of Facilities in any City Street, or upon the addition or annexation to the City of any area in which Permittee owns or operates any Facility in any Streets, the Permittee shall, at the City's request, submit to the City a statement describing all

Facilities involved, whether authorized by franchise, permit, license or other prior right, and specifying the location of all such Facilities to the extent the Permittee has possession of such information. At the City's sole option, as expressed by ordinance adopted by the City Council, such Facilities shall immediately be subject to the terms of this Permit within a reasonable period of time to bring the acquired Facilities into compliance with this Permit.

**15.7 Reservation of City Street Rights.** Nothing in this Permit shall prevent the City from constructing sewers; grading, paving, repairing and/or altering any Street; laying down, repairing or removing water mains; 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 Permittee's Cable System. However, if any of the Permittee's Cable System interferes with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, the Permittee's Cable System shall be removed or replaced in the manner the City shall direct. Any and all such removal or replacement shall be at the expense of the Permittee. Should Permittee fail to remove, adjust or relocate its Facilities by the date established by the City Engineer's written notice to Permittee, the City may effect such removal, adjustment or relocation, and the expense thereof shall be paid by Permittee, including all costs and expenses incurred by the City due to Permittee's delay.

**15.8 New Construction.**

(A) Permittee shall provide twenty-one (21) days prior written notice to the City of any planned Duct construction. Such notice shall include a description of any planned duct construction and a map showing the planned route in a form acceptable to the City Engineer. Within ten (10) business days of receiving the written notice, the City shall provide a written request to Permittee if it desires any Ducts along the planned route, and Permittee shall provide such Ducts to the City pursuant to the process set forth in this Section 15.8.

(B) For Permittee's new Duct installation, Permittee will provide additional Duct(s) as needed by the City:

(1) Permittee will confer with City prior to finalizing plans and specifications for any proposed new build, to establish and define City requirements for Duct and access vaults;

(2) If the City determines a need for Duct and access vaults under Section 15.8(A), City will pay Permittee the direct Incremental costs for this work, consisting of material, labor, and design and engineering costs associated with modifications to the plans and specifications for the segments defined and necessary facilities;

(3) Permittee will provide suitable documentation of ownership and include location in map submitted per Section 15.1(B). City will then maintain ownership of and maintenance responsibilities for the additional Duct(s).

(C) Permittee will provide separate access vaults for the City at City's cost, at locations to be determined by the City during the conference noted in Section 15.8(A)(1).

**15.9 Street Vacation.** If any Street or portion thereof used by Permittee is vacated by the City during the term of this Permit, unless the City Council specifically reserves to Permittee the right to continue its installation in the vacated Street, Permittee shall, without delay or expense to the City, remove its Facilities from such Street, and restore, repair or reconstruct the Street where such removal has occurred,

and place the Street in such condition as may be required by the City Council. In the event of failure, neglect or refusal of Permittee, after thirty days' notice by the City Council, to restore, repair or reconstruct such Street, the City may do such work or cause it to be done, and the cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Permittee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket.

#### 15.10 Common Users.

(A) For the purposes of this Section 15.10:

(1) "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video or data transmission.

(2) "Conduit Facility" means any structure, or section thereof, containing one or more Ducts, conduits, manholes, handhole or other such facilities in the Permittee's Cable System.

(3) "Duct" means a single enclosed raceway for power or communication lines, conductors, optical fiber, wire or other cable.

(4) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association franchised, licensed or otherwise permitted by the City to use the Streets.

(5) "Surplus Ducts or Conduits" are Conduit Facilities other than those occupied by the Permittee or any prior Licensee, one unoccupied duct held by Permittee as an emergency use spare, and other unoccupied ducts that the Permittee reasonably expects to use within the next 18 months.

(B) Permittee acknowledges that the Streets have a finite capacity for containing conduits. Therefore, Permittee agrees that, whenever the City Engineer determines it is impracticable to permit construction of an underground conduit system by any other Licensee, the City Engineer may require Permittee to afford to such person the right to use Permittee's Surplus Ducts or Conduits in common with the Permittee, unless safety or engineering concerns cannot reasonably be mitigated or eliminated. This right of use shall be subject to the terms and conditions of an agreement for use of Surplus Ducts or Conduits entered into by the Permittee and the Licensee, and to the safety and reliability of Permittee's Cable System and maintenance requirements. Any agreement governing the terms and conditions of use of Surplus Ducts or Conduits may, at Permittee's discretion, require use of Permittee's employees or contractors in any work occurring in Permittee's vaults.

(C) If the Permittee and any Licensee fail or cannot otherwise agree to fair and equitable terms, conditions and regulations, including but not limited to a conduit rental rate, within a reasonable period of time, the Permittee and the Licensee shall enter into binding arbitration to determine such terms, conditions and regulations. In such arbitration, the arbitrators shall determine the conduit rental rate at a fair market rate. The binding arbitration shall be as provided in Section 20.2.

(D) A Licensee occupying part of a Duct shall be deemed to occupy the entire Duct.

(E) Permittee shall give a Licensee a minimum of 120 days notice of its need to occupy licensed Conduit Facility or Duct and shall propose that the Licensee take the first feasible action as follows:

(1) Pay revised conduit or duct rent designed to recover the cost of retrofitting the conduit or duct with multiplexing, optical fibers or other space-saving technology sufficient to meet the Permittee's space needs;

(2) Pay revised conduit or duct rent designed to recover the cost of new conduit or duct constructed to meet the Permittee's space needs;

(3) Vacate the Conduit Facility or Duct that are no longer surplus; or

(4) Construct and maintain sufficient new conduit or Duct to meet the Permittee's space needs.

(F) When two or more Licensees occupy a portion of Conduit Facility or Duct, the last Licensee to occupy the Conduit Facility or Duct shall be the first to vacate or construct new conduit or duct as directed by Permittee. When conduit or duct rent is revised because of retrofitting of space-saving technology or construction of new conduit or duct, all Licensees shall bear the increased cost.

(G) All Attachments shall meet local, state, and federal clearance and other safety requirements, be adequately grounded and anchored, and meet the provisions of contracts executed between the Permittee and the Licensee. Permittee may, at its option, correct any attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay the Permittee for any fines, fees, damages or other costs the Licensee's attachments cause the Permittee to incur.

(H) The City will be allowed to access and use Permittee's Surplus Ducts or Conduits without use fees, subject to the same process and other terms applicable to Licensees under Section 15.10 and subject to a separate written agreement between the City and Permittee specifying the terms of such access and usage by the City.

**15.11 Discontinuing Use of Facilities.** Whenever Permittee intends to discontinue using any Facility within the Streets, Permittee shall submit for the City Engineer's approval a complete description of the Facility and the date on which the Permittee intends to discontinue using the Facility. Permittee may remove the Facility or request that the City permit it to remain in place. Notwithstanding the Permittee's request that any such Facility remain in place, the City Engineer may require the Permittee to remove the Facility from the Street or modify the Facility to protect the public health and safety or otherwise serve the public interest. The City Engineer may require the Permittee to perform a combination of modification and removal of the Facility. Permittee shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until such time as Permittee removes or modifies the Facility as directed by the City Engineer, or until the rights to and responsibility for the Facility are accepted by another Person having authority to construct and maintain such Facility, Permittee shall be responsible for all necessary repairs and relocations of the Facility, as well as maintenance of the Street, in the same manner and degree as if the Facility were in active use, and Permittee shall retain all liability for such Facility.

#### **15.12 Hazardous Substances.**

(A) **Compliance with Applicable Law.** Permittee shall comply with all applicable state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to its Cable System and Facilities in the Streets.

(B) Maintenance, Inspection and Remediation. Permittee shall maintain and inspect its Cable System located in the Streets. If Permittee discovers any Hazardous Substances in the course of Permittee's work on its Facilities in the Streets, Permittee shall provide a written report of the discovery to the City within two (2) business days. Permittee shall immediately proceed to remove and remediate, in accordance with, and only to the extent required by, all applicable local, state and federal laws, any Hazardous Substances in the Streets directly attributable to or caused by Permittee's Facilities or the acts or omissions of Permittee. Nothing in this Permit transfers or is intended to transfer any liability to the City for removal or remediation of any such Hazardous Substances in the Streets.

(C) Construction, Modification or Removal of Facilities. In the course of construction, modification or removal of any of its Facilities in the Streets, to the extent necessary to safely proceed with such work, Permittee shall remove and remediate Hazardous Substances encountered in the course of its activities in accordance with, and only to the extent required by, all applicable state and federal laws, statutes, regulations and orders. Permittee may use reasonable business efforts to recover its costs for such removal and disposal from all legally responsible third parties.

15.13 Undergrounding of Cable. Permittee is strongly encouraged to locate and construct its present and future cables underground. Permittee shall install its cables or other Facilities underground wherever all existing utilities already are underground, where all utilities are placed underground, or where statute or ordinance requires utilities to be placed underground. Previously installed aerial cable shall be undergrounded in concert, and on a reasonable cost-sharing basis, with other utilities pursuant to the general ordinances of the City or applicable State law, or in the event that an institutional utility or a public utility decides to underground its facilities on a voluntary basis, unless the City grants an exception.

15.14 Construction Codes. Permittee shall strictly adhere to all building and zoning codes currently or hereafter in effect. Permittee shall arrange its lines, cables, and other appurtenances, on both public and private property, in such a manner as to cause no unreasonable interference with the use of said public or private property by any Person. In the event of such interference, the City may require the removal or relocation of the Permittee's lines, cables, and other appurtenances from the property in question.

#### 15.15 Construction and Use of Poles.

(A) Whenever feasible, the construction, maintenance, and use of Permittee's Cable System shall comply with the standards of materials in engineering and all other provisions of a pole user agreement for use of poles, entered into by and between the pole owners and the Permittee, or separate agreements between each of said companies and the Permittee. The City may request a copy of any pole attachment agreement affecting poles placed in the Streets, and Permittee shall not unreasonably refuse such request. In the event Permittee cannot obtain the necessary poles and allied facilities pursuant to the provisions of such an agreement, and only in such event, then it shall be lawful for the Permittee to make all needed excavations in the Streets for the purpose of placing, erecting, laying, maintaining, repairing, and removing poles, conduits, supports for wires and conductors, and any other Facility needed for the maintenance or extension of Permittee's Cable System. All poles of the Permittee shall be erected between the curb and the sidewalk unless otherwise designated by the proper City authorities, and each pole shall be set whenever practicable at an extension of a lot line. The City shall have the right to require the Permittee to change the location of any pole, conduit, structure or other Facility within the Streets when in the opinion of the City the public convenience requires such change, and the expense thereof shall be paid by the Permittee.



(B) The terms of Section 15.15 shall not exempt the Permittee from compliance with all Charter and ordinance provisions relating to such excavations or construction or from any provision requiring payment of permit or license fees pertaining thereto.

#### 15.16 Tree Trimming.

(A) When Permits Needed. Upon obtaining a written permit from the City Forester, Permittee may prune or cause to be pruned, using proper utility arboricultural practices and in accordance with such permit, any tree in or overhanging the Streets which interferes with Permittee's Facilities. Except in emergencies or by special written permission of the City Forester, Permittee may not prune trees at a point below 30 feet above sidewalk grade until one week (seven [7] calendar days) after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. The owner or occupant shall have one week from receipt of notice to have such trees pruned by a qualified line clearance arborist at his or her own expense in accordance with Permittee's standards for reliable utility service, provided that the owner or occupant agrees to use tree pruning personnel that are qualified to work in close proximity to power lines. If the owner or occupant fails to do so in compliance with the notice, Permittee may prune such tree at its expense.

(B) Blanket Permits. The City Forester may, at the City Forester's discretion, waive the notification and single tree permit process and issue a blanket tree pruning permit if Permittee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper utility arboricultural practices to the pruning of trees. Before any blanket permit may be issued, any contractor of Permittee shall be subject to the approval of the City Forester. The City Forester shall have discretion to cancel the blanket permit, notification and single tree permit process if, at any time, the Permittee or its agents fail to either use proper utility arboricultural practices or to properly notify the public as specified in Section 15.6.

(C) Emergencies. Notwithstanding the permit and notice requirements of Section 15.6, in the event of an emergency, Permittee may prune a tree or trees as necessary to abate the emergency. For purposes of Section 15.16, emergencies exist when it is necessary to prune a tree or trees in order to restore electrical services, or to protect the public from imminent danger, or to prevent the imminent destruction of property.

### **Section 16. TRANSFER OF PERMITEE'S CABLE SYSTEM**

16.1 Transfer Defined. For purposes of Section 16, "Transfer" shall mean any form of sale, change in control, conveyance, mortgage, assignment, merger, pledge, encumbrance, deed or grant, in whole or in part, and whether voluntary or involuntary.

16.2 Council Consent. Neither this Permit nor all or substantially all of Permittee's Cable System located in the Streets by authority of this Permit shall be Transferred without the prior written consent of the City as expressed by ordinance, which consent shall not be unreasonably withheld, except to entities that control, are controlled by, or are under common control with the Permittee. Permittee shall give written notice to the City of any Transfers to entities under such common control within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained in this Permit shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Permittee's Cable System for the purpose of financing the acquisition of equipment for or the construction and operation of Permittee's

cable system, within or outside the City, without the City's consent, but any such mortgage, pledge or assignment with respect to Permittee's Cable System shall be subject to the City's other rights contained in this Permit.

### 16.3 Review.

(A) In determining whether the City will consent to any Transfer, the City may inquire into the technical, legal, and financial qualifications of the prospective party. Permittee shall assist the City in any such inquiry. The City may condition any Transfer upon such conditions related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of this Permit, as it deems reasonably appropriate or to the resolution of outstanding and unresolved issues of Permittee's noncompliance with the terms and conditions of this Permit.

(B) No Transfer for which the City's consent by ordinance is required may occur until the successor, assignee, lessee or transferee has complied with the requirements of Section 14 of this Permit, including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) days after execution and delivery of any instrument so consented to by the City, Permittee shall file with the City Auditor an executed counterpart or certified copy thereof.

16.4 Leases. Permittee shall not lease any portion of its franchised Cable System without the City's prior consent as expressed by ordinance. However, and notwithstanding Section 16.2, Permittee may lease any portion of its Cable System in the ordinary course of its business without otherwise obtaining the City's consent by ordinance, so long as Permittee remains solely responsible for locating, servicing, repairing, relocating or removing such portion of its Cable System. A lessee of any portion of Permittee's Cable System shall not obtain any rights under this Permit.

### 16.5 Sales.

(A) Notwithstanding Section 16.2, Permittee may sell portions of its Cable System in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Permittee complies with the following conditions:

(1) The sale is to the holder of a current existing, cable system franchise, license, permit, or other similar right granted by the City;

(2) Within fourteen (14) days of the sale being executed and becoming final, Permittee shall provide written notice to the City, describing the portions of the Cable System sold by the Permittee, identifying the purchaser of the Facilities, the location of the Facilities (in accordance with the mapping requirements of Section 15.1(B)) and providing an executed counterpart or certified copy of the sales documents;

(3) Permittee remains solely responsible for locating, servicing, repairing, relocating or removing its remaining Cable System; and,

(4) Within fourteen (14) days of the sale being executed and becoming final, the purchaser of such Facilities shall file written notice to the City that it has assumed sole responsibility for locating, servicing, repairing, relocating or removing the purchased Facilities under the purchaser's current, existing valid cable system franchise, license, permit or other similar right granted by the City. The purchaser shall not obtain any of the Permittee's rights under this Permit.

(B) If required by federal law, the City shall make a final decision upon a proposed Transfer within 120 days of receiving a written request for approval of a Transfer containing or accompanied by such information as is required by federal law and this Permit. If the City fails to render a final decision on the request within 120 days, then the proposed Transfer shall be deemed to be consented to by the City. At any time during the 120 day period, the City may request in writing that the Permittee provide or cause to provide any information reasonably necessary to rendering a final decision on the request. The City and the Permittee may, at any time, agree to extend the 120 day period.

(C) Bankruptcy or Dissolution. Permittee shall immediately report to the City, as soon as it becomes known, the initiation of bankruptcy proceedings, or corporate or partnership dissolution.

(D) Consent. No consent by the City, which is required under this Section, shall be unreasonably denied or delayed.

## **Section 17. CITY REGULATORY AUTHORITY**

### **17.1 City Regulatory Rights.**

(A) The City Council shall be vested with the power and right to reasonably regulate the exercise of the privileges permitted by this Permit in the public interest.

(B) Permittee shall not be relieved of its obligations to comply, promptly and completely, with any provision of this Permit by any failure of the City to promptly enforce compliance with this Permit.

17.2 City Regulatory Actions. Permittee shall comply with any and all lawful actions of the City affecting Permittee's operations under this Permit, including, without limitation, all orders, contracts, and regulatory actions taken pursuant thereto, in all respects and without exception, so long as such actions do not materially affect the rights of Permittee hereunder. In the event of any direct conflict between City orders and regulatory actions, and the terms of this Permit, this Permit shall prevail.

17.3 Right of Intervention. The City shall have the right to intervene in any suit or proceeding to which the Permittee is a party, in the event the City's rights under this Permit may be affected thereby.

## **Section 18. EQUAL EMPLOYMENT OPPORTUNITY/ AFFIRMATIVE ACTION/ MINORITY BUSINESS ENTERPRISES**

### **18.1 Equal Employment Opportunity.**

(A) Throughout the term of this Permit, Permittee shall fully comply with the equal employment opportunity requirements of federal, state, and local law, and in particular, FCC rules and regulations relating thereto. Upon request by the City, Permittee shall furnish the City a copy of the Permittee's Annual statistical report filed with the FCC, along with proof of Permittee's Annual certification of compliance. Permittee shall immediately notify the City in the event Permittee is at any time determined not to be in compliance with FCC rules or regulations.

(B) Throughout the term of this Permit, the Permittee shall maintain a policy that all employment decisions, practices, and procedures are based on merit and ability without discrimination on the basis of an individual's race, color, religion, age, sex, national origin, sexual orientation or

physical or mental disability. Permittee's policy shall apply to all employment actions including advertising, recruiting, hiring, promotion, transfer, remuneration, selection for training, company benefits, disciplinary action, lay-off, and termination.

18.2 Affirmative Action. Permittee shall carry out its equal employment opportunity policy by making a determined and good-faith effort at affirmative action to employ and advance in employment women, minorities, and the physically and mentally disabled.

18.3 Minority and Female Business Enterprises. Permittee shall make determined and good faith efforts to use minority and female business enterprises in its contracted expenditures, including, without limitation, contracts for the acquisition of goods, services, materials, supplies, and equipment used in the construction, maintenance, and operation of its Cable System. If directed by the City, the Permittee shall participate in the City's Minority and Female Business Enterprise Certification Program.

## **Section 19. FRANCHISE VIOLATIONS AND REMEDIES, EXPIRATION AND RENEWAL**

### **19.1 Remedies for Permit Violations.**

(A) In addition to any rights set out elsewhere in this Permit, or such other rights as it may possess, the City reserves the right at its discretion to apply any of the following remedies, alone or in combination, in the event Permittee violates any material provision of this Permit.

(1) Recover liquidated damages as provided in Section 19.1(C);

(2) Recover specific damages from all or any part of the security provided pursuant to this Permit, including without limitation any performance bond, letter of credit or other security, provided, however, the assessment shall be for such amount as the City reasonably determines is necessary to remedy the violation;

(3) Commence litigation seeking recovery of monetary damages or specific performance of this Permit, as such remedy may be available;

(4) Reduce the duration of the term of this Permit on such basis as is reasonable provided that in no event shall the amount of the term remaining after the reduction be less than three (3) years; or

(5) Revoke this Permit.

(B) (1) Permittee shall not be relieved of its obligations to comply promptly with this Permit by reason of any failure of the City to enforce prompt compliance. The City's failure to enforce shall not constitute a waiver of any term, condition, or obligation imposed upon the Permittee under this Permit; nor a waiver of rights by the City or acquiescence in Permittee's conduct. A specific waiver of a particular term, condition, or obligation imposed upon Permittee under this Permit shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation. The acts or omissions of Affiliates are not beyond the Permittee's control, and the knowledge of Affiliates shall be imputed to Permittee.

(2) Subject to applicable law, the remedies provided for in this Permit are cumulative and not exclusive; the exercise of one remedy shall not prevent the exercise of another remedy, or the exercise of any available rights of the City at law or equity.

(3) No cost or liability to Permittee arising from a breach or violation of this Permit shall be recovered from Subscribers or be offset against any other sums due to the City as a tax, Permit Fee or otherwise, regardless of whether the combination of Permit Fees and said costs exceeds five percent (5%) of Permittee's Gross Revenues in any twelve (12) month period.

(C) Liquidated Damages.

(1) The City and Permittee recognize that delays, expense and unique difficulties would be involved in establishing actual losses suffered by the City and the public as a result of the Permittee's violation of certain aspects of this Permit. To that end and subject to Permittee's right to notice and the opportunity to cure as provided in Section 19.2, the City may assess liquidated damages as set forth in the categories below. Instead of requiring proof of actual damages, the City and Permittee agree that Permittee shall pay liquidated damages in these amounts to the City for any violation of the categories listed below. The parties agree that such amounts are a reasonable estimate of the actual damages (including increased costs of administration and other damages difficult to measure) the City and the public would suffer in the event of Permittee's breach such provisions of this Permit. The election of liquidated damages for an incident shall be the City's sole and complete remedy as to that incident. The parties agree that such liquidated damages shall be considered as a reasonable estimation of the actual and potential damages suffered for violations of these categories:

- (a) For any failure to provide data, documents, reports or information as provided in the Permit - \$1,000 per day or per violation, up to a total of \$20,000 during any rolling twelve (12) month period;
- (b) For any failure to comply with FCC technical standards, any emergency alert standards or any back-up power requirements - \$1,000 per day or per violation, up to a total of \$40,000 during any rolling twelve (12) month period;
- (c) Failure to provide PEG Channels and/or PEG/I-Net capital support payments required by this Permit - \$1,000 per day or per violation, up to a total of \$40,000 during any rolling twelve (12) month period;
- (d) Failure to provide I-Net in compliance with the provisions of this Permit - \$1,000 per day or per violation, up to a total of \$40,000 during any rolling twelve (12) month period;
- (e) Failure to comply with customer service standards and reports - \$1,000 per day or per violation, up to a total of \$40,000 during any rolling twelve (12) month period.
- (f) Violation of any other provision of the Permit - \$1,000 per day or per violation, up to a total of \$20,000 during any rolling twelve (12) month period.

(2) The Commission, acting on behalf of the City, may determine that the actual and potential harm to the public is greater than the amounts agreed to by the parties as liquidated damages, taking into account the nature and extent of the violation, whether there has been a pattern or practice of repeated violations of the same nature resulting in increased costs of administrative oversight by staff and the Commission, and the harm to the public or individual subscribers. Any liquidated damages exceeding the amounts set forth in Section 19.1(C)(1) may be submitted to Arbitration in accordance with the provisions of Section 20.2 of this Permit.

(3) Effective January 1, 2017, maximum liability for each category of damages set forth in Section 19.1(C)(1)(a) through (f) above shall increase by 15%, so that, by way of example and not limitation, where the maximum liability in a twelve month rolling period is \$20,000, that limit shall increase to \$23,000 for each remaining year of the Permit term.

(4) The assessment and recovery of liquidated damages will not constitute a waiver by the City of any other right or remedy it may have under the Permit or applicable law as to subsequent incidents. The assessment and recovery of liquidated damages for a particular violation will substitute for the recovery of actual damages for the period of the assessment.

(5) Each violation of any material provision of this Permit shall be considered a separate violation for which separate liquidated damages may be imposed. Permittee's obligations under this Permit relating to PEG Access Channels, PEG/I-Net Capital support, I-Net, permit fees, customer service standards and reports, and reports and records contained in Section 13 shall at all times be considered material provisions. Enumeration of material Permit provisions set forth in this Section 20.1(C)(5) is not exhaustive and shall not be invoked under any guideline for contract interpretation to narrow the scope of other material terms, violation of which would be a material breach of this Permit. After the imposition of liquidated damages, if Permittee has not cured or commenced to cure the alleged breach to the satisfaction of the City, the City may pursue any other remedies available under this Permit or applicable law.

(D) In determining which of the remedies available under this Permit is appropriate, the City may consider, among other things: (1) the nature and extent of the violation; (2) whether Permittee has had a history of similar violations; (3) the damage suffered by the public and the cost of remedying the violation; and (4) such other factors as the City may deem appropriate.

(E) The City may shorten the term of this Permit or revoke this Permit in the manner described in Sections 20.1(A)(4) and (5) upon the occurrence of any of the following acts or events:

(1) Any failure to comply with the requirements of Section 14 of this Permit, including but not limited to, any failure to provide uninterrupted insurance or performance bonds;

(2) Permittee is found by a court of competent jurisdiction to have practiced any fraud upon the City; or

(3) Permittee fails to obtain and maintain any permit, franchise or license required by any federal or state regulatory body affecting Permittee's authority to own or operate a Cable System within the City.

(F) Except for the remedies specified in Section 19.1(A)(3), in addition to its other rights and remedies as set forth in this Permit, the City shall have the right to revoke this Permit after the appointment of a receiver or trustee to take over and conduct the Permittee's business, or the initiation of receivership, reorganization, insolvency or other similar action or proceeding, unless Permittee, its receiver or trustee timely and fully perform all obligations, until such time as this Permit is either rejected or assumed by Permittee, its receiver or trustee.

(G) Except for liquidated damages as provided in Section 19.1(C), in the event that the City makes a preliminary determination that the Permittee has violated this Permit, the City shall commence a contested case proceeding under the rules adopted by the City. The City's final determination,

following a contested case proceeding, may be appealed to the City Council. The City Council shall consider the appeal, under rules established by the City Council, based on the record established in the contested case proceeding.

#### 19.2 Notice and Opportunity to Cure.

(A) The City shall give Permittee thirty (30) days prior written notice of its intent to exercise any of its rights under Section 19.1, identifying the reasons for such action.

(B) If Permittee removes or otherwise cures the asserted violation constituting the stated reason within the thirty (30) day notice period, or if cure is not reasonably possible within the thirty (30) day period and the Permittee initiates good faith efforts satisfactory to the City within the thirty (30) day period to cure the asserted violation constituting the stated reason and the efforts continue in good faith, the City shall not exercise its rights under Section 19.1.

(C) If Permittee fails to remove or otherwise cure the asserted violation constituting the stated reason within the thirty (30) day notice period, or if the Permittee does not undertake and continue efforts satisfactory to the City to remedy the stated reason, then the City may exercise any or all of the remedies available under Section 19.1 or such other rights as the City may possess.

19.3 Minor Variances. The City may, upon request of the Permittee or its own motion, permit the Permittee to vary its manner of performance under this Permit so long as the variance does not result in a substantial change in the terms of this Permit or a substantial reduction in the services to be provided.

#### 19.4 Expiration.

(A) Upon the expiration of this Permit, subject to 47 U.S.C. § 546 and other applicable federal, state or local laws, the City shall have the right, at its election, to:

- (1) Renew or extend Permittee's Permit;
- (2) Invite additional proposals and award a Permit to another Person;
- (3) Decline to grant a renewed franchise; or
- (4) Take such further action as the City deems appropriate.

(B) Until such time as the City exercises its rights under Section 19.4, the Permittee's rights and responsibilities within the City shall be controlled by the terms of this Permit.

19.5 Removal of Plant and Equipment. If the City has revoked this Permit as provided in Section 19.1, or if this Permit has expired without being renewed or extended, or in the event of the City's purchase, lease-purchase, condemnation, acquisition, taking over or holding of plant and equipment, all of Permittee's rights under this Permit shall immediately cease and be divested. Thereafter, except as provided in this Section, or as otherwise provided by ordinance, the Permittee shall remove its Facilities from the Streets and restore the Streets to the standards provided in Section 15.4. In the event of a failure by the Permittee to properly perform such work, then the City may perform the work and collect the cost thereof from the Permittee. The cost thereof shall be a lien upon the system of the Permittee and a set-off against any sums owed Permittee by City.

## **Section 20. MISCELLANEOUS PROVISIONS**

### **20.1 Compliance with Laws.**

- (A) Both Permittee and the City shall comply with all applicable federal and state laws.
- (B) Permittee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.
- (C) Nothing in this Permit is intended to authorize the Permittee to engage in any activity constituting a violation of federal or state antitrust laws, including, but not limited to, the Sherman Act, the Clayton Act, the Robinson-Patman Act or any related amendments or regulatory provisions.

### **20.2 Arbitration.**

- (A) Any dispute between the parties hereto, including but not limited to disputes or controversies arising from or related to interpretation of this Permit, may be arbitrated provided that both parties consent in writing to the arbitration. Such arbitration will be final and binding, and the parties shall have no right to appeal from the arbitrator's decision.
- (B) The City may initiate arbitration by resolution of its City Council, while Permittee may choose to initiate arbitration by sending written notice to the City.
- (C) After arbitration has been initiated, the City and Permittee may agree that one arbitrator may conduct the arbitration. If the parties are unable to agree upon the identity of the arbitrator within 20 days after the arbitration has been initiated, the arbitrator shall be selected by the presiding civil judge of the Multnomah County Circuit Court.
- (D) If either the City or Permittee does not consent to having one arbitrator conduct the arbitration, the arbitration shall be conducted by three arbitrators, who shall be selected as follows:
  - (1) If the City initiates arbitration, the City shall select one arbitrator and Permittee by written notice shall select one arbitrator within 15 days after passage of the resolution. If Permittee initiates arbitration, it shall identify its selected arbitrator in its written notice, and the City shall select one arbitrator, within 15 days after receiving the notice.
  - (2) The two selected arbitrators shall select a third arbitrator within 15 days after the appointment of the second arbitrator. If the two arbitrators are unable to agree upon a third arbitrator within the time limit, the third arbitrator shall be appointed by the presiding civil judge of the Multnomah County Circuit Court.
- (E) After selection of the arbitrator(s), the arbitrator(s) shall take an oath to serve neutrally and impartially. The arbitrator(s) shall then schedule a date, time and place for the arbitration hearing. The hearing shall occur not less than 120 days after the appointment of the arbitrator (or the third arbitrator, if three arbitrators are used), unless extended by mutual agreement of the City and Permittee. The arbitrator(s) shall make a written report to the City and Permittee on the final determination within 60 days after completion of the hearing. If the arbitration is conducted by three arbitrators, the determination of a majority of the arbitrators shall constitute a final, binding arbitration determination.



(F) Once initiated by the parties, the arbitration shall be conducted according to the Uniform Arbitration Act, ORS 36.600 to ORS 36.470 (2009).

(G) The City and Permittee shall share equally the fees and costs of the arbitrator(s).

(H) In any arbitration proceeding regarding a modification of this Permit, initiated under Section 20.15, Section 20.16 or Section 20.8, the arbitrator(s) may order a modification of the Permit in response to the events and circumstances initiating the arbitration proceeding. The arbitrator(s) shall attempt to modify the Permit so that the net rights and obligations of the City and the Permittee remain substantially the same after the modification as they were prior to the events and circumstances leading to the arbitration proceeding. The party seeking the modification shall have the burden of establishing how the net rights and obligations remain substantially the same. If the arbitrator(s) determine that it is not possible to so modify the Permit, then they shall make a finding so stating in their final determination and instead shall modify the Permit to provide as fair a balancing of the rights and obligations of the City and the Permittee as they are reasonably able to achieve in relation to the balancing of rights and obligations under the Permit prior to modification.

### 20.3 Mediation.

(A) The City and Permittee agree that should any dispute arise between the parties concerning any aspect of this Permit which is not resolved by mutual agreement of the parties, and unless either party believes in good faith that injunctive relief is warranted, the dispute may be submitted to mediated negotiation prior to any party commencing litigation. In such event, the City and Permittee may agree to participate in good faith in a non-binding mediation process. The mediator shall be selected by mutual agreement of the parties. In the absence of such mutual agreement, each party shall select a temporary mediator, and those mediators shall jointly select a permanent mediator. If the City and Permittee are unable to successfully conclude the mediation within 45 days from the date of the selection of the mediator, either party may terminate further mediation by sending written notice. After written termination notice has been received by the other party, either party may request arbitration, as set forth in Section 20.2, or may pursue any other available legal remedies. All costs associated with mediation shall be borne, equally and separately, by the parties.

(B) In any mediation regarding a modification of this Permit, regarding disputes between the parties under Section 20.15, Section 20.16 or Section 20.8, the City and the Permittee agree that they shall attempt, in good faith, to agree to modifications to the Permit so that the net rights and obligations of the City and the Permittee remain substantially the same after the modification, as they were prior to the events and circumstances leading to the mediation proceeding.

20.4 Continuity of Service. Permittee agrees that all Residential Subscribers shall receive all available Cable Services insofar as their financial and other obligations to the Permittee are honored. In the event that the Permittee elects to modify or sell its Cable System, the Permittee shall make a good faith effort to ensure that all Residential Subscribers receive continuous, uninterrupted service regardless of the circumstances during the term of this Permit. In the event of purchase, lease-purchase, condemnation, acquisition, taking over or holding of plant and equipment, including subsequent assignment, sale, lease or other transfer to any other Person, the Permittee shall operate the Cable System for such reasonable periods as are necessary to maintain continuity of Cable Service to all Residential Subscribers.

20.5 Severability and Survivability. If any Section, provision or clause of this Permit is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or

regulations, the remainder of this Permit shall not be affected, unless the City Council determines such Section, provision or clause was material to the City's agreement to issue the Permit. All provisions concerning indemnity shall survive the termination of this Agreement for any cause. Expiration or termination of this Permit shall not extinguish, prejudice or limit either party's right to enforce this Permit with respect to any default or defect in performance that has not been corrected.

20.6 No Recourse against City. To the extent provided by law, Permittee's recourse against the City or its officials, boards, commissions, agents or employees for any claim arising from any provision or requirement of this Permit shall be limited to injunctive relief and declaratory relief.

20.7 Nonenforcement by the City. Permittee shall not be relieved of its obligations to comply with any of the provisions of this Permit by reason of any failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Permit by reason of such failure or neglect. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Permit in the public interest.

20.8 Action by Agencies or Courts. Permittee shall promptly notify the City in the event that any agency of the federal government or the State of Oregon or any court with competent jurisdiction requires the Permittee to act inconsistently with any provisions of this Permit. Upon receipt of such notification, the City or the Permittee may determine if a material provision of this Permit has been affected. Upon such determination, the City or the Permittee may seek to modify or amend this Permit, pursuant to Section 20.15, as may be necessary to carry out the parties' intentions and purposes under this Permit.

20.9 Choice of Forum. Any litigation between the City and the Permittee arising under or regarding this Permit shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon, Portland Division.

20.10 Choice of Law. This Permit shall be governed by and construed in accordance with the laws of the State of Oregon, even if Oregon's choice of law rules would otherwise require application of the law of a different state.

20.11 Notice. Any notice provided for under this Permit shall be sufficient if in writing and: (1) delivered personally to the following addressee; (2) deposited in the United States Mail, postage prepaid, certified mail, return receipt requested; (3) sent by overnight or commercial courier (such as Federal Express); or, (4) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to the City: Office for Community Technology  
City of Portland, Oregon  
1120 SW 5<sup>th</sup> Ave., Rm 1305  
Portland, OR 97204

With a copy to: City Attorney's Office  
Room 430, City Hall  
1221 SW 4th Avenue  
Portland, Oregon 97204  
FAX No. (503) 823-3089

If to the Permittee: Comcast Cable  
Attention: Government Affairs  
9605 SW Nimbus Ave.  
Beaverton, OR 97008

185004

With a copy to: Comcast Cable  
Attention: Government Affairs  
15815 25<sup>th</sup> Ave. West  
Lynwood, WA 98087

Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of: 1) actual delivery; three (3) business days after depositing in the United States mail as aforesaid; 2) one (1) business day after shipment by commercial courier as aforesaid; or 3) the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

20.12 Reasonability of Actions. In any matter provided for in this Permit involving discretionary acts by the City or the Permittee, including but not limited to the giving of consent, approval or instructions, the parties agree that they will each act in a manner that is reasonable under the circumstances.

20.13 Force Majeure.

(A) For purposes of this Permit, the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts of terrorism or of the public enemy, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots, partial or entire failure of utilities, documented work delays caused by waiting for utility providers to service or monitor utility poles to which Permittee's facilities are attached and documented unavailability of materials and/or qualified labor to perform the work necessary; and other similar events which are not reasonably within the control of the distressed party.

(B) If either party is wholly or partially unable to carry out or perform its obligations under this Permit as a result of Force Majeure, the distressed party shall not be deemed in violation or default during the duration of the Force Majeure. The distressed party shall take immediate and diligent steps to comply as soon as possible under the circumstances, and shall take all necessary corrective steps to remedy as expeditiously as possible the non-compliant responsibilities and duties affected by the Force Majeure. The distressed party shall give prompt notice of such Force Majeure, describing the same in reasonable detail. The distressed party's obligations under this Permit shall not be deemed in violation or default for the duration of the Force Majeure. In the event that delay in performance or failure to perform affects only part of the distressed party's capacity to perform, the distressed party shall perform to the extent that it is reasonably able to do so. Force Majeure shall not apply to any obligations under this Permit for the payment of monies due. The acts or omissions of Affiliates are not beyond the Permittee's control, and knowledge of Affiliates shall be imputed to Permittee.

20.14 Integration and Written Modification. Except as otherwise expressly provided within this Permit, this Permit contains the entire agreement between the City and the Permittee. Any prior agreements between the City and the Permittee shall be superseded upon the effective date of this Permit. This Permit may not be altered or modified orally but only by an instrument in writing executed by duly authorized representatives of the City and the Permittee.

## 20.15 Changes in Law or Unenforceability of Permit Provisions.

(A) The City and Permittee have entered into this Permit under the federal and state laws in effect on the effective date of this Permit. The City and the Permittee reserve the right to request modifications to this Permit, under Section 20.15(B), to account for changes in the law during the term of this Permit. The City and the Permittee also reserve the right to request modifications in this Permit, under Section 20.15(B), if any provision of this Permit becomes, or is declared, invalid or unenforceable.

(B) Upon written notice from either party, the City and the Permittee may voluntarily agree, under Section 20.15(A), to participate in a non-binding mediation proceeding under Section 20.3 to mediate, in good faith, modifications to the terms and conditions of this Permit. The written request shall specifically identify the particular reasons under Section 20.15 (A) for the modification sought by the requesting party. In the mediation proceeding, the City and the Permittee shall attempt, in good faith, to agree to modifications to the Permit so that the net rights and obligations of the City and the Permittee remain substantially the same after the modification, as they were prior to the events and circumstances leading to the mediation proceeding. If the City and Permittee are unable to successfully conclude the mediation within 90 days from the date of the written notice requesting the mediation proceeding, the parties may agree to submit the matter to arbitration as set forth in Section 20.2.

## 20.16 Renegotiation.

(A) If any provision of this Permit becomes invalid or unenforceable and the City Council or the Permittee expressly finds that such provision constituted a consideration material to this Permit, then the City and the Permittee shall renegotiate the terms of this Permit, subject to the mediation procedures of Section 20.3. The party seeking renegotiation shall serve on the other party written notice of a request to mediate. The parties shall have 90 days to conduct and complete the renegotiation. If the City and the Permittee cannot successfully conclude the renegotiation within 90 days from the date of the mediation request is served upon the other party, the matter may be submitted to arbitration under Section 20.2.

(B) By mutual agreement, the City and the Permittee may meet at any time during the term of this Permit to review and renegotiate matters of concern or interest to either of them. The topics of such renegotiation shall be stated in writing by each party prior to such meeting, but each party may include any topic or concern arising under this Permit or otherwise.

## **Section 21. WRITTEN ACCEPTANCE**

21.1 Written Acceptance. On or before or before the tenth business day after this Ordinance becomes effective, Grantee shall file with the City Auditor's Office a written acceptance of this Ordinance duly executed by the Grantee, in the form provided in Exhibit G to this Ordinance. Such acceptance shall be unqualified and shall be an acceptance of all the terms, conditions and restrictions contained in this Ordinance.

21.2 Failure to File Acceptance. Any failure on the part of the Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred by this Permit, and this Ordinance shall thereupon be null and void.

**Section 22.** The Commissioner-in-Charge of the Office for Community Technology is authorized to execute a side letter negotiated by representatives of Comcast and the City of Portland during the informal franchise renewal process addressing performance of the obligations of the renewal franchise, when presented to the City as executed by a duly authorized representative of Comcast, subject to approval as to form by the City Attorney's Office.

**Section 23.** The Council declares that an emergency exists because the general public welfare will be served by the Permittee being authorized to continue to provide cable services without interruption in its authority to use and occupy the public right-of-way; therefore, this ordinance shall be in full force and effect from and after its passage by the Council.

Passed by the Council: NOV 16 2011  
 Commissioner Saltzman  
 Prepared by: DOlson/BWalters  
 Date Prepared: October 27, 2011

**LaVonne Griffin-Valade**  
 Auditor of the City of Portland

By  Deputy

**EXHIBITS:**

- EXHIBIT A: Comcast Letter addressing Temporary, Revocable Permit
- EXHIBIT B: Intergovernmental Agreement Creating Mt. Hood Cable Regulatory Commission
- EXHIBIT C: Hardwired Live Origination Sites
- EXHIBIT D: Institutional Network Assets
- EXHIBIT E: Customer Service Standards Interpretations
- EXHIBIT F: Form of Guarantee in Lieu of Bond
- EXHIBIT G: Form of Acceptance

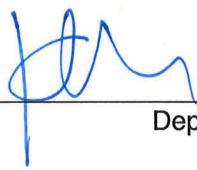
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Agenda No.  
**ORDINANCE NO. 185004** As Amended  
 Title

\* Grant a temporary, revocable permit to Comcast of Oregon II, Inc. to operate a Cable System.  
 (Ordinance)

<b>INTRODUCED BY</b> Commissioner/Auditor: <b>Saltzman</b>	CLERK USE: DATE FILED <b>NOV 10 2011</b>
<b>COMMISSIONER APPROVAL</b> Mayor—Finance and Administration - Adams Position 1/Utilities - Fritz Position 2/Works - Fish Position 3/Affairs - Saltzman Position 4/Safety - Leonard	LaVonne Griffin-Valade Auditor of the City of Portland  By:  Deputy
<b>BUREAU APPROVAL</b> Bureau: Office for Community Technology Bureau Head: David C. Olson Prepared by: David C. Olson Date Prepared: 11/8/11 Financial Impact & Public Involvement Statement Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/> Portland Policy Document If "Yes" requires City Policy paragraph stated in document. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Council Meeting Date <b>November 16, 2011</b> City Attorney Approval: required for contract, code, easement, franchise, comp plan, charter	<b>ACTION TAKEN:</b>

<b>AGENDA</b> <b>TIME CERTAIN</b> <input checked="" type="checkbox"/> <b>Start time: 10:05am</b> <b>Total amount of time needed: 15 min</b> (for presentation, testimony and discussion) <b>CONSENT</b> <input type="checkbox"/> <b>REGULAR</b> <input type="checkbox"/> <b>Total amount of time needed: _____</b> (for presentation, testimony and discussion)
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FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:		
		YEAS	NAYS
1. Fritz	1. Fritz	✓	
2. Fish	2. Fish	✓	
3. Saltzman	3. Saltzman	✓	
4. Leonard	4. Leonard	✓	
Adams	Adams	✓	