

MAYOR & COUNCIL AGENDA COVER SHEET

MEETING DATE:

May 4, 2009

CALL TO PODIUM:

Tony Tomasello,
Assistant City Manager

RESPONSIBLE STAFF:

Tony Tomasello,
Assistant City Manager

Lynn Board,
City Attorney

AGENDA ITEM:
(please check one)

<input type="checkbox"/>	Presentation
<input type="checkbox"/>	Proclamation/Certificate
<input type="checkbox"/>	Appointment
<input type="checkbox"/>	Public Hearing
<input type="checkbox"/>	Historic District
<input type="checkbox"/>	Consent Item
<input checked="" type="checkbox"/>	Ordinance INTRODUCTION
<input type="checkbox"/>	Resolution
<input type="checkbox"/>	Policy Discussion
<input type="checkbox"/>	Work Session Discussion Item
<input type="checkbox"/>	Other:

PUBLIC HEARING HISTORY:

(Please complete this section if agenda item is a public hearing)

Introduced	5-04-09
Advertised	
Hearing Date	6-01-09
Record Held Open	
Policy Discussion	

TITLE:
Introduction of an Ordinance to Award a Cable Services Franchise to RCN Pursuant to Chapter 6 of the City Code, Section 6-4, Entitled "Award of Franchise"

SUPPORTING BACKGROUND:
<p>The City Code provides that a cable system may not be installed or operated in the City without obtaining a cable franchise from the Council. RCN has requested that the City award a franchise to it in accordance with the terms and conditions of the attached Cable Franchise Agreement.</p> <p>The proposed Cable Franchise Agreement with RCN grants a cable franchise on a nonexclusive basis as required by Section 6-4 of the City Code and is similar to the existing cable franchise approved by the City in terms of costs and services.</p>

DESIRED OUTCOME:
Introduce Ordinance and Give Notification of the Scheduled Public Hearing on June 1, 2009.

ORDINANCE NO. _____

AN ORDINANCE TO AWARD A CABLE SERVICES FRANCHISE
TO RCN PURSUANT TO CHAPTER 6 OF THE CITY CODE,
SECTION 6-4, ENTITLED "AWARD OF FRANCHISE"

BE IT ORDAINED, by the Mayor and City Council of the City of Gaithersburg,
in public meeting assembled, pursuant to Chapter 6 of the City Code that:

The City of Gaithersburg hereby grants a cable services franchise on a
nonexclusive basis to RCN in accordance with the terms and conditions
provided in the Cable Franchise Agreement between the City of
Gaithersburg, Maryland and RCN, attached hereto and incorporated
herein.

ADOPTED this 15th day of June, 2009 by the City Council of Gaithersburg, Maryland.

SIDNEY A. KATZ, MAYOR and
President of the Council

DELIVERED to the Mayor of the City of Gaithersburg, Maryland, this 15th day of June, 2009. APPROVED by the Mayor of the City of Gaithersburg, this 15th day of June, 2009.

SIDNEY A. KATZ, MAYOR

THIS IS TO CERTIFY that the foregoing ordinance as adopted by the City Council of Gaithersburg, in public meeting assembled, on the 15th day of June, 2009, and that the same was approved by the Mayor of the City of Gaithersburg on the 15th day of June, 2009. This ordinance will become effective in accordance with the provisions of this ordinance.

Angel L. Jones, City Manager

Boldface

Heading or defined term.

Underlining

Added to existing law by original bill.

[Single boldface brackets]

Deleted from existing law by original bill.

Double underlining

Added by Amendment.

[[Double boldface brackets]]

Deleted from existing law or the bill by amendment.

* * *

Existing law unaffected by bill.

CABLE FRANCHISE AGREEMENT
GAITHERSBURG, MARYLAND

This Franchise Agreement (hereinafter, the “Agreement” or “Franchise Agreement”) is made between the Mayor and City Council of Gaithersburg, Maryland (hereinafter, the “City”) and RCN (hereinafter, the “Grantee”).

The City, having determined that the financial, legal, and technical ability of the Grantee is reasonably sufficient to provide the services, facilities, and equipment necessary to meet the future cable-related needs of the community, desires to enter into this Franchise Agreement with the Grantee for the construction, operation and maintenance of a cable system on the terms and conditions set forth herein.

SECTION 1.
Definition of Terms

1.1. **Terms.** For the purpose of this Franchise Agreement, capitalized terms, phrases, words, and abbreviations shall have the meanings ascribed to them in the Cable Communications Policy Act of 1984, as amended from time to time, 47 U.S.C. §§ 521 et seq. (the “Cable Act”), unless otherwise defined herein.

“Access Channel” means any channel on the Cable System set aside for public, education or governmental use without a charge by Grantee for channel usage within the City.

“Cable Law” means Chapter 6 of the City Code of the Mayor and City Council of Gaithersburg, as amended.

“Cable Service” means (1) the one-way transmission to Subscribers of video programming or other programming services; and (2) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

“Cable System” means a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service which includes video programming and which is provided to multiple Subscribers within the City, but such term does not include (1) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves subscribers without using any Public Way; (3) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title H of the Communications Act, except that such facility shall be considered a Cable System if such facility is used in the transmission of video programming directly to Subscribers; (4) an open video system that complies with 47 U.S.C. § 573; or (5) any facilities of any electric utility used solely for operating its electric utility system.

“County” means Montgomery County, Maryland.

“City Agreement” means the Cable Television Franchise Agreement by and between the City and Grantee.

“Customer” or “Subscriber” means a Person or user of the Cable System who lawfully receives Cable Service therefrom with the Grantee’s expressed permission.

“Effective Date” means _____.

“FCC” means the Federal Communications Commission, or successor governmental entity thereto.

“Franchise” means the initial authorization, or renewal thereof, issued by the Franchising Authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, ordinance or otherwise, which authorizes the construction and operation of the Cable System.

“Franchise Agreement” or “Agreement” shall mean this Agreement and any amendments or modifications hereto.

“Franchise Area” means the present legal boundaries of the City as of the Effective Date, and shall also include any additions thereto, by annexation or other legal means.

“Franchising Authority” means the City or the lawful successor, transferee, designee, or assignee thereof.

“Grantee” shall mean RCN.

“Gross Revenue” shall mean any and all cash or other consideration of any kind that constitute revenue in accordance with generally accepted accounting principles derived from the operation of the Grantee’s Cable System to provide Cable Services in the Franchise Area by the Grantee and any other entity that receives such revenue. Gross Revenues, to the extent derived from the operation of the Grantee’s Cable System to provide Cable Services in the Franchise Area, include, by way of illustration and not limitation: monthly fees charged Subscribers for any basic, optional, premium, per-channel, per-program service, or cable programming service; installation, disconnection, reconnection, and change-in-service fees; any revenue generated by the Grantee or by any affiliated person through any means which has the effect of avoiding the payment of compensation that would otherwise be paid to the City for the Franchise granted herein; leased channel fees; administrative fees; revenue from rentals or sales of converters or other equipment; to the extent directly connected to the Cable System facilities, studio and production equipment rental and related personnel fees; advertising revenues; revenues from program guides; revenues from the sale or carriage of other Cable Services; and revenues from home shopping commission and bank-at-home channels. Gross revenues shall not include any taxes on services furnished by the Grantee, which are imposed directly on the Subscriber or user by the state, County, City or other governmental unit and which are collected by the Grantee on behalf of said government unit. A franchise fee is not such a tax.

Gross Revenues shall not include (i) any compensation awarded to Grantee based on the City’s condemnation of property of the Grantee; or any expense reimbursement paid by the City or its agents, or by PEG users, to the Grantee under that section; or (iii) any uncollected receipts (i.e., “bad debt”) not to exceed 2% of annual revenue, provided, however, that (A) all or any part

of such actual bad debt that is written off but subsequently collected, and (B) any late fees offset against such bad debt, shall be included in Gross Revenues in the period collected or offset.

“Person” means any natural person or any association, firm, partnership, joint venture, corporation, or other legally recognized entity, whether for-profit or not-for profit, but shall not mean the Franchising Authority.

“Public Way” shall mean the surface of, and the space above and below, any public street, highway, freeway, bridge, land path, alley, court, boulevard, sidewalk, way, lane, public way, drive, circle or other public right-of-way, including, but not limited to, public utility easements, dedicated utility strips, or rights-of-way dedicated for compatible uses and any temporary or permanent fixtures or improvements located thereon now or hereafter held by the Franchising Authority in the Franchise Area. Public Way shall also mean any easement now or hereafter held by the Franchising Authority within the Franchise Area for the purpose of public travel, or for utility or public service use dedicated for compatible uses, and shall include other easements or rights-of-way as shall within their proper use and meaning entitle the Franchising Authority and the Grantee to the use thereof for the purposes of installing, operating, and maintaining the Grantee’s Cable System over poles, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to the Cable System.

SECTION 2. Grant of Authority

2.1. Grant of Franchise. The Franchising Authority hereby grants to the Grantee under the Cable Act a nonexclusive Franchise, which authorizes the Grantee to construct, and operate a Cable System in, along, among, upon, across, above, over, under, or in any manner connected with Public Ways within the Franchise Area, and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain, or retain in, on, over, under, upon, across, or along any Public Way and all extensions thereof and additions thereto, such poles, wires, cables, conductors, ducts, conduits, vaults, manholes, pedestals, amplifiers, appliances, attachments, and other related property or equipment as may be necessary or appurtenant to the Cable System.

2.2. Term of Franchise. The term of the Franchise granted hereunder shall be for an initial term of fifteen (15) years, commencing upon the Effective Date of the Franchise, unless the Franchise is renewed or is lawfully terminated in accordance with the terms of this Franchise Agreement.

2.3. Renewal. Any renewal of this Franchise shall be governed by and comply with the provisions of Section 626 of the Cable Act, as amended.

2.4. Reservation of Authority. Nothing in this Franchise Agreement shall (A) abrogate the right of the Franchising Authority to perform any public works or public improvements of any description, (B) be construed as a waiver of any codes or ordinances of general applicability promulgated or those to be promulgated by the Franchising Authority, or (C) be construed as a waiver or release of the rights of the Franchising Authority in and to the Public Ways.

2.5. Competitive Equity.

2.5.1. The Grantee acknowledges and agrees that the Franchising Authority reserves the right to grant one or more additional franchises to provide Cable Service within the Franchise Area; provided, however, the Franchise Authority shall use its reasonable efforts to require the additional franchisee(s) to be bound by a franchise agreement, the material provisions of which shall be reasonably comparable to those contained herein so as to preclude one operator from having an unfair competitive advantage over another. If any such additional and/or competitive franchise is granted by the Franchising Authority the material provisions of which in the aggregate, contains more favorable or less burdensome terms or conditions than this Franchise Agreement, the Franchising Authority agrees that it shall amend this Franchise Agreement to include the more favorable or less burdensome terms or conditions.

2.5.2. In the event an application for a new cable television franchise is filed with the Franchising Authority proposing to serve the Franchising Area, in whole or in part, the Franchising Authority shall serve a copy of such application upon any existing Grantee or incumbent cable operator by registered or certified mail or via nationally recognized overnight courier service.

2.6. Compliance With Law. Grantee shall be subject to and comply with all applicable and controlling local, state and federal laws, including the rules and regulations of any and all agencies thereof, whether presently in force or whether enacted or adopted at any time in the future.

2.7. Authority. The City reserves the right to exercise the maximum plenary authority, as may at the time be lawfully permissible, to regulate the Cable System, the Franchise and the Grantee. Should applicable legislative, judicial or regulatory authorities expressly authorize regulation not presently authorized to the City, the City may, without the approval of the Grantee, engage in any such additional regulation as may then be permissible, whether or not contemplated by the Franchise or the Cable Law, including without limitation, regulation regarding franchise fees, taxes, programming, rates charged to Subscribers, consumer protection or any other matter; provided, however, that the City shall take into account the potential impact on Subscriber rates and the commercial practicability of such additional regulation. In the event that the Grantee reasonably believes that such additional regulation is commercially impracticable, the Grantee may seek modification of any such additional franchise obligations pursuant to 47 U.S.C. Section 545.

SECTION 3. The System

3.1. Permits. The Grantee shall be responsible for obtaining, at its own cost and expense, all permits, licenses, or other forms of approval or authorization necessary to construct, operate, maintain or repair the Cable System, or any part thereof, prior to the commencement of any such activity.

3.2. Construction. Construction, installation, and maintenance of the Cable System shall be performed in a safe, thorough and reliable manner using materials of good and durable quality as follows:

3.2.1. All transmission and distribution structures, poles, other lines, and equipment installed by the Grantee for use in the Cable System in accordance with the terms and conditions of this Franchise Agreement shall be located so as to minimize the interference with the proper use of the Public Ways and the rights and reasonable convenience of property owners who own property that adjoins any such Public Way.

3.2.2. The construction, operation, maintenance, and repair of the Cable System shall be in accordance with all applicable federal, state or City laws and regulations that may apply to the operation, construction, maintenance and/or repair of a Cable System, including, without limitation, local zoning and construction codes and laws and accepted industry practices, all as hereafter may be amended or adopted. In the event of a conflict among codes, the most stringent code shall apply (except insofar as those codes, if followed, would result in a system that could not meet requirements of federal, state or City law, or is expressly preempted by other such provisions). The City may adopt additional standards as required to ensure that work continues to be performed in an orderly and workmanlike manner.

3.2.3. All installation of electronic equipment shall be of a permanent nature, using durable components, except where maintenance or emergency repairs require the installation of temporary equipment. Temporary equipment shall be replaced as soon as possible. If replacement cannot occur within sixty (60) days, Grantee must provide notification to the City.

3.2.4. Without limiting the foregoing, all of Grantee's plant and equipment, including, but not limited to, the antennae site, headend and distribution system, towers, house connections, structures, poles, wires, cable, coaxial cable, fiber optic cable, fixtures, and apparatuses shall be installed, located, erected, constructed, reconstructed, replaced, removed, repaired, maintained, and operated in accordance with good engineering practices, performed by experienced and properly trained maintenance and construction personnel.

3.2.5. All safety practices required by applicable law shall be used during construction, maintenance, and/or repair of the Cable System. Grantee shall at all times employ ordinary care and shall install and maintain in use commonly accepted methods and devices minimizing failures and accidents that are likely to cause damage, injury, or nuisance to the public.

3.2.6. In the event of a failure by Grantee to complete any work required for the protection or restoration of the Public Way, or any other work required by applicable law, within the time specified by and to the reasonable satisfaction of the City, the City, following notice and an opportunity to cure, may cause such work to be done, and Grantee shall reimburse the City the cost thereof within thirty (30) days after receipt of an itemized list of such costs; or the City may recover such costs through the performance bond provided by Grantee.

3.2.7. Grantee shall place facilities, equipment, and fixtures where they will minimize effects on any gas, electric, telephone, water, sewer, or other utility facilities, and shall not obstruct or hinder in any manner the various utilities serving the residents of the City or its use of any Public Way. In the event of an emergency, or where the Cable System creates or is contributing to an imminent danger to health, safety, or property, the City may remove, relay, or relocate any or all parts of that Cable System without prior notice. The City shall make

reasonable efforts to contact Grantee prior to performing such work, or immediately thereafter if prior notice is impossible.

3.2.8. Grantee shall, on the request of any Person holding a building moving permit issued by the City, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal or raising or lowering of wires shall be paid by the Person requesting same, and Grantee shall have the authority to require such payment in advance, except in the case where the requesting Person is the City, in which case no such payment shall be required. Grantee shall be given not less than 5 days advance notice to arrange for such temporary wire changes.

3.2.9. Grantee shall use, with the owner's permission, existing poles, conduits and other facilities whenever technically feasible and economically practical. Grantee may not erect poles, conduits, or other facilities in Public Way without the express permission of the City, and/or necessary local permits. Copies of agreements for use of conduits or other facilities shall be filed with the City upon City request.

3.2.10. System cable and facilities may be constructed overhead where poles now exist and electric or telephone lines or both are now overhead, but where no overhead poles exist all cables and facilities, excluding system passive or active electronics that may be housed in low-profile, above-ground pedestals, shall be constructed underground. Whenever and wherever electric lines and telephone lines are moved from overhead to underground placement, all Cable System cables shall be similarly moved.

3.2.11. The City shall have the right to install and maintain free of charge upon any poles owned by Grantee any wire and pole fixtures that do not unreasonably interfere with the Cable System operations of Grantee. If the City installs such fixtures and the Grantee later expands its cable operations in such a way that the City fixtures unreasonably interfere in the expanded operations, the Grantee may require the City to remove such fixtures.

3.2.12. Prior to erection of any poles or conduits or the construction, upgrade, or rebuild of a Cable System, the Grantee shall first submit to the City for approval a concise description of the Cable System facilities proposed to be erected or installed, including engineering drawings, if required by the City, together with a strand map and plans indicating the proposed location of all Grantee's distribution plant in the right of way, unless another user of the public right of way has authority to do the work in question and has made the required submission. This section shall not apply to routine line extensions.

3.2.13. Any contractor or subcontractor used for work or construction, installation, operation, maintenance and/or repair of the Cable System equipment or for the pruning or removal must be properly licensed under laws of the State and all applicable local ordinances, where applicable, and each contractor or subcontractor shall have the same obligations with respect to its work as Grantee would have if the work were performed by Grantee. Grantee shall be responsible for ensuring that the work of contractors is performed consistent with the Franchise and applicable law, shall be fully responsible for acts or omissions of contractors or subcontractors as to the requirements of the franchise, and shall be responsible for promptly correcting such franchise violations. Nothing in this section is intended to create any liability of

the Grantee to any third party for acts by contractors and subcontractors nor to waive any rights Grantee may have to seek indemnification from a contractor or subcontractor.

3.2.14. Grantee shall notify the public prior to commencing any proposed construction that will significantly disturb or disrupt public property or have the potential to present a danger or affect the safety of the public generally, except when a delay in commencing such work would present a danger or affect the safety of the public. Grantee shall publicize the proposed construction work at least one (1) day prior to commencement of that work by causing written notice of such construction work to be delivered to the City and by notifying those Persons most likely to be affected by the work in at least two (2) of the following ways: by telephone, in person, by mail, by distribution of flyers to residences, or in any other manner reasonably calculated to provide adequate notice and approved by the City.

3.2.15. Grantee shall keep accurate, complete and current maps and records of the Cable System and its facilities. Such maps and records shall be available for inspection by the City at the Grantee's offices.

3.3. Conditions on Street Occupancy.

3.3.1. If the grades or lines of any Public Way within the Franchise Area are lawfully changed at any time during the term of this Franchise Agreement, then the Grantee shall, upon reasonable advance written notice from the Franchising Authority (which shall not be less than ten (10) business days) and at its own cost and expense, protect or promptly alter or relocate the Cable System, or any part thereof, so as to conform with any such new grades or lines. If public funds are available to any Person using such street or public right-of-way for the purpose of defraying the cost of any of the foregoing, the Franchising Authority shall upon written request of the Grantee make application for such funds on behalf of the Grantee.

3.3.2. If in connection with the construction, operation, maintenance, or repair of the Cable System, the Grantee disturbs, alters or damages any such Public Way, the Grantee agrees that it shall at its own cost and expense replace and restore any such Public Way to a condition reasonably comparable to the condition of the Public Way existing immediately prior to the disturbance as required by this Franchise Agreement. Such restoration shall be undertaken as quickly as possible, and within no more than thirty (30) days after the damage is incurred and shall be completed as soon as reasonably possible thereafter, provided that the City may extend the 30-day period if weather conditions make restoration within that time period impractical. The Grantee shall guarantee and maintain such restoration for at least one (1) year defective materials or workmanship.

3.3.3. The Grantee shall, at its own cost and expense, undertake all necessary and appropriate efforts to maintain its work sites in a safe manner in order to prevent failures and accidents that may cause damage, injuries or nuisances. All work undertaken on the Cable System shall be performed in substantial accordance with applicable FCC or other federal, state, and local regulations. The Cable System shall not unreasonably endanger or interfere with the safety of Persons or property in the Franchise Area.

3.3.4. The Grantee shall have the authority to trim trees or other natural growth overhanging any of its Cable System in the Franchise Area so as to prevent contact with the Grantee's wires, cables, or other equipment. All such trimming shall be done at the Grantee's sole cost and expense upon not less than three (3) days advance notice. At the option of the City, such trimming may be done by it or under the supervision and direction of the City. The Grantee shall be responsible for any damage caused by such trimming.

SECTION 4. Service Obligations

4.1. General Service Obligation. The Grantee shall make cable service available to all residents in the Franchise Area, subject to section 4.2 below, unless legally or otherwise prevented from doing so by factors outside of the Grantee's control, including but not limited to, denial of access by owners of private property or multiple dwelling units. Installation charges shall be non-discriminatory, except that an additional charge for time and materials may be made for customized installation within a subscriber's residence or except when the Licensee is engaged in marketing promotions. Any dwelling unit within 175 feet of the Grantee's distribution cable shall be entitled to a standard aerial installation rate. Any aerial installation of greater than 175 feet shall be provided at Grantee's actual cost, plus profit, if allowable by applicable law(s) or regulation(s), including the cost for system design changes to extend the cable plant to within 175 feet of the dwelling unit. Any underground installation shall be provided at the Grantee's actual cost.

4.2. Line Extension Requirements. The Grantee's obligation to extend its cable service to unconstructed Public Ways or Streets in the City shall be limited to those Public Ways or Streets in which the Grantee's cost of construction is no greater than Five Hundred Dollars (\$500.00) per dwelling unit, unless prospective subscribers within said Public Ways or Streets agree to pay additional costs in excess of said amount of \$500.00. On each anniversary of the Execution Date of this Franchise Agreement, the aforesaid \$500.00 threshold by the Grantee shall be increased by any increase in the Gross National Product Price Increase (GNP-PI). The Grantee, in its sole discretion, may waive excess charges to be paid by prospective subscribers if it deems it commercially desirable. For purposes of this section 4.2, the term "dwelling unit" is hereby defined as any and all occupied residences, individual apartment, individual condominium, units in cooperative buildings and private homes, but excluding lodging houses, hotels, motels, hospitals, dormitories, organizations and businesses; provided, however, that the Grantee shall include in the above definition of "dwelling unit" any residences that are undergoing renovation or construction at the time that a request for cable service is made.

4.2. Programming. The Grantee shall offer to all Customers a diversity of video programming services.

4.3. No Discrimination. Neither the Grantee nor any of its employees, agents, representatives, contractors, subcontractors, or consultants, nor any other Person, shall discriminate or permit discrimination between or among any Persons in the availability of Cable Services provided in connection with the Cable System in the Franchise Area. It shall be the right of all Persons to receive all available services provided on the Cable System so long as such Person's financial or other obligations to the Grantee are satisfied.

4.4. New Developments. The Franchising Authority shall provide the Grantee with written notice of the issuance of building or development permits for planned developments within the Franchise Area requiring undergrounding of cable facilities. The Franchising Authority agrees to require the developer, as a condition of issuing the permit, to give the Grantee access to open trenches for deployment of cable facilities and at least ten (10) business days written notice of the date of availability of open trenches. Developer shall be responsible for the digging and backfilling of all trenches. The Grantee shall be responsible for engineering and deployment of labor applicable to its cable facilities.

4.5. Prohibition against Reselling Service. No Person shall resell, without the express prior written consent of the Grantee, any Cable Service, program or signal transmitted over the Cable System by the Grantee.

SECTION 5.
Fees and Charges to Customers

5.1. Rates, Fees, Charges. All rates, fees, charges, deposits and associated terms and conditions to be imposed by the Grantee or any affiliated Person for any Cable Service as of the Effective Date shall be in accordance with applicable FCC's rate regulations. Before any new or modified rate, fee, or charge is imposed, the Grantee shall follow the applicable FCC notice requirements and rules and notify affected Customers, which notice may be by any means permitted under applicable law. The City reserves all of its rights to regulate the Grantee's rates to the maximum extent permitted by applicable law.

SECTION 6.
Customer Service Standards; Customer Bills; and Privacy Protection

6.1. Customer Service Standards. The Franchising Authority hereby adopts the customer service standards set forth in Part 76, §76.309 of the FCC's rules and regulations. The Grantee shall comply in all respects with the customer service requirements established by the FCC.

6.2. Customer Bills. Customer bills shall be designed in such a way as to present the information contained therein clearly and comprehensibly to Customers, and in a way that (A) is not misleading and (B) does not omit material information. Notwithstanding anything to the contrary in Section 6.1, above, the Grantee may, in its sole discretion, consolidate costs on Customer bills as may otherwise be permitted by Section 622(c) of the Cable Act (47 U.S.C. §542(c)).

6.3. Privacy Protection. The Grantee shall comply with Section 631 of the Cable Act and regulations adopted pursuant thereto.

6.4. Telephone and Office Availability. In addition:

6.4.1. Grantee shall maintain an office at a convenient location near but not necessarily in the City that shall be open during normal business hours to allow Subscribers to request service, pay bills, and conduct other business until such time as Grantee attains a minimum of eight thousand (8,000) subscribers in the City. Thereafter, Grantee shall establish a conveniently located office in the City of Gaithersburg.

6.4.2. Grantee will maintain at least one (1) local, toll-free or collect call telephone access line, which will be available to Subscribers twenty-four (24) hours a day, seven (7) days a week. Trained representatives of Grantee shall be available to respond to Subscriber telephone inquiries during normal business hours.

6.4.3. Under normal operating conditions, the following standards shall be met by Grantee at least ninety percent (90%) of the time, measured quarterly:

6.4.4. Telephone answering time shall not exceed thirty (30) seconds, and the time to transfer the call to a customer service representative (including hold time) shall not exceed an additional thirty (30) seconds; and

6.4.5. A Customer will receive a busy signal less than three percent (3%) of the time; and

6.4.6. When the business office is closed, answering machine or service capable of receiving and recording service complaints and inquiries shall be employed. Inquiries received after hours must be responded to by a trained representative of Grantee on the next business day. To the extent possible, the after-hours answering service shall comply with the same telephone answer time standard set forth in this Section.

6.4.7. Grantee must hire sufficient staff so that it can adequately respond to Customer inquiries, complaints, and requests for service in its office, over the phone, and at the Subscriber's residence.

6.5. Scheduling and Completing Service. Under normal operating conditions, each of, the following standards shall be met by Grantee at least ninety-five percent (95%) of the time, as measured on a quarterly basis:

6.5.1. Installations located up to 175 feet from the nearest Public Way shall be completed within seven (7) business days after the order is placed or Miss Utility marking, or at a later time if requested by the Subscriber. Repairs and maintenance for service interruptions and other repairs not requiring work within a Subscriber's premises must be initiated within twenty-four (24) hours of the time the Subscriber reports the problem to Grantee or its representative or the interruption or need for repairs otherwise becomes known to Grantee. Work on all other requests for service shall be scheduled for the next available appointment, or at a later time mutually agreeable to Grantee and the Subscriber. Grantee shall exercise its best efforts to complete such work within three (3) days from the date of the initial request except installation requests, provided the Grantee shall complete the work in the shortest time possible where, for reasons beyond Grantee's control, the work could not be completed in those time periods even with the exercise of all due diligence; the failure of Grantee to hire sufficient staff or to properly train its staff shall not justify Grantee's failure to comply with this provision. All requests for repairs and installations within the City will be handled on a nondiscriminatory basis. Grantee shall perform service calls, installations, and disconnects at least during normal business hours. In addition, maintenance service capability enabling the prompt location and correction of outages that affect fifty percent (50%) or more of channels in any tier or a channel for which there is a separate charge affects shall be available Monday through Friday from the

end of normal business hours until 12:30 a.m., and from 8:00 a.m. until 12:30 a.m. on Saturdays, Sundays, and holidays.

6.5.2. The appointment window for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four (4) hour time block during normal business hours. Where a Subscriber cannot conveniently arrange for a service call or installation during normal business hours, Grantee shall make reasonable efforts to schedule service and installation calls outside normal business hours for the express convenience of the Subscriber.

6.5.3. Grantee may not cancel an appointment with a Subscriber after the close of business on the business day preceding the appointment. If Grantee's representative is running late for an appointment with a Subscriber and will not be able to keep the appointment as scheduled, the Subscriber will be contacted, and the appointment rescheduled, as necessary, at a time which is convenient for the Subscriber.

6.5.4. Grantee shall keep an emergency system maintenance and repair staff, capable of responding to and repairing system malfunctions or interruptions, on a twenty-four (24) hour basis at all times, and under normal operating conditions shall provide an immediate response to Cable System outages twenty-four (24) hours a day, seven (7) days a week.

6.5.5. Under normal operating conditions, billing inquiries and requests for service, repair, and maintenance not involving service interruptions must be acknowledged by a trained customer service representative within twenty-four (24) hours, or prior to the end of the next business day, whichever is earlier. Grantee shall respond to all other inquiries within five (5) business days of receipt of the inquiry or complaint.

6.5.6. To the extent consistent with federal law, no charge shall be made to the Subscriber for repairs or maintenance of Grantee-owned equipment or facilities, except for the cost of repairs to Grantee's equipment or facilities where it can be shown that the equipment or facility was damaged by a Subscriber.

6.5.7. With regard to mobility-limited Subscribers, upon Subscriber request, Grantee shall arrange for pickup and/or replacement of converters or other Grantee equipment at the Subscriber's address or by a satisfactory equivalent (such as the provision of a postage-prepaid mailer).

6.6. Notice to Subscribers.

6.6.1. Grantee shall provide the following materials to each Subscriber at the time Cable Service is installed, at least annually thereafter, and at any time upon request. Copies of all such materials provided to Subscribers shall also be provided to the City.

6.6.1.1. A written description of products and services offered, including a schedule of rates and charges, a list of channel positions, and a description of programming services, options and conditions;

6.6.1.2. A written description of Grantee's installation and service maintenance policies, delinquent subscriber disconnect and reconnect procedures, and any other of its policies applicable to its Subscribers;

6.6.1.3. Written instructions on how to use the Cable Service;

6.6.1.4. Written instructions for placing a service call;

6.6.1.5. A written description of Grantee's billing and complaint procedures, including the address and telephone number of the City office responsible for receiving Subscriber complaints;

6.6.1.6. Notice regarding Subscribers' privacy rights pursuant to 47 U.S.C. § 551;

6.6.1.7. Notice of the availability of universal remote controls and other compatible equipment (a list of which, specifying brands and models, shall be provided to any - Subscriber-upon-request).

6.6.2. Subscribers and the City will be notified of any changes in rates, programming services or channel positions, and any significant changes in any other information required to be provided by this Section, as soon as possible in writing. Notice must be given to Subscribers and the City a minimum of thirty (30) days in advance of such changes and other significant changes if the change is within the control of Grantee.

6.6.3. All Grantee promotional materials, announcements, and advertising of residential Cable Service to Subscribers and the general public, where price information is listed in any manner, shall clearly and accurately disclose price terms. In the case of pay-per-view or pay-per-event programming, all promotional materials must clearly and accurately disclose price terms and in the case of telephone orders, Grantee shall take appropriate steps to ensure that price terms are clearly and accurately disclosed to potential customers before the order is accepted.

SECTION 7.

Oversight and Regulation by Franchising Authority

7.1. Franchise Fees. The Grantee shall pay to the Franchising Authority a franchise fee in an amount equal to five percent (5%) of annual Gross Revenue received from the operation of the Cable System to provide Cable Service in the Franchise Area; provided, however, that Grantee Shall not be compelled to pay any higher percentage of franchise fees than any other cable operator providing service in the Franchise Area. The payment of franchise fees shall be made on a quarterly basis and shall be due thirty (30) days after the close of each calendar quarter. Each franchise fee payment shall be accompanied by a report prepared by a representative of the Grantee, which shows the basis for the computation of all Gross Revenue actually received from the operation of the Cable System for the provision of Cable Service in the Franchise Area during the period for which such franchise fee payment is made.

7.2. Periodic Reports. Each Franchise fee payment shall be submitted with supporting detail and a statement certified by Grantee's chief financial or accounting officer or an independent certified public accountant, reflecting the total amount of quarterly Gross Revenues for the payment period and a breakdown of major revenue categories (such as basic service, cable programming service, premium service, etc.). The City shall have the right to require further supporting information.

7.3. Late Payment. In the event any Franchise fee payment or recomputation amount is not made on or before the required date, Grantee shall pay a late charge of five percent (5%) of the amount of payment plus interest charges computed from such due date at an annual rate equal to the annual rate then charged for unpaid federal income taxes.

7.4. Franchise Fees Subject to Inspection.

7.4.1. Upon reasonable prior written notice, during normal business hours, at Grantee's principal business office, the Franchising Authority shall have the right to inspect the Grantee's financial records used to calculate the Franchising Authority's franchise fees; provided, however, that any such inspection shall take place within two (2) years from the date the Franchising Authority receives such payment, after which period any such payment shall be considered final.

7.4.2. Upon the completion of any such inspection by the Franchising Authority, the Franchising Authority shall provide to the Grantee a final report, which sets forth the Franchising Authority's findings in detail, including any and all substantiating documentation. The Grantee shall have thirty (30) days from the receipt of the report to provide the Franchising Authority with a written response, including any substantiating documentation. Any "Finally Settled Amount(s)" due to the Franchising Authority as a result of such inspection shall be paid to the Franchising Authority by the Grantee within thirty (30) days from receipt of written notice of the acceptance of such Finally Settled Amount from the Franchising Authority. For purposes of this Section 7 the term "Finally Settled Amount(s)" shall mean the agreed upon underpayment, if any, to the Franchising Authority by the Grantee as a result of any such inspection. The Franchising Authority shall bear the expense of any inspection of the Grantee's books and records, unless the inspection results in a Finally Settled Amount due to the Franchise Authority of five percent (5%) or more for any applicable period, in which event Grantee shall bear all reasonable costs of the inspection.

7.5. Oversight of Franchise. In accordance with applicable law, the Franchising Authority shall have the right to oversee, regulate and, on reasonable prior written notice, periodically inspect the construction, operation and maintenance of the Cable System in the Franchise Area, and all parts thereof, as necessary to monitor Grantee's compliance with the provisions of this Franchise Agreement.

7.6. Technical Standards. The Grantee shall comply with all applicable technical standards of the FCC as published in subpart K of 47 C.F.R. § 76. To the extent those standards are altered, modified, or amended during the term of this Franchise, the Grantee shall comply with such altered, modified or amended standards within a reasonable period after such standards become

effective. The Franchising Authority shall have, upon written request, the right to obtain a copy of tests and records required to be performed pursuant to the FCC's rules.

7.7. Maintenance of Books, Records, and Files.

7.7.1. Books and Records. Throughout the term of this Franchise Agreement, the Grantee agrees that the Franchising Authority, upon reasonable prior written notice to the Grantee, may review such of the Grantee's books and records regarding the operation of the Cable System and the provision of Cable Service in the Franchise Area which are reasonably necessary to monitor Grantee's compliance with the provisions of this Franchise Agreement at the Grantee's business office, during normal business hours and without unreasonably interfering with Grantee's business operations. Such books and records shall include any records required to be kept in a public file by the Grantee pursuant to the rules and regulations of the FCC. All such documents pertaining to financial matters that may be the subject of an inspection by the Franchising Authority shall be retained by the Grantee for a minimum period of five (5) years.

7.7.2. File for Public Inspection. Throughout the term of this Franchise Agreement, the Grantee shall maintain at its business office, in a file available for public inspection during normal business hours, those documents required pursuant to the FCC's rules and regulations.

7.7.3. Proprietary Information. Notwithstanding anything to the contrary set forth in this Section 7, the Grantee shall not be required to disclose information which it reasonably deems to be proprietary or confidential in nature. The Franchising Authority agrees to treat any information disclosed by the Grantee as confidential and only to disclose it to employees, representatives, and agents of the Franchising Authority that have a need to know, or in order to enforce this Franchise Agreement and who agree to maintain the confidentiality of all such information. The Grantee shall not be required to provide Customer information in violation of Section 631 of the Cable Act. For purposes of this Section 7, the terms "proprietary or confidential" include, but are not limited to, information relating to the Cable System design, customer lists, marketing plans, financial information unrelated to the calculation of franchise fees or rates pursuant to FCC rules, or other information that is reasonably determined by the Grantee to be competitively sensitive.

7.7.4. Records Required. Grantee shall at all times maintain:

7.7.4.1. Records of all written complaints received. The term "complaints" as used herein and throughout this Agreement refers to complaints about any aspect of the Cable System or Grantee's operations, including, without limitation, complaints about employee courtesy. Complaints recorded may not be limited to complaints requiring an employee service call.

7.7.4.2. A full and complete set of plans, records, and "as built" maps showing the exact location of all Cable System equipment installed or in use in the City, exclusive of Subscriber service drops.

7.7.4.3. Records of outages, indicating date, duration, area, and the number of Subscribers affected, type of outage, and cause.

7.7.4.4. Reports. Grantee shall prepare and submit to the City periodic written reports as to the Cable System and its operations at the times and in the format currently provided by Grantee to the City. In addition, Grantee shall prepare and submit to the City periodic reports necessary to substantiate Grantee compliance with the customer service standards set forth herein.

7.8. Transfer or Change of Control of Franchise.

7.8.1. Any transaction in which the ownership and/or operating control of the Cable System and/or the Franchise is transferred to a Person other than Grantee or any transaction, which results in a change in ownership interest in Grantee of five (5%) or more must not occur without prior written approval by the City.

7.8.2. An application to transfer the Franchise must provide complete information on the proposed transaction, including the legal, financial, technical and other pertinent qualifications of the transferee, and on the potential impact of the transfer on rates.

7.8.3. Approval by the City of such a transfer does not constitute a waiver or release of any of the rights of the City.

7.8.4. No application for such a transfer shall be granted unless the transferee agrees in writing that it will abide by and accept all terms of this Agreement and that it will assume the obligations, liabilities, and responsibility for all acts and omissions, known and unknown, of the previous franchisee under this Agreement for all purposes, including renewal, unless the City, in its sole discretion, expressly waive this requirement in whole or in part.

7.8.5. Neither the Grantee nor any other person may transfer the Cable System or the Franchise without the prior written consent of the Franchising Authority, which consent shall not be unreasonably withheld or delayed. No such consent shall be required, however, for (i) a transfer in trust, by mortgage, hypothecation, or by assignment of any rights, title, or interest of the Grantee in the Franchise or in the Cable System in order to secure indebtedness, or (ii) a transfer to an entity owned and/or controlled by Comcast Corporation. All transfers will be considered in accordance with the standards and time limits of the Cable Act and FCC rules.

SECTION 8.

Insurance and Indemnity

8.1. Insurance. Throughout the term of this Franchise Agreement, the Grantee shall, at its own cost and expense, maintain Comprehensive General Liability Insurance and provide the Franchising Authority, certificates of insurance designating the Franchising Authority and its officers, boards, commissions, councils, elected officials, agents and employees as additional insureds and demonstrating that the Grantee has obtained the insurance required in this Section 8. Such policy or policies shall be in the minimum amount of One Million Dollars (\$1,000,000.00) for bodily injury or death to any one person, and One Million Dollars (\$1,000,000.00) for bodily injury or death of any two or more persons resulting from one occurrence, One Million Dollars (\$1,000,000.00) for property damage resulting from any one accident, and Three Million Dollars (\$3,000,000.00) for excess liability or umbrella coverage. Such policy or policies shall be non-cancelable except upon thirty (30) days prior written notice

to the Franchising Authority. The Grantee shall provide workers' compensation coverage in accordance with applicable law. All insurance policies shall be with sureties qualified to do business in the State of Maryland, with an A-9 or better rating for financial condition and financial performance by Best's Key Rating Guide, Property/Casualty Edition, and in a form approved by the City. Grantee shall deliver to the City a copy of the required certificates of insurance, evidencing that the required policies are in effect, no later than thirty (30) days after such policy is required to be effective. Grantee shall not cancel any required insurance policy without submission of proof that Grantee has obtained alternative insurance satisfactory to the City which complies with this Agreement. The Grantee shall indemnify and hold harmless the Franchising Authority from any workers compensation claims to which the Grantee may become subject during the term of this Franchise Agreement

8.2. Indemnification. The Grantee shall indemnify, defend and hold harmless the Franchising Authority, its officers, employees, and agents from and against any liability or claims resulting from property damage or bodily injury (including accidental death), which arise out of the Grantee's construction, operation, maintenance or removal of the Cable System, including, but not limited to, reasonable attorneys' fees and costs, provided that the Franchising Authority shall give the Grantee written notice of its obligation to indemnify the Franchising Authority within ten (10) business days of receipt of a claim or action pursuant to this Section 8.2. If the Franchising Authority determines that it is necessary for it to employ separate counsel, the costs for such separate counsel shall be the responsibility of the Franchising Authority.

8.3. Immunity. Nothing in this Agreement shall be construed to waive any immunity of the City under applicable law.

8.4. Performance Bond. Grantee shall obtain and maintain during the entire term of the Franchise, and any renewal or extensions thereof, a performance bond in the amount of \$100,000 to ensure Grantee's faithful performance of its obligations under this Agreement, as follows:

8.4.1. There shall be recoverable by the City, from the principal and surety, any and all fines and penalties due to the City and any and all damages, losses, costs, and expenses suffered or incurred by the City resulting from the failure of Grantee after notice and opportunity to cure to faithfully comply with (i) the material provisions of this Agreement, the Cable Law, and other applicable law; (ii) all orders, permits and directives of the City or other body having jurisdiction over its acts or defaults; (iii) payment of fees due to the City; or (iv) payment of any claims or liens due the City. Such losses, costs and expenses shall include but not be limited to reasonable attorney's fees and other associated expenses.

The performance bond shall be issued by a surety qualified to do business in Maryland and with an A- or better rating for financial condition and financial performance in Best's Key Rating Guide, Property/Casualty Edition; shall be in a form approved by the City; and shall contain the following endorsement:

"This bond may not be cancelled, or allowed to lapse. Until thirty (30) days after receipt by the City, by certified mail, return receipt requested, of a written notice from the issuer of the bond of intent to cancel or not renew."

8.4.2. Upon written application by Grantee, the City may, at its sole option, in writing, permit the amount of the bond to be reduced or waive the requirements for a performance bond. Reductions granted or denied upon application by Grantee shall be without prejudice to Grantee's subsequent applications or to the City's right to require the full bond at any time thereafter. However, no application shall be made by Grantee within one (1) year of any prior application.

8.4.3. The rights reserved to the City herein are in addition to all other rights of the City, whether reserved herein or authorized by applicable law, and no action, proceeding, or exercise of a right with respect to such performance bond will affect any other right the City may have. The receipt of damages by the City from the performance bond shall not be construed to excuse faithful performance by Grantee or limit the liability of Grantee under, the terms of its Franchise for damages.

8.4.4. The performance bond is the property of the City if the Franchise is revoked. The City must return the performance bond to Grantee after the Franchise is terminated if there is no outstanding default or unpaid amounts owed to the City.

SECTION 9. System Description and Service

9.1. System Capacity. During the term of this Agreement the Grantee's Cable System shall be capable of providing a modern design when built, utilizing an architecture that will permit additional improvements necessary for high quality and reliable service. The Grantee's Cable System shall initially utilize the ITU G.983 Passive Optical Network standard and have no active elements so as to make it more reliable.

9.2. Service to School Buildings. The Grantee shall provide free "Basic" and "Expanded Basic" tier Cable Service, and free installation of one outlet to each public and private K - 12 school located in the Franchise Area within 150 feet of the Grantee's distribution cable.

9.3. Service to Governmental and Institutional Facilities. The Grantee shall provide free "Basic" and "Expanded Basic" tier Cable Service and free installation of one outlet to each municipal building located in the Franchise Area within 150 feet of the Grantee's distribution cable.

9.4. Government Telecommunications Transport Backbone Facility. The Grantee shall continue to provide the Government Telecommunications Transport Backbone Facility (GTTBF) as in existence at the time of the execution of this Franchise Agreement and provide GTTBF to City buildings constructed during the term of this Agreement. This would include a dedicated ISP connection for the GTTBF and a share hosted City WEB page. The Grantee shall provide four (4) hour technical response time to correct GTTBF System malfunctions. Technical response does not include malfunction of City's equipment used on the GTTBF. The two strands of fiber shall be for the exclusive use of the City for the term of this Franchise Agreement. The City shall not make available to third parties for sale, lease, or use any portion of the bandwidth made available to the City by the Grantee.

Comment [Ib1]:

9.5. Access channels.

9.5.1. Grantee shall provide at least one (1) video channel for non-commercial public, educational and governmental use within the City's franchise area.

9.5.2. The City of Gaithersburg's Access Channel position should not be changed unless there is good business cause and the City consents to the change, such consent not to be unreasonably withheld. The Access Channel position should be the same throughout the City. If Grantee elects to change the channel position for the City's Access Channel, Grantee shall provide at least three (3) months notice to the City prior to doing so. Grantee will provide reasonable advertising and promotional materials necessary to educate viewers of the channel repositioning.

9.5.3. The Access Channel for the City shall be provided on the lowest cost tier of service and shall be provided City-wide.

9.5.4. The City will continue to receive the same Public, Education and Government channels that are included in Montgomery County's channel line-up, with the exception of the Takoma Park Access Channel, which will be used to air the City's Access Channel City-wide.

9.5.5. Capital Equipment Support Fee for I-Net and Access Equipment and Facilities. Grantee shall collect a Gaithersburg Capital Equipment Support Fee in the amount of \$0.25 per subscriber each month for the City. The fee will be used by the City, in its sole discretion, for PEG equipment (including, but not limited to, studio and portable production equipment, editing equipment and program playback equipment), PEG-related facilities renovation, or construction. It will also be used to support continued operation and maintenance of the City's Institutional Network ("I-Net") and associated network equipment, and the Institutional Network. Payment of the Capital Equipment Support Fee shall be made quarterly, concurrently with the Franchise fee payment. The first payment shall be due on the same date as the first Franchise fee payment made by Grantee under this Agreement. The fee will not be considered as Gross Revenue, for the purpose of collecting franchise fees.

9.6. Editorial Control. Except as expressly permitted by federal law, Grantee shall not exercise any editorial control over the content of programming on PEG Channels (except for such programming as Grantee may produce and cablecast on such channels).

9.7. System Maintenance. Grantee shall schedule maintenance on the Cable System at times that will minimize the likelihood of interruptions in service to Subscribers. Maintenance of the Cable System shall be performed in accordance with the technical performance and operating standards established by FCC rules and regulations

9.8. Cable System Characteristics: The Cable System shall, at all times during the Franchise term, meet or exceed the following requirements:

9.8.1. Cable System shall be capable of continuous twenty-four (24) hour daily operations without severe material degradation of signal except during extremely inclement weather or immediately following extraordinary storms that adversely affect utility services or damage major system components.

9.8.2. Grantee shall operate the Cable System in such a manner as to minimize interference with the reception of off-the-air signals by a Subscriber.

Grantee shall provide standby power generating capacity at the headend and at all hubs. Grantee shall maintain motorized standby power generators capable of at least twenty-four (24) hours duration at the headend and battery back-up power capability of at least four (4) hours duration for all system hubs with automatic dialer response systems to alert the system headend when commercial power is interrupted. The headend generator shall be tested once per week. The power supplies serving the nodes and distribution shall be capable of providing power to the system for not less than two (2) hours according to manufacturer specification in the event of an electrical outage. Grantee shall maintain sufficient portable motorized generators to be deployed to a hub site in the event that the duration of a power disruption is expected to exceed four (4) hours.

9.8.3. Grantee shall offer customer set top boxes with the capability to enable Subscribers without cost to block out audio and video on any undesired channels on the Cable System.

9.8.4. Cable System shall include equipment so that any pay-per-view programming can only be activated by the positive action of a Subscriber.

9.8.5. All closed-caption programming retransmitted by the Cable System shall include the closed-caption signal. For hearing impaired Subscribers, Grantee shall provide information concerning the cost and availability of equipment to facilitate the reception of all basic services for the hearing impaired. In addition, Grantee must have TDD/TTY (or equivalent) equipment at the company office, and a publicly listed telephone number for such equipment, that will allow hearing impaired customers to contact Grantee. Upon request, Grantee shall provide, for purchase or lease, a remote control device to those Subscribers who are mobility limited, or where a member of the Subscriber's household is mobility limited.

9.9. Integration of Advancements in Technology. To ensure that Grantee is carrying out its responsibilities hereunder, Grantee shall be required to submit a report on cable technology to the City at the same time it provides such a report to the County. Each report shall include the same information as provided in the report to the County.

9.10. Design Modifications. At least ninety (90) days prior to the date of any construction on the Cable System intended to implement any modifications to the design, the Grantee shall provide, for purchase or lease, a remote control device to those Subscribers who are mobility limited, or where a member of the Subscriber's household is mobility limited.

9.11. Periodic Performance Evaluations. The City may, at its discretion, hold performance evaluation sessions every three (3) years. Grantee may be required by the City to notify Subscribers of all such evaluation sessions by announcement on a designated local channel on the Cable System in a manner and with a frequency specified by the City for five (5) consecutive dates preceding each session. Topics that may be discussed at any evaluation session may include, but are not limited to, system performance and construction, Grantee compliance with the Cable Law and this Agreement, customer service and complaint response, Subscriber

privacy, services provided, programming offered, service rate structures, Franchise fees, penalties, free or discounted services, applications of new technologies, judicial and FCC filings, and line extensions. During the evaluation process, Grantee shall fully cooperate with the City and shall provide such information and documents as the City may need to reasonably perform its review.

9.12. Mid-Term Review

9.12.1. In addition to any periodic performance evaluations required herein, the City may also conduct a mid-term technical review of Grantee's cable system once during the Franchise term. The Grantee shall fully cooperate and assist the City in conducting such review.

9.12.2. The City may commence the mid-term review process at any time after the beginning of the tenth year of the Franchise term. The City may issue an Upgrade Order, as defined herein, at any time after the end of the tenth year of the Franchise term.

9.12.3. Purpose: The purpose of the mid-term technical review shall be to evaluate the technical performance and capabilities of the Grantee's system to determine whether to require a system upgrade to conform with technical improvements then commonly in use in the industry and available on systems in communities similar to the City. Subject to the provisions of this Section, the City may amend this Agreement to require the Grantee to upgrade its system to incorporate technical improvements (the "Upgrade Option").

9.12.4. City's Initial Review: To determine whether to invoke the Upgrade Option, the City shall first commence a review of the cable system. Such review shall be conducted to enable the City to determine whether the cable system should be upgraded or rebuilt. This determination shall be based upon the reasonable cable-related needs and interests of the community, considering the costs to the Grantee of meeting those needs and interests.

9.12.5. Grantee's Report: To assist in the City's initial review, the Grantee shall, at the City's request, promptly submit a report to the City describing advances in cable technology nationwide, the potential benefits and disadvantages of those advances for consumers, and any plans or timetables the Grantee may have for instituting such changes in technology.

9.12.6. Public Hearings: If, after conducting its initial review, the City determines that a system upgrade may be warranted, it shall hold at least two public hearings to enable the general public and the Grantee to comment and to present additional information.

9.12.7. Upgrade Order: Following such hearings, the City shall determine whether the exercise of the Upgrade Option is warranted, based upon the reasonable cable-related needs and interests of the community, considering the costs to the Grantee of meeting those needs and interests. The City shall issue a written order ("Upgrade Order") stating whether an upgrade is required, describing any upgrade to be implemented, and setting forth the basis for its decision. If an upgrade is required, the City shall set forth any relevant conditions.

9.12.8. Grantee's Response: Within sixty (60) days after the City issues the Upgrade Order, the Grantee shall notify the City in writing whether it will comply with the Order. If the

Grantee does not so notify the City within sixty (60) days, the Grantee will be deemed to have agreed to comply with the Upgrade Order.

9.12.9. Amendment of the Franchise Agreement. If the Grantee agrees to comply with the Upgrade Order, the parties shall amend this Agreement accordingly.

9.12.10. Rejection of the Upgrade Option: If, however, the Grantee is unwilling to comply with the Upgrade Order, the Grantee shall, as its sole remedy, notify the City in writing as part of the response specified in Section 9.12.8, pursuant to Section 626 of the Cable Act, that it wishes to commence proceedings to renew the Franchise. If, at the time of such notice, more than three (3) years remain in the term of the Franchise, such notice shall be deemed, by mutual agreement, to shorten the term of the Franchise and this Agreement so that the Franchise and the Agreement shall terminate thirty-six months from the date of the notice.

SECTION 10.

Enforcement and Termination of Franchise

10.1. Notice of Violation or Default. In the event the Franchising Authority believes that the Grantee has not complied with the material terms of the Franchise, it shall notify the Grantee in writing with specific details regarding the exact nature of the alleged noncompliance or default.

10.2. Grantee's Right to Cure or Respond. The Grantee shall have thirty (30) days from the receipt of the Franchising Authority's notice described in Section 10.1, above: (A) to respond to the Franchising Authority, contesting the assertion of noncompliance or default, or (B) to cure such default, or (C) in the event that, by nature of the default, such default cannot be cured within the thirty (30) day period, initiate reasonable steps to remedy such default and notify the Franchising Authority of the steps being taken and the projected date that they will be completed.

10.3. Enforcement. In the event the Grantee fails to respond to the Franchising Authority's notice described in Section 10.1, above, or in the event that the alleged default is not remedied within thirty (30) days or the date projected pursuant to Section 10.2, above, the Franchising Authority may take one or more of the following actions: impose liquidated damages in the amount, whether per day, incident or other measure of violation, as provided in this Franchise Agreement; draw upon the performance bond; seek compensatory damages from Grantee for the benefit of the City and/or the Subscribers; or revoke the Franchise pursuant to procedures specified in this agreement.. Payment of liquidated damages by Grantee will not relieve Grantee of its obligation to meet the Franchise requirements.

10.4. Alternate Remedies. In determining which remedy or remedies are appropriate, the City must consider the nature of the violation, the person or persons bearing the impact of the violation, the nature of the remedy required in order to prevent further violations, and any other matters the City determines are appropriate. In addition to or instead of these remedies, the City may seek legal or equitable relief from any court of competent jurisdiction. The parties are agreeing to liquidated damages as a reasonable estimate of the damages the City will incur in the event of a breach of the franchise and that the City's decision to assess liquidated damages shall be an offset to any actual damages the City may subsequently claim, and shall be in lieu of revocation.

10.5. Liquidated Damages. Because Grantee's failure to comply with provisions of the Franchise and this Franchise Agreement will result in injury to the City, and because it will be difficult to estimate the extent of such injury, the City and Grantee agree to the following liquidated damages for the following violations of the Franchise and of this Agreement, which represent both parties' best estimate of the damages resulting from the specified violation. To maintain that estimate, the parties agree that the liquidated damage amounts are in 2001 dollars and shall be increased each year by the CPL. The City may draw on the performance bond to recover any liquidated damages.

Comment [lb2]: 2009?

10.5.1. For failure to comply with PEG Access requirements: \$125 per day, in addition to any monetary payment due under this Agreement.

10.5.2. For failure to supply information, reports, or filings lawfully required under the Franchise Agreement or applicable law or by the City: \$200/day for each day the violation continues;

10.5.3. For violation of any other customer service standards: \$200 per violation;

10.5.4. For failure to render required payment for reimbursement of any Franchise expenses, or liquidated damages: \$100 per day, in addition to any monetary payment due under this Agreement or the Cable Law;

10.5.5. For failure to file, obtain or maintain the performance bond in a timely fashion: \$50 per day;

10.5.6. For failure to restore damaged property: \$50 per day, in addition to the cost of the restoration as required elsewhere herein; and

10.5.7. For violation of technical standards established by the FCC: \$100 per day

10.5.8. Breaches affecting multiple subscribers shall be assessed as a single breach.

10.5.9. In the case of a substantial default of a material provision of the Franchise, the City may declare the Franchise Agreement to be revoked in accordance with the following:

10.5.9.1. The Franchising Authority shall give written notice to the Grantee of its intent to revoke the Franchise on the basis of a pattern of noncompliance by the Grantee, including one or more instances of substantial noncompliance with a material provision of the Franchise. The notice shall set forth with specificity the exact nature of the noncompliance. The Grantee shall have thirty (30) days from the receipt of such notice to object in writing and to state its reasons for such objection. In the event the Franchising Authority has not received a satisfactory response from the Grantee, it may then seek termination of the Franchise at a public hearing. The Franchising Authority shall cause to be served upon the Grantee, at least ten (10) days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to request termination of the Franchise.

10.5.9.2. At the designated hearing, the Franchising Authority shall give the Grantee an opportunity to state its position on the matter, present evidence and question

witnesses, after which it shall determine whether or not the Franchise shall be revoked. The public hearing shall be on the record and a written transcript shall be made available to the Grantee within ten (10) business days. The decision of the Franchising Authority shall be in writing and shall be delivered to the Grantee in the manner set forth in Section 11.2 herein.

10.5.10. If the City revokes, the Franchise, or if for any other reason Grantee abandons, terminates, or fails to operate or maintain Cable Service to its Subscribers, the following procedures and rights are effective:

10.5.10.1. The City may require the former Grantee to remove its facilities and equipment at the former Grantee's expense and restore affected sites as required in Section 3.3.2 or permit the former Grantee to abandon such facilities in place. If the former Grantee fails to do so within a reasonable period of time, the City may have the removal done at the former Grantee's and/or surety's expense.

10.5.10.2. If a Cable System is abandoned by the Grantee or the Grantee fails to operate or continue to provide Cable Service to its Subscribers or otherwise terminates the Franchise, the ownership of all portions of the Cable System in Public Way shall revert to the City and the City may sell, assign, or transfer all or part of the assets of the Cable System.

Technical Violation. The Franchising Authority agrees that it is not its intention to subject the Grantee to penalties, fines, forfeitures or revocation of the Franchise for so-called "technical" breach(es) or violation(s) of the Franchise, which shall include, but not be limited to instances or for matters where a violation or a breach of the Franchise by the Grantee was good faith error that resulted in no or minimal negative impact on the Customers within the Franchise Area;

SECTION 11. Miscellaneous Provisions

11.1. Force Majeure. The Grantee shall not be held in default under, or in noncompliance with, the provisions of the Franchise, nor suffer any enforcement or penalty relating to noncompliance or default (including termination, cancellation or revocation of the Franchise), where such noncompliance or alleged defaults occurred or were caused by strike, riot, war, earthquake, flood, tidal wave, unusually severe rain or snow storm, hurricane, tornado or other catastrophic act of nature, failure of utility service necessary to operate the Cable System, governmental, administrative or judicial order or regulation or other event that is reasonably beyond the Grantee's ability to anticipate or control. This provision also covers work delays caused by waiting for utility providers to service or monitor their own utility poles on which the Grantee's cable and/or equipment is attached, as well as unavailability of materials and/or qualified labor to perform the work necessary.

11.2. Notice. All notices shall be in writing and shall be sufficiently given and served upon the other party by hand delivery, first class mail, registered or certified, return receipt requested, postage prepaid, or by reputable overnight courier service and addressed as follows:

The Franchising Authority: The City of Gaithersburg
Attn: Tony Tomasello

31 South Summit Avenue
Gaithersburg, MD 20877-2098
ATTN: City Manager

The Grantee:

RCN

Comment [lb3]: Add address

11.3. Entire Agreement. This Franchise Agreement, including all Exhibits, embodies the entire understanding and agreement of the Franchising Authority and the Grantee with respect to the subject matter hereof and supersedes all prior understandings, agreements and communications, whether written or oral. All ordinances or parts of ordinances that are in conflict with the provisions of this Franchise Agreement are superseded by this Franchise Agreement.

11.4. Severability. If any section, subsection, sentence, clause, phrase, or other portion of this Franchise Agreement is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect.

11.5. Governing Law. This Franchise Agreement shall be deemed to be executed in the City of Gaithersburg, State of Maryland, and shall be governed in all respects, including validity, interpretation and effect, and construed in accordance with, the laws of the State of Maryland, as applicable to contracts entered into and performed entirely within the State.

11.6. Modification. No provision of this Franchise Agreement shall be amended or otherwise modified, in whole or in part, except by an instrument, in writing, duly executed by the Franchising Authority and the Grantee, which amendment shall be authorized on behalf of the Franchising Authority through the adoption of an appropriate resolution or Order by the Franchising Authority, as required by applicable law.

11.7. Jurisdiction and Venue. Grantee consents to venue and jurisdiction in the U.S. District Court of Maryland and the Circuit Court for Montgomery County, Maryland.

11.8. Franchise Agreement Subject to Exercise of Police Powers. All rights and privileges granted herein are subject to the police powers of the City

11.9. No Waiver. The failure of the City on one or more occasions to exercise a right or to require compliance or performance under this Franchise Agreement, the Cable Law, or any other applicable law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance by the City, nor to excuse Grantee from complying or performing, unless such right or such compliance or performance has been specifically waived in writing.

IN WITNESS WHEREOF, this Franchise Agreement has been executed by the duly authorized representatives of the parties as set forth below, as of this _____ day of June, 2009.

Attest: Franchising Authority:
Mayor and City Council of Gaithersburg

_____ By: _____
Angel L. Jones
City Manager

Attest: _____ RCN _____

Comment [1b4]: Add signatory information

DRAFT