

**CITY OF MERCER ISLAND  
ORDINANCE NO. 05-07**

**AN ORDINANCE OF THE CITY OF MERCER ISLAND, WASHINGTON,  
RELATING TO THE ADOPTION OF AN ORDINANCE GRANTING A  
NON-EXCLUSIVE FRANCHISE TO COMCAST CABLE TO CONSTRUCT,  
MAINTAIN AND OPERATE A CABLE SYSTEM FOR THE  
DISTRIBUTION OF TELEVISION AND OTHER ELECTRONIC SIGNALS  
WITHIN THE CITY**

WHEREAS, the City of Mercer Island has adopted a Master Cable Television Ordinance (95-113) on June 5, 1995;

WHEREAS, the City of Mercer Island City Council adopted a Franchise Ordinance (95-114) on June 5, 1995 between the City and Tele-Vue Systems, Inc., Viacom Cable (Franchise Ordinance);

WHEREAS, Comcast California/Colorado/Texas/Washington, Inc (Comcast) is Viacom's successor in interest and has assumed all obligations under the Franchise Ordinance;

WHEREAS, the Franchise Ordinance terminates on June 27, 2005; and

WHEREAS, the Mercer Island City Council directed staff to enter into negotiations with Comcast cable have negotiated a non-exclusive franchise for operation within Mercer Island; NOW THEREFORE,

THE CITY COUNCIL OF THE CITY OF MERCER ISLAND DO ORDAIN AS FOLLOWS:

**Section 1. Adoption of Mercer Island Franchise Ordinance.** The Mercer Island City Council hereby approves, adopts and directs the City Manager to execute the following Franchise Agreement to be entered into between the City of Mercer Island and Comcast:

## **CABLE FRANCHISE**

This Cable Franchise (hereinafter, the "Franchise") is between the City of Mercer Island (hereinafter, "City") and Comcast of California/Colorado/Texas/Washington, Inc. (hereinafter, "Franchisee").

The City, having determined that the financial, legal, and technical ability of the Franchisee 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 with the Franchisee for the construction, operation and maintenance of a Cable System on the terms and conditions set forth herein.

### **SECTION 1 - Definition of Terms**

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

1.1 "Access" or "EG" includes educational access and governmental access, collectively, and means the availability for noncommercial use by various governmental and educational agencies, institutions, organizations, groups and individuals in the community, including the City and its designees, of a particular channel or channels on the Cable System to receive and distribute video programming to Customers, as permitted under applicable law, including, but not limited to governmental access where the City or their designees are the primary users having editorial control over programming and services.

1.2 "Bad Debt" means amounts lawfully owed by a Customer and accrued as revenues on the books of the Franchisee but not collected after reasonable efforts by the Franchisee.

1.3 "Basic Cable Service" means the lowest service Tier that includes the retransmission of local television broadcast signals and Access channels, or as such service Tier may be further defined by federal law.

1.4 "Cable Act" means the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996, and any amendments thereto.

1.5 "Cable Services" shall mean the one-way transmission to Customers of video programming, or other programming service, and Customer interaction, if any, which is required for the selection or use of such video programming or other programming service.

1.6 "Cable System" or "system" shall mean the Franchisee's facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that

is designed to provide Cable Service which includes video programming and which is provided within the Franchise Area.

1.7 "Channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel, as television channel is defined by FCC regulations.

1.8 "City" means the City of Mercer Island or the lawful successor, transferee, designee, or assignee thereof.

1.9 "Customer" means a Person or user of the Cable System who lawfully elects to receive Cable Service from Franchisee.

1.10 "Effective Date" means the date set forth in Section 2.6 "Term of Franchise".

1.11 "EG Origination Point" means the location chosen by the City as their EG return feed termination point.

1.12 "FCC" means the Federal Communications Commission, or successor governmental entity thereto.

1.13 "Franchise" shall mean the non-exclusive right and authority to construct, maintain, and operate a Cable System through use of the public streets, dedications, public utility easements, or other Right of Ways in the Franchise Area pursuant to a contractual agreement executed by the City and the Franchisee.

1.14 "Franchise Area" means the area within the jurisdictional boundaries of the City.

1.15 "Franchise Fee" means consideration paid by the Franchisee for the privilege granted under this Franchise for the use of Right of Ways and the privilege to construct and/or operate a Cable System in the Franchise Area. The term Franchise Fee does not include:

- (A) Any tax, fee or assessment of general applicability;
- (B) Capital costs which are required by the Franchise to be incurred by the Franchisee for Access facilities, including the support required in Section 10;
- (C) Requirements or charges incidental to the awarding or enforcing of the Franchise, including but not limited to, payments for bonds, letters of credit, insurance, indemnification, penalties or liquidated damages; or
- (D) Any fee imposed under Title 17, United States Code.

1.16 "Franchisee" shall mean Comcast of California/Colorado/Texas/Washington, Inc. or the lawful successor, transferee, designee, or assignee thereof.

1.17. "Gross Revenues" means all revenue derived directly or indirectly by the Franchisee from the operation of the Cable System in the Franchise Area to provide Cable Services, calculated in accordance with generally accepted accounting principles, including but not limited to monthly basic, premium and pay-per-view fees, installation fees, and equipment rental fees. Gross Revenues shall not include (i) Bad Debt, provided, however, that all or part of any such Bad Debt that is written off but subsequently collected shall be included in Gross Revenues in the period collected; or (ii) any taxes on services furnished by the Franchisee which are imposed directly on any Customer by the State, City or other governmental unit and which are collected by the Franchisee on behalf of said governmental unit.

1.18 "Headend" means any facility used for signal reception and dissemination on the Cable System, including cables, antennas, wires, satellite dishes, monitors, switchers, modulators, processors for broadcast signals or other signals, and all other related equipment and facilities.

1.19 "Normal Business Hours" means those hours during which most similar businesses in the community are open to serve customers. In all cases, "normal business hours" must include some evening hours at least one night per week and/or some hours on Saturday.

1.20 "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 City.

1.21 "Right of 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, drive, circle or other public way, including, but not limited to, utility easements, dedicated utility strips, or rights-of-way dedicated for compatible uses now or hereafter held by the City in the Franchise Area, which shall entitle the City and the Franchisee to the use thereof for the purpose of installing, operating, repairing, upgrading and maintaining the Cable System.

## **SECTION 2 - Grant of Authority**

2.1. **Nonexclusive Franchise.** The City hereby grants to the Franchisee under the Cable Act a nonexclusive Franchise authorizing the Franchisee to make reasonable and lawful use of the Right-of-Way within the Franchise Area to construct, operate, maintain, reconstruct, repair and upgrade a Cable System for the purpose of providing Cable Services. Such grant is subject to the terms and conditions set forth in this Franchise, and applicable law. This Franchise shall constitute both a right and an obligation to provide Cable Services and to fulfill the obligations set forth in the provisions of this Franchise.

2.2. **Other Required Permits/Approvals.** This Franchise shall not be interpreted to prevent the City from imposing other conditions, to the extent permitted by law, including additional compensation for use of the Right of Ways, should the Franchisee provide service(s) other than Cable Service. No rights shall pass to the Franchisee by implication. Without limiting the foregoing and by way of example, this Franchise shall not include or be a substitute for (i) any other permit or authorization required for transacting business within the City; (ii) any permit or approval required by the City for Right of Way users including right of way permits,

encroachment agreements, tree trimming permits or site lease agreements; and (iii) any permits or agreements for use of City property to which access is not specifically granted by this Franchise.

2.3 Other Ordinances. The Franchisee agrees to comply with the terms of any lawfully adopted generally applicable local ordinance, to the extent that the provisions of the ordinance do not have the effect of limiting the benefits or expanding the obligations of the Franchisee that are granted by this Franchise. Franchisee reserves the right to challenge provisions of any ordinance which conflict with its contractual rights, either now or in the future. In the event of a conflict between any ordinance and this Franchise, the Franchise shall control, provided however that the Franchisee agrees that it is subject to the lawful exercise of the police power of the City.

2.4 No Warranty. This Franchise is intended to convey limited rights and interests only as to those Right of Ways in which the City has an actual interest. It is not a warranty of title or interest in any Right of Way; it does not provide the Franchisee with any interest in any particular location within the Right of Way. This Franchise shall not be deemed to authorize the Franchisee to provide service, or install cables, wires, lines, or any other equipment or facilities upon City property other than the Right of Way or upon private property without the owner's consent or to utilize publicly or privately owned utility poles or conduits without a separate agreement with the owners thereof.

2.5 Other Services. This Franchise is an express authorization to provide Cable Services. This Franchise is not a bar to the imposition of any lawful conditions on the Franchisee with respect to Franchisee's delivery of non-cable services, telecommunications services or information services. This Franchise does not relieve the Franchisee of any obligation it may have to obtain from the City an authorization to provide non-cable services, telecommunication services or information services or relieve the Franchisee of its obligations to comply with any such authorizations that may be lawfully required. However, this Franchise shall not be read as a concession by the Franchisee that it needs authorization to provide non-cable services.

2.6 Term of Franchise. The term of the Franchise granted hereunder shall be five (5) years, commencing on September 9, 2005 and terminating on September 8, 2010, unless the Franchise is renewed or is lawfully terminated in accordance with the terms of this Franchise and the Cable Act.

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

2.8 Reservation of Authority. Nothing in this Franchise shall (A) abrogate the right of the City 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 by the City, or (C) be construed as a waiver or release of the rights of the City in and to the Right of Ways.

2.9 Competitive Equity. In the event an application for a new cable television franchise is filed with the City, the City will notify Franchisee of such application via regular mail. The Franchisee acknowledges and agrees that the City reserves the right to grant one or more

additional franchises to provide Cable Service within the Franchise Area; provided, however, that the terms or conditions of any such franchise agreement, taken as a whole, should be substantially similar in order that no one cable company or multi-channel video programming distributor is granted an unfair advantage over another company. If any such additional or competitive franchise is granted by the City which, in the reasonable opinion of the Franchisee, contains more favorable or less burdensome terms or conditions than this Franchise, the City and Franchisee will negotiate amendments mutually agreed upon by City and Franchisee.

### **SECTION 3 – Construction and Maintenance of the Cable System**

3.1. **Permits and General Obligations.** The Franchisee shall be responsible for obtaining 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. Construction, installation, and maintenance of the Cable System shall be performed in a safe manner using materials that meet or exceed industry standards. All facilities, poles, conduits, cables and equipment installed by the Franchisee shall be located so as to minimize interference with the designated use of the Right of Ways at the time of installation.

3.2. **Conditions on Occupancy of Right of Ways.**

3.2.1 **Relocation at request of City.** Upon thirty (30) days prior written notice to Franchisee (except in the case of emergency), the City shall have the right to require Franchisee to relocate any part of Franchisee's Cable System within the Right of Ways when required for any public work, capital improvement or when the safety, health or welfare of the public requires such change, and the expense thereof shall be paid by Franchisee. Should Franchisee fail to remove or relocate any such facilities by a reasonable date established by the City or in the case of an emergency, City may effect such removal or relocation, and the expense thereof shall be paid by Franchisee, including all costs and expenses incurred by City due to Franchisee's delay. If City requires Franchisee to relocate its facilities located within the Right of Ways, City shall make a reasonable effort to provide Franchisee with an alternate location within the Right of Ways.

3.2.2 **Temporary Relocation at request of Third Party.** The Franchisee shall, upon reasonable prior written request of any Person holding a permit issued by the City to move any structure, temporarily move its facilities to permit the moving of such structure; provided (i) the Franchisee may impose a reasonable charge on any Person for the movement of its facilities, and such charge may be required to be paid in advance of the movement of its wires or cables; and (ii) the Franchisee is given not less than ten (10) business days advance written notice to arrange for such temporary relocation.

3.2.3 **Restoration of Right of Ways.** If Franchisee disturbs, alters, or damages any Right of Way during construction, connection, operation, maintenance or repair of the Cable System, the Franchisee shall restore any such Right of Way or portion of Right of Way in accordance with applicable City codes and regulations. The City may perform such restoration work, after providing notice to the Franchisee and a reasonable

opportunity for Franchisee to perform such work , or without notice when there is a risk to public health, safety or welfare, or when restoration will cause delay or added expense to a public project or activity,. The cost thereof, including the costs of inspection and supervision, shall be paid by the Franchisee.

**3.2.4 Safety Requirements.** The Franchisee shall undertake all necessary and appropriate efforts to maintain its work sites in a safe manner in order to prevent accidents that may cause damage or injuries. All work undertaken on the Cable System shall be performed in substantial accordance with applicable FCC or other federal and state regulations. The Cable System shall not unreasonably endanger or interfere with the safety of Persons or property in the Right of Ways.

**3.2.5 Trimming of Trees and Shrubbery.** The Franchisee shall be required to obtain a tree permit under Chapter 19.11, Mercer Island City Code, prior to trimming trees or other natural growth. All such trimming shall be done at the Franchisee's cost and expense. The Franchisee shall be responsible for any damage caused by such trimming.

**3.2.6 Aerial and Underground Construction.** If the majority of the transmission and distribution facilities of all of the respective wireline service providers in any given area within the Franchise Area are underground, the Franchisee shall place its Cable Systems' distribution cables underground; provided that such underground locations are capable of accommodating the Franchisee's cable and other equipment without technical degradation of the Cable System's signal quality. If the majority of the transmission or distribution facilities of any of the respective wireline service providers are both aerial and underground, then Franchisee shall have the discretion to construct, operate, and maintain its distribution cables, or any part thereof, aerially or underground. In areas where a wireline service provider's wiring is aerial, then Franchisee may also install aerial cable, except when a property owner or resident requests underground installation and agrees to bear the additional cost in excess of aerial installation. When electric and telephone utility wiring and the aerial lines of telecommunications providers in an area of the Franchise Area are subsequently relocated to underground, the Franchisee shall relocate its aerial Cable System facilities to underground, at no cost or expense to the City, at the same time.

Nothing in this Section shall be construed to require the Franchisee to construct, operate, or maintain underground any ground-mounted appurtenances such as customer taps, line extenders, system passive devices, amplifiers, power supplies, fiber splices, nodes, pedestals, or other related equipment.

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

A. Utility Trench and Vault/Pedestal Engineering -- To ensure proper space and availability in the supplied joint trench, Franchisee shall only be required to pay for the work hours necessary to complete cable system related engineering in coordination with the other utilities involved in the project.

B. Conduit and Vaults/Pedestals Placement -- Franchisee shall only be required to pay for the direct cost of the labor and materials necessary to place its conduits and vaults/pedestals in the supplied joint trench and/or solo cable trench as follows:

1. If the City contractor is completing this task, Franchisee shall only pay the direct costs in accordance with Franchisee's approved labor and materials exhibits at the time of the project.
2. If the direct costs of Franchisee's approved labor and materials exhibits are not agreeable to the City or its contractor, Franchisee shall have the option to hire their own contractor(s) to complete the work in accordance with Franchisee's approved labor and materials exhibits at the time of the project.
3. If Franchisee chooses option (2), the City and its contractor(s) are responsible for coordinating with Franchisee's contractor(s) to provide reasonable notice and time to complete the placement of Franchisee's conduits and vaults/pedestals in the supplied joint trench.

C. Within the conversion area, Franchisee shall not be responsible for any on-site coordination or performance of traffic control, trenching, backfill, or restoration, unless it is work related to a solo cable trench. In those areas, Franchisee shall pay the direct cost of labor and materials in accordance with the provisions listed in item B above.

3.2.6.2 In the event of a Local Improvement District (LID) project that requires relocation of Franchisee's facilities, Franchisee shall be reimbursed by the LID funding for all expenses incurred as a result of the project.

3.2.6.3 The Franchisee shall, upon reasonable prior written request of any Person, relocate its wires or cables underground; provided (i) the Franchisee may impose a reasonable charge for all time and material costs associated with the project on any Person for the relocation of its facilities, and such charge may be required to be paid in advance of the relocation of its wires or cables, and (ii) Franchisee is granted a permit for such work by the City.

3.2.6.4 In the event an underground conversion of cable facilities is required as part of the street improvement condition(s) of a new subdivision and/or planned development, the developer shall be responsible for all time and material costs associated with the conditioned underground conversion of cable facilities.



Comcast and/or its authorized contractor are the only agents allowed to complete the reconnection aspects of the conversion.

3.2.6.5 The Franchisee shall utilize existing poles and conduit wherever possible.

#### **SECTION 4 - Service Obligations**

4.1. **General Service Obligation.** The Franchisee shall make Cable Service available to every residential dwelling unit within the Franchise Area where the minimum density is at least thirty (30) dwelling units per strand mile in areas served by overhead facilities and sixty (60) dwelling units per strand mile in areas served by underground facilities. Subject to this density requirement, Franchisee shall offer Cable Service at standard installation rates to all new homes or previously unserved homes located within one-hundred twenty five (125) aerial feet of the Franchisee's aerial distribution cable, or within sixty (60) underground trench feet of either aerial or underground distribution facilities.

The Franchisee may elect to provide Cable Service to areas not meeting the above distance standards. The Franchisee may impose an additional charge in excess of its regular installation charge for any service installation requiring a drop or a line extension in excess of the above standards. Any additional charge shall be that portion of the installation that exceeds the standards set forth above.

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

4.3. **No Discrimination.** Neither the Franchisee nor any of its employees, agents, representatives, contractors, subcontractors, or consultants shall discriminate amongst any Persons in the availability of Cable Services provided in the Franchise Area. It shall be the right of all Persons to receive all available services provided over the Cable System so long as such Person's financial, and other business obligations to the Franchisee are satisfied. Franchisee shall not however be required to continue service to a Customer who is verbally or physically abusive, harassing, or threatening to Franchisee or any of its employees, agents, representatives, contractors, subcontractors or consultants. Nothing contained herein shall prohibit the Franchisee from offering bulk discounts, promotional discounts, package discounts, or other such pricing strategies as part of its business practice.

4.4. **New Developments.** The City shall provide the Franchisee with written notice of the issuance of formal approvals for new subdivisions and/or planned developments within the Franchise Area requiring underground installation and/or conversion of cable facilities as part of the approval condition(s). The City agrees to require the developer, as a condition of issuing land use and building permits, to give the Franchisee access to all open trenches for deployment of cable facilities throughout the development and at least ten (10) business days written notice of the date of availability of such open trenches. The developer shall be responsible for all digging and backfilling of all trenches. The Franchisee shall be responsible for the engineering and deployment of labor applicable to its installation of cable facilities within the development.

(For conversion of cable facilities as part of a street improvement condition, see Section 3.2.6, Aerial and Underground Construction.)

4.5 Future Services. Throughout the Term, Franchisee shall provide additional Cable System facilities and equipment, expand Cable System channel capacity and otherwise upgrade or re-build its Cable System as required to incorporate improvements in technology as necessary to reasonably meet the needs and interests of the community, in light of the costs thereof.

#### **SECTION 5 - Fees and Charges to Customers**

All rates, fees, charges, deposits and associated terms and conditions imposed by the Franchisee or any affiliated Person for any Cable Service as of the Effective Date shall be in accordance with applicable FCC rate regulations. Before any new or modified rate, fee, or charge is imposed, the Franchisee shall follow applicable FCC notice requirements and rules and notify affected Customers, which notice may be by any means permitted under applicable law.

#### **SECTION 6 - Customer Service Standards; Customer Bills, Privacy Protection and Annual Reports**

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

6.2. Customer Bills. Customer bills shall 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 Franchisee 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 Franchisee shall comply with all applicable federal and state privacy laws, including Section 631 of the Cable Act and regulations adopted pursuant thereto.

6.4. Annual Reports. The Franchisee shall provide an executive summary report to the City on an annual basis which shall include the following information:

- (i) Nature and type of customer complaints and the Franchisee's actions in response to those complaints, in a manner consistent with the privacy rights of Customers;
- (ii) A summary of any unplanned service interruptions, including the frequency, location and customer impact, if available;
- (iii) Any significant construction activities which affected the quality of the Cable System;
- (iv) Average response time for service calls;
- (v) Phone activity report;
- (vi) Programming changes; and
- (vii) Such other information as reasonably requested by the City

## **SECTION 7 - Oversight and Regulation by City**

7.1. **Franchise Fees.** The Franchisee shall pay to the City a Franchise Fee in an amount equal to five percent (5%) of annual Gross Revenues received from the operation of the Cable System to provide Cable Service in the Franchise Area; provided, however, that Franchisee 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 forty-five (45) days after the close of each calendar quarter. Each Franchise Fee payment shall be accompanied by a report prepared by a representative of the Franchisee showing the basis for the computation of the Franchise Fees paid during that period. In the event that any Franchise Fee payment is not received by the City by the date due, interest shall be charged from such date at the rate of twelve percent (12%) per annum, in addition to any applicable penalties.

7.2 **Acceptance of Payment.** No acceptance of any payment shall be construed as an accord by the City that the amount paid is, in fact, the correct amount. No acceptance of any payment shall be construed as a release of any claim the City may have for further or additional sums payable or for the performance of any other obligation of the Franchisee. The period of limitation for recovery of Franchise Fees payable hereunder shall be five (5) years from the date on which payment was due.

### 7.3 **Franchise Fees Subject to Audit.**

7.3.1 Upon reasonable prior written notice, during normal business hours, at Franchisee's principal business office, the City may inspect Franchisee's financial records used to calculate the City's franchise fees; provided, however, that any such inspection shall take place within five (5) years from the date the City receives such payment, after which period any such payment shall be considered final.

7.3.2 Upon completion of any audit by the City, the City shall provide to the Franchisee a final report setting forth the City's findings in detail, including any and all substantiating documentation. In the event of an alleged underpayment of franchise fees, the Franchisee shall have thirty (30) days from receipt of the report to provide the City with a written response agreeing to or refuting the results of the audit, including any substantiating documentation. Based on these reports and responses, the parties shall agree upon a "Finally Settled Amount." For purposes of this Section, the term "Finally Settled Amount" shall mean the agreed upon underpayment, if any, to the City by the Franchisee as a result of any such audit. If the parties cannot agree on a "Final Settlement Amount," the parties shall submit the dispute to a mutually agreed upon mediator within sixty (60) days of reaching an impasse. In the event an agreement is not reached at mediation, either party may bring an action to have the disputed amount determined by a court of law.

7.3.3 Any "Finally Settled Amount" due to the City as a result of such audit shall be paid to the City by the Franchisee within forty-five (45) days from the date the parties agree upon the "Finally Settled Amount." Once the parties agree upon a Finally Settled

Amount and such amount is paid by the Franchisee, the City shall have no further rights to audit or challenge the payment for that period. The City shall bear the expense of its audit of the Franchisee's books and records; provided, however, that if the audit shows that there has been a material underpayment of Franchise Fees by three percent (3%) or more in a calendar year, then the Franchisee shall pay the cost of the audit, such cost not to exceed five thousand dollars (\$5,000) for each year of the audit period..

7.4 Oversight of Franchise. In accordance with applicable law, the City shall have the right to oversee, regulate and, on reasonable prior written notice and in the presence of Franchisee's employee, periodically inspect the construction, operation or maintenance of the Cable System in the Right of Ways, as necessary to monitor Franchisee's compliance with the provisions of this Franchise.

7.5 Technical Standards. The Franchisee 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 Franchisee shall comply with such altered, modified or amended standards within a reasonable period after such standards become effective. Upon written request, the City shall have the right to review those tests and records required pursuant to FCC rules.

7.6 Maintenance of Books, Records, and Files.

7.6.1 Books and Records. Throughout the term of this Franchise, the Franchisee agrees that the City, upon reasonable prior written notice to the Franchisee, may review such of the Franchisee's books and records regarding the operation of the Cable System and the provision of Cable Service in the Franchise Area for the enforcement of the terms of this Franchise at the Franchisee's business office, during normal business hours, and without unreasonably interfering with Franchisee's business operations. The Franchisee shall not deny the City access to any of the Franchisee's records on the basis that the Franchisee's records are under the control of any parent corporation, affiliated entity or a third party. Such books and records shall include any records required to be kept in a public file by the Franchisee 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 City shall be retained by the Franchisee for a minimum period of five (5) years. One copy of all reports and records required under this or any other section shall be furnished to the City at the sole expense of the Franchisee.

7.6.2 File for Public Inspection. Throughout the term of this Franchise, the Franchisee 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.

7.6.3 Proprietary Information. The City agrees to treat any information disclosed by the Franchisee as confidential and only to disclose it to those employees, representatives, and agents of the City that have a need to know in order to enforce this Franchise and who agree to maintain the confidentiality of all such information or to disclose such information as required by applicable law. The Franchisee shall not be required to

provide Customer information in violation of Section 631 of the Cable Act or any other applicable federal or state privacy law. For purposes of this Section, 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 Franchisee to be competitively sensitive. In the event that the City receives a request under a state "sunshine law", public records or similar law for the disclosure of information the Franchisee has designated as confidential, trade secret or proprietary, the City shall notify Franchisee of such request.

### **SECTION 8 – Transfer or Change of Control of Cable System or Franchise**

Neither the Franchisee nor any other Person may transfer the Cable System or the Franchise without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. No change in control of the Franchisee, defined as an acquisition of 50% or greater ownership interest in Franchisee, shall take place without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. No 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 Franchisee in the Franchise or in the Cable System in order to secure indebtedness, or (ii) a transfer to an entity directly or indirectly owned or controlled by Comcast Corporation. Within thirty (30) days of receiving a request for consent, the City shall, in accordance with FCC rules and regulations, notify the Franchisee in writing of the additional information, if any, it requires to determine the legal, financial and technical qualifications of the transferee or new controlling party. If the City has not taken action on the Franchisee's request for consent within one hundred twenty (120) days after receiving such request, consent shall be deemed given.

### **SECTION 9 - Insurance and Indemnity**

9.1. **Insurance.** Throughout the term of this Franchise, and for a period of 12 months thereafter, the Franchisee shall, at its own cost and expense, maintain Comprehensive General Liability Insurance, Automobile Liability, Employer's Liability and Workers' Compensation Insurance and provide the City certificates of insurance designating the City as additional insured and demonstrating that the Franchisee has obtained the insurance required in this Section. The Franchisee shall also furnish the City with an endorsement reflecting additional insured status. Such policy or policies shall be in the minimum amount of Three Million Dollars (\$3,000,000.00) for bodily injury or death to any one person, and Three Million Dollars (\$3,000,000.00) for bodily injury or death of any two or more persons resulting from one occurrence, and Three Million Dollars (\$3,000,000.00) for property damage resulting from any one accident. Excess Liability or Umbrella Coverage insurance shall be written with limits no less than Five Million Dollars (\$5,000,000) each occurrence, Five Million Dollars (\$5,000,000) general aggregate. Such policy or policies shall be non-cancelable except upon thirty (30) days prior written notice to the City. The Franchisee shall provide workers' compensation coverage in accordance with applicable law. The Franchisee shall indemnify and hold harmless the City from any workers' compensation claims to which the Franchisee may become subject during the term of this Franchise. The Franchisee's insurance coverage shall be primary insurance with

respect to the City, its officers, officials, boards, commissions, employees and duly authorized agents. Any insurance or self-insurance maintained by the City, its officers, officials, boards, commissions, employees and agents shall be in excess of the Franchisee's insurance and shall not contribute to it.

9.2. Indemnification. The Franchisee shall indemnify, defend and hold harmless the City, its officers, employees, and agents from and against any liability or claims resulting from property damage or bodily injury (including without limitation accidental death, copyright, infringement, defamation and all other damages) that arise out of the Franchisee's construction, operation, maintenance or removal of the Cable System, including, but not limited to, reasonable attorneys' fees and costs. If a claim or action arises, the City or any other indemnified party shall tender the defense of the claim or action to the Franchisee, which defense shall be at the Franchisee's expense. The City may participate in the defense of a claim and, in any event, the Franchisee may not agree to any settlement of claims financially affecting the City without the City's written approval, which shall not be unreasonably withheld. The City shall give the Franchisee timely written notice of any claim or of the commencement of any action, suit or other proceeding covered by this Section. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the City and the counsel selected by the Franchisee to represent the City, the Franchisee shall pay attorneys' fees and expenses incurred by the City in defending itself with regard to any action, suit or proceeding indemnified by the Franchisee. The City's fees and expenses shall include all out-of-pocket expenses, such as consultants' fees, and shall also include the reasonable value of any services rendered by the City Attorney or his/her assistants or any employees of the City or its agents but shall not include outside attorneys' fees for services that are unnecessarily duplicative of services provided the City by the Franchisee.

## **SECTION 10 - System Description and Access**

10.1. System Capacity. During the term of this Franchise the Franchisee's Cable System shall be capable of providing a minimum of 85 channels of video programming to its customers in the Franchise Area.

10.2. Service to School Buildings. The Franchisee shall provide the "Basic" tier of Cable Service without charge and free installation (within the installation guidelines described in Section 4.1 of this Franchise) to each accredited K-12 public school located in the Franchise Area.

10.3. Service to Government Facilities. The Franchisee shall provide the "Basic" tier of Cable Service without charge and free installation of the first outlet (within the installation guidelines described in Section 4.1 of this Franchise) to each municipal building located in the Franchise Area. Additional outlets may be installed by Franchisee at the normal non-discriminatory commercial rate and any services in addition to the "Basic" services may be billed for on a monthly basis at the normal commercial rate as determined by the Franchisee's commercial accounts guidelines. The City may however install additional outlets within their facilities at no monthly charge for their use. All such additional outlets shall be installed only with Franchisee's approval and shall be subject to disconnection at Franchisee's discretion should they interfere with the normal operation of Franchisee's system. "Municipal buildings" are those buildings owned or leased and occupied by the City where Cable Service is currently provided and those buildings owned or leased and occupied by the City for government administrative purposes, including without limitation those listed in Exhibit A to this Franchise but not including those buildings owned by

the City but leased to third parties at which government employees are not regularly stationed. In instances wherein the City is leasing and occupying the building, the City shall be responsible for acquiring any necessary right of entry agreement and paying any associated fees that may be required by the building's owner.

10.4 Access Channel. The Franchisee shall provide one (1) Access channel, as currently provided on Channel 21 for use by the City for governmental or educational programming, as the City sees fit; provided, however, during such times that the City is not using this Access channel, Franchisee shall broadcast City of Bellevue government programming. Additional channels shall be made available upon six (6) months written notice and when the following criteria are met:

1. The City has made a determination, after notice and opportunity for public comment, that an additional dedicated Access channel is required to meet more fully such community needs and interests.
2. The existing Access channel provided under this Franchise is in use and programmed with Access programming during at least eighty percent (80%) of the time during any consecutive twelve (12) hour period for ten (10) consecutive weeks.
3. At least one-third (1/3) of the Access programming presented during such ten (10) week period is produced within or related directly to the City.
4. Not more than one-third (1/3) of the aggregate hours of Access programming is repeat programming.

After one hundred and eighty (180) days of operation of a triggered Access channel, and upon thirty (30) days written notice, the Franchisee may make use of the triggered Access channel for its own purposes if said channel no longer fits the above criteria for a period of ten (10) consecutive weeks. Upon one hundred and eighty (180) days' notice, the City may reclaim use of such channel(s) for transmission of Access programming which cannot be accommodated on other channels then in use for Access programming.

10.5 EG Origination Site Relocation. The EG Origination Site is currently located at the Mercer Island High School at 9100 SE 42<sup>nd</sup> Street, Mercer Island, Washington. Franchisee shall relocate the EG Origination Site to the Mercer Island Community Center located at 2040 84<sup>th</sup> Avenue SE, Mercer Island, Washington within one hundred twenty (120) days of the Effective Date of this Franchise, at the City's expense, which amount shall not exceed \$14,000. Franchisee shall also install and construct a fiber optic line to be used as a future EG Origination Site return line feed at Mercer Island City Hall at 9611 SE 36<sup>th</sup> Street, Mercer Island, Washington within one hundred twenty (120) days of the Effective Date of this Franchise at Franchisee's expense. Franchisee shall provide the City with two (2) strands of fiber optic cable and an optical transmitter to use for EG Access purposes. Franchisee shall continue to provide such two (2) strands of fiber to the City during the Term of this Franchise and any renewals thereof, at no charge to the City; provided, however, the optical transmitter is a one time only provision.

The new fiber-optic lines described above shall be maintained by Franchisee and will terminate at a City designated internal location within City Hall and the Community Center at a standard termination panel provided by Franchisee. The City will provide wall mounted backboard or rack space and a power source for the termination panels.

### **SECTION 11 - Enforcement and Termination of Franchise**

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

11.2. **Franchisee's Right to Cure or Respond.** The Franchisee shall have forty-five (45) days from receipt of the City's written notice to: (A) respond to the City, 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 forty-five (45) day period, initiate reasonable steps to remedy such default and notify the City of the steps being taken and the projected date that they will be completed.

11.3. **Public Hearings.** In the event the Franchisee fails to respond to the City's notice, that the alleged default is not remedied within forty-five (45) days or the date projected by the Franchisee, the City shall schedule a public hearing to investigate the alleged default. Such public hearing shall be held at the next regularly scheduled meeting of the City that is scheduled at a time that is no less than ten (10) business days therefrom. The City shall notify the Franchisee in writing of the time and place of such meeting and shall provide the Franchisee with a reasonable opportunity to be heard.

11.4. **Enforcement.** Subject to applicable federal and state law, in the event the City, after such public hearing, determines that the Franchisee is in default of any provision of the Franchise, the City may:

11.4.1 seek specific performance of any provision that reasonably lends itself to such remedy as an alternative to damages, or seek other equitable relief; or

11.4.2 in the case of a substantial default of a material provision of the Franchise, declare the Franchise to be revoked in accordance with the following:

- (i) The City shall give written notice to the Franchisee of its intent to revoke the Franchise on the basis of a pattern of noncompliance by the Franchisee, 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 Franchisee shall have ninety (90) days from the receipt of such notice to object in writing and to state its reasons for such objection. In the event the City has not received a response from the Franchisee or upon receipt of the response does not agree with the Franchisee's proposed remedy, it may then seek termination of the Franchise at a public hearing. The



City shall cause to be served upon the Franchisee, 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.

- (ii) At the designated hearing, the City shall give the Franchisee 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 Franchisee within ten (10) business days. The decision of the City shall be in writing and shall be delivered to the Franchisee by certified mail. The Franchisee may appeal such determination to an appropriate court, which shall have the power to review the decision of the City on a “de novo” basis and to modify or reverse such decision as justice may require. Such appeal to the appropriate court must be taken within sixty (60) days of the City’s issuance of its decision to revoke the Franchise.

11.5. Technical Violations. The City agrees that it is not its intention to subject the Franchisee 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 the following:

11.5.1 instances where a breach of the Franchise by the Franchisee was a good faith error that resulted in no or minimal negative impact on the Customers within the Franchise Area; or

11.5.2 instances where there existed circumstances reasonably beyond the control of the Franchisee and which precipitated a violation by the Franchisee of the Franchise, or which were deemed to have prevented the Franchisee from complying with a term or condition of the Franchise.

## **SECTION 12 - Miscellaneous Provisions**

12.1 Force Majeure. The Franchisee 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, labor disputes, 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 Franchisee’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 Franchisee’s cable or equipment is attached, as well as unavailability of materials or qualified labor to perform the work necessary.

12.2 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:

**To the City:**

Deputy City Manager  
City of Mercer Island  
9611 SE 36<sup>th</sup> Street  
Mercer Island, WA 98040

With a copy to:

City Attorney  
City of Mercer Island  
9611 SE 36<sup>th</sup> Street  
Mercer Island, WA 98040

**To the Franchisee:**

Comcast of California/Colorado/Texas/  
Washington, Inc.  
Attn: Franchising  
PO Box 97007  
Redmond, WA 98073-9707

With a copy to:

Comcast Cable Communications, Inc.  
22025 30<sup>th</sup> Dr. SE  
Bothell, WA 98021  
Attn.: Government Affairs Department

12.3 **Entire Franchise.** This Franchise, including all Exhibits attached hereto, embodies the entire understanding and agreement of the City and the Franchisee with respect to the subject matter hereof and supersedes all prior understandings, agreements and communications, whether written or oral.

12.4 **Severability.** If any section, subsection, sentence, clause, phrase, or other portion of this Franchise 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.

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

12.6 **Modification.** No provision of this Franchise shall be amended or otherwise modified, in whole or in part, except by an instrument, in writing, duly executed by the City and the Franchisee, which amendment shall be authorized on behalf of the City through the adoption of an appropriate resolution or order by the City, as required by applicable law.

12.7 **No Third-Party Beneficiaries.** Nothing in this Franchise is or was intended to confer third-party beneficiary status on any member of the public to enforce the terms of this Franchise.

12.8 **No Waiver of Rights.** Nothing in this Franchise shall be construed as a waiver of any rights, substantive or procedural, that Franchisee may have under Federal or state law unless such waiver is expressly stated herein.

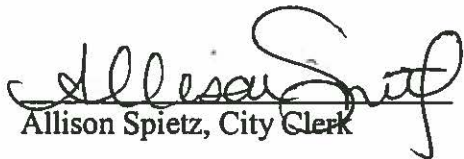
IN WITNESS WHEREOF, this Franchise has been executed by the duly authorized representatives of the parties as set forth below, as of the date set forth below:

Approved as to Form:



Londi K. Lindell  
City Attorney

Attest:



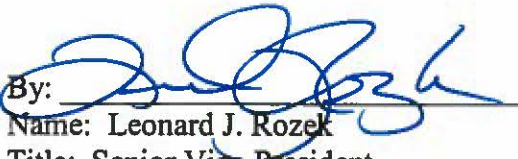
Allison Spietz, City Clerk

City:



By: Richard M. Conrad  
Name: Richard M. Conrad  
Title: City Manager

Comcast of California/Colorado/  
Texas/Washington, Inc.



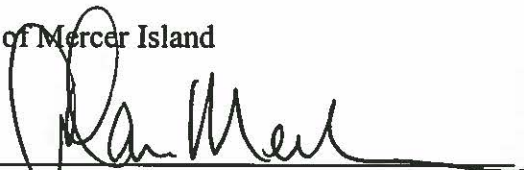
By: Leonard J. Rozek  
Name: Leonard J. Rozek  
Title: Senior Vice-President

**Section 2. Repealer.** Ordinances No. 95-113 and 95-114 shall repealed in their entirety upon the Effective Date of the Franchise Agreement described in Section 1 above.


**Section 3. Validity.** If any section, paragraph, clause or phrase of this Ordinance id for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that they would have passed this Ordinance and each section, paragraph, clause, or phrase thereof irrespective of the fact that any one or more sections, paragraphs, clauses, or phrases may subsequently be found by competent authority to be unconstitutional or invalid.

**Section 4. Effective Date.** This ordinance shall take effect and be in force thirty (30) days after its passage, approval and publication.

PASSED BY THE CITY COUNCIL OF THE CITY OF MERCER ISLAND, WASHINGTON  
AT ITS REGULAR MEETING ON THE 1st DAY OF AUGUST 2005.

City of Mercer Island  
  
\_\_\_\_\_  
Alan R. Merkle, Mayor

Attest:  
  
Allison Spietz, City Clerk

Approved as to form:  
  
\_\_\_\_\_  
Londi Lindell, City Attorney

Date of Publication: 8/10/05