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**SEP 15 2005**

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OAKLAND

Approved as to Form and Legality

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City Attorney

**OAKLAND CITY COUNCIL**

**ORDINANCE NO. \_\_\_\_\_ C.M.S.**

**AN ORDINANCE OF THE CITY OF OAKLAND AMENDING CHAPTER 5.16 OF TITLE 5 OF THE OAKLAND MUNICIPAL CODE TO REGULATE THE OCCUPANCY AND USE OF PUBLIC RIGHTS-OF-WAY BY CABLE SYSTEMS AND OPEN VIDEO SYSTEMS, TO PROVIDE FOR ESTABLISHMENT OF CUSTOMER SERVICE STANDARDS; ESTABLISHING FRANCHISE AND LICENSING REQUIREMENTS FOR OPERATORS OF SUCH SYSTEMS AND TO PRESCRIBE MINIMUM CHARGES, TERMS, AND CONDITIONS FOR AND UPON THE CONSTRUCTION, MAINTENANCE, AND REPAIR OF SUCH SYSTEMS**

**WHEREAS**, it is anticipated that an ever-increasing number of companies will request access to and use of Public rights-of-way for provision of cable and other services to the public; and

**WHEREAS**, the City of Oakland (“City”) has the authority to regulate the use of streets, Public rights-of-way, and other City property, and to grant access thereto upon certain terms and conditions; and

**WHEREAS**, the public streets, alleys, utility easements dedicated for compatible uses, and other rights-of-way within the City: 1) are critical to the travel of Persons and the transport of goods and other tangibles in the business and social life of the community by all citizens; 2) are a unique and physically limited resource so that proper management by the City is necessary to maximize the efficiency and to minimize the costs to the taxpayers of the foregoing uses, and to prevent harm to the community; and 3) are intended for public uses and must be managed and controlled consistent with that intent; and

**WHEREAS**, the right to occupy the Public rights-of-way cannot be granted to all Persons, and those who are granted that right obtain significant benefits; and

**WHEREAS**, the right to use the Public rights-of-way therefore must be exercised in a manner consistent with the public interest; and

**WHEREAS**, the City wishes to promote the availability of high-quality and diverse services to the City residents, businesses, the City, and other public institutions; and to promote the availability of diverse information resources to the community, including through the development of advanced systems that can support public, educational, and governmental programming and high-speed access to the Internet; and

**WHEREAS**, the City wishes to provide opportunities to the public to obtain access to communications facilities for the purpose of disseminating and receiving information; to promote competitive cable rates and services; to take advantage of opportunities presented by cable and open video systems to provide for more open government; to enhance educational opportunities throughout the community and provide opportunities for building a stronger community; and to allow flexibility to respond to changes in technology, subscriber interests, and competitive factors that will affect the health, welfare, and well-being of the community; and

**WHEREAS**, the City finds that it is in the interest of the public to franchise and to establish standards for franchising such operators in a manner that promotes these objectives and otherwise protects the public interest;

**WHEREAS**, the Council finds this ordinance is subject to exemptions from the California Environmental Quality Act (CEQA), including without limitation, CEQA Guidelines sections 15301; 15302; and 15305.

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF OAKLAND:**

SECTION 1, Chapter 5.16 of Title 5 of the Oakland Municipal Code is hereby amended to read in its entirety as follows:

**“CHAPTER 5.16  
CABLE SYSTEMS AND OPEN VIDEO SYSTEMS”**

Part I GENERAL .....	4
5.16.010    Definitions.....	4
5.16.020    Access, PEG access, or PEG use .....	4
5.16.030    Public access or Public use .....	5
5.16.040    Education access or Education use .....	5
5.16.050    Government access or Government use.....	5
5.16.060    Affiliate .....	5
5.16.070    Basic Service.....	5
5.16.080    Cable Act .....	5
5.16.090    Cable Communications System .....	6
5.16.100    Cable Service .....	6
5.16.110    Cable System .....	6
5.16.120    Channel .....	7
5.16.130    City.....	7

5.16.140	City Administrator .....	7
5.16.150	Construction, operation or repair .....	7
5.16.160	FCC .....	7
5.16.170	Franchise .....	7
5.16.180	Franchise Area .....	7
5.16.190	Franchisee .....	8
5.16.200	Gross Revenues.....	8
5.16.210	Operator .....	8
5.16.220	OVS.....	8
5.16.230	OVS Agreement.....	8
5.16.240	Person.....	9
5.16.250	Public Property.....	9
5.16.260	Public rights-of-way.....	9
5.16.270	School .....	9
5.16.280	Subscriber .....	9
5.16.290	User .....	9
Part 2 GENERAL PROVISIONS.....		10
5.16.300	Franchise Required .....	10
5.16.310	Form of Franchise .....	10
5.16.320	Scope of Franchise.....	10
5.16.330	Franchise Non-Exclusive .....	11
5.16.340	Franchise Term .....	11
5.16.350	Costs Borne by Franchisee.....	11
5.16.360	Failures to Perform .....	11
5.16.370	Administration of Ordinance; Adoption of Regulations.....	12
5.16.380	Transfers .....	12
5.16.390	General Conditions upon Construction, Operation and Repair .....	13
5.16.400	Protection of City and Residents.....	19
5.16.410	Enforcement and Remedies .....	23
5.16.420	Books and Records .....	25
5.16.430	Reports .....	26
5.16.440	Maps Required.....	27

5.16.450	Other Records Required.....	27
5.16.460	Exemptions .....	28
5.16.470	Privacy .....	28
5.16.480	Procedures for Paying Franchise Fees and Fees in Lieu of Franchise Fees .....	28
Part 3 SPECIAL RULES APPLICABLE TO CABLE SYSTEMS .....		30
5.16.490	Applications - Generally.....	30
5.16.500	Application for an Initial Franchise or Renewal Franchise .....	31
5.16.510	Application for Renewal Filed Pursuant to 47 U.S.C. Section 546.....	33
5.16.520	Application for Transfer .....	33
5.16.530	Legal Qualifications.....	34
5.16.540	Franchise Fee .....	36
5.16.550	No Exclusivity .....	36
5.16.560	Rate Regulation.....	37
5.16.570	Consumer Protection and Customer Service .....	38
Part 4 OPEN VIDEO SYSTEMS .....		39
5.16.580	Applications for Grant or Renewal of Franchises.....	39
5.16.590	Transfers .....	41
5.16.600	Legal Qualifications.....	42
5.16.610	Minimum Requirements .....	44
5.16.620	Fee in Lieu of Franchise Fee.....	45
5.16.630	Exclusive Contracts .....	45
Part 5 MISCELLANEOUS.....		46
5.16.640	Captions .....	46
5.16.650	Calculation of Time .....	46
5.16.660	Severability .....	46
5.16.670	Connections to Cable System; Use of Antennae .....	46
5.16.680	Discrimination Prohibited.....	47

## Part 1

### GENERAL

#### 5.16.010 Definitions

- A. The definitions set forth in this Part shall govern the application and interpretation of this Chapter.
- B. When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number; and words in the singular number include the plural number; and the masculine gender includes the feminine gender.
- C. Subject to the provisions of Section 1.04.020 of Title 1 of the Municipal Code, the words “shall” and “will” are mandatory, and “may” is permissive.
- D. Words not defined in this Chapter shall have the same meaning as in Title VI of Title 47 of the United States Code in effect on the effective date of the ordinance enacting this Chapter, and, if not defined therein, their common and ordinary meaning.
- E. References to governmental entities (whether Persons or entities) refer to those entities or their successors in authority.
- F. If specific provisions of law referred to herein are renumbered, then the reference shall be read to refer to the renumbered provision.
- G. Unless otherwise specified, references to laws, ordinances or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

#### 5.16.020 Access, PEG access, or PEG use

“Access,” “PEG access,” or “PEG use” refers to the availability of a Cable System or OVS for public, education or government use (including channel capacity on institutional networks designated for PEG use) by various agencies, institutions, organizations, groups, and individuals,

including the City and its designated access providers, to distribute programming not under a Franchisee's editorial control, including, but not limited to the access or use described in Sections 5.16.030, 5.16.040 and 5.16.050 below.

5.16.030 Public access or Public use

“Public access” or “Public use” means access where organizations, groups, or individual members of the general public are the designated programmers or users having editorial control over their communications.

5.16.040 Education access or Education use

“Education access” or “Education use” means access where Schools are the designated programmers or users having editorial control over their communications.

5.16.050 Government access or Government use

“Government access” or “Government use” means access where government institutions or their designees are the designated programmers or users having editorial control over their communications.

5.16.060 Affiliate

“Affiliate” means a Person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another Person.

5.16.070 Basic Service

“Basic service” means any service tier regularly provided on a Cable Communications System to all Subscribers which includes the retransmission of local television broadcast signals.

5.16.080 Cable Act

“Cable Act” means the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq., as amended by the Cable Television Consumer Protection and Competition Act of 1992, as further amended by the Telecommunications Act of 1996, as it may be amended from time to time.

5.16.090 Cable Communications System

“Cable Communications System” refers to open video systems (OVS) and Cable Systems.

5.16.100 Cable Service

“Cable Service” shall have the same meaning as in Title VI of Title 47 of the United States Code, as amended from time to time.

5.16.110 Cable System

“Cable System” means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple Subscribers within a community, but such term does not include:

- A. A facility that serves only to retransmit the television signals of one (1) or more television broadcast stations;
- B. A facility that serves Subscribers without using, or connecting to a facility that uses, any Public right-of-way within the City;
- C. A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II (Common Carriers) of the federal Communications Act of 1934, as amended, except that such facility shall be considered a Cable System to the extent such facility is used in the transmission of video programming directly to Subscribers, unless the extent of such use is solely to provide interactive on-demand services;
- D. Any facilities of any electric utility used solely for operating its electric utility systems; or
- E. An OVS that complies with 47 USC Section 573 and FCC regulations promulgated thereunder.

5.16.120 Channel

“Channel” means a portion of the electromagnetic frequency spectrum which is used in a Cable System or OVS and which is capable of delivering a standard NTSC broadcast video programming service whether in an analog or digital format. The definition does not restrict the use of any Channel to the transmission of analog television signals.

5.16.130 City

“City” means the City of Oakland and all departments, divisions, and agencies thereof; except that, when used to describe a geographic area, the term refers to the boundaries of the City of Oakland, California, as they exist now or may exist in the future.

5.16.140 City Administrator

“City Administrator” means the City Administrator or the City Administrator’s designee.

5.16.150 Construction, operation or repair

“Construction, operation or repair” and similar formulations of that term means the named actions interpreted broadly, encompassing, among other things, installation, extension, maintenance, replacement of components, relocation, undergrounding, grading, site preparation, adjusting, testing, make-ready, excavation and the management of the cable system and its operations.

5.16.160 FCC

“FCC” means the Federal Communications Commission.

5.16.170 Franchise

“Franchise” refers to an authorization granted by the City to the Operator of a Cable Communications System giving the Operator the non-exclusive right to occupy the space, or use facilities upon, across, beneath, or over Public rights-of-way in the City, to provide specified services within a Franchise area. A permit is not a Franchise.

5.16.180 Franchise Area

“Franchise Area” means the area of the City that a Franchisee is authorized to serve by the terms of its Franchise ordinance or by operation of law.



5.16.190 Franchisee

“Franchisee” refers to a Person holding a Cable Communications System franchise granted by the City.

5.16.200 Gross Revenues

“Gross Revenues” means any and all revenue as determined in accordance with generally accepted accounting principles (“GAAP”) derived from the operation of a Cable Communications System to provide Cable Service. Gross Revenues include, by way of example and not limitation, revenues from equipment sales and rentals services, installation, late fees and other Subscriber charges, fees for carriage of programming, advertising revenue and shopping services recorded as revenue in accordance with GAAP; the term encompasses revenues that are received now, as well as new revenue sources that may develop in the future. “Gross Revenues shall include revenues of Affiliates using the Cable Communications System in the City to provide Cable Service (other than those revenues which are already treated as the revenues of the Franchisee) to the extent required to prevent avoidance of fees owed on Gross Revenues.

5.16.210 Operator

“Operator” when used with reference to a Cable Communications System, refers to a Person (a) who directly or through one (1) or more Affiliates provides Cable Service or OVS over a Cable Communications System and directly or through one (1) or more Affiliates owns a significant interest in such system; and (b) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a system.

5.16.220 OVS

“OVS” means an open video system. A reference to an OVS includes pedestals, equipment enclosures (such as equipment cabinets), amplifiers, power guards, nodes, cables, fiber optics and other equipment necessary to operate the OVS, or installed in conjunction with the OVS.

5.16.230 OVS Agreement

“OVS Agreement” means a Franchise entered into in accordance with the provisions of this Chapter between the City and an OVS Franchisee setting forth the terms and conditions under which the OVS Franchise will be exercised.

5.16.240 Person

“Person,” unless it otherwise appears from the context as used, means and includes any person, individual, firm, organization, corporation, partnership, association, limited liability company, joint stock or other company, business or other trust, public agency, school district, the State of California, its political subdivisions and/or instrumentalities, or any other legal entity, but not the City.

5.16.250 Public Property

“Public Property” means any property that is owned or under the control of the City that is not a Public right-of-way, including but not limited to, buildings, parks, structures such as utility poles and light poles, or similar facilities or property located in a Public right-of-way or owned by or leased to the City.

5.16.260 Public rights-of-way

“Public rights-of-way” means the surface of and the space above and below any street, road, highway, freeway, bridge, lane, path, alley, court, sidewalk, parkway, parkstrip, drive, or right-of-way or easement generally available to and used by utilities, communication companies, or for travel by the public, now or hereafter existing within the City which may be properly used and the City has the authority to allow the use of, for the purpose of installing, maintaining, and operating a Cable Communications System; and any other property, that a Franchisee is entitled by state or federal law to use by virtue of the grant of a Franchise.

5.16.270 School

“School” means any publicly funded charter school or public primary and secondary schools (K-12) located within the City.

5.16.280 Subscriber

“Subscriber” means any Person who is lawfully receiving, for any purpose or reason, any Cable Service via a Cable Communications System, whether or not a fee is paid for such service.

5.16.290 User

“User” means a Person or the City utilizing a Channel, capacity or equipment and facilities of a Cable Communications System for purposes of transmitting programming material, as contrasted with the receipt thereof in the capacity of a Subscriber.

**Part 2**  
**GENERAL PROVISIONS**

*5.16.300      Franchise Required*

No Person may construct, operate or repair a Cable Communications System in the City without first obtaining a Franchise from the City pursuant to the terms and provisions of the City Charter and this Chapter.

*5.16.310      Form of Franchise*

Any Franchise shall be issued in the form of an ordinance and must be accepted by the Franchisee pursuant to the terms of this Chapter and the Franchise ordinance to become effective.

*5.16.320      Scope of Franchise*

A Franchise granted pursuant to this Chapter shall authorize and permit a Franchisee to construct, operate and repair a Cable System, or an OVS (as applicable) pursuant to the terms of its Franchise ordinance and this Chapter to provide Cable Service in the City, and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain facilities appurtenant to such system in, on, over, under, upon, across, and along those Public rights-of-way that the City may authorize a Franchisee to use.

- A. A Franchise shall not convey rights other than as expressly specified in this Chapter, or in a Franchise ordinance
- B. A Franchise shall not include, or be a substitute for:
  - 1. Any permit, agreement or authorization required commonly of all utilities in connection with construction, operation or repair on or in Public rights-of-way or Public Property;
  - 2. Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by the Franchise.
- C. A Franchise does not relieve a Franchisee of its duty to comply with all lawful City ordinances, resolutions, written policies, and regulations in effect as of the date on which

the Franchise becomes effective, and every Franchisee must comply with the same. The rights granted under a franchise ordinance are subject to the lawful exercise of police powers the City now has or may later obtain. To the extent legally permitted, the terms of every Franchise granted shall be subordinate to all the requirements of the Oakland City Charter as of the date the Franchise becomes effective. Nothing herein prevents a Franchisee from raising a claim or defense that a particular provision of the City Charter, a city ordinance, resolution, written policy, or regulation is unlawful or is unlawful as applied to the Franchisee.

- D. A Franchise does not convey title, equitable or legal, in the Public rights-of-way or Public Property. Any right granted to Franchisee by a Franchise ordinance shall not be subdivided or subleased to any other Person or Affiliate.

*5.16.330      Franchise Non-Exclusive*

No Franchise shall be exclusive, or prevent the City from issuing other Franchises or authorizations, or prevent the City from itself constructing, operating, or repairing its own Cable Communications System.

*5.16.340      Franchise Term*

Every Franchise ordinance shall specify the franchise term as a precise number of years.

*5.16.350      Costs Borne by Franchisee*

Unless otherwise specifically stated in a Franchise ordinance or required by law, all acts which a Franchisee is required to perform under the Franchise ordinance or applicable law must be performed at the Franchisee's expense and at no cost to the City, provided that nothing contained in this Section 5.16.350 is intended to restrict or limit Franchisee's rights under Applicable Law to recover costs from third parties, or assess or pass-through costs to its Subscribers.

*5.16.360      Failures to Perform*

If a Cable Communications System Operator fails to perform work that it is required to perform within the time provided for performance, the City may perform the work or cause the work to be performed and bill the Operator therefor. Except in the case of safety issues or other urgent circumstances, the City shall provide the Operator with 30 days notice and opportunity to

perform the work before the City acts pursuant to this section 5.16.360. The Operator shall pay the actual cost incurred within thirty (30) days receipt of invoice. City will not unreasonably deny a request for an extension of time to perform, where the City Administrator finds that the delay will not adversely affect the work, the City, third parties affected by the work, or the public.

*5.16.370 Administration of Ordinance; Adoption of Regulations*

- A. The City may from time to time adopt regulations in a manner consistent with this Chapter to implement the provisions of this Chapter. This Chapter, and any regulations adopted pursuant to this Chapter are not contracts with any Franchisee, and may be amended at any time by the City.
- B. Except where this Chapter specifically directs that action be taken by the City Council, the City Administrator or its designees are hereby authorized to administer and enforce the provisions of this Chapter and any Franchise issued pursuant hereto, to provide any notices (including noncompliance notices), and to take any action on the City's behalf that may be required hereunder or under applicable law.
- C. The failure of City, upon one (1) or more occasions, to exercise a right or to require compliance or performance under a Franchise ordinance or any other applicable law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance, unless such right has been specifically waived in writing.
- D. The City may designate one (1) or more Persons, including itself, to control and manage the use of Public, Educational or Government access Channels, facilities and equipment.

*5.16.380 Transfers*

- A. No transfer of a Franchise, Franchisee, or Cable Communications System, or of control over the same (including, but not limited to, transfer by forced or voluntary sale, merger, consolidation, receivership, or any other means) shall occur unless prior application is made by the Franchisee to the City and the City's prior written consent is obtained, pursuant to this Chapter and the Franchise ordinance. Every Franchise shall be deemed

to be held in trust, and to be personal to the Franchisee. Any transfer that is made without the prior approval of the City shall be deemed to impair that trust. The granting of approval for a transfer in one instance shall not render unnecessary approval of any subsequent transfer.

- B. A transfer of control of a Franchise, Franchisee, or Cable Communications System will be deemed to have occurred whenever there is a change, acquisition or transfer of control of fifty percent (50%) or more of the ownership in the Franchisee or its direct or indirect parents by any Person, or a group of Persons acting in concert, or whenever there is a change in actual working control, in whatever manner exercised, over the affairs of a Franchisee or its direct or indirect parents, regardless of the percentage of ownership change. Without limiting the above, any change in the general partners of a Franchisee will be presumed a change in control.
  
- C. Notwithstanding any other provision of this Chapter, pledges in trust or mortgages of the assets of a Cable Communications System to secure the Construction, operation, or repair of the system may be made without application and without the City's prior consent. However, no such arrangement may be made if it would in any respect under any condition: (1) prevent the Cable Communications System Operator or any successor from complying with, this Chapter, the Franchise ordinance or other applicable law or regulation; or (2) permit a third party to succeed to the interest of the Operator, or to own or control the system, without the prior consent of the City. Any mortgage, pledge or lease shall be subject to and subordinate to the rights of the City under any Franchise, this Chapter, or other applicable law.

5.16.390 General Conditions upon Construction, Operation and Repair

- A. The Construction, operation, upgrade and repair of Cable Communications Systems shall be performed in compliance with all laws, ordinances, resolutions, departmental rules, regulations, written policies, and practices affecting such system. By way of example, and not limitation, this includes the relevant portions of the Oakland Municipal Code (i.e., the City's zoning ordinance), ordinances, regulations and policies to preserve or

protect the public safety, construction standards, regulations for providing notice to Persons that may be affected by system construction, and directives governing the time, place and manner in which facilities may be installed in the Public rights-of-way. Persons engaged in the Construction, operation, upgrade or repair of Cable Communications Systems shall exercise reasonable care in the performance of all their activities and shall use commonly accepted methods and devices for preventing failures and accidents that are likely to cause damage, injury, or nuisance to the public or to property.

- B. A Franchise is required before a permit may be issued for work associated with the construction, operation, upgrade or repair of a Cable Communications System. Any permit issued for such work to a Person that does not hold a Franchise shall vest no rights in the permittee; the permit may be revoked at will, and the permittee shall remove all facilities installed under the permit upon and in full compliance with the City's demand.
- C. Construction, operation, upgrade or repair of a Cable Communications System shall not commence until all required permits have been obtained from the proper City officials and all required fees have been paid. All work performed will be performed in strict accordance with the conditions of the permit. Upon order of the City, any work and/or construction undertaken that is not completed in compliance with the City's requirements, or which is installed without obtaining necessary permits and approvals shall be removed in accordance with the reasonable timeline set forth by the City. A Franchisee shall reimburse the City for costs incurred in inspecting construction projects undertaken in the course of major or minor upgrades, installation of fiber optics, minor and major repairs, all other work for which the City requires inspection, and permit review and processing.
- D. Interference with the use of the Public rights-of-way by others, including others that may be installing Cable Communications Systems, must be minimized. The City may require, except as prohibited by law or the franchise, a person using the Public rights-of-way to cooperate with others through joint trenching and other arrangements to minimize adverse impacts on the Public rights-of-way.

- E. To the extent possible, Operators of Cable Communications Systems shall use existing poles and conduit. Additional poles may not be installed in the right-of-way, nor may pole capacity be increased by vertical or horizontal extenders, without the permission of the City Administrator, which permission shall not be unreasonably withheld.
  
- F. **Undergrounding**
  - 1. Whenever all existing utilities are located underground in an area in the City, every Cable Communications System Operator installing its system in the same area must locate its Cable Communications System underground.
  - 2. Whenever the owner of a pole locates or relocates underground within an area of the City, every Cable Communications System Operator in the same area shall concurrently relocate its cables, wires or fiber optics underground.
  - 3. The City Council may, in its discretion, exempt a particular Cable Communications System or facility or group of Cable Communications Systems or facilities from the obligation to locate or relocate the Cable Communications System or facility underground, where a Franchisee has demonstrated that relocation is impractical, or where the interest in protecting against visual blight can be protected in another manner.
  
- G. Any and all Public Property, or Private property that is disturbed or damaged during the Construction, operation, upgrade or repair of a Cable Communications System shall be promptly repaired by the Operator. Public Property must be restored to a condition as good as before the disturbance or damage occurred. Public rights-of-way must be restored to a condition consistent with City standards that are generally applicable to all Persons performing construction or excavation in the Public rights-of-way.



## H. Relocation

1. A Cable Communications System Operator shall at no cost to the City and by a time specified by City, protect, support, temporarily disconnect, relocate, or remove any of its property when requested by the City by reason of traffic conditions; public safety; Public right-of-way construction and repair (including regrading, resurfacing or widening); Public right-of-way vacation; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of government-owned system or utility, public work, public facility, or improvement; or for any other purpose where the work involved would be aided by the removal or relocation of the Cable Communications System. Collectively, such matters are referred to below as the “public work.”
2. The City shall provide written notice describing where the public work is to be performed at least three (3) weeks prior to the deadline by which a Cable Communications System Operator must protect, support, temporarily disconnect, relocate or remove its facilities. The Cable Communications System Operator may seek an extension of the time to perform the work. The City shall not unreasonably deny such an extension where the Operator demonstrates it can not perform the work by the deadline even with the exercise of due diligence. Provided that, in an emergency, or where a Cable Communications System creates or is contributing to an imminent danger to health, safety, or property, the City may protect, support, temporarily disconnect, remove, or relocate any or all parts of the Cable Communications System without prior notice, and charge the Cable Communications System Operator for costs incurred; however, City will make reasonable efforts, considering the circumstances, to provide prior notice.

## I. Construction activities of Others

1. To accommodate the Construction, operation, upgrade or repair of the facilities of another Person authorized to use the Public rights-of-way or Public Property, a Franchisee shall, by a time specified by such Person, protect, support, temporarily

disconnect, relocate or remove its facilities. The Franchisee shall be given written notice describing where the Construction, operation or repair is to be performed at least fifteen (15) days prior to the time by which its work must be completed. Unless the matter is governed by a valid contract or a state or federal law or regulation, or unless the Cable Communications System that is being requested to move was not properly installed, the reasonable cost of the same shall be borne by the Person requesting the protection, support, temporary disconnection, removal, or relocation and at no charge to the City, even if the City makes the request for such action. In cases where the requesting person is required under this section 5.16.390(I)(1) to bear the cost of relaying, relocation or temporary removal, a franchisee may require the person to agree, before the work is performed, to pay the reasonable actual cost of the work. If the Franchisee does so, it must provide an estimate of the cost of the work and support for that estimate.

2. A Cable Communications System Operator shall, on the request of any Person holding a valid permit issued by a governmental authority, temporarily raise or lower its wires by a time specified to permit the moving of buildings or other objects. A Cable Communications System Operator shall be given not less than fifteen (15) days advance notice to arrange for such temporary wire changes. The expense of such temporary removal or raising or lowering of wires shall be paid in advance by the Person requesting the same.

#### J. Abandonment

1. A Cable Communications System Operator may abandon any property in place in the Public rights-of-way or upon Public Property upon written notice to the City. However, if, within ninety (90) days of the receipt of written notice of abandonment, the City determines, that the safety, appearance, functioning or use of the Public right-of-way or Public Property and facilities in the Public right-of-way or on Public Property will be adversely affected, the property must be removed by a date specified by the City. In specifying a date for removal, the City shall take into account the amount of work to be performed.

2. A Cable Communications System Operator that abandons its property must, upon request, transfer ownership of the property to the City at no cost, and execute necessary quitclaim deeds provided that nothing in the preceding sentence prevents a Cable Communications System Operator from bringing an action in a court of competent jurisdiction if it believes that the Cable Communications System was not abandoned. Whether or not ownership is transferred, the Operator must indemnify the City against future costs associated with mitigating or eliminating any hazard associated with the abandoned property.
- K. Every Cable Communications System shall be subject to inspection and testing by the City. Each Operator must timely and fully respond to requests for information regarding its system and plans for the system as the City may from time to time issue, including requests for information regarding its plans for Construction, operation and repair and the purposes for which the plant is being constructed, operated, or repaired.
- L. Each Operator of a Cable Communications System that places facilities underground shall be a member of the regional notification center for subsurface installations (Underground Services Alert) and shall field mark the locations of its underground communications facilities upon request. The Operator shall locate its facilities for the City at no charge.
- M. At least ninety (90) days prior to commencing construction, each Cable Communications System Operator shall provide the City a construction plan for any initial Cable Communications System construction, operation or repair or for any substantial rebuild, upgrade or extension of its Cable Communications System, which shall show its timetable for construction of each phase of the project, and the areas of the City that will be affected. The construction plans and timetables shall be reviewed by the City. The City acknowledges that certain portions of the construction plan may be tentative. The Cable Communications System Operator shall provide additional information requested by the City within thirty (30) days of receipt of the request, to the extent such information is available. During construction, notice of changes to the construction plans and/or

timetables must be provided to the City forty-eight (48) hours in advance. To the extent that any portion of such plan is tentative, Franchisee shall provide the City with an update reasonably in advance of initiating such construction and repair.

- N. Unless otherwise specified in a Franchise, upon request of the City and subject to the terms of the Franchise, every Cable Communications System shall be required to interconnect, temporarily, with every other Cable Communications System within the City, on fair and reasonable terms, for the purpose of providing access to PEG programming.
  
- O. Upon any request given within one hundred eighty (180) days from and after effective date of the ordinance awarding the Franchise or Franchise renewal, the Franchisee shall make available for the City's review all contracts which it may have with all public utility companies, whereby Franchisee is granted any right to use any of the property, equipment or facilities of such utility or utilities in the conduct of any operations pursuant to the Franchise or Franchise renewal awarded to said Franchisee.

*5.16.400      Protection of City and Residents*

- A. No Franchise shall be valid or effective until and unless the City obtains an adequate indemnity from the Franchisee. The indemnity must, to the extent permitted by law:
  - 1. Release the City from and against any and all liability and responsibility in or arising out of the Construction, operation, upgrade repair or maintenance of the Cable Communications System; and
  
  - 2. Indemnify and hold harmless the City, its trustees, elected and appointed officers, agents, and employees, from and against any and all claims, demands, or causes of action of any kind or nature, and the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities, damages, orders, judgments, or decrees sustained by the City or any third party arising out of, or by reason of, or resulting from or of the acts, errors, or omissions of the Cable Communications System

Operator, or its agents, independent contractors or employees related to or in any way arising out of the Construction, operation, upgrade or repair of the system except those claims which arise out of the negligence or willful misconduct of the City.

- B. A Franchisee (or those acting on its behalf) shall not commence construction or operation of the Cable Communications System without first obtaining insurance in amounts and of a type satisfactory to the City. The required insurance must be obtained and maintained for the entire period the Franchisee has facilities in the Public rights-of-way or on Public Property. If the Franchisee, its contractors, or subcontractors do not have the required insurance, the City may order such Persons to stop operations until the insurance is obtained and approved.
- C. Certificates of insurance, reflecting evidence of the required insurance and naming the City as an additional insured, and other proofs as the City may find necessary, shall be filed with the City. For Persons issued Franchises after the effective date of this Chapter, certificates and other required proofs shall be filed within thirty (30) days of the issuance of a Franchise, once a year thereafter, and whenever there is any expiration of or change in coverage. For Persons that have facilities in the Public rights-of-way as of the effective date of this Chapter, the certificate shall be filed within sixty (60) days of the effective date of this Chapter, annually thereafter, and whenever there is any expiration of or change in coverage, unless a pre-existing Franchise ordinance expressly provides for filing of certificates in a different manner. Each Franchisee's insurance coverage shall be primary insurance as respects the City. Any insurance or self -insurance maintained by the City shall be excess of the Franchisee's insurance and shall not contribute with it.
- D. Certificates shall contain a provision that coverage afforded under these policies will not be canceled until at least thirty (30) days' prior written notice has been given to the City. Policies shall be issued by companies authorized to do business under the laws of the State of California. Financial Ratings must be no less than "A" in the latest edition of "Bests Key Rating Guide," published by A.M. Best Guide.

E. A Cable Communications System Operator (and those acting on its behalf to construct, operate or repair the system) shall maintain the following insurance, in the minimum amounts specified under the applicable Franchise. The City shall be named as an additional insured on the general liability and automobile policies; those insurance policies shall be primary and contain a cross-liability clause.

1. COMMERCIAL GENERAL LIABILITY insurance to cover liability from bodily injury and property damage. Exposures to be covered shall include: premises, operations, products/completed operations, and certain contracts. Coverage must be written on an occurrence basis

Completed Operations and Products Liability shall be maintained for two (2) years after the termination of the Franchise or License (in the case of the Cable Communications System owner or Operator) or completion of the work for the Cable Communications System owner or Operator (in the case of a contractor or subcontractor).

Property Damage Liability Insurance shall include Coverage for the following hazards: X - explosion, C - Collapse, U - underground.

2. WORKERS' COMPENSATION insurance shall be maintained during the life of the Franchise to comply with statutory limits for all employees, and in the case any work is sublet, each Cable Communications System Operator shall require the subcontractors similarly to provide workers' compensation insurance for all the latter's employees unless such employees are covered by the protection afforded by each Cable Communications System operator. Each Cable Communications System Operator and its contractors and subcontractors shall maintain during the life of this policy employers liability insurance.

3. COMPREHENSIVE AUTO LIABILITY

Coverage shall include owned, hired, and non-owned vehicles.

F. Every Operator of a Cable Communications System shall obtain and maintain a performance bond to ensure the faithful performance of its responsibilities under this Chapter and any Franchise ordinance. In the case of any Franchise ordinance that

requires the Cable Communications System Operator to initially build, or to upgrade a system, the amount of the bond shall be specified in the Franchise. The amount of the bond shall be reduced upon successful completion of the required construction. The amount of the performance bonds shall be set by the City Administrator or may be set in a Franchise ordinance in light of the nature of the work to be performed pursuant to or under the Franchise. Bonds must be obtained prior to the effective date of any Franchise, transfer or Franchise renewal, unless a Franchise ordinance specifically provides otherwise.

- G. Every Cable Communications System Operator shall establish and maintain a cash security fund or provide the City an irrevocable letter of credit in a form mutually acceptable to the City and Franchisee, in an amount specified in the Franchise ordinance but no less than one hundred thousand dollars (\$100,000) to secure the payment of fees owed, to secure any other performance promised in a Franchise ordinance, and to pay any taxes, fees or liens owed to the City. The letter of credit shall be in a form and with an institution acceptable to the City's Director of Finance and in a form acceptable to the City Attorney. Should the City lawfully draw upon the cash security fund or letter of credit, the Cable Communications System Operator shall, within fourteen (14) days, restore the fund or the letter of credit to the full required amount. This security fund/letter of credit may be waived or reduced by the City for a Franchisee where the City determines in its discretion that a particular Franchisee's operations are sufficiently limited that a security fund/letter of credit is not necessary to secure the required performance. The City may from time to time require a Franchisee to change the amount of the required security fund/letter of credit to reflect changed risks to the City and to the public, including delinquencies in taxes or other payments to the City. The cash security fund or letter of credit must be obtained prior to the effective date of any Franchise, transfer or Franchise renewal, unless a Franchise ordinance specifically provides otherwise.

- H. A Franchise ordinance may provide that the Security Fund requirements of Section 5.16.400(G) may be satisfied by a security bond in an amount provided in a Franchise ordinance and in a form satisfactory to the City.

5.16.410 Enforcement and Remedies

- A. The City Council may revoke a Franchise if it finds, after a hearing, that a Cable Communications System Operator has violated any material provision of this Chapter, has committed a material breach of its Franchise ordinance or repeatedly failed to comply with its Franchise ordinance; has defrauded or attempted to defraud the City or Subscribers; or has attempted to evade the requirements of this Chapter or its Franchise ordinance. Before conducting a hearing to revoke the Franchise: (1) the City Administrator must have given written notice of a claimed violation, breach, default or failure; and (2) the Franchisee must have been given thirty (30) days to: (a) cure the claimed default, or (b) in the event that, by nature of the default, a cure is not feasible within such thirty (30) day period, initiate reasonable steps to remedy such default. An opportunity to cure is not required where the City finds that the defect in performance is part of a pattern of violations where the Franchise has already had notice and opportunity to cure. The Franchisee will be given at least thirty (30) days notice of the hearing date, and will be provided an opportunity to be heard at the hearing. Any revocation proceeding must be conducted in accordance with then applicable federal and state laws, and City shall be responsible for ensuring that Franchisee is afforded due process under the law.
  
- B. To the extent not prohibited by the U.S. Bankruptcy Code, a Franchise will terminate automatically by force of law one hundred twenty (120) calendar days after an assignment for the benefit of creditors or the appointment of a receiver or trustee to take over the business of the Franchisee, whether in a receivership, reorganization, bankruptcy assignment for the benefit of creditors, or other action or proceeding. However, the Franchise may be reinstated within that one hundred twenty (120) day period, if: (1) such assignment, receivership or trusteeship has been vacated; or (2) such assignee, receiver or trustee has fully complied with the terms and conditions of this Chapter and the Franchise



ordinance, and has executed an agreement, approved by any court having jurisdiction, assuming and agreeing to be bound by the terms and conditions of this Chapter and the Franchise ordinance. In the event of foreclosure or other judicial sale of any of the facilities, equipment or property of a Franchisee, the City may revoke the Franchise following a public hearing before the City Council, by serving notice upon the Franchisee and the successful bidder at the sale, in which event the Franchise and all rights and privileges thereunder will be revoked and will terminate thirty (30) calendar days after serving such notice, unless: (1) the City has approved the transfer of the Franchise to the successful bidder; and (2) the successful bidder has covenanted and agreed with the City to assume and be bound by the terms and conditions of the Franchise ordinance and this Chapter.

- C. Upon termination or forfeiture of a Franchise, whether by action of the City as provided above, or by passage of time, the City may do one or a combination of the following.
1. The Franchisee must, as the City so directs, stop using the cable communications system for the purposes authorized by the franchise.
  2. The City may require the former Franchisee to remove all of a portion of its facilities and equipment at the former Franchisee's expense, subject to Franchisee's right to abandon property in place. If the former Franchisee fails to do so within a reasonable period of time, the City may have the removal done at *the former Franchisee's and/or surety's expense*.
  3. The City, by resolution of the City Council, may acquire ownership or effect a transfer of all or a portion of the Cable Communications System at the prices and under the conditions set forth in 47 U.S.C. § 547.
  4. Subsection 5.16.410(D)(3) of this section does not apply to an abandonment. If a Cable Communications System or any part thereof is abandoned by Franchisee, the City may require the Franchisee to transfer title to the all of some of the

abandoned portions to it at no charge, free and clear of encumbrances, and the same will become the City's property and the City may keep, sell, assign, or transfer all or part of the assets of the cable communications system, or otherwise dispose of those assets as it sees fit.

5. Notwithstanding the foregoing, the City may not, pursuant to this section, issue an order that violates 47 U.S.C. § 541(b)(3)(C).
- D. Remedies provided for under this Chapter, or under a Franchise ordinance shall be cumulative and are in addition to all other remedies which may be available at law or equity. Recovery by the City of any amounts under insurance, the performance bond, the security fund or letter of credit, does not limit a Franchisee's duty to indemnify the City; or otherwise relieve a Franchisee of its Franchise obligations.
  - E. Each Franchise shall contain a provision specifying liquidated damages payable to the City in the event of a breach of a Franchise obligation where damages would otherwise be difficult to ascertain.

5.16.420 Books and Records

- A. The City shall have the right to inspect and copy books and records that are relevant to monitoring compliance with the terms of this ordinance, a franchise or applicable law; or that are relevant to the exercise of any right or duty of the City under the same. Each Cable Communications System Operator is responsible for maintaining control over such books and records whether created by it, or by those acting on its behalf. It is responsible for producing these records upon the City's request, for the City's inspection and copying. The records that Franchisee must produce shall include, but are not limited to revenue records, and other records related to compliance with any provision of this Chapter or a Franchise ordinance. Books and records must be maintained for a period of three (3) years, except that a Franchise ordinance may specify a shorter period for certain categories of voluminous books and records where the information contained therein can be derived simply from other materials. The phrase "books and records" shall be read expansively to include information in whatever format stored.

- B. Books and records requested shall be produced to the City by a time and at a location in the City designated by the City Administrator. However, if the requested books and records cannot be copied and moved for security reasons, then the Franchisee may request that the inspection take place at some other location mutually agreed to by the City and the Franchisee, provided that (1) the Franchisee must make necessary arrangements for copying documents selected by the City after its review; and (2) the Franchisee must pay all travel and additional copying expenses incurred by the City (above those that would have been incurred had the documents been produced in the City) in inspecting those documents or having those documents inspected by its designee.
- C. Any proprietary information received by the City from a Franchisee must be clearly marked as proprietary information which the Franchisee asserts is not required to be disclosed pursuant to the California Public Records Act. If a third party seeks release of a document held by the City marked as provided in this Section 5.16.420(C), the City will notify the franchisee so that the franchisee may seek court protection against the release of the document.

5.16.430 Reports

- A. The City Administrator may from time to time direct a Franchisee to prepare reports related to the provisions of Applicable Law or the Franchise, or the construction, operation, upgrade or repair of the Cable Communications System and to submit those reports by a date certain, in a format prescribed by the City Administrator, in addition to those required by this Chapter.
- B. Each Franchisee shall submit the reports specified in the franchise ordinance, within the time limits specified in the ordinance.
- C. No later than thirty (30) days after the end of each calendar year, a Franchisee shall submit the following information:

1. A certified statement setting forth the computation of Gross revenues used to calculate the Franchise fee for the preceding year and a detailed explanation of the method of computation showing (i) Gross revenues by category (e.g., basic, pay, pay-per-view, advertising, installation, equipment, late charges, miscellaneous, other); and (ii) what, if any, deductions were made from Gross revenues in calculating the Franchise fee (e.g., bad debt, credits and refunds), and the amount of each deduction.
  
2. A report showing, for each applicable customer service standard, the Franchisee's performance with respect to that standard for the preceding year. In each case where Franchisee concludes it did not comply fully, the Franchisee will describe the corrective actions it is taking to assure future compliance. In addition, the report should identify the number and nature of all escalated customer service complaints received and an explanation of their dispositions.

5.16.440 Maps Required

Each Franchisee shall maintain accurate maps and improvement plans that show the location, size, and a general description of all facilities installed in the Public rights-of-way or on Public Property and any power supply sources (including voltages and connections). Each Franchisee shall provide an as-built map to the City showing the location of its facilities and shall update such map whenever the facility expands or is relocated. Copies of the maps shall be provided on disk, in a commercially available electronic format specified by the City Administrator. As built must be submitted in the time and manner specified in the Franchise ordinance and consistent with other City ordinances.

5.16.450 Other Records Required

A Franchisee shall make available for inspection by the City Administrator in the City during normal business hours within ten (10) business days a written request the following records for the preceding 12 months or such longer period as the Franchisee may be required to maintain the records under applicable state or federal law:

- A. Records of all escalated complaints received, their nature and resolution. The term “complaints” refers to complaints about any aspect of the Franchisee’s construction,

operations or repairs activities whether received directly by the Franchisee or forwarded to the Franchisee by the City or other agencies;

- B. Records of outages known to the Franchisee, their cause and duration;
- C. Records of service calls for repair and maintenance indicating the nature of the call for service, the date and time service was requested, the date of acknowledgment and date and time service was scheduled (if it was scheduled), and the date and time service was provided, and (if different) the date and time the problem was solved;
- D. Records of installation/reconnection and requests for service extension, indicating date of request, date of acknowledgment, and the date and time service was extended;
- E. Records sufficient to show whether the Franchisee has complied with each customer service standard that applies to it; and
- F. Records identifying all credits and/or refunds for outages, missed appointments and other service refunds, provided to any.

#### *5.16.460 Exemptions*

The City Administrator may temporarily exempt any Franchisee from its obligations under Sections 5.16.430 – 5.16.450 if the City Administrator determines that City and Subscriber interests may be adequately protected in some other manner, so long as such temporary exemption does not conflict with any other City ordinance.

#### *5.16.470 Privacy*

A Franchisee shall take all reasonable steps required so that it is able to provide reports, books and records to the City. Each Franchisee shall be responsible for redacting data that applicable law prevents it from providing to the City. Nothing in this Section shall be read to require a Franchisee to violate state or federal Subscriber privacy laws.

#### *5.16.480 Procedures for Paying Franchise Fees and Fees in Lieu of Franchise Fees*

- A. The Franchise fee paid pursuant to Part 3, and the fee in lieu of Franchise fee paid pursuant to Part 4 shall be paid quarterly unless otherwise specified in a Franchise.

Payment for each quarter shall be delivered to the City by check or electronic transfer not later than thirty (30) days after the end of each calendar quarter. Each payment made shall be accompanied by a report detailing how the payment was calculated.

- B. No acceptance by the City of any payment shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of such payment be construed as a release of any claim the City may have for additional sums payable or otherwise related to that payment.
- C. Neither the Franchise fee under Part 3, nor the fee paid in lieu of the Franchise fee under Part 4, is a payment in lieu of any tax, fee or other assessment.
- D. In the event that a fee payment is not received by the City on or before the due date set forth in this Section or in a Franchise ordinance, or the fee owed is not fully paid, the Person subject to the fee will be charged interest on the outstanding amount owed from the due date at an interest rate equal to two percent (2%) above the rate for three-month Federal Treasury Bills, compounded daily, at the most recent United States Treasury Department sale of such Treasury Bills occurring prior to the due date of the franchise fee payment.
- E. Within ninety (90) days of the date a Franchisee ceases operations under a Franchise (whether because of Franchise termination, transfer, bankruptcy or for any other reason), the Franchisee (or its successor in interest) shall: (A) make a final franchise fee payment, covering the period from the end of prior calendar month to date the Franchisee ceased operations; and (B) file a final statement of Gross revenues covering the period from the beginning of the calendar year in which the operations ceased to the date operations ceased. The statement shall contain the information and be certified as required by Section 5.16.430(C)(1).

### Part 3

## SPECIAL RULES APPLICABLE TO CABLE SYSTEMS

### 5.16.490 Applications - Generally

- A. An application must be filed for an initial and renewal Cable System Franchise, or for approval of a transfer. All applications under the provisions of this chapter shall be in writing and shall be filed in the Office of the City Clerk. These requirements do not apply to a renewal proposal submitted pursuant to 47 U.S.C. Section 546(h) as may be amended.
1. At a minimum, each application must identify the applicant, show that the applicant is financially, technically and legally qualified to construct, maintain and operate the Cable System, contain a pro forma showing capital expenditures and expected income and expenses for the first five (5) years the applicant is to hold the Franchise, and show that the applicant is willing to comply unconditionally with this Chapter and its Franchise obligations. In addition, any application for an initial or renewal Franchise must describe in detail the Cable System that the applicant proposes to build or maintain, show where it is or will be located, set out the system construction or rebuild schedule, and show that the applicant will provide adequate Channels, facilities and other support for Public, Educational and Government use (including institutional network use) of the Cable System. To be accepted for filing, an original and six (6) copies of a complete application must be submitted. All applications shall include the names and addresses of Persons authorized to act on behalf of the applicant with respect to the application.
  2. The City may demand, and applicant shall provide, such supplementary, additional or other information as the City Council may deem reasonably necessary to determine whether the application should be granted. An applicant (and the transferor and transferee, in the case of a transfer) shall respond to any request for information from the City by the time specified by the City or by applicable law.

- C. An application may be rejected if it is incomplete.

5.16.500 Application for an Initial Franchise or Renewal Franchise

- A. This Section establishes additional provisions that apply to an application for an initial Franchise, or a renewal Franchise application that is not governed by 47 U.S.C. Section 546(a)-(h) as may be amended.
- B. Any Person may apply for an initial or renewal Franchise by submitting an application therefor on that Person's own initiative, or in response to a request for proposals issued by the City. If the City receives an unsolicited application, it may choose to issue a request for additional proposals, and require the applicant to amend its proposal to respond thereto. The City may conduct such investigations as are necessary to act on an application.
- C. Before taking final action on an application, the City shall conduct a public hearing in accordance with applicable state and federal law.
- D. In determining whether to grant a Franchise, The City may consider:
  - 1. the extent to which an applicant for renewal has substantially complied with the applicable law and the material terms of any existing cable Franchise ordinance;
  - 2. whether an applicant for renewal's quality of service under its existing Franchise ordinance, including signal quality, response to customer complaints, billing practices, and the like has been reasonable in light of the needs of the community;
  - 3. where the applicant has not previously held a Cable System Franchise in the City, whether the applicant's record in other communities indicates that it can be relied upon to provide high-quality service throughout any Franchise term;



4. whether the applicant has the financial, legal, and technical ability to provide the services, facilities, and equipment set forth in an application, and to satisfy any *minimum requirements established by the City*;
  5. whether the applicant's application is reasonable to meet the future cable-related needs and interests of the City, taking into account the cost of meeting such needs and interests;
  6. whether issuance of a Franchise is warranted in the public interest considering the immediate and future effect on streets, Public Property, and Private property that will be used by the applicant's Cable System;
  7. whether issuance of the Franchise would reduce competition in the provision of Cable Service in the City;
  8. whether the applicant has proposed to provide adequate facilities, equipment, Channels and other support for PEG use of the Cable System;
  9. such other matters as the City is authorized or required to consider.
- E. If the City determines that issuance of a Franchise would be in the public interest considering the factors described in this Section, it may proffer a Franchise ordinance to the applicant.
- F. Within thirty-one (31) days after the effective date of the ordinance awarding a Franchise or Franchise renewal, or within such extended period of time as the City Council in its discretion may authorize, the successful applicant or Franchisee shall file with the City Clerk an unconditional written acceptance, in form satisfactory to the City Attorney, of the Franchise or Franchise renewal, together with an agreement to be bound by and to comply with all applicable provisions of the City's charter, this Chapter, and the Franchise ordinance. Such acceptance and agreement shall be acknowledged before a

notary public and shall in form and content be satisfactory to and approved by the City Attorney.

*5.16.510      Application for Renewal Filed Pursuant to 47 U.S.C. Section 546*

- A. This Section establishes provisions that apply to applications for renewal governed by 47 U.S.C. 546(a)-(g) as may be amended.
- B. A Franchisee that intends to exercise rights under 47 U.S.C. 546(a)-(g) as may be amended shall submit a notice in writing to the City in a timely manner clearly stating that it is activating the procedures set forth in those sections. The City shall thereafter commence any proceedings that may be required under federal law, and upon completion of those proceedings, the City may issue a request for proposals and an application may be submitted for renewal. The City may preliminarily deny the application by resolution, and if the application is preliminarily denied, the City may conduct such proceedings and by resolution establish such procedures and appoint such individuals as may be necessary to conduct any proceedings to review the application.
- C. An application for renewal pursuant to 47 U.S.C. §546(h) may be submitted at any time, and may be rejected by the city at any time after public hearing.

*5.16.520      Application for Transfer*

- A. This Section establishes provisions that apply to applications for transfer approval.
- B. An application for transfer must contain all the information required by Section 5.16.490, all information, required by the FCC Form 394 as it existed on January 1, 1999, and all information that it is required to file under applicable federal or state law.
- C. Subject to limitations under applicable law, in determining whether a transfer application should be granted, denied, or granted subject to conditions, the City may consider the legal, financial, and technical qualifications of the transferee to operate the Cable System; any potential impact of the transfer on Subscriber rates or services; whether the

incumbent cable Operator is in material compliance with its Franchise, and if not any commitments to cure such non-compliance; whether the transfer may eliminate or reduce competition in the delivery of Cable Service in the City; and whether operation by the transferee or approval of the transfer would otherwise materially adversely affect Subscribers, the public, or the City's interest under this Chapter, the Franchise ordinance, or other applicable law. The proposed transferee shall pay all reasonable costs incurred by the City in reviewing and evaluating the applications.

- D. No application shall be granted unless the transferee agrees in writing that it will abide by and accept all terms of this Chapter and the Franchise ordinance, and that it will assume the obligations, liabilities, and responsibility for all acts and omissions, known and unknown, of the previous Franchisee for all purposes, except for purposes of Cable Act renewal proceedings to the extent that such a condition is prohibited by Section 626 of the Cable Act, 47 U.S.C. § 546.

*5.16.530      Legal Qualifications*

- A.
1. The applicant must be willing to comply with the provisions of this Chapter and applicable laws; and to comply with such requirements of a Franchise ordinance as the City may lawfully require.
  2. The applicant must not have had any Cable System or OVS Franchise revoked by the City within three (3) years preceding the submission of the application. If Franchisee challenges a revocation, it may not apply while the appeal is pending, or for three (3) years after the final resolution of the appeal if the revocation is valid.
  3. The applicant may not have had an application to the City for an initial or renewal Cable System Franchise denied on the ground that the applicant failed to propose a Cable System meeting the cable-related needs and interests of the community,

or as to which any challenges to such franchising decision were finally resolved (including any appeals) adversely to the applicant, within three (3) years preceding the submission of the application; and may not have had an application for an initial or renewal OVS Franchise denied on any ground within three (3) years of the application.

4. The applicant shall not be issued a Franchise if, at any time during the ten (10) years preceding the submission of the application, applicant was convicted of fraud, racketeering, anti-competitive actions, unfair trade practices or other conduct of such character that the applicant cannot be relied upon to deal truthfully with the City and the Subscribers, or to substantially comply with its obligations.
  5. Applicant must have the necessary authority under California and federal law to operate a Cable System, or show that it is in a position to obtain that authority.
  6. The Applicant shall not be issued a Franchise if it files materially misleading information in its application or intentionally withholds information that the applicant lawfully is required to provide.
  7. For purposes of Section 5.16.530(A)(1)-(4), the term applicant includes any Affiliate of applicant.
- B. Notwithstanding Section 5.16.530(A), an applicant shall be provided a reasonable opportunity to show that a Franchise should issue even if the requirements of Section 5.16.530(A)(2)-(4) are not satisfied, by virtue of the circumstances surrounding the matter and the steps taken by the applicant to cure all harms flowing therefrom and prevent their recurrence, the lack of involvement of the applicant's principals, or the remoteness of the matter from the operation of a Cable System.

5.16.540 Franchise Fee

A Cable System Operator shall pay to the City a Franchise fee in an amount equal to five (5) percent of Gross Revenues from the provision of Cable Services, or such other amount as may be specified in the Franchise ordinance.

5.16.550 No Exclusivity

To the extent prohibited by applicable law, a Franchisee may not directly or indirectly require a Subscriber or building owner or manager to enter into an exclusive contract as a condition of providing or continuing to provide Cable Service. A Franchisee must offer service on a month-to-month basis. Nothing in this section shall prevent a Franchisee from entering into a longer term and/or exclusive contract with a Subscriber or building owner in exchange for discounted rates or other consideration, to the extent permitted by applicable law.

- A. It is the policy of the City to ensure that every Cable System provide service in its Franchise area upon request to any residential dwelling unit. In addition, each Franchisee shall provide service to any school or government building in the City, subject to written request from the City Administrator and any applicable line extension policies in a Franchise Ordinance. Each Franchisee shall extend service upon request within its Franchise area, provided that, a Franchise ordinance may permit a Franchisee to require a potential Subscriber to contribute a fair share of the capital costs of installation or extension as a condition of extension or installation in cases where such extension or installation may be unduly expensive. Cable Service must be provided within time limits specified in the Franchise Ordinance.
- B. A Cable System within the City shall meet or exceed the technical standards set forth in 47 C.F.R. § 76.601 and any other applicable technical standards as may be amended.
- C. Each Cable System Operator shall perform at its expense such tests as may be necessary to show whether or not the Franchisee is in compliance with its obligations under applicable FCC standards, this Chapter or a Franchise ordinance.
- D. Each Franchisee shall, during the term of its Franchise, ensure that Subscribers are able to receive continuous service. In the event the Franchise is revoked or terminated, the Franchisee may be required to continue to provide service for a reasonable period to

assure an orderly transition of service from the Franchisee to another Person. A Franchise ordinance may establish more particular requirements under which these obligations will be satisfied.

5.16.560 Rate Regulation

- A. The City may regulate any of the Cable Communications System Operator's rates and charges, except to the extent it is prohibited from doing so by law. The City will regulate rates in accordance with FCC rules and regulations, where applicable. Except to the extent FCC rules provide otherwise, all rates and charges that are subject to regulation, and changes in those rates or charges must be approved in advance. The City Administrator may take any required steps to file complaints, toll rates, issue accounting orders or take any other steps required to comply with FCC regulations. The City Council shall be responsible for issuing rate orders that establish rates or order refunds. A franchisee must comply with all rate orders issued by the City Council pending appeals by the franchisee unless a stay order has been issued by the FCC.
- B. Except to the extent the City may not enforce such a requirement, a Cable Communications System Operator is prohibited from discriminating in its rates or charges or from granting undue preferences to any Subscriber, potential Subscriber, or group of Subscribers or potential Subscribers; provided, however, that a Franchisee may offer temporary, bona fide promotional discounts in order to attract or maintain Subscribers, so long as such discounts are offered on a non-discriminatory basis to similar classes of Subscribers throughout the Franchise area; and a Franchisee may offer bulk discounts at negotiated rates; and a Franchisee may offer discounts for the elderly, the disabled, or the economically disadvantaged; and such other discounts as it is permitted to provide under federal and state law, if such discounts are applied in a uniform and consistent manner.
- C. A Cable Communications System Operator shall not deny access or charge different rates to any group of Subscribers or potential Subscribers because of the income of the residents of the local area in which such group resides.

5.16.570 Consumer Protection and Customer Service

- A. Each Franchisee must comply with all applicable state and federal consumer protection provisions. In addition, each Franchise Ordinance shall set forth customer service standards which the Franchisee must comply with.
- B. For each violation of an applicable consumer protection or customer service standard, the City may impose penalties as follows:
  - 1. Two hundred dollars (\$200) for each day of each material breach, not to exceed six hundred dollars (\$600) for each occurrence of the material breach).
  - 2. If there is a subsequent material breach of the same provision within twelve (12) months, four hundred dollars (\$400) for each day of each material breach, not to exceed twelve hundred dollars (\$1200) for each occurrence of the material breach.
  - 3. If there is a third or additional material breach of the same provision within twelve (12) months of the first, one thousand dollars (\$1000) for each day of each material breach, not to exceed three thousand dollars for each occurrence of the material breach.
- C. No penalty shall be assessed under this Section 5.16.570 for a breach where the City has the right to impose liquidated damages for the same occurrence.
- D. A citation may be served on the Franchisee by providing a copy to the person to whom notices are to be sent under the Franchise Ordinance.
- E. Penalties under this Section 3.650 shall be imposed pursuant to the procedures set forth in Cal. Govt. Code Section 53088(r), and may be collected by the City from the Security Fund required under Section 2.430(G) of this Ordinance.

**Part 4**  
**OPEN VIDEO SYSTEMS**

5.16.580 Applications for Grant or Renewal of Franchises

A.

1. A written application shall be filed with the City Clerk for grant of an initial or renewal OVS Franchise.
2. To be acceptable for filing, a signed original of the application shall be submitted together with six (6) copies. The application must conform to any applicable request for proposals, and contain all information required under Section 3.570-(B)(2). All applications shall include the names and addresses of Persons authorized to act on behalf of the applicant with respect to the application.

B. The City Administrator may specify the information that must be provided in connection with a request for proposals or an application for an initial or renewal OVS Franchise. At a minimum, each application must: identify the applicant, where it plans to construct its OVS, and the OVS construction schedule; show that the Applicant will provide adequate Channels, facilities and other support for Public, Educational and Government use (including institutional network use) of the OVS; and show that the applicant is financially, technically and legally qualified to construct and operate the OVS.

C.

1. A Person may apply for an initial or renewal OVS Franchise on its own initiative or in response to a request for proposals. Upon receipt of an application, the City may conduct such investigations as are necessary to consider the application. The City may request such additional information as it deems appropriate.
2. An applicant shall respond to requests for information completely, and within the time directed by the City, and must strictly comply with procedures, instructions, and requirements the City may establish.



3. An application may be rejected if it is incomplete or the applicant fails to follow procedures or respond fully to information requests.

D. In evaluating an OVS Franchise application, the City may consider the following:

1. The extent to which the applicant has substantially complied with the applicable law and the material terms of any existing City OVS Franchise;
2. Whether the applicant has the financial, technical, and legal qualifications to hold an OVS Franchise;
3. Whether the application satisfies any minimum requirements established by the City for, or will otherwise provide adequate Public, Educational, and Governmental use capacity, facilities, or financial support (including with respect to institutional networks);
4. Whether issuance of an OVS Franchise would require replacement of property or involve disruption of property, public services, or use of the Public rights-of-way;
5. Whether the approval of the application may eliminate or reduce competition in the delivery of Cable Service in the City; and
6. Such other matters as it is required or entitled to consider.

E. If the City finds that it is in the public interest to issue an OVS Franchise considering the factors above, shall proffer an OVS Agreement to applicant, and if applicant is willing to unconditionally accept the terms thereof, and to comply with the requirements of applicable law, including this Chapter, it shall issue an OVS Franchise.

5.16.590 Transfers

- A. No transfer of an OVS Franchise shall occur without prior written notice to and approval of the City Council.
- B.
1. An OVS Franchisee shall promptly notify the City of any proposed transfer, and submit an application for its approval at least 120 days in advance of the proposed and anticipated transfer date.
  2. The City Administrator may specify information that must be provided in connection with a transfer application. At a minimum, an application must: describe the Persons involved in the transaction and the Person that will hold the OVS Franchise; describe the chain of ownership before and after the proposed transaction; show that the Person that will hold the OVS Franchise will be legally, financially, and technically qualified to do so; attach complete information on the proposed transaction, including the contracts or other documents that relate to the proposed transaction, and all documents, schedules, exhibits, or the like referred to therein; and attach any shareholder reports or filings with the Securities and Exchange Commission (“SEC”) that discuss the transaction.
  3. For the purposes of determining whether it shall consent to a transfer, the City or its agents may *inquire into all qualifications of the prospective transferee and such other matters as the City may deem necessary to determine whether the transfer is in the public interest and should be approved, denied, or conditioned.* If the transferee or OVS Franchisee refuse to provide information, or provide incomplete information, the request for transfer may be denied.
- C.
1. In deciding whether a transfer application should be granted, denied or granted subject to conditions, the City may consider the legal, financial, and technical

qualifications of the transferee to operate the OVS; whether the incumbent OVS Operator is in compliance with its OVS Agreement and this Chapter and, if not, the proposed transferee's commitment to cure such noncompliance; whether the transferee owns or controls any other OVS or Cable System in the City, and whether operation by the transferee may eliminate or reduce competition in the delivery of Cable Service in the City; and whether operation by the transferee or approval of the transfer would adversely affect Subscribers, the public, or the City's interest under this Chapter, the OVS Agreement, or other applicable law.

2. No application shall be granted unless the transferee agrees in writing that it will abide by and accept all terms of this Chapter and the OVS Agreement , and that it will assume the obligations, liabilities, and responsibility for all acts and omissions, known and unknown, of the previous Franchisee for all purposes. The proposed transferee shall pay all reasonable costs incurred by the City in reviewing and evaluating the applications.

5.16.600 Legal Qualifications

A. In order to be legally qualified:

1. The applicant must be willing to comply with the provisions of this Chapter and applicable laws, and to comply with such requirements of an OVS Agreement as the City may lawfully require.
2. The applicant must not hold a Cable System Franchise, or have pending an application for a Cable System Franchise.
3. The applicant must not have had any Cable System or OVS Franchise revoked by the City within three (3) years preceding the submission of the application. If Franchisee challenges a revocation, it may not apply while the appeal is pending, or for three years after the final resolution of the appeal if the revocation is valid.

4. The applicant may not have had an application for an initial or renewal Cable System Franchise to the City denied on the ground that the applicant failed to propose a Cable System meeting the cable-related needs and interests of the community, or as to which any challenges to such franchising decision were finally resolved (including any appeals) adversely to the applicant, within three (3) years preceding the submission of the application.
  5. The applicant may not have had an application for an initial or renewal OVS Franchise denied on any grounds within three (3) years of the applications.
  6. The applicant shall not be issued an OVS Franchise if, at any time during the ten (10) years preceding the submission of the application, applicant was convicted of fraud, racketeering, anti-competitive actions, unfair trade practices or other conduct of such character that the applicant cannot be relied upon to deal truthfully with the City and the Subscribers, or to substantially comply with its obligations.
  7. Applicant must have the necessary authority under California and federal law to operate an OVS, and must be certified by the FCC under Section 653 of the Cable Act as may be amended.
  8. The Applicant shall not be issued an OVS Franchise if it files materially misleading information in its application or intentionally withholds information that the applicant lawfully is required to provide.
  9. For purposes of Section 5.16.600(A)(2)-(6), the term applicant includes any Affiliate of applicant.
- B. Notwithstanding Section 5.16.600(A), an applicant shall be provided a reasonable opportunity to show that an OVS Franchise should issue even if the requirements of Section 5.16.600(A)(3)-(6) are not satisfied, by virtue of the circumstances surrounding

the matter and the steps taken by the applicant to cure all harms flowing therefrom and prevent their recurrence, the lack of involvement of the applicant's principals, or the remoteness of the matter from the operation of an OVS.

5.16.610 Minimum Requirements

- A. No OVS Operator shall be issued a Franchise, or may commence construction of an OVS, until (A) it agrees to match in all respects the highest PEG obligations borne by any Cable System Operator in the City; or (B) it agrees to PEG obligations acceptable to the City.
- B. Any OVS Operator that constructs an I-Net must match in all respects the highest I-Net obligations borne by any Cable System Operator in the City, unless it agrees to alternative I-Net obligations acceptable to the City.
- C. Every OVS Agreement shall specify the construction schedule that will apply to any required construction, upgrade, or rebuild of the OVS. The schedule shall provide for prompt completion of the project, considering the amount and type of construction required.
- D. Each OVS Operator shall perform at its expense such tests as may be necessary to show whether or not the OVS Franchisee is in compliance with its obligations under this Chapter or a Franchise or an OVS Agreement.
- E. Every OVS Franchisee must satisfy customer service consumer protection requirements established from time to time under state or local law and applicable to OVS.
- F. If an OVS Franchisee's FCC certification is revoked or otherwise terminates as a result of the passage of time or as a matter of law, the City may revoke the OVS Franchise after a hearing. The OVS franchise may also be revoked if federal regulations or statutory provisions governing OVS are declared invalid or unenforceable, or are repealed.

- G. The City may regulate an OVS Franchisee's rates and charges except as prohibited by law, and may do so by amendment to this Chapter, separate ordinance, by amendment to an OVS Agreement, or in any other lawful manner.

5.16.620 Fee in Lieu of Franchise Fee

- A. In lieu of the Franchise fee required by Part 3, an OVS Franchisee shall pay to the City a fee of five percent (5%) of Gross Revenues.

B.

1. A Person leasing capacity from an OVS Operator, other than a Person whose revenues are included in the payment made under Section 5.16.620(A) shall pay the City a fee in lieu of the Franchise fee required by Part 3 of five percent (5%) of the gross revenues of such Person. For purposes of this section 5.16.620(B)(1), the term gross revenues means all revenues, whether cash, in-kind or in any other form, of the Person leasing capacity, or its affiliates, derived from use of the OVS to provide cable service in the City.
2. Notwithstanding the foregoing, where a Person, other than an Affiliate, pays an OVS Franchisee to use its Franchisee's OVS (the "use payments"); and that Person recovers those use payments through charges to its Subscribers that are included in that Person's Gross revenues; and the OVS Franchisee pays a Franchise fee on those use charges; then that Person may deduct from its Gross revenues the use payments it makes.

5.16.630 Exclusive Contracts

An OVS Franchisee may not directly or indirectly require a Subscriber or a building owner or manager to enter into an exclusive contract as a condition of providing or continuing service, nor may an OVS Franchisee enter into any arrangement that would effectively prevent other Persons from using the OVS to compete in the delivery of Cable Services with an OVS Franchisee or its Affiliates. A Franchisee must provide service on a month to month basis; however, nothing in this section prevents a Franchisee from entering into a longer term contract with a Subscriber in exchange for discounted rates.

**Part 5**  
**MISCELLANEOUS**

5.16.640      Captions

The captions to sections throughout this Chapter are intended solely to facilitate reading and reference to the sections and provisions of this Chapter. Such captions shall not affect the meaning or interpretation of this Chapter.

5.16.650      Calculation of Time

Unless otherwise indicated, when the performance or doing of any act, duty, matter, or payment is required under this Chapter or any Franchise, and a period of time or duration for the fulfillment of doing thereof is prescribed and is fixed herein, the time shall be computed so as to exclude the first and include the last day of the prescribed or fixed period of time.

5.16.660      Severability

If any term, condition, or provision of this Chapter shall, to any extent, be held to be invalid or unenforceable by a valid order of any court or regulatory agency, the remainder hereof shall be valid in all other respects and continue to be effective. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by the City and shall thereafter be binding on the Franchisee and the City.

5.16.670      Connections to Cable System; Use of Antennae

- A. To the extent consistent with federal law, Subscribers shall have the right to attach VCR's, receivers, and other terminal equipment to a Franchisee's Cable Communications System, Subscribers also shall have the right to use their own remote control devices and converters, and other similar equipment.
  
- B. A Franchisee shall not, as a condition of providing service, require a Subscriber or potential Subscriber to remove any existing antenna or satellite dish, or disconnect an antenna or satellite dish except at the express direction of the subscriber or potential

Subscriber, or prohibit installation of a new antenna or connection to any other multi-channel video provider's system.

5.16.680 Discrimination Prohibited

- A. A Cable Communications System Operator shall not unlawfully discriminate among Persons or the City or take any retaliatory action against a Person or the City because of that Person's exercise of any right it may have under federal, state, or local law, nor may the Operator require a Person or the City to waive such rights as a condition of taking service.
  
- B. A Cable Communications System Operator shall not refuse to employ, discharge from employment, or unlawfully discriminate against any Person in compensation or in terms, conditions, or privileges of employment because of race, color, creed, national origin, sex, age, disability, religion, ethnic background, marital status or sexual orientation. A Cable Communications System Operator shall comply with all federal, state, and local laws and regulations governing equal employment opportunities, and hiring practices, as the same may be amended from time to time.”

IN COUNCIL, OAKLAND, CALIFORNIA, \_\_\_\_\_, 2005

**PASSED BY THE FOLLOWING VOTE:**

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST: \_\_\_\_\_

LATONDA SIMMONS  
City Clerk and Clerk of the Council  
of the City of Oakland, California