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ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney  
John A. Russo  
City Attorney

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FAX: (510) 238-6500  
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March 4, 2008

HONORABLE CITY COUNCIL  
Oakland, California

President De La Fuente and Members of the City Council

Subject: RESOLUTION AUTHORIZING AND DIRECTING THE CITY ATTORNEY TO COMPROMISE AND SETTLE THE CASE OF CITY OF OAKLAND v. COMCAST OF CALIFORNIA/COLORADO LLC, COMCAST CORPORATION, DOES 1-10 CASE NO. C065380 CW – U.S. DISTRICT CT., NORTHERN DISTRICT OF CALIF.

Pursuant to Section 401 of the Charter, the City Attorney has prepared and recommended settlement of the above-entitled lawsuit. This was a closed session item on December 18, 2007, and February 19, 2008. This settlement agreement is the final piece of the settlement described in the City Administrator's report to City Counsel, dated January 15, 2008, attached. A copy of the settlement agreement is attached to the resolution.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John A. Russo', written over a horizontal line.

JOHN A. RUSSO  
City Attorney

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Office of the City Administrator  
Deborah A. Edgerly  
City Administrator

(510) 238-3301  
FAX (510) 238-2223  
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January 15, 2008

Oakland City Council  
Oakland, California

**RE: An Ordinance Amending Ordinance No. 10399 C.M.S. to Extend for Ten Years the Cable Franchise Held By Comcast of California / Colorado, LLC to Construct and Operate a Cable System to Provide Cable Service Within the City of Oakland; Amending the Terms and Conditions of the Franchise; and Establishing Certain Remedies for the Violation of the Franchise**

Dear President De La Fuente and Members of the Council:

#### **SUMMARY**

On December 18, 2007, the Council approved the settlement of pending litigation, entitled City of Oakland vs. Comcast of California/Colorado, LLC, et al. Pursuant to the settlement, Comcast agreed to a 10-year extension and amendment of the local cable franchise originally granted pursuant to Ordinance No. 10399 C.M.S., consistent with the attached franchise agreement. In exchange, the City agreed to dismiss its lawsuit against Comcast, without prejudice, reserving its right to re-file the lawsuit if Comcast chooses to opt out of the local franchise and obtain a state franchise pursuant to the Digital Infrastructure and Video Competition Act (DIVCA) prior to the end of the 10-year local franchise term. Comcast and the City also agreed to enter into a separate settlement agreement setting forth the terms of the Settlement. This Ordinance amends Ordinance No. 10399 C.M.S. consistent with the terms of the amended and extended cable franchise authorized by the Council on December 18, 2007 and agreed to by Comcast.

#### **FISCAL IMPACT**

Under the terms of the extended and amended local cable franchise, Comcast will pay to the City a fee equal to five percent (5%) of Comcast's gross revenues from the provision of cable services in the City, consistent with the definition of gross revenues set forth in DIVCA. In addition, Comcast will pay the City a fee for capital support of public, educational, and government access channels and programming equal to one percent (1%) of gross revenues. Comcast has also agreed to a credit of \$200,000 for use by the City for institutional network (I-NET) capacity on Comcast's fiber optic backbone, to the extent the City elects the I-Net construction option set forth in the franchise agreement.

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## BACKGROUND

On July 28, 2006 the City filed a lawsuit against Comcast of California/Colorado in the United States District Court. The complaint seeks damages for a 2005 breach of a Memorandum of Understanding and a Change of Control Agreement executed in 2002. Since the lawsuit was filed, DIVCA, the new state video franchising law, was passed by the Legislature and took effect. Under DIVCA, an incumbent cable operator may, commencing in January 2, 2008, obtain and commence operating under a state franchise issued by the California Public Utilities Commission, rather than a local franchise. Under the settlement and extended and amended local franchise, Comcast will continue to provide certain benefits to the City that the company would not be required to provide if operating under a state franchise, including City-wide cable service, free cable service to schools and municipal buildings, insurance and security bonds, and an option for the City to obtain institutional network capacity.

## KEY ISSUES AND IMPACTS

With the adoption of the ordinance attached, the City amends the cable franchise consistent with the attached franchise agreement.

The key terms of the amended cable franchise are:

- A term of 10 years that encompass the following provisions, and otherwise tracks applicable provisions of a State Franchise pursuant to DIVCA:
  - Comcast will pay the City an annual franchise fee of five percent (5%) of gross revenues.
  - Comcast will continue to provide the three PEG Channels currently activated in the City. The City can trigger additional PEG channels upon reaching programming milestones consistent with DIVCA.
  - Comcast will provide one percent (1%) of gross revenues for funding of Public Educational and Government ("PEG") Channel capital expenditures or, at the option of City, for capital expense funding of an Institutional Network ("I-Net").
  - Comcast will provide the City with a \$200,000.00 dollar credit for use in purchasing I-Net capacity, at or below market rates, on Comcast's fiber optic backbone.
  - Comcast will make service available to all lawful residential dwelling units existing in the City of Oakland on September 30, 2004, with no charge for any plant extensions that may be required, and will provide free residential cable drops up to 150 feet.

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- Comcast will continue to provide free cable service at the existing levels to all City and school buildings currently receiving service, and will provide one free outlet of basic cable service to any new or existing buildings not currently receiving service.
- Comcast will provide and maintain a security bond of \$50,000.00 dollars, and will maintain applicable insurance policies in the amount of not less than \$3 million dollars.

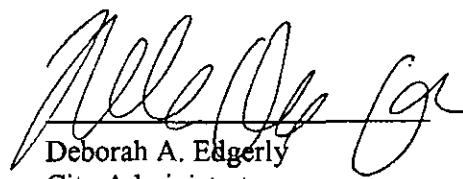
In addition, Comcast and the City will enter into a settlement agreement consistent with the foregoing terms, under which:

- The City agrees to dismiss its lawsuit without prejudice with the option to re-file the lawsuit, if Comcast chooses to opt out of the local franchise and obtains a state franchise pursuant to DIVCA before the end of the 10-year franchise term.
- Comcast agrees to dismiss its counter-claims against the City under the same conditions.
- The parties agree to toll any applicable statutes of limitation for the 10-year term of the franchise.

#### **ACTION REQUESTED OF THE COUNCIL**

Accept this report and approve the ordinance to extend the Cable Franchise with Comcast of California/Colorado, LLC, *et al*

Respectfully submitted,



Deborah A. Edgerly  
City Administrator

Reviewed by:  
Anne Campbell Washington  
Office of the City Administrator

Prepared by:  
Brian Tino Granados

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City Council  
January 15, 2008

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*M. London*

Approved as to Form

RESOLUTION No. \_\_\_\_\_ C.M.S.

**RESOLUTION AUTHORIZING AND DIRECTING THE CITY ATTORNEY TO COMPROMISE AND SETTLE THE CASE OF CITY OF OAKLAND v. COMCAST OF CALIFORNIA/COLORADO LLC, COMCAST CORPORATION, DOES 1-10 CASE NO. C065380 CW – U.S. DISTRICT CT., NORTHERN DISTRICT OF CALIF.**

**RESOLVED:** That the City Attorney is and has been authorized and directed to compromise and settle the case of City of Oakland v. Comcast of California/Colorado LLC, Comcast Corporation, Does 1-10 Case No. C065380 CW – U.S. District Ct., Northern District of California, as set forth in the attached settlement agreement.

**FURTHER RESOLVED:** That the City Attorney is and has been further authorized and directed to take whatever steps as may be necessary to effect said settlement; and be it

IN COUNCIL, OAKLAND, CALIFORNIA.

**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

## SETTLEMENT & RELEASE AGREEMENT

This Settlement Agreement (the "Agreement") is made and entered into by and between Comcast of California/Colorado, LLC ("Franchisee") on behalf of itself and co-defendants Comcast Corporation, and Comcast Cable Communications Management, LLC (collectively, "Comcast"), on the one hand, and the City of Oakland (the "City"), on the other hand. Comcast and the City are sometimes referred to collectively in this Agreement individually as the "Party" and collectively as the "Parties." This Agreement is made and entered into by the Parties with reference to the following facts:

A. The City is a municipal corporation and has exercised jurisdiction over cable television franchises within the City limits (the "Territory") pursuant to Article X, Section 1000 of the Oakland City Charter and other applicable laws.

B. Franchisee has held a non-exclusive franchise (the "Local Franchise") to construct, operate and maintain a cable television and communications system (the "Cable System") within the Territory pursuant to a franchise originally granted to its predecessor. Franchisee has duly reserved franchise renewal rights and procedures for the Local Franchise under Section 626 of the federal Cable Act (47 USC §546).

C. The City has filed a Fifth Amended Complaint against Comcast and its affiliates (the "Complaint", attached as Exhibit A) in the U.S. District Court for the Northern District of California, Case Number C065380CW (the "Action"). The Complaint asserts various allegations and causes of action against Comcast related to the Local Franchise and related agreements and documents including without limitation the

Memorandum of Understanding (the "MOU") dated July 16, 2002, between the City and AT&T Broadband HC of Delaware, LLC. Comcast has filed an answer ("Answer") and a Cross-Complaint ("Cross-Complaint") against the City, collectively attached as Exhibit B. The Cross-Complaint and Answer deny the material allegations of the Complaint and seek affirmative relief for Comcast.

D. Effective January 1, 2007, the State of California adopted the Digital Infrastructure and Video Competition Act ("DIVCA"), which establishes a procedure for video service providers, such as Franchisee and others, to apply for video service franchises from the state ("State Franchise"), administered by the California Public Utilities Commission ("CPUC"), to serve local areas.

E. Absent this Agreement, Franchisee intended to apply for a State Franchise pursuant to DIVCA commencing during 2008 to serve the Oakland area now served under the Local Franchise.

F. The parties wish to settle the disputes raised in the Action and with respect to the Local Franchise and other related disputes through agreement and compromise on the terms set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants, agreements and representations in this Agreement, and other valuable consideration, the Parties hereto agree as follows.

**1. Continuation of Local Franchise.**

a) By inducement of this Agreement with the City, Franchisee is not applying for a State Franchise to serve Oakland at this time, and instead the parties have executed

and the City ratified by ordinance a local franchise agreement between them in the form attached as Exhibit C, as an extension, amendment and complete restatement of the Local Franchise, effective on or about December 18, 2007 (the "2007 Franchise"). The City and Comcast agree that the 2007 Franchise is an amendment, extension and complete restatement of the Local Franchise, not the grant of a new or renewal franchise, and neither the City nor Comcast will assert otherwise, nor assert that the City was for any reason without authority to adopt the 2007 Franchise, in any legal, judicial, legislative, CPUC or other administrative proceeding, action, investigation, litigation or appeal.

b) The City acknowledges that Franchisee's cable communications system construction and upgrade has been completed as certified by Comcast to the City, effective September 30, 2004, and that the City has no outstanding claims with respect to Franchisee's completion of its construction obligations under the Local Franchise, the MOU or otherwise ("Construction Claims").

2. **Dismissal of Action.** The City and Comcast agree to complete mutual dismissal of the Action without prejudice. The Parties will each execute such a Request for Dismissal of their respective pleadings and each Party shall file its respective Request for Dismissal within five (5) business days after this Agreement is mutually signed and delivered. Upon the Termination Date defined in Section 3(a) below, except as expressly may apply otherwise in Section 4(b) below, the Action shall be deemed to have been dismissed with prejudice.



**3. Tolling of Time; Termination of Tolling and Action.**

a) All statutes of limitation applying to any claims either party may have against the other party as asserted in the Action (the "Tolled Claims") shall be and hereby are tolled from the date of this Agreement, up to and including December 18, 2017, or sixty (60) days after termination for any reason of the 2007 Franchise, except as specified in Section 3(b) below, whichever is sooner (in any such event, the "Termination Date"). Each Party agrees that it will execute further extensions of the statute of limitations for each of the Tolled Claims as is necessary to ensure that such claims are tolled until December 18, 2017, to the extent such further extensions are required under Code of Civil Procedure Section 360.5. The failure of any Party to execute an extension of a Tolled Claim within thirty (30) days of the other party's written request shall constitute a material breach of this Agreement; and if breached by either party shall, at the option of the non-breaching party, result in the termination of the 2007 Franchise and permit either party to assert any of the Tolled Claims in a new lawsuit.

b) The City agrees that if Franchisee becomes legally obligated to apply for a State Franchise in order to continue to provide video services in Oakland prior to December 18, 2017 (a "Compulsory State Franchise"), such event will not be considered an "abrogation" by Franchisee of the 2007 Franchise. The Termination Date shall be deemed to have occurred in the event that Franchisee becomes legally required to apply for a State Franchise. Notwithstanding the foregoing, if Franchisee obtains a Compulsory State Franchise, Franchisee shall, to the extent permitted by applicable law, continue to honor each of the Institutional Network provisions, the Service Availability provisions,

the Cable Service to City and School Building provisions, and the Insurance and Security Bond provisions specified in the 2007 Franchise (hereinafter, collectively, the "Material City Benefits"), through December 18, 2017.

c) Each party hereby waives any and all defenses it may have to any Tolled Claim based on statutes of limitations, laches, or otherwise arising from the passage of time (or action or inaction) between the date the Action was first filed and the Termination Date. This Agreement shall not be deemed to resurrect or revive all or any portion of such claims or defenses thereto which were time-barred or for which the statute of limitations had expired on or before the date the Action was first filed. Further, this Agreement does not and shall not constitute a waiver of any defense that the applicable statute of limitations had expired on or before the date the Action was first filed. Each party reserves the right to challenge the sufficiency of any claims that are asserted against it or that name it as defendant or cross-defendant and further reserves the right to assert any and all applicable defenses to any claims made by any other party, subject only to the limitations specified in this Agreement.

d) The parties recognize that under limited circumstances certain statutes of limitations enacted for the benefit of the public cannot be waived by agreement. The parties agree that no such statute of limitations is implicated by this Agreement and that no party will raise any defense based on such alleged nonwaivability.

e) This Agreement shall not be used by any of the parties, nor interpreted by any of the parties, as an acknowledgment of the validity of any claim or right asserted by any of the parties or an acknowledgment of the validity or effect of any defense thereto.

4. **Release.**

a) Effective only as and when provided in Section 4(b) below, Comcast and the City each agrees, for itself and any related persons and entities and each of their representatives, administrators, Boards, Councils, agents, attorneys, related, affiliated and parent entities, successors, assigns, directors, officers, owners, and employees, to fully and forever release the other and each of their related persons and entities and their representatives, administrators, Boards, Councils, agents, attorneys, related, affiliated and parent entities, successors, predecessors, assigns, directors, officers, owners and employees, from any and all claims, demands, debts, grievances, obligations, liabilities, costs, losses, damages, fines, penalties, expenses, rights of action, causes of action, or judgments of any kind or character, whether known or unknown, suspected or unsuspected, arising prior to the date of execution of this Agreement or which hereafter may be claimed to arise out of any action, inaction, event, circumstance or matter occurring prior to the date of execution of this Agreement in any way arising from or related to the Action, Complaint, Answer, Cross-Complaint, MOU, Tolted Claims, Construction Claims, or the Local Franchise other than open CPUC Rule 20 facilities undergrounding projects (collectively the "Released Claims"). These include, but are not limited to, any and all claims, rights, demands, losses, and causes of action that were asserted by any party in the Action, Answer or Cross-Complaint or that could have been so asserted.

b) The Section 4(a) mutual releases set forth above are provisionally effective, except as to the Construction Claims for which such releases are finally and

unconditionally effective, upon execution and delivery of this Agreement. On the Termination Date as defined above, the Section 4(a) mutual releases are deemed permanently effective in their entirety and the Action is deemed to have been dismissed with prejudice, by both parties. Each Party, intending the other to rely thereon, for so long as this Agreement is in effect, hereby agrees to not otherwise pursue, whether before, on or after the Termination Date, any dispute, proceeding, administrative or legal action against the other on any Released Claims, unless prior to December 18, 2017, Franchisee has chosen to voluntarily apply for and has been granted a State Franchise for Oakland that is effective prior to December 18, 2017, by which the 2007 Franchise with the City is abrogated and any of the Material City Benefits are lost. If Comcast becomes legally obligated to obtain a State Franchise to continue providing video services in the Territory and fails to continue to honor and abide by any Material City Benefit that it is lawfully permitted to provide, the City may pursue specific performance of this Agreement to enforce such Material City Benefit.

5. **Waiver of California Civil Code Section 1542.** With respect to the waiver and releases set forth in Section 4 above, each Party hereby expressly waives and relinquishes all rights and benefits afforded by Section 1542 of the Civil Code of the State of California, or by any comparable state or federal statute, and does so understanding and acknowledging the significance and consequences of such specific waiver of Section

1542. Section 1542 of the Civil Code of the State of California states:

**A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.**

The Parties have executed this Agreement with full knowledge that, when it is executed, they are releasing and extinguishing claims identified in Section 4(a) above, effective as provided in Section 4(b), that they do not know or suspect to exist in their favor at the time of executing this Agreement after discussions with counsel concerning the same.

6. **No Admission of Liability.** The Parties agree this Agreement is intended to compromise disputed claims and neither the furnishing of any consideration hereunder nor anything contained in this Agreement shall ever be interpreted or construed to be an admission of liability or responsibility on the part of, or to the prejudice of, the Parties or any of them. Other than in a proceeding to enforce this Agreement or the terms of the 2007 Franchise, except as set forth below, the parties agree that neither shall hereafter use, disclose or refer to this Agreement, the 2007 Franchise or any related prior negotiations or documents between the parties in any legal, judicial, investigative, legislative or administrative proceeding, including without limitation the City's pending petition to the California Court of Appeal in City of Oakland. v. Public Utilities Commission of the State of California, California Court of Appeals, First Appellate District, Case No. A119929. Notwithstanding the foregoing, the parties acknowledge that, pursuant to California law,

the City cannot be required by this Agreement to keep the Agreement or the 2007 Franchise secret or confidential. In accordance therewith, any party to this Agreement may (a) discuss or acknowledge the existence of this Agreement, the 2007 Franchise or any related negotiations or documents, or any of related terms, if asked a question reasonably related to its existence by a third party (including without limitation any member of the public, a judge, or an administrative law judge) or an employee or official of the parties or (b) may discuss or acknowledge the existence of this Agreement, the 2007 Franchise or any related negotiations or documents, in a proceeding if the other party did so first in that same proceeding..

7. **Parties to Bear Own Fees and Costs.** Each Party shall bear its own costs incurred to and including the date of this Agreement, in connection with the preparation and negotiation of this Agreement, the Action and all related claims and disputes referenced in this Agreement.

8. **Superseding and Binding Effect; Integration Clause.** This Agreement with Exhibit C (the 2007 Franchise) constitutes the full and complete agreement between the Parties with respect to its subject matter including the settlement of the Action, the Local Franchise and any Released Claims, and fully supersedes any and all prior agreements or understandings between them, whether written or oral, pertaining to the matters in this Agreement. There are no oral understandings, statements, or stipulations bearing upon the effect of this Agreement that have not been incorporated in this Agreement; all prior negotiations and representations between the Parties pertaining to the matters in this Agreement are merged herein and replaced hereby.

9. **Interpretation of Agreement.** The Parties acknowledge their respective intentions that this Agreement be interpreted as if drafted cooperatively by both of them and shall not be interpreted against either one side or the other.

10. **Knowing and Voluntary Execution of Agreement.** Each Party represents and agrees that it fully understands its right to discuss this Agreement with an attorney; that it has availed itself of this opportunity to the extent it wished; that it has carefully read and fully understands all the provisions of this Agreement; and that it is voluntarily entering into this Agreement with full understanding of its legal consequences and without any duress or pressure.

11. **Binding Effect.** This Agreement shall inure to the benefit of the Parties, and each of their representatives, administrators, successors, assigns, affiliates, related and parent companies, directors, officers, employees, agents and attorneys.

12. **Counterparts.** This Agreement may be executed in counterparts, all of which when taken together shall constitute one and the same instrument.

13. **No Waiver.** No breach of any provision of this Agreement can be waived unless in writing and mutually agreed upon by the Parties. Waiver of any one breach of this Agreement shall not be deemed to be a waiver of any other breach of that or any other provision of this Agreement.

14. **Modification and Amendment.** No modification or amendment of any of the terms of this Agreement shall be binding upon either Party unless made in writing and signed by all parties or by a duly authorized representative or agent of such parties.

15. **2007 Franchise.** The 2007 Franchise is enforceable under its own stated terms and at law, and its terms are not altered by this Agreement. Nothing herein shall in any way affect Franchisee's obligations to make service connections as required under the Service Availability provision of the 2007 Franchise.

16. **Governing Law.** This Agreement shall be governed by and interpreted and construed in accordance with the laws of the State of California.

17. **Authority.** Each Party and the individual(s) signing on its behalf represents and warrants that it is competent and legally authorized to enter into this Agreement. The City represents that it has complied with all legal requirements for authorization and approval of this settlement and its terms.

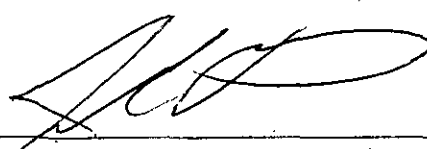
18. **Further Acts.** The Parties agree to take such further reasonable acts as may be required to implement this Agreement.

IN WITNESS WHEREOF, the Parties hereto execute this Agreement.

COMCAST OF  
CALIFORNIA/COLORADO, LLC

CITY OF OAKLAND

By: \_\_\_\_\_

By:  \_\_\_\_\_  
21 Feb. 2008