

SPONSORED BY: _____
PROPOSED BY: Executive
INTRODUCTION DATE: _____

ORDINANCE NO. _____

GRANTING WAVEDIVISION I, LLC, A NON-EXCLUSIVE FRANCHISE FOR THE PROVISION OF CABLE SERVICES.

WHEREAS, Country Cable, Inc. was granted a cable services franchise ("Franchise") by Whatcom County ("County") under County Ordinance No. 92-077, approved on October 27, 1992; and the County consented to the transfer of the Franchise to Northland Cable Properties Seven Limited Partnership under County Ordinance No. 93-025, adopted on May 25, 1993, and the County further consented to the transfer of the Franchise to WaveDivision I, LLC ("Grantee") under County Ordinance No. 2003-016, adopted on February 11, 2003; and

WHEREAS, the Franchise expired on October 27, 2017; and

WHEREAS, the County and Grantee have continued to operate under the terms and conditions of the Franchise since the transfer of the Franchise to Grantee, and are not aware of any defaults on the part of either party under the terms and conditions of the Franchise; and

WHEREAS, the County and Wave began renewal negotiations in accordance with Section 62(h) of Title VI of the Communications Act of 1934, as amended, and the parties continued to reserve all rights under Section 626 during such negotiations; and

WHEREAS, as part of the Franchise negotiations, Grantee has applied to the County for a the grant, continuation and renewal of its non-exclusive franchise for the right of entry, use, and occupation of the public Rights-of-Way within the County, expressly to install, construct, erect, operate, maintain, repair, relocate and remove its Facilities in, on, upon, along and/or across those Rights-of-Way for purposes of offering and providing Cable Services utilizing said Facilities ("Grantee Services"); and

WHEREAS, RCW 36.55.010, Whatcom County Charter Section 9.30, and Whatcom County Code Chapter 12.24 address the requirements pertaining to the granting of franchises by the County; and

WHEREAS, said application has come on regularly to be heard by the County Council on the ___ day of _____, 2019, and notice of this hearing having been duly published on the ___ day of _____, 2019, and the ___ day of _____, 2019, in the Bellingham Herald, a daily newspaper published in Whatcom County having county-wide circulation; and

WHEREAS, from information presented at such public hearing, and from facts and circumstances developed or discovered through independent study and investigation, the County Council now deems it appropriate and in the best interest of the County and its inhabitants that a franchise be extended, renewed and granted to Grantee.

NOW, THEREFORE, BE IT ORDAINED by the Whatcom County Council that a non-exclusive franchise set forth in the language hereinbelow, is hereby granted to Grantee for a period of ten (10) years in order that it may install, construct, erect, operate, maintain, repair, relocate and remove its Facilities in, on, upon, along and/or across those Rights-of-Way for purposes of offering and providing Cable Services utilizing said Facilities

Adopted this _____ day of _____, 2019.

ATTEST

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

Dana Brown Davis, Clerk of the Council

Rud Browne, Council Chair

APPROVED AS TO FORM:

WHATCOM COUNTY EXECUTIVE
WHATCOM COUNTY, WASHINGTON

Civil Deputy Prosecutor

Jack Louws, County Executive
() Approved () Denied

Date Signed: _____

Definitions.

For the purpose of this Franchise, the following terms, phrases, words, and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number, and the use of any gender shall be applicable to all genders whenever the sense requires. The words "shall" and "will" are mandatory and the word "may" is permissive. Where a term in the Franchise is not defined in this section and there is a definition for the term in the Cable Act, the Cable Act definition shall apply. Other terms in the Franchise which are not defined in this section shall be given their common and ordinary meaning.

"Access," "PEG Access," or "PEG Use"

refers to the availability, for non-commercial purposes, of a channel, or channels, on the Cable System for Public, Education or Government programming by various agencies, institutions, organizations, groups, and individuals, including the County.

a. "Public Access" or "Public Use"

means access where organizations, groups, or individual members of the general public, on a non-discriminatory basis, are the primary or designated programmers or users having editorial control over their programming;

b. "Education Access" or "Education Use"

means access where accredited educational institutions are the primary or designated programmers or users having editorial control over their programming;
and

c. "Government Access" or "Government Use"

means access where government institutions or their designees are the primary or designated programmers or users having editorial control over their programming.

"Access Channel"

means any channel or portion of a PEG channel utilized for Video Services , whether by Grantee or in cooperation with, by or through the County, where any resident of the County or any non-commercial organization whose members reside in the County may be a programmer, either without charge or in a non-profit manner, on a non-discriminatory basis.

"Access Facilities"

means a facilities designated for PEG Use, and equipment, including, but not limited to, modulators, demodulators and transmitters, as well as production facilities and equipment for PEG Use of PEG Channels.

“Access Provider”

means an entity designated by the County to provide PEG programming and the provision of any facilities, equipment or other services for the purpose of facilitating such programming.

“Applicable Law”

means any federal, State or local statute, law, regulation, or other final legal authority governing any of the matters addressed in this Franchise.

“Basic or Basic Service”

means a service tier that includes, at a minimum, all signals of domestic television broadcast stations provided to any Subscriber (except a signal secondarily transmitted by satellite carrier beyond the local service area of such station, regardless of how such signal is ultimately received by the Cable System), any public, educational, and governmental programming required by this Franchise to be carried on the Basic tier, and any additional video programming signals or service added to the Basic tier by the Grantee.

“Cable Service”

means:

- (a) The one-way transmission to Subscribers of (1) video programming, or (2) other programming services; and
- (b) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming services.

“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 further amended from time to time.

“Cable System”

means a facility, consisting of closed transmission paths and associated signal generation, reception, and control equipment that is designated to provide Cable Service which includes video programming and which is provided to multiple Subscribers within the County, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves Subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of the Cable Act, except that such facility shall be considered a Cable System (other than for purposes of section 541(c) of the Cable Act) 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 service; (D) an open video system that complies with Section 573 of the Cable Act; or (E) any facilities of an electric utility used solely for operating its electric system. For the purposes of this Franchise, Cable System means Grantee’s system serving the County.

“Channel”

means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).

“County”

means Whatcom County of the State of Washington and all the unincorporated territory within its present and future boundaries.

“County Code”

means the Municipal Code of Whatcom County, Washington, as may be amended from time to time.

“Grantee”

means WaveDivision I, LLC, a Washington limited liability company and permitted successors and assigns.

“Day”

unless otherwise specified shall mean a calendar day.

“Demarcation Point”

means the physical point at which the Cable System enters a subscriber’s home or building.

“Digital Services”

means services offered over the Cable system including the transmission of audio and video by discrete (digital) signals including standard definition and high definition signals consistent with the standards developed by the Advanced Television Systems Committee for digital television transmission over terrestrial, cable, and satellite networks.

“Effective Date”

means this Franchise granted by this Ordinance shall be effective upon Grantee’s acceptance and no sooner than ten (10) days from date of final passage by County Council; provided, however, that Grantee shall have sixty (60) days to accept the Franchise and comply with all conditions for such acceptance. This Franchise shall be voidable at the County’s discretion if Grantee fails to accept within sixty (60) days.

“Expanded Basic Service”

Refers to the next tier of service above the Basic Service tier excluding premium or pay-per-view services.

“Franchise”

means this Ordinance and conditions as set forth herein.

“Franchise Area”

means the limited area within the County as specified in Section 1.4 hereof within which the Grantee is authorized to provide Cable Services under this Franchise, .

“Franchise Fee”

means the fee the County may assess in accordance with Section 622 (g) of the Cable Act (47 U.S.C. 542(g)).

“Grantee Facilities” means such poles, antenna, wires, cables, conductors, ducts, conduits, vaults, manholes, pedestals, amplifiers, appliances, attachments, and other related wireline and wireless property or equipment as may be necessary or appurtenant to Grantee’s Cable System.

“Gross Revenues”

means all revenue derived by Grantee, or any affiliate of Grantee or any other person who would constitute a cable operator of the Cable System under the Cable Act, from the operation of the Cable System to provide Cable Service in the County. Gross Revenues include, by way of illustration and not limitation, monthly fees charged Subscribers for any tier of Cable Services including Basic Service, optional Premium Service or Digital Services; pay-per-view services; installation, disconnection, reconnection and change-in-service fees, Leased Access channel fees, all Cable Service lease payments from the Cable System to provide Cable Services in the County, late fees and administrative fees, payments or other consideration received by Grantee from programmers for carriage of programming on the Cable System and accounted for as revenue under GAAP; revenues from rentals or sales of converters or other Cable System equipment; advertising sales revenues booked in accordance with Applicable Law and GAAP; revenues from program guides and electronic guides, additional outlet fees, Franchise Fees required by this Franchise, revenues from home shopping and other revenue-sharing arrangements.

Gross Revenues shall not include any taxes or other fees on services furnished by Grantee, which taxes or fees are imposed directly on or passed through to a Subscriber or user by a city, county, State or other governmental unit, and collected by Grantee for such entity. The Franchise fee is such a fee. Gross Revenues shall not include amounts which cannot be collected by Grantee and are identified as bad debt; provided that if amounts previously representing bad debt are collected, then those amounts shall be included in Gross Revenues for the period in which they are collected.

Gross Revenues shall include revenue received by any entity other than Grantee where necessary to prevent evasion or avoidance of the obligation under this Franchise to pay the Franchise Fees, however, amounts included in Gross Revenues shall not be counted more than once; therefore, amounts included once in Grantee’s Gross Revenues shall not be added to Gross Revenues again if they are received by an affiliate of Grantee in payment for programming or other goods or services supplied to Grantee.

“Headend”

means the control center of the Cable System where incoming signals are amplified, converted, processed, and combined for transmission to the Subscriber.

“Leased Access”

means Channel capacity designated for commercial use by Persons unaffiliated with Grantee, in accordance with section 612 of the Cable Act.

“Liquidated Damages”

means any requirement imposed on the Grantee to pay specified sums to the County as a result of performance deficiencies and/or Franchise violations identified herein.

“MVPD”

means "multichannel video programming distributor." As used in this Franchise MVPD means a cable operator or a multichannel multipoint distribution service, that makes available for purchase, by Subscribers, multiple Channels of video programming.

“Normal Business Office Hours”

is defined in 76 CFR Section 309(c)(4)(i), as may be amended, the current version of which is included in Exhibit A to this Franchise.

“Normal Operating Conditions”

is defined in 76 CFR Section 309(c)(4)(ii), as may be amended, the current version of which is included in Exhibit A to this Franchise.

“Parent Corporation”

means any existing or future corporation, entity, or person with greater than 50 percent ownership or control over Grantee.

“Premium Service”

means a Cable Service (such as movie channels or pay-per-view programs) offered to Subscribers on a per-channel, per-program, or per-event basis.

“PEG”

means public, educational and governmental.

“Person”

means any individual, corporation, partnership, association, joint venture or organization of any kind and the lawful trustee, successor, assignee, transferee or personal representative thereof.

“Subscriber”

means any person who legally receives Grantee’s Cable Services over the Cable System.

“State”

means The State of Washington

“Road”

means the surface of and the space above and below the right of way of any public street, road, highway, freeway, easement, lane, path, alley, court, sidewalk, parkway, or driveway now or hereafter existing as such within all unincorporated areas of the County.

“Transfer”

means any transaction in which:

- (a) All or a portion of the Cable System is sold or assigned (except a sale or assignment that results in removal of a particular portion of the facility from the Roads);
- (b) There is any change, acquisition, or direct or indirect transfer of control of the Grantee;
- (c) The rights and/or obligations held by the Grantee under the Franchise are transferred, sold, assigned, or leased, in whole or in part, directly or indirectly, to another party; or
- (d) The transfer of stock in a corporation so as to create a new controlling interest constitutes a “transfer.” The term “controlling interest” is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

“Video Services”

means programming provided by, or generally considered comparable to programming provided by a cable operator as the term “cable operator” is defined in the Cable Act.

Section 1. Grant of Franchise Right to Use Franchise Area.

1.1 County hereby authorizes Grantee to occupy or use the County’s Roads subject to (A) the terms, conditions, and other provisions of this non-exclusive Franchise to provide Cable Service within the County; and (B) all applicable provisions of the County Code. Said Franchise shall constitute both a right and an obligation to provide Cable Services as required by the provisions of this Franchise. Nothing in this Franchise shall be construed to prohibit Grantee from providing services other than Cable Services to the extent not prohibited by Applicable Law. The County hereby reserves all of its rights to regulate such other serves to the extent consistent with Applicable Law and no provision herein shall be construed to limit or give up any right to regulate.

1.2 The Grantee, through this Franchise, is granted the right to operate its Cable System using the Roads within the Franchise Area in compliance with the County Code, as may be amended periodically. The Grantee specifically agrees to comply with the lawful provisions of the County Code and lawful applicable regulations of the County, and subject to the police power exception below, in the event of a conflict between the lawful provisions of the County Code or lawful applicable regulations of the County and this Franchise, the express provisions of this Franchise shall govern. Subject to express federal and State preemption, the material terms and conditions contained in this Franchise may not be unilaterally altered by the County

through subsequent amendment to the County Code or any regulation of County, except in the lawful exercise of County's police power. Grantee acknowledges that the County may modify its generally applicable regulatory policies by lawful exercise of the County's police powers throughout the term of this Franchise. Grantee agrees to comply with such lawful modifications. Grantee reserves all rights it may have to challenge such lawful modifications whether arising in contract or at law. The County reserves all of its rights and defenses to such challenges whether arising in contract or at law.

1.3 The term of the Franchise shall be ten (10) years, unless extended by mutual written consent or terminated sooner in accordance with this Franchise.

1.4 The Franchise Area shall be that area Grantee's Facilities occupy together with any adjoining area in which Grantee expands the Grantee Facilities, which shall automatically become a part of the Franchise Area at the time of permitting for the installation of any Grantee Facilities, within the present or future unincorporated limits of the County. Cable Service shall be provided to all Persons subject to the service and installation policy outlined in this Franchise Section 9.1.

1.5 The Franchise granted herein shall be nonexclusive. The County specifically reserves the right to grant, at any time, such additional franchises for a Cable System as it deems appropriate provided, however, such additional grants shall not operate to materially modify, revoke, or terminate any rights previously granted to Grantee. If following the execution of this agreement, any other wireline MVPD enters into any agreement with the County to provide Video Services to Subscribers in the County, the County, upon written request of the Grantee, shall permit the Grantee to construct and/or operate its Cable System and provide Video Services to Subscribers in the County under a substantively similar agreement as applicable to the new MVPD, if permissible under Applicable Law. Within one hundred and twenty (120) Days after the Grantee submits a written request to the County, the Grantee and the County shall enter into an agreement or other appropriate authorization (if necessary) containing the exact same terms and conditions as are applicable to the new wireline MVPD.

1.6 If there is a change in federal, state or local law that provides for a new or alternative form of authorization for a wireline MVPD to provide Cable Service or Video Service to Subscribers in the County, or that otherwise changes the nature or extent of the obligations that the County may request from or impose on a wireline MVPD providing Cable Service or Video Service to subscribers in the County, the County agrees that if another wireline MVPD avails itself of such new law and provides Cable Service or Video Service in the County, upon Grantee's written request, the County shall permit the Grantee to terminate this Franchise and, subject to Applicable Law, provide Cable Service or Video Service to Subscribers in the County on substantively similar terms and conditions as are applicable to the other wireline MVPD under the changed law. The County and the Grantee shall implement the provisions of this

section within one hundred and twenty (120) Days after the Grantee submits a written request to the County. The County shall have the same right of termination of this Franchise should the changed law be more advantageous to the County, in the County's sole discretion.

1.7 The County may establish appropriate requirements for new franchises or franchise renewals consistent with Applicable Law.

1.8 Upon thirty (30) days written notification, the County may hold performance evaluation sessions, no more than once every thirty-six months, whenever necessary to ensure proper performance of the provisions of this Franchise. All evaluation sessions shall be open to the public. Topics which may be discussed at any evaluation session include, but are not limited to, construction issues, Cable Service rate structures, Franchise Fee payments, liquidated damages, free or discounted Cable Service, application of new technologies, Cable System performance, Cable Services currently provided and programming offered, future plans of Grantee for new services or programs, Subscriber Complaints, privacy, modifications to this Franchise, judicial and FCC rulings, line extension policies and the City's or Grantee's rules; provided that nothing in this subsection shall be construed as requiring the renegotiation of this Franchise. During evaluations under this subsection, Grantee shall fully cooperate with the County and shall provide such information and documents as the County may reasonably require to perform the evaluation, subject to the confidentiality provisions of this Franchise.

1.9 Neither the Grantee nor any other Person may Transfer the Cable System or the Franchise without the prior written consent of the County, which consent shall not be unreasonably withheld. No consent shall be required, however, for (i) a transfer in trust, by mortgage, hypothecation, or by assignment of any rights, title, or interest of the Grantee in the Franchise or in the Cable System in order to secure indebtedness, or (ii) a transfer to an entity directly or indirectly owned or controlled by WaveDivision Holdings, LLC. In any event of transfer or change of control in which the consent of the County is not required, Grantee shall nonetheless promptly inform the County of the transfer (ii) above and the identity of the transferee. If Grantee submits an application for approval of any Transfer in accordance with federal regulations (47 C.F.R. Section 76.502) the County shall process said application in accordance with those regulations. Applications for approval of any Transfer shall also be filed, and the County shall process such applications, in accordance with procedures set out in the County Code so long as they are not in conflict with Applicable Law. A Transfer without the prior written approval of the County is a material violation of this Franchise and shall make the Franchise subject to termination by the County.

For the purposes of determining whether it shall consent to a Transfer, the County, or its agents, may inquire into all qualifications of the prospective Transferee and such other matters subject to applicable law. The Grantee and any prospective transferees shall assist the County in any such inquiry, and if they fail to do so, the request for Transfer may be denied.

In making a determination as to whether to grant, deny, or grant subject to conditions an application for a Transfer of a Franchise, the County shall consider the legal, financial, and technical qualifications of the transferee to operate the Cable System as per federal law.

No application for a Transfer of a Franchise shall be granted unless the transferee agrees in writing that it will abide by and accept all lawful terms of this Franchise, and that it will assume the obligations, liabilities, and responsibility for all acts and omissions, known and unknown, of the Grantee under this Franchise for all purposes, including renewal, unless the County, in its sole discretion, expressly waives this requirement in whole or in part.

Approval by the County of a Transfer of a Franchise does not constitute a waiver or release of any of the rights of the County under this Franchise, whether arising before or after the date of the Transfer.

1.10 This Franchise shall be renewed in accordance with 47 U.S.C. 546.

1.11 The County may acquire the Cable System as provided 47 U.S.C. 447.

1.12 At the expiration of the term for which the Franchise is granted provided no renewal is granted, or upon its forfeiture or revocation as provided for herein, the County shall have the right to require Grantee to remove at Grantee's own expense all or any part of the Grantee's Facilities from all roads and public ways within the Franchise area. If Grantee fails to do so, the County may perform the work and collect the cost thereof from Grantee. The actual cost thereof, including direct and indirect administrative costs, shall be a lien upon all plant and property of Grantee effective upon filing of the lien with the Whatcom County Auditor.

1.13 Grantee shall make its best effort to ensure that all Subscribers receive continuous uninterrupted Cable Service under normal operating conditions so long as their obligations to Grantee are honored and do not abuse Grantee's personnel or Facilities or otherwise misuse the Grantee's Facilities. In the event of purchase, lease-purchase, acquisition, sale, lease, or other transfer to any other Person, including any other operator of a cable communications franchise, Grantee shall cooperate fully to operate the Cable System in accordance with the terms and conditions of this agreement through the transition, to maintain continuity of service to all Subscribers until such time as the transfer is complete.

Section 2. Construction and Operation in Roads and Rights-of-Way

2.1 Grantee may, subject to the terms of this Franchise, erect, install, construct, repair, replace, reconstruct and retain in, on, over, under, upon, across and along the Roads within the County such lines, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, pedestals, attachments and other property and equipment as are necessary and appurtenant to the operation of a Cable System within the County. Without limiting the foregoing, Grantee expressly agrees that it will construct, operate and maintain its Cable System in compliance with, and subject to Applicable Law.

2.2 Subject to Section 1.2 herein, in connection with the construction, operation or repair of the Cable System, Grantee shall, in all cases, comply with the County Code.

2.3 Grantee shall exert its best efforts to construct and maintain a Cable System so as not to interfere with other use of Roads. Grantee shall, where possible in the case of above ground lines, make use of existing poles and other facilities available to Grantee. When residents receiving underground service or who will be receiving underground service will be affected by proposed construction or alteration, Grantee shall make every effort to provide advance notice of the same to such affected residents as per reasonable industry standard.

2.4 Notwithstanding the above grant to use Roads, the County is under no obligation to grant a permit to Grantee for construction of Grantee Facilities if the County, in its sole opinion, determines that at the time of the permit application such use is inconsistent with the terms, conditions or provisions by which such road was created or dedicated, or presently used under Applicable Laws.

If an ordinance is passed creating a local improvement district which involves placing underground certain utilities including Grantee's cable plant which is then located overhead, Grantee shall participate in such underground project and shall remove cables and overhead wires within such district if requested to do so and place facilities underground and all other utilities are required to do so. If such undergrounding of Grantee facilities is part of such a project, the costs thereof shall be included in such local improvement district.

2.5 All construction or installation of Grantee's Facilities, service, repair, or relocation of the same, performed over, above, along or under the Franchise Area shall be done in such a manner as not to interfere unreasonably with the construction and maintenance of other existing utilities, lines, public or private, drains, drainage ditches and structures, irrigation ditches and structures, located therein, nor with the grading or improvement of the Franchise Area. The owner of all utilities, public or private, installed in the Franchise Area prior in time to the Grantee's Facilities shall have preference as to the positioning and location of such utilities so installed with respect to the Grantee's Facilities. Such preference shall continue in the event of the necessity of relocating or changing the grade of the Franchise Area. Grantee shall have such preference as to owners of all utilities, public or private, initially installed in the Franchise Area subsequent in time to Grantee's Facilities.

Grantee shall maintain a minimum underground horizontal separation of five (5) feet from County water facilities and ten (10) feet from above-ground County water facilities; provided, that for development of new areas, County, together with Grantee and other utility purveyors or authorized users of rights-of-way, will develop and follow the Public Works Director's determination of a consensus for guidelines and procedures for determining specific utility locations, subject additionally to this Franchise.

2.6 Maintenance and Restoration

- a. Consistent with Section 12.24, 12.27, 12.28, and 12.30 of the County Code, in case of any disturbance of any Road, pavement, sidewalk, driveway or other surfacing, the Grantee shall, at its own cost and expense and in a manner approved by the County, replace and restore all paving, sidewalk, driveway, landscaping or surface, in as good condition as before said work was commenced and in accordance with standards for such work set by the County and the County Code.

Grantee shall perform all restoration work promptly.

If Grantee fails, neglects or refuses to make restorations as required under this Section, then the County may do such work or cause it to be done, and the cost thereof to the County shall be paid by Grantee.

Grantee shall maintain all above ground improvements that it places on County Roads pursuant to this franchise. In order to avoid interference with the County's ability to maintain the Roads, Grantee shall provide and maintain a clear zone of five feet on all sides of such improvements. For these purposes, "clear zone" means an area that is mowed or otherwise maintained so that the Facilities are readily visible to County maintenance operations. If Grantee fails to comply with this provision, and by its failure, property is damaged, then Grantee shall be responsible for all damages caused thereby.

Before commencing any work within the Franchise Area, Grantee shall comply with the One Number Locator provisions of RCW Chapter 19.122 to identify existing utility infrastructure.

If Grantee fails to comply with this provision, and by its failure, property is damaged, then Grantee shall be responsible for all damages caused thereby.

- b. In any dispute over the adequacy of restoration or maintenance relative to this section, final determination shall be the prerogative of Whatcom County Department of Public Works subject to appeal by Grantee to Hearings Examiner consistent with Section 6.4 herein.

2.7 Grantee shall have the authority to trim trees upon and overhanging Roads, alleys, sidewalks, and public ways so as to prevent the branches of such trees from coming in contact with the wires and cables of Grantee. The Grantee shall not remove any tree or trim any portion, either above, at or below ground level, of any tree within any public place without the prior consent of the County; provided, that the Grantee may so remove or trim when necessary to permit immediate repair of the system in order to restore its signal so long as it gives the County notice thereof as promptly as is reasonably practical. Regardless of who

performs the work requested by the Grantee, the Grantee shall be responsible, and shall defend and hold County harmless for any and all damages to any tree as a result of trimming, or to the land surrounding any tree, whether such tree is trimmed or removed, or for any personal injury or property damage resulting from said activities.

2.8 Relocation

- a. In the event that at any time during the period of the Franchise, county or state shall lawfully elect to alter or change the grade of any road, alley, or other public ways, the Grantee, upon reasonable notice by the proper governmental entity, shall remove or relocate as necessary its poles, wires, cables, underground conduits, manholes and other fixtures within the public right-of-way at its own expense and within the time frame established by the County Engineer, which time frame shall be reasonably determined and which shall in no event be less than sixty (60) days following the date of written notice of such order. Design locate marks will be placed in the same three (3) day time frame as construction located marks.
- b. If Grantee fails, neglects, or refuses to remove or relocate its facilities as directed by the County; or in emergencies or where public health and safety or property is endangered, the County may do such work or cause it to be done, and the cost thereof to the County shall be paid by Grantee.
- c. Grantee shall not remove any underground cable or conduit which requires trenching or other opening of the streets along the extension of cable to be removed, except as hereinafter provided. Grantee may remove any underground cable from the roads which has been installed in such a manner that it can be removed without trenching or other opening of the streets along the extension of cable to be removed. Subject to the County Code and other Applicable Law, Grantee shall remove, at its sole cost and expense, any underground cable or conduit by trenching or opening of the streets along the extension thereof or otherwise which is ordered to be removed by the County based upon a determination, in the reasonable discretion of the County, that removal is required in order to eliminate or prevent a hazardous condition. Underground cable and conduit in the roads which is not removed shall be deemed abandoned and title thereto shall be vested in the County.
- d. If all of the distribution lines of all of the wireline service providers, such as telecommunications service providers, as defined in RCW 35.99.010, a utility service provider or a Cable Operator (collectively "Service Providers") in any portion of the Franchise Area are underground, Grantee shall place its Cable System's distribution cables underground within that area; provided that such underground locations are actually capable of accommodating Grantee's cable and other equipment without technical degradation of the Cable System's signal

quality. In any portion(s) of the Franchise Area where the distribution lines of any of the respective Service Providers are both aerial and underground, Grantee shall have the discretion to construct, operate, and maintain all of its distribution cables, or any part thereof, aerially or underground. In areas where a Service Provider's wiring is aerial, Grantee may install aerial cable, except when a property owner or resident requests underground installation and agrees to bear the additional cost in excess of aerial installation. If funds exist, are set aside for such purpose, or provided by a third party, Grantee shall be entitled to seek reimbursement for its share of funds to offset the cost of placing its facilities underground. Grantee shall utilize existing conduit wherever possible.

d(i) The County shall not be required to obtain easements for Grantee. Grantee shall, to the extent economically feasible, participate with other providers in joint trench projects to relocate its overhead facilities underground and remove its overhead facilities in areas where utilities are being converted to underground facilities.

d(ii) Nothing in this Franchise shall be construed to require Grantee to construct, operate, or maintain underground any ground-mounted appurtenances such as Customer taps, line extenders, system passive devices, amplifiers, power supplies, fiber splices, nodes, pedestals, or other related equipment.

d(iii) In the event of a County facilities relocation project that requires conversion of overhead facilities to underground for purposes of health, safety or public welfare, Grantee agrees to bear its proportionate share of the costs of converting Grantee's Cable System from an overhead system to an underground system as follows:

- A. Utility Trench and Vault/Pedestal Engineering: To ensure proper space and availability in the supplied joint trench, Grantee shall only pay for the work hours necessary to complete Cable System related engineering coordination with the other utilities involved in the project.
- B. Conduit and Vaults/Pedestals Placement: Grantee shall only pay for the direct cost of labor and materials it takes to place its conduits and vaults/pedestals in the supplied joint trench and/or solo cable trench as follows:
 - 1. If the County contractor is completing this task, Grantee shall only pay the direct costs in accordance with Grantee's approved labor and materials exhibits at the time of the project.

2. If the direct costs of Grantee's approved labor and materials exhibits are not agreeable to the County or its contractor, Grantee shall have the option to hire its own contractor(s) to complete the work in accordance with Grantee's approved labor and materials exhibits at the time of the project.

3. If Grantee chooses to hire its own contractor(s), the County and its contractor(s) are responsible for coordinating with Grantee's contractor(s) to provide reasonable notice and time to complete the placement of Grantee's conduits and vaults/pedestals in the supplied joint trench.

d(iv). Within the conversion area, Grantee shall not be responsible for any on-site coordination and performance of traffic control, trenching, backfill, and restoration, unless it is work related to its solo cable trench. In those areas, Grantee shall pay the direct cost of labor and materials in accordance with the provisions listed in Section 2.8(D) above.

- A. In the event of a Local Improvement District (LID) project that requires relocation of Grantee's facilities, Grantee shall be reimbursed by the LID funding for all expenses incurred as a result of the project.
- B. In the event an underground conversion of cable facilities is required as part of the street improvement condition(s) of a new subdivision and/or planned development, the developer shall be responsible for all time and material costs associated with the conditioned underground conversion of cable facilities.
- C. Grantee shall utilize existing poles and conduit wherever possible.

2.9 Grantee shall, upon request by any person holding a building moving permit, franchise or other approval issued by the County, temporarily remove, raise or lower its wire to permit the movement of buildings. The expense of such removal, raising or lowering shall be paid by the person requesting same, and Grantee shall be authorized to require such payment in advance. The County shall require all building movers to provide not less than 15 days' notice to the cable company to arrange for such temporary wire changes.

Section 3. Cable System Capacity

3.1 During the term of this Franchise the Grantee's Cable System shall be capable of providing a minimum of 85 channels of video programming to its customers in the Franchise Area, including Basic Cable.

3.3 Subject to density requirements, Grantee shall provide access to equal and uniform Cable Service throughout the Franchise Area and shall not discriminate in the provision of Cable Services against any Subscriber on the basis of income.

3.4 Cable System Specifications

- a. In all its construction and service provision activities, Grantee shall meet or exceed the construction, technical performance, extension and service requirements set forth in this Franchise agreement.
- b. Grantee shall provide and maintain an Emergency Alert System (EAS) consistent with applicable Federal law and regulations including 47 C.F.R., Part 11, and any Washington State Emergency Alert System.
- c. Grantee shall provide standby power generating capacity at the Cable System control center and at all hubs. Grantee shall have in place throughout the Franchise term a plan, and all reasonable resources necessary for implementation of the plan, for dealing with outages of more than two hours. This outage plan and evidence of requisite implementation resources shall be presented to the County upon request.

3.5 The Federal Communications Commission (FCC) Rules and Regulations, Part 76, Subpart K (Technical Standards), as now or hereafter constituted, shall apply. The County may establish reasonable technical standards for the performance of the Cable System if permitted to do so under Applicable law.

3.6 Grantee shall perform all Cable System tests at the intervals required by the FCC, and all other tests reasonably necessary to determine compliance with technical standards required by this Franchise. Records of all Cable System test results performed by or for Grantee shall be maintained and available for County inspection upon reasonable request. If more than one of the locations tested fail to meet the performance standards, Grantee shall be required to indicate what corrective measures have been taken, and the entire test shall be repeated at the locations which failed. If a second test results in failure of one or more sites, then the County may seek remedies in accordance with sections 6.4 and 6.5 unless the circumstances of the failure are caused by conditions which are beyond Grantee's control, as determined, acknowledged and verified by the County.

Section 4. Programming and Services

4.1 Grantee shall provide video programming services in at least the following broad categories:

- News and Information
- Sports
- General Entertainment
- Arts/Performance/Humanities
- Science/Technology
- Children/Family/Seniors
- Foreign Language

4.2 Grantee shall not delete or so limit as to effectively delete any broad category of programming within its control without notifying the County. Further, Grantee shall provide at least thirty (30) days' prior written notice to Subscribers and to the County of Grantee's intent to effectively delete any broad category of programming or any channel within its control, including all proposed changes in channel allocation, including any new equipment requirements that may occur as a result of these changes.

Subscribers will be notified by Grantee of any changes in programming services or channel positions as soon as possible in writing. Notice must be given to Subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the Grantee. The Grantee shall also give 30 days' written notice to both Subscribers and the County before implementing any service change. When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified. For purposes of the carriage of digital broadcast signals, the operator need only identify for Subscribers, the television signal added and not whether that signal may be multiplexed during certain day-parts.

4.3 Grantee shall not transmit over the Cable System programming which is obscene or otherwise unprotected by the Constitution of the United States; provided, however, Grantee shall in no way be responsible for programming over which it has no editorial control, including public, educational and governmental access programming.

4.4 Upon request by any Subscriber, Grantee shall make available a parental control or lockout device that will enable the Subscriber to block all access to any and all channels without affecting those not blocked. Grantee shall inform Subscribers of the availability of the lockout device at the time of original subscription and annually thereafter.

4.5 Grantee shall at all times comply with the requirements of 47 C.F.R. § 79.1 by providing services for the disabled, including, but not limited to, passing through closed captioning for local programming if provided by County or Access Provider.

Section 5. Public, Educational and Governmental Access

5.1 Within one hundred eighty days (180) of a written request from the County, Grantee shall make available one (1) full time activated channel for use by the County for PEG Access over the Cable System.

Upon such notice, the County and Grantee shall meet to discuss and mutually agree upon a reasonable implementation plan to activate said PEG Access, including discussion of format of the PEG Access channel and the delivery of the signal from the County to Grantee.

5.2 The control and administration of the PEG Access Channel shall rest with the County and the County may delegate, from time to time over the term of this Franchise, such control and administration to various entities as determined in the County's sole discretion.

5.3 PEG Channels are for noncommercial programming to be promoted and administered by the County as allowed under Applicable Law. Permitted noncommercial uses of the PEG Channels shall include by way of example and not limitation: (A) the identification of financial supporters similar to what is provided on public broadcasting stations; or (B) the solicitation of financial support for the provision of PEG programming by the County or third party users for charitable, educational or governmental purposes; or (C) programming offered by accredited, non-profit, educational institutions which may offer telecourses over a PEG Channel.

5.4 The County shall require, through the mutually agreed upon use requirements related to the protection of copyrighted material, that all public access users indemnify and hold the Grantee and the County harmless from all liability of any kind whatsoever, including the costs of legal defense arising from the use of facilities, channel(s) or access time by the user. To the extent allowed by law, the County agrees to indemnify, save and hold harmless the Grantee from and against any and all liability resulting from the County's use of the PEG Channels required herein.

5.5 Any PEG Channel activated hereunder will be located reasonably close in proximity to other broadcast Channels and/or other commercial video Channels, excluding pay-per-view programming offered by Grantee in the County.

Grantee will give County at least 90 day notice prior to changing any PEG channel location or number.

5.6 PEG Capital Fees

- a. Upon the notice described in Section 5.1 above, the County shall present its plan for the PEG Access channel to Grantee. The parties will then discuss in good faith the amount of any fee that Grantee will collect from Subscribers on behalf of the County for the PEG Access channel ("PEG Fee").

Any PEG fees collected and shown on Subscriber bills shall appear in a single line on the bill.

- b. In no event shall the County use any portion of the PEG Fee in a manner inconsistent with 47 U.S.C. § 542(g)(2)(C) or any other applicable provisions of the Cable Act and FCC regulations.

So long as the County uses the PEG fee for capital purposes consistent with federal law and FCC determinations, the County and Grantee agree that the PEG Fee is in addition to the Franchise Fee, and falls within one or more of the exceptions in 47 U.S.C. § 542. Such costs may be categorized, itemized, and passed through to Subscribers as permissible, in accordance with 47 U.S.C. §542 or other Applicable Law.

- c. Grantee shall pay the PEG Fee to the County quarterly at the same time as the payment of franchise fees under Section 10.1 of this Franchise. So long as the County uses any PEG fee in a manner consistent with this Franchise, federal law and FCC determinations, Grantee agrees that it will not offset or reduce its payment of past, present or future Franchise fees required as a result of its obligation to remit the PEG Funds or the PEG Fee.

Should Grantee continue to provide Cable Service after the scheduled expiration of this Franchise, until and unless this Franchise is superseded by a renewed franchise in accordance with Applicable Law, Grantee shall continue to make monthly PEG Fee payments for, and in support of PEG Channels as specified hereinabove.

Any PEG Access capital support amounts owing pursuant to this Franchise which remain unpaid more than forty five (45) Days after the date the payment is due shall be delinquent and shall thereafter accrue interest at twelve (12) percent per annum or the prime lending rate published by the Wall Street Journal plus two percent on the day the payment was due, whichever is greater.

Section 6. Regulatory Provisions

6.1 In accordance with the provisions of Chapter 12.24, 12.27, 12.28, and 12.30 Whatcom County Code and Chapter 36.55 RCW, the County retains the right to administer and regulate activities under the Franchise up to the full extent permitted by Applicable Law, so long as such regulation does not modify or subvert the express provisions of this Franchise.

6.2 In addition to any other regulatory authority granted to the County by law or franchise, the County shall have administrative authority in the following areas:

- (a) Administering and enforcing the provisions of this Franchise agreement, including the adoption of administrative rules and regulations to carry out this responsibility.
- (b) Coordinating the operation of PEG Channel programming.
- (c) Formulating and recommending long-range cable communications policy for the Franchise area.
- (d) Disbursing and utilizing Franchise revenues paid to the County.

Grantee shall cooperate fully in facilitating the County's discharge of its administrative authority.

6.3 Regulation of Rates and Charges

- (a) **Right to Regulate.** The County reserves the right to regulate rates and charges for any Cable Service within the limits of Applicable Law.
- (b) **Notice of Change in Rates and Charges.** Throughout the term of this Franchise, Grantee shall give the County and all Subscribers within Whatcom County at least thirty (30) days' notice of any intended change to Subscriber rates or charges. Nothing in this Subsection shall be construed to prohibit the reduction or waiving of rates or charges in conjunction with promotional campaigns for the purpose of attracting Subscribers.
- (c) **Rate Discrimination Prohibited.** Within any category of Subscribers, Grantee shall not discriminate among Subscribers with regard to rates and charges made for any Cable Service based on considerations of race, color, creed, sex, marital or economic status, national origin, sexual preference, or neighborhood of residence, except as otherwise provided herein; and for purposes of setting rates and charges, no categorization of Subscribers shall be made by Grantee on the basis of those considerations.

6.4 Franchise Violations, Remedies, and Revocation

- (a) The County shall have the right to assert the remedies set out below in the event Grantee violates any provision of this Franchise. These remedies are intended to embody the County's and/or the public's rights under County Charter to the extent permitted by Applicable Law.
 - (1) To the extent the County deems necessary to remedy the default, proceeding against all or any part of any security provided under the County Code or this Franchise, including, without limitation, any bonds,

security funds, or other surety, Grantee shall be responsible for all direct and actual costs related to the enforcement action including, but not limited to, legal and administrative costs;

- (2) Impose liquidated damages as set forth in Section 6.5, but only after the due process provisions outlined herein have been completed;
- (3) Commencing an action at law for monetary damages or seeking equitable relief, including specific performance; or
- (4) In the case of a Grantee's default as to a material provision of the Franchise, undertake the proceeding to revoke the Franchise.

In determining which remedy or remedies for Grantee's violation are appropriate, the County shall take into consideration the nature and extent of the violation, the remedy needed to prevent such violations in the future, whether Grantee has a history of previous violations of the same or similar kind, and such other considerations as are appropriate under the circumstances.

- (b) The County has the right to revoke this Franchise, and all rights and privileges pertaining thereto, in the event that:
 - (1) Grantee is in violation of any material provision of the Franchise agreement or has demonstrated a pattern of Franchise violations and fails to correct the violation(s) after written notice of the violation(s) and proposed forfeiture and a reasonable opportunity thereafter to correct the violation(s) as noted in section 6.4 (c); or
 - (2) Grantee becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt, to the extent permitted by Applicable Law; or
 - (3) Grantee is found to have engaged in any fraud or attempted fraud upon the County.
- (c) Enforcement Procedures
 - (1) Notice of Violation or Default. In the event the County believes that the Grantee has not complied with the material terms of the Franchise or has demonstrated a pattern of Franchise violations, it shall first make contact with Grantee to informally discuss the issue. This informal discussion may be via telephone, email or other electronic means and is intended as a courtesy to Grantee prior to issuing a notice of violation. Thereafter the County shall notify the Grantee in writing with specific details

regarding the exact nature of the alleged noncompliance or default (“Violation Notice”).

- (2) Grantee’s Right to Cure or Respond. The Grantee shall have thirty (30) days from the receipt of the Violation Notice to: (A) to respond to the County, contesting the assertion of noncompliance or default; or (B) to cure such default; or (C) in the event that, by nature of the default, such default cannot be cured within the thirty (30) day period, initiate reasonable steps to remedy such default and notify the County of the steps being taken and the projected date that they will be completed. The County shall not unreasonably refuse to accept the Grantee’s proposed cure date but such decision shall be the County’s alone to make.
- (3) Contested Hearings. In the event the Grantee fails to respond to the Violation Notice or in the event that the alleged default is not remedied as required under this Section 6.4 (c), the County may refer the matter to the County’s hearing examiner in accordance with Section 2.11 of the County Code. The Grantee will be provided an opportunity to present evidence to contest the alleged violation. County shall notify Grantee of the hearing in writing. The determination as to whether Grantee is in default of this Franchise shall be determined by the hearing examiner, but any such written decision shall be subject to appeal to a court of competent jurisdiction. Such appeal to the appropriate Court shall be filed within thirty (30) Days of the issuance of the written decision of the hearing examiner. County shall receive notice from Grantee of any appeal concurrent with any filing to a court of competent jurisdiction.
- (4) In the event the hearing examiner determines that Grantee is in non-compliance with any provision of the Franchise, the County may impose any of the remedies set out in section 6.

6.5 Liquidated Damages

- (a) Because Grantee’s failure to comply with the provisions of this Franchise will result in damage to the County and because it will be impractical to determine the actual amount of such damages, the County and Grantee hereby agree upon and specify certain amounts set forth hereafter in this section which represent both parties’ best estimate of the damages.
- (b) The County shall specify any damages subject to this section and shall include such information in the Violation Notice sent to Grantee required under Section 6.5(c)(1). Such Violation Notice may provide for incidents occurring up to sixty

(60) days prior to the Violation Notice where so provided, and subsequent thereto pending compliance by Grantee.

- (c) To the extent that the County elects to assess liquidated damages as provided in this section and such liquidated damages have been paid, the parties agree that the assessment of liquidated damages shall be the County's sole and exclusive remedy for the matters for which liquidated damages are sought.
- (d) Unless otherwise provided, liquidated damages shall accrue once the thirty (30) day cure period has expired following Grantee's receipt of the Violation Notice, unless the County has agreed to extend the thirty (30) day cure period. If Grantee fails to cure within the thirty (30) days, then the liquidated damages accrue from the date of the Violation Notice for a maximum of one hundred-twenty (120) days. Nothing in this section prevents the parties from settling any dispute relating to liquidated damages by mutual stipulation.
- (e) Grantee may cure the breach or violation within the time specified in Section 6.4(c)(2) to the County's satisfaction, whereupon no liquidated damages are assessed.
- (f) Nothing requires the County to assess liquidated damages, acting in its sole discretion, but such non-assessment does not operate as waiver or estoppel upon the County. Liquidated damages are set as follows.
 - 1. For failure to provide data, documents, reports and information as required by this Franchise or to cooperate with the County during a system review, Fifty and No/100 Dollars (\$50) per day, or part thereof, per each separate violation.
 - 2. For failure to provide the services required by this Franchise, including, but not limited to, the implementation and utilization of the PEG Channels, performance of required tests, and compliance with customer service standards, Two Hundred and No/100 Dollars (\$200) per day for each day, or part thereof, such failure occurs or continues; .
 - 3. For failure to comply with any of the material provisions of the Franchise, for which a liquidated damage is not otherwise specified, the liquidated damages shall be Two Hundred and No/100 (\$200) per day for each day, or part thereof, such failure occurs or continues provided that any delay is not caused by the County or any other cause beyond Grantee's reasonable control.
 - 4. Grantee is not responsible for and shall not be liable for any liquidated damages, if the failure to comply is in any way caused by any factors outside Grantee's reasonable control as described in Section 11.7 below.

(g) Any liquidated damages assessed under this Franchise shall be capped at the amount of \$20,000 per calendar year.

6.6 Any order by the County to remove cable or conduit shall be mailed to Grantee not later than thirty (30) calendar days following the final determination of revocation of Grantee's right to occupy public right of way. Grantee shall file written notice with the County not later than 30 calendar days following the date of termination of the Franchise of its intention to remove cable and a schedule for removal by location. The schedule and timing of removal shall be subject to approval and regulation by the County. Removal shall be completed no later than 12 months following the date of expiration of the Franchise.

6.7 Grantee shall not be relieved of any of its obligations to comply promptly with any provision of the Franchise by reason of any failure of the County to enforce prompt compliance, and County's failure to enforce shall not constitute a waiver of rights or acquiescence in Grantee's conduct.

6.8 Alternative Remedies

(a) As an alternative to the remedy set forth herein, the parties may mutually agree to submit any alleged violation of the provisions of this franchise to arbitration. The matter shall be determined by a board of three arbitrators, all of whom shall be citizens and taxpayers of the State of Washington, and shall be selected as follows: one by the County Council, one by the Grantee, and one by the two so appointed. Should the two arbitrators be unable to name a third, such third arbitrator shall be named by a judge of the Superior Court for Whatcom County. Said board shall make its decision in writing and file its decision with the parties within 60 days from the date of the appointment of the final arbitrator. The decision of the board shall be by a majority vote and signed by at least two arbitrators. The written decision shall be final and binding upon the parties.

(b) No provision of this Franchise shall be deemed to bar the right of the parties to seek or obtain judicial relief from a violation of any provision of the Franchise or any rule, regulation, requirement or directive promulgated thereunder. Neither the existence of other remedies identified in the Franchise nor the exercise thereof shall be deemed to bar or otherwise limit the right of the parties to recover monetary damages (except where liquidated damages are otherwise prescribed) for such violation by Grantee, or to seek and obtain judicial enforcement of Grantee's obligations by means of specific performance, injunctive relief or mandate, or any other judicial remedy at law or in equity.

6.9 Grantee shall comply with all applicable federal and State laws and regulations, including regulations of any administrative agency thereof, as well as all generally applicable ordinances, resolutions, rules and regulations of the County heretofore or hereafter adopted or

established during the term, of this Franchise. Nothing in the Franchise shall expand or limit the County's right of eminent domain under State law. Nothing in the Franchise shall be deemed to waive the requirements of any lawful code, ordinance or resolution of the County requiring permits, fees to be paid, or regulation of construction.

Section 7. Reporting Requirements

7.1 For each Franchise Fee payment there shall be a report submitted by a representative of the Grantee showing the basis for the computation of the Franchise Fees and any PEG fees paid during that period in the Grantee's standard format. This report shall separately indicate revenues received by Grantee within the County including, but not limited to such items as listed in the definition of "Gross Revenues" of this Franchise.

7.2 The County shall have access to, and the right to inspect, any books and records of Grantee and its affiliates which are reasonably necessary to monitor and enforce Grantee's compliance with the provisions of this Franchise, during normal business hours, and without unreasonably interfering with Grantee's business operations. The County may, in writing, request copies of any such records or books that are not identified as proprietary or confidential, and Grantee shall provide such copies within thirty (30) days of the transmittal of such request. One copy of all reports and records required under this or any other Section shall be furnished to the County at the sole expense of Grantee. If the requested books and records are too voluminous, or identified as proprietary and confidential, or for security reasons cannot be copied or removed, then the County shall inspect them at Grantee's office.

7.3 Grantee shall not be required to disclose information that it reasonably deems to be proprietary or confidential in nature, nor disclose books and records of any affiliate of Grantee that is not providing Cable Service in the Franchise Area. The County agrees to keep proprietary or confidential books or records of Grantee confidential to the extent permitted by law. Grantee shall be responsible for clearly and conspicuously identifying the records as confidential or proprietary, and shall provide a brief written explanation as to why such information is confidential or proprietary and how it may be treated as such under State or federal law. The Grantee shall not be required to provide customer information in violation of Section 631 of the Cable Act or any other applicable federal or State privacy law. For purposes of this Section, the terms "proprietary or confidential" include, but are not limited to, information relating to the Cable System design, customer lists, marketing plans, financial information unrelated to the calculation of franchise fees or rates pursuant to FCC rules, or other information that is reasonably determined by the Grantee to be competitively sensitive. If the County receives a demand from any Person for disclosure of any information designated by Grantee as proprietary or confidential, the County shall, so far as consistent with applicable law, advise Grantee and provide Grantee with a copy of any written request by the Person demanding access to such information within five (5) business days.

7.4 Grantee shall provide to the County upon reasonable request, provided that Grantee may comply with this Section by making information available on a publicly available web site:

(a) A route map that depicts the general location of the Cable System facilities placed in the Right-of-Ways. The route map shall identify Cable System facilities as aerial or underground and is not required to depict cable types, number of cables, electronic equipment, and service lines to individual Subscribers. The Grantee shall also provide, if requested, an electronic format of the aerial/underground facilities in relation to a Right-of-Way centerline reference to allow the County to add this information to County's geographic information system program; subject to the County maintaining the confidentiality of this information;

(b) A copy of all FCC filings which relate to the operation of the Cable System in the Franchise Area maintained by Grantee on the FCC's public website; and

(c) A list of Grantee's Cable Services, rates and channel line-up, as provided on Grantee's web site.

7.5 Upon request, thirty (30) days after the end of the year, Grantee shall submit to the County a summary of gross revenue and franchise fee calculations for the previous year.

7.6 Upon request, but no more than once a year, Grantee shall provide FCC proof of performance test results. Upon request, Grantee shall make available for County's review, any other technical testing results related to the system serving the County.

7.7 Grantee shall prepare and the County may review, at the times and in the form prepared by Grantee in its normal course of business, such additional reports with respect to its operation, transactions, or property, as may be reasonably necessary to ensure compliance with the terms of this Franchise.

7.8 Upon request, Grantee will make available updated route maps for the County's inspection Grantee may take reasonable steps to ensure the confidentiality of its system maps.

Section 8. Customer Service Policies

8.1 Grantee shall promptly respond to all requests for service, repair, installation and information from Subscribers. Grantee acknowledges the County's interest in the prompt resolution of all cable complaints and shall work in close cooperation with the County to resolve complaints. Grantee shall comply with FCC standards, as may be amended from time to time. The current FCC standards are set forth in Exhibit A.

8.2 County reserves the right upon request to review Subscriber complaint records. County acknowledges that Grantee does not organize complaints by franchise area and it would

be the responsibility of the County to review complaint records in the form provided by the Grantee.

Section 9. Line Extension Policy

9.1 Grantee shall make service available at standard installation and service rates, for every potential subscriber within the Franchise Area, pursuant to the following requirements:

- (a) In newly developing underground service areas, where a shared trench is provided, Grantee shall extend and make cable television service available to every dwelling unit in areas having at least sixty (60) dwelling units per trench mile as measured from the end of Grantee's then existing distribution system.
- (b) In any area served by overhead facilities Grantee shall extend and make cable television service available to every dwelling unit in areas having at least thirty (30) dwelling units per strand mile as measured from the end of Grantee's then existing distribution system.
- (c) In any area served by underground facilities that has existing homes that are not served by Grantee, Grantee shall extend and make cable television service available to every dwelling unit in areas having at least one-hundred twenty (120) dwelling units per trench mile as measured from the end of Grantee's then existing distribution system.
- (d) Grantee must extend and make cable television service available to any resident requesting connection at the standard connection charge if the connection from Grantee's distribution plant to the resident would require no more than a standard 125' aerial drop line.
- (e) With respect to requests for connection requiring an aerial drop line in excess of 125' from Grantee's distribution plant, the Grantee must extend and make available cable television service to such residents at a connection charge not to exceed the actual installation costs incurred by Grantee for the distance exceeding 125'; provided that nothing in this section shall require Grantee to extend its distribution plant.

Section 10. Compensation and Financial Provisions

10.1 During the term of the Franchise, Grantee shall pay to the County a franchise fee of 4% of Gross Revenues. The County retains the option of increasing the franchise fee up to 5% of Gross Revenues. If any such law, regulation or valid rule alters the 5% franchise fee enacted by the Cable Act, then the County shall have the authority to increase or decrease the franchise fee accordingly, provided such change is for purposes not inconsistent with Applicable Law and that all cable providers serving the County are treated similarly. In the event the franchise fee is modified by the County, the County agrees to provide Grantee with at least

sixty (60) days' prior written notice of such modification. In the event Grantee bundles or combines Cable Services (which are subject to the franchise fee) with non-Cable Services (which are not subject to the franchise fee) so that Subscribers pay a single fee for more than one class of service resulting in a discount on Cable Services, Grantee agrees that for the purpose of calculation of the franchise fee, it shall allocate Cable Service revenue no less than a pro rata share of the revenue received for the bundled or combined services. The pro rata share shall be computed on the basis of the published charge for each service in the bundled or combined classes of services when purchased separately.

- (a) Franchise fees shall be paid quarterly not later than 45 days following the end of a given quarter. In accordance with Section 7.1 of this Franchise, and not later than the date of each payment, Grantee shall file with the County on a quarterly basis a franchise fee payment report which identifies Gross Revenues earned by Grantee during the prior quarter. No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall such acceptance of payment be construed as a release of any claim which the County may have for further or additional sums payable under the provisions of this section.
- (b) Neither current nor previously paid franchise fees shall be subtracted from the Gross Revenue amount upon which franchise fees are calculated and due for any period, unless otherwise required by Applicable Law. Nor shall copyright fees or other license fees paid by Grantee be subtracted from Gross Revenues for purposes of calculating franchise fees.
- (c) Any franchise fees owing pursuant to this Franchise which remain unpaid more than 45 days after the dates specified herein shall be delinquent and shall thereafter accrue interest at 12% per annum or 2% above prime lending rate as quoted by major Seattle banks, whichever is greater.

10.2 If the County requests remittance of any PEG Fees, they shall provide to Grantee, within ninety (90) days following the end of each calendar year, a report detailing the County's PEG related capital expenditures.

If Grantee alleges that County has inappropriately used PEG fees, Grantee agrees to first notify the County of its concern prior to taking any legal action or withholding payment against any other fees owed County.

10.3 Grantee agrees to discuss with representatives of the County upon reasonable request to review its methodology of record-keeping, financial reporting, computing franchise fee obligations, and other procedures the understanding of which the County deems necessary for understanding the meaning of reports and records.

The County or its authorized agent may at any time, but not more than once every three (3) calendar years, and at the County's own expense conduct an independent audit of the revenues of Grantee in order to verify the accuracy of franchise fees paid to the County. Grantee and each parent company of Grantee shall cooperate fully in the conduct of such audit. Any such audit shall take place within three (3) years from the date the County receives such payment, after which period any such payment shall be considered final. If the County uses an independent contractor for such audit, the contractor must sign a non-disclosure agreement acceptable to Grantee prior to the contractor accessing any Grantee information.

Upon the completion of any such audit by the County, the County shall provide to the Grantee a final report setting forth the County's findings in detail, including any and all substantiating documentation. Enforcement of any overpayment or underpayment shall be undertaken in accordance with Section 6.4 of this Franchise. In the event Grantee has underpaid the County by an amount greater than five percent (5%) underpayment, Grantee agrees to pay the cost of the audit in an amount up to fifteen thousand dollars (\$15,000). No such payment shall be required of Grantee until Grantee has exhausted all of its Legal and administrative remedies.

In the event of an overpayment by Grantee, the County shall have the option of reimbursing Grantee within forty-five (45) days or of requesting in writing within forty-five (45) days that Grantee withhold fifty percent (50%) of each future Franchise Fee payment until such time as said overpayment is recovered and thereafter remitting the full amounts to the County.

The County agrees to request access to only those books and records, in exercising its rights under this section, which it deems reasonably necessary for the enforcement of the Franchise.

10.4 Within 30 days after the Grantee's acceptance of this Franchise, Grantee shall post a performance bond, in the amount of one hundred thousand dollars (\$100,000.00), to ensure Grantee's faithful performance of the terms of this Franchise.

Neither the provisions of this section, any bond accepted by the County pursuant thereto, nor any damages recovered by the County thereunder shall be construed to excuse faithful performance by Grantee or to limit liability of Grantee under the Franchise or for damages, either to the full amount of the bond or otherwise, except as otherwise provided herein.

10.5 If, at any time during the term of the Franchise, the condition of the entity issuing the bond shall change in such a manner as to render the bond unsatisfactory to the County, Grantee shall replace such bond by a bond of like amount and similarly conditioned, issued by an entity satisfactory to the County.

10.6 Grantee shall, at its sole expense, fully indemnify, defend, and hold harmless the County, and its officers, agents, and employees in their capacity as such, , from any claim for injury, damages, loss, liability, cost, and expense arising in whole or in part from, incident to, or connected with any act or omission of the Grantee, or its Parent Corporation, their agents, contractors or subcontractors, or any of their employees, including without limitation any

construction, operation, maintenance, excavation, reconstruction, or any other act done under this Franchise by or for Grantee, its Parent Corporation, their agents, contractors, subcontractors, or their employees, and including any neglect or omission to keep the Cable System in a safe condition. Grantee's obligation to indemnify, defend, and hold the County harmless includes the obligation to pay attorney's fees, expert fees, and all other costs of defending any indemnified claim, and all such costs incurred in recovering against Grantee under this indemnity provision. To the maximum extent permitted by the law, Grantee's indemnity obligation shall not be extinguished or reduced in the event that an act or omission of the indemnified parties is a concurrent or contributing cause of the claim, but no indemnity shall be owed to the extent that the cause of any claim is the negligence of the County or a willful omission of the County in violation of this Franchise. Grantee shall have full control of the defense, including the right to settle any claim. . The County shall fully cooperate with the Grantee in said defense. Nothing herein shall be deemed to prevent the County, its officers, or its employees, from participating in the defense of any litigation by their own counsel, at such party's expense.

The County shall give the Grantee timely notice of the making of any claim or the commencement of any action, suit, or other proceeding covered by this indemnity. In the event any such claim arises, the County or any other indemnified party shall tender the defense thereof to the Grantee and the Grantee shall have the right and duty to accept the tender and thereafter defend, settle, or compromise any claims arising hereunder and the County shall cooperate fully therein

Notwithstanding, this Section (10.6) does not include PEG Access programming, operations, or administration, Access Channel(s), Access Facilities, or Access Provider(s), all of which is the County's sole responsibility.

10.7 Grantee shall maintain, throughout the term of the Franchise, liability insurance in the minimum amounts of:

- (a) \$2,000,000 for personal injury or death to any one person and \$5,000,000 aggregate for personal injury or death per single accident or occurrence.
- (b) \$2,000,000 for property damage to any one person and \$5,000,000 aggregate for property damage per single accident or occurrence.
- (c) \$2,000,000 for all other types of liability, including claims for damages for invasion of the right of privacy; for defamation of any person, firm, or corporation; for the violation or infringement of any copyright, trademark, trade name, service mark or patent; or, for damage to any other person, firm, or corporation arising out of or alleged to arise out of failure to comply with the provisions of any statute, regulation or

resolution of the United States, State of Washington, or any local agency with jurisdiction.

Such insurance shall specifically name as additional insured Whatcom County, its officers, employees and agents. The policy shall not be materially modified or canceled during the life of this Franchise without giving 30 days' written notice to the County.

Grantee shall maintain on file with the County a current certificate of insurance showing up-to-date coverage and additional insured coverage, as set forth above. Grantee specifically acknowledges that the limits of liability requirements specified above shall neither be construed as a limitation of Grantee's liability nor shall it be construed to inure to the benefit of any insurer by serving as a limitation or cap of any insurer's limits of liability that would otherwise apply.

Section 11. Miscellaneous Provisions

11.1 Grantee shall assume the cost of posting and publication of this Franchise as such posting and publication is required by law and such is payable upon Grantee's filing of acceptance of this Franchise.

11.2 Grantee agrees that it enters into this Franchise voluntarily in order to secure and in consideration of the grant from the County of a 10-year Franchise. Performance pursuant to the terms and conditions of this Franchise agreement is guaranteed by Grantee.

11.3 This Franchise contains the entire agreement between the parties, supersedes all prior agreements or proposals except as specifically set forth herein, and cannot be changed orally but only by an instrument in writing executed by the parties.

11.4 Wherever the consent or approval of either Grantee or the County is specifically required in this agreement, such consent or approval shall not be unreasonably withheld.

11.6 This Franchise granted by this Ordinance shall be effective upon Grantee's acceptance and no less than 10 days from date of final passage by County Council; provided, however, that Grantee shall have 60 days to accept the Franchise and comply with all conditions for such acceptance. This Franchise shall be voidable at the County's discretion if Grantee fails to accept within 60 days. This Franchise, and any rights granted hereunder, shall not become effective for any purpose unless and until Grantee files with the Whatcom County Council the Statement of Acceptance, attached hereto as Exhibit B (the "Franchise Acceptance"). The date that the Franchise Acceptance is filed with the County Council shall be the effective date of this Franchise. Should Grantee fail to file the Franchise Acceptance with the County Council within 30 days after the effective date of this ordinance, the Franchise will terminate and shall be null and void, at the discretion of the County.

11.7 In the event that either party is prevented or delayed in the performance of any of its obligations, under this Agreement by reason of acts of God, floods, fire, hurricanes, tornadoes, earthquakes, or other unavoidable casualties, insurrection, war, riot, vandalism, strikes, sabotage, boycotts, lockouts, labor disputes, shortage of qualified labor, freight embargoes, shortages or unavailability of materials or supplies, unusually severe weather conditions, acts or omissions of the other party, or any other similar event beyond the reasonable control of that party, it shall have a reasonable time under the circumstances to perform such obligation under this Agreement, or to procure a substitute for such obligation to the reasonable satisfaction of the other party.

11.8 If the parties fail to formally renew this Franchise prior to the expiration of its term or any extension thereof, the obligations and privileges of this Franchise shall nonetheless continue in full force and effect until renewed or otherwise terminated by either party through written notice to that effect.

11.8 Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by Grantee. Grantee shall be responsible for all work performed by its contractors and subcontractors, and others performing work on its behalf as if the work were performed by it and shall ensure that all such work is performed in compliance with this Franchise, the County Code and other Applicable Law, and shall be jointly and severally liable for all damages and correcting all damage caused by them. It is Grantee's responsibility to ensure that contractors, subcontractors or other Persons performing work on Grantee's behalf are familiar with the requirements of this Franchise, the County Code and other Applicable Laws governing the work performed by them.

11.9 If any Section, subsection, paragraph or provision of this Franchise is determined to be illegal, invalid or unconstitutional by any court of competent jurisdiction, such determination shall have no effect on the validity of any other Section, subsection, paragraph or provision of this Franchise, all of which will remain in full force and effect for the term of the Franchise.

11.10 This Franchise may be executed in several counterparts, each of which when so executed shall be deemed to be an original copy, and all of which together shall constitute one agreement binding on all parties hereto, notwithstanding that all parties shall not have signed the same counterpart.

11.11 Nothing in this Franchise shall be construed as a waiver of any rights, substantive or procedural, either County or Grantee may have under Federal or state law unless such waiver is expressly stated herein.

11.12 Nothing in this Franchise is or was intended to confer third-party beneficiary status on any member of the public to enforce the terms of this Franchise.

11.13 No provision of this Franchise shall be amended or otherwise modified, in whole or in part, except by an instrument, in writing, duly executed by the County and the Grantee,

which amendment shall be authorized on behalf of the County through the adoption of an appropriate resolution or order by the County, as required by applicable law.

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

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

To the County:

County Executive
Whatcom County Courthouse
311 Grand Ave., Suite 108
Bellingham, WA 98225-4038

To the Grantee:

WaveDivision I, LLC
401 Parkplace Center, Suite 103
Kirkland, WA 98033
Attn: Legal Department

With copies to:

RCN Telecom
650 College Road East, Ste, 3100
Princeton, NJ 08540
Attn: Regulatory Department

RCN Telecom
105 West First Street
South Boston, MA 02127
Attn: Regulatory Department

Exhibit A

FCC Customer Service Standards

76 CFR Section 309

76 CFR Section 1602

76 CRF Section 1603

Federal Communications Commission

§ 76.309

depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished, or distributed by a sponsor of a program cablecast on the system in question.

(c) The provisions of paragraphs (a) and (b) of this section shall not apply to advertisements or lists of prizes or information concerning:

(1) A lottery conducted by a State acting under authority of State law which is transmitted:

(i) By a cable system located in that State;

(ii) By a cable system located in another State which conducts such a lottery; or

(iii) By a cable system located in another State which is integrated with a cable system described in paragraphs (c)(1)(i) or (c)(1)(ii) of this section, if termination of the receipt of such transmission by the cable systems in such other State would be technically infeasible.

(2) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act. (25 U.S.C. 2701 *et seq.*)

(3) A lottery, gift enterprise or similar scheme, other than one described in paragraph (c)(1) of this section, that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization; or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(d) For the purposes of paragraph (c) *lottery* means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or

parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting events or contests.

(e) For purposes of paragraph (c)(3)(i) of this section, the term "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

[37 FR 3278, Feb. 12, 1972, as amended at 40 FR 6210, Feb. 10, 1975; 42 FR 13947, Apr. 13, 1977; 54 FR 20856, May 15, 1989; 55 FR 18888, May 7, 1990]

§ 76.225 Commercial limits in children's programs.

(a) No cable operator shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

(b) This rule shall not apply to programs aired on a broadcast television channel which the cable operator passively carries, or to access channels over which the cable operator may not exercise editorial control, pursuant to 47 U.S.C. 531(e) and 532(c)(2).

NOTE 1 TO § 76.225: *Commercial matter* means air time sold for purposes of selling a product or service.

NOTE 2 TO § 76.225: For purposes of this section, children's programming refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.

NOTE 3 TO § 76.225: Section 76.1703 contains recordkeeping requirements for cable operators with regard to children's programming.

[56 FR 19616, Apr. 29, 1991, as amended at 65 FR 53615, Sept. 5, 2000]

§ 76.227 [Reserved]

Subpart H—General Operating Requirements

§ 76.309 Customer service obligations.

(a) A cable franchise authority may enforce the customer service standards set forth in paragraph (c) of this section against cable operators. The franchise authority must provide affected cable operators ninety (90) days written notice of its intent to enforce the standards.

(b) Nothing in this rule should be construed to prevent or prohibit:

(1) A franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards set forth in paragraph (c) of this section;

(2) A franchising authority from enforcing, through the end of the franchise term, pre-existing customer service requirements that exceed the standards set forth in paragraph (c) of this section and are contained in current franchise agreements;

(3) Any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted herein; or

(4) The establishment or enforcement of any State or municipal law or regulation concerning customer service that imposes customer service requirements that exceed, or address matters not addressed by the standards set forth in paragraph (c) of this section.

(c) Effective July 1, 1993, a cable operator shall be subject to the following customer service standards:

(1) Cable system office hours and telephone availability—

(i) The cable operator will maintain a local, toll-free or collect call telephone access line which will be available to its subscribers 24 hours a day, seven days a week.

(A) Trained company representatives will be available to respond to customer telephone inquiries during normal business hours.

(B) After normal business hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day.

(ii) Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under normal operating conditions, measured on a quarterly basis.

(iii) The operator will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless an historical record of complaints indicates a clear failure to comply.

(iv) Under normal operating conditions, the customer will receive a busy signal less than three (3) percent of the time.

(v) Customer service center and bill payment locations will be open at least during normal business hours and will be conveniently located.

(2) Installations, outages and service calls. Under normal operating conditions, each of the following four standards will be met no less than ninety five (95) percent of the time measured on a quarterly basis:

(i) Standard installations will be performed within seven (7) business days after an order has been placed. "Standard" installations are those that are located up to 125 feet from the existing distribution system.

(ii) Excluding conditions beyond the control of the operator, the cable operator will begin working on "service interruptions" promptly and in no event later than 24 hours after the interruption becomes known. The cable operator must begin actions to correct other service problems the next business day after notification of the service problem.

(iii) The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four-hour time block during normal business hours. (The operator may schedule service calls and other installation activities outside of normal business hours for the express convenience of the customer.)

(iv) An operator may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.

(v) If a cable operator representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

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(3) Communications between cable operators and cable subscribers—

(i) Refunds—Refund checks will be issued promptly, but no later than either—

(A) The customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or

(B) The return of the equipment supplied by the cable operator if service is terminated.

(ii) Credits—Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

(4) Definitions—

(i) *Normal business hours*—The term "normal business hours" means those hours during which most similar businesses in the community are open to serve customers. In all cases, "normal business hours" must include some evening hours at least one night per week and/or some weekend hours.

(ii) *Normal operating conditions*—The term "normal operating conditions" means those service conditions which are within the control of the cable operator. Those conditions which are *not* within the control of the cable operator include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions. Those conditions which are ordinarily within the control of the cable operator include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the cable system.

(iii) *Service interruption*—The term "service interruption" means the loss of picture or sound on one or more cable channels.

NOTE TO § 76.309: Section 76.1602 contains notification requirements for cable operators with regard to operator obligations to subscribers and general information to be provided to customers regarding service. Section 76.1603 contains subscriber notification requirements governing rate and service changes. Section 76.1619 contains notification requirements for cable operators with regard to subscriber bill information and op-

erator response procedures pertaining to bill disputes.

[58 FR 21109, Apr. 19, 1993, as amended at 61 FR 18977, Apr. 30, 1996; 65 FR 53615, Sept. 5, 2000; 67 FR 1650, Jan. 14, 2002]

Subpart I—Forms and Reports

§ 76.403 Cable television system reports.

The operator of every operational cable television system that serves 20,000 or more subscribers shall file with the Commission a Form 325 soliciting general information and frequency and signal distribution information on a Physical System Identification Number ("PSID") basis. These forms shall be completed and filed with (returned to) the Commission within 60 days after the Commission notifies the operator that the form is due.

NOTE: The Commission retains its authority to require Form 325 to be filed by a sampling of cable operators with less than 20,000 subscribers.

[64 FR 28108, May 25, 1999, as amended at 68 FR 27003, May 19, 2003]

Subpart J—Ownership of Cable Systems

§ 76.501 Cross-ownership.

(a)–(c) [Reserved]

(d) No cable operator shall offer satellite master antenna television service ("SMATV"), as that service is defined in § 76.5(a)(2), separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator's cable system, either directly or indirectly through an affiliate owned, operated, controlled, or under common control with the cable operator.

(e)(1) A cable operator may directly or indirectly, through an affiliate owned, operated, controlled by, or under common control with the cable operator, offer SMATV service within its franchise area if the cable operator's SMATV system was owned, operated, controlled by or under common control with the cable operator as of October 5, 1992.

(2) A cable operator may directly or indirectly, through an affiliate owned,

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§ 76.1602 Customer service—general information.

(a) A cable franchise authority may enforce the customer service standards set forth in paragraph (b) of this section against cable operators. The franchise authority must provide affected cable operators 90 days written notice of its intent to enforce standards.

(b) Effective July 1, 1993, the cable operator shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request:

(1) Products and services offered;

(2) Prices and options for programming services and conditions of subscription to programming and other services;

(3) Installation and service maintenance policies;

(4) Instructions on how to use the cable service;

(5) Channel positions of programming carried on the system; and

(6) Billing and complaint procedures, including the address and telephone number of the local franchise authority's cable office.

(c) Subscribers shall be advised of the procedures for resolution of complaints about the quality of the television signal delivered by the cable system operator, including the address of the responsible officer of the local franchising authority.

§ 76.1603 Customer service—rate and service changes.

(a) A cable franchise authority may enforce the customer service standards set forth in paragraph (b) of this section against cable operators. The franchise authority must provide affected cable operators 90 days written notice of its intent to enforce standards.

(b) Customers will be notified of any changes in rates, programming services or channel positions as soon as possible in writing. Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator. In addition, the cable operator shall notify subscribers 30 days in advance of any significant changes in the other information required by § 76.1602.

(c) In addition to the requirement of paragraph (b) of this section regarding advance notification to customers of any changes in rates, programming services or channel positions, cable systems shall give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change. Such notice shall state the precise amount of any rate change and briefly explain in readily understandable fashion the cause of the rate change (e.g., inflation, change in external costs or the addition/deletion of channels). When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified. For purposes of the carriage of digital broadcast signals, the operator need only identify for subscribers, the television signal added and not whether that signal may be multiplexed during certain dayparts.

(d) A cable operator shall provide written notice to a subscriber of any increase in the price to be charged for the basic service tier or associated equipment at least 30 days before any proposed increase is effective. The notice should include the name and address of the local franchising authority.

(e) To the extent the operator is required to provide notice of service and rate changes to subscribers, the operator may provide such notice using any reasonable written means at its sole discretion.

(f) Notwithstanding any other provision of part 76 of this chapter, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.

NOTE 1 TO § 76.1603: Section 624(h) of the Communications Act, 47 U.S.C. 544(h), contains additional notification requirements which a franchising authority may enforce.

NOTE 2 TO §76.1603: Section 624(d)(3) of the Communications Act, 47 U.S.C. 544(d)(3), contains additional notification provisions pertaining to cable operators who offer a premium channel without charge to cable subscribers who do not subscribe to such premium channel.

NOTE 3 TO §76.1603: Section 631 of the Communications Act, 47 U.S.C. 551, contains additional notification requirements pertaining to the protection of subscriber privacy.

[65 FR 53617, Sept. 5, 2000, as amended at 66 FR 16554, Mar. 26, 2001]

§ 76.1604 Charges for customer service changes.

If a cable operator establishes a higher charge for changes effected solely by coded entry on a computer terminal or by other similarly simple methods, as provided in §76.980(d), the cable system must notify all subscribers in writing that they may be subject to such a charge for changing service tiers more than the specified number of times in any 12 month period.

§ 76.1605 New product tier.

(a) Within 30 days of the offering of an NPT, operators shall file with the Commission a copy of the new rate card that contains the following information on their BSTs, CPSTs and NPTs:

- (1) The names of the programming services contained on each tier; and
- (2) The price of each tier.

(b) Operators also must file with the Commission, copies of notifications that were sent to subscribers regarding the initial offering of NPTs. After this initial filing, cable operators must file updated rate cards and copies of customer notifications with the Commission within 30 days of rate or service changes affecting the NPT.

§ 76.1606 Rate change while complaint pending.

A regulated cable operator that proposes to change any rate while a cable service tier complaint is pending before the Commission shall provide the Commission at least 30 days notice of the proposed change.

§ 76.1607 Principal headend.

A cable operator shall provide written notice by certified mail to all sta-

tions carried on its system pursuant to the must-carry rules at least 60 days prior to any change in the designation of its principal headend.

§ 76.1608 System technical integration requiring uniform election of must-carry or retransmission consent status.

A cable system that changes its technical configuration in such a way as to integrate two formerly separate cable systems must give 90 days notice of its intention to do so to any television broadcast stations that have elected must-carry status with respect to one system and retransmission consent status with respect to the other. If the system and the station do not agree on a uniform election 45 days prior to integration, the cable system may require the station to make such a uniform election 30 days prior to integration.

§ 76.1609 Non-duplication and syndicated exclusivity.

Within 60 days following the provision of service to 1,000 subscribers, the operator of each such system shall file a notice to that effect with the Commission, and serve a copy of that notice on every television station that would be entitled to exercise network non-duplication protection or syndicated exclusivity protection against it.

76.1610 Change of operational information.

Within 30 days following a change of cable television system operator, and/or change of the operator's mail address, and/or change in the operational status of a cable television system, the operator shall inform the Commission in writing of the following, as appropriate:

(a) The legal name of the operator and whether the operator is an individual, private association, partnership or corporation. *See* §76.5(cc). If the operator is a partnership, the legal name of the partner responsible for communications with the Commission shall be supplied;

(b) The assumed name (if any) used for doing business in each community;