

11. PERFORMANCE GUARANTEES AND REMEDIES

(a) Performance Bond.

(1) Grantee shall obtain and maintain during the entire term of the Franchise, and any renewal or extensions thereof a non-cancelable performance bond in the County's favor in the amount of \$500,000, to ensure the Grantee's faithful performance of its obligations. The County may, at its sole discretion, reduce the amount of the bond upon written application by the Grantee. Reductions granted or denied upon application by the Grantee shall not be unreasonably withheld and be without prejudice to the Grantee's subsequent applications or to the County's right to require the full bond at any time thereafter. However, no application for a reduction of bond shall be submitted by the Grantee within one year of any prior application. In no event shall such performance bond or bonds be reduced to less than Fifty Thousand Dollars.

(2) The performance bond shall provide the following conditions:

(A) There shall be recoverable by the County from the principal and surety, any and all amounts due to the County and any and all damages, losses, costs, and expenses suffered or incurred by the County resulting from the failure of the Grantee to faithfully comply with the material provisions of this Agreement, the Communications Ordinance, and other applicable law, to comply with all orders, permits and directives of any County agency or body having jurisdiction over its acts or defaults, to pay fees, penalties or liquidated damages due to the County, or to pay any claims, taxes or liens due the County. Such losses, costs and expenses shall include but not be limited to reasonable attorney's fees and other associated expenses.

(B) The total amount of the performance bond required by this Agreement shall be forfeited in favor of the County in the event:

- (i) the Grantee abandons Grantee's Cable System at any time during the term of its Franchise or any extension thereto; or
- (ii) the Grantee carries out a transaction described in Section 3 of this Agreement without County approval.

(3) The performance bond shall be issued by a surety with an A-1 or better rating of insurance in Best's Key Rating Guide, Property/Casualty Edition; shall be in a form satisfactory to the County Attorney; shall be subject to the approval of the County; and shall contain the following endorsement:

This bond may not be allowed to lapse until at least ninety days after receipt by the County, by certified mail, return receipt requested, of a written notice from the issuer of the bond of intent not to renew.

(4) All performance bonds and insurance policies required herein shall be in a form satisfactory to the County. The County may, at any time, increase the amount of the required performance bond to reflect increased risks to the County and the public and/or require the Grantee to provide additional sureties to any and all bonds or to replace existing bonds with new bonds that satisfy the criteria in this Section. No bond or insurance policy shall be cancelable. Insurance policies written for a period less than the term of a Franchise shall be renewed at least thirty days before the policy's expiration, and the renewed policies and evidence of premium payments shall be promptly delivered to the County.

(5) No Grantee shall permit any insurance policy or performance bond to expire or approach less than thirty days prior to expiration without securing and delivering to the

County a substitute, renewal or replacement policy or bond in conformance with the provisions of this Agreement and Chapter 9.1.

(6) Right to Require Additional or Other Bonds. The County shall have the right, at any time that it reasonably deems itself insecure, to require that any bond be replaced by such other bond as the County may reasonably require, notwithstanding the fact that the County may have indicated its acceptance or approval of any bond(s) submitted with this Agreement.

(7) The County may require performance bonds and insurance policies described in this Section to run to the benefit of the County.

(b) Letter of Credit.

(1) In addition to the performance bond, the Grantee shall provide to the County a Letter of Credit in the amount of \$50,000 (the "Letter of Credit"), in substantially the same form as that attached hereto as Appendix 4. The Letter of Credit shall be provided by a third party agent ("Third Party Agent") approved by the County. The Grantee shall maintain such Letter of Credit at all times throughout the term of the Franchise Agreement and for a period of one year following the expiration or termination of the Franchise Agreement.

(A) If the County notifies the Grantee of any amounts due to the County pursuant to this Agreement or applicable law, and the Grantee does not make such payment within ten business days, the County may withdraw the amount in question, with any applicable interest and penalties, from the Letter of Credit by notice to the Grantee and the Third Party Agent specifying the amount and purpose of such withdrawal. However, if the Grantee files a legal action disputing the County's claim, the ten-business-day notice period shall be tolled as to that claim until the claim is resolved by order of the trial court.

(B) If at the time of a withdrawal from the Letter of Credit by the County, the amount available with the Third Party Agent is insufficient to provide the total payment of the claim asserted in the County's notice of withdrawal, the balance of such claim shall not be discharged or waived, but the County may continue to assert the same as an obligation of the Grantee to the County.

(C) No later than thirty days after mailing of notification to the Grantee by certified mail, return receipt requested, of a withdrawal under the Letter of Credit, the Grantee shall restore the amount of the Letter of Credit to \$50,000.

(D) In the event the Third Party Agent serves notice to the County that it elects not to renew the Letter of Credit, the County may withdraw the entire amount of the Letter of Credit unless the Grantee provides a substitute Letter of Credit, in substantially the same form as that attached hereto as Appendix 4, from a Third Party Agent approved by the County, before the effective Letter of Credit expires.

(c) *Rights Cumulative.* The rights reserved to the County in this Section 11 are in addition to all other rights of the County, whether reserved herein or authorized by applicable law, and no action, proceeding or exercise of a right with respect to a performance bond or the Letter of Credit shall affect any other right the County may have. Neither the making of the Letter of Credit, nor the receipt of any damages recovered by the County thereunder, shall be construed to excuse the faithful performance by the Grantee or limit the liability of the Grantee under the terms of its Franchise for damages, either to the full amount of the Letter of Credit or otherwise; provided, however, that the amount of any damages recovered by the County through the Letter of Credit shall be offset against any damages otherwise recoverable by the County.

(d) *Remedies.* In addition to any other remedies available at law or equity, the County may revoke the Franchise for a material violation as set forth in Section 12(1)(2) of this Agreement pursuant to the procedures specified in this Agreement.

(e) *Liquidated Damages.* Because the Grantee's failure to comply with provisions of the Franchise and this Franchise Agreement will result in injury to the County, and because it will be difficult to estimate the extent of such injury, the County and the Grantee agree to the following liquidated damages to be effective during the term of the Franchise for the following violations of the Franchise and of this Agreement, which represent both parties' best estimate of the damages resulting from the specified violation. Such damages shall not be a substitute for actual performance by the Grantee of a financial payment, but shall be in addition to any such actual performance. The failure of the Grantee to hire sufficient staff or to properly train its staff shall not preclude the application of the provisions in this Section. The Communications Administrator, or designee, shall have the authority to waive or reduce the liquidated damage amounts herein for good cause. Cure periods listed below shall begin to run at the time the Grantee is notified in writing of a violation by the County, unless otherwise specified below. Should the County elect to receive liquidated damages for any of the violations enumerated herein, such liquidated damages shall be the County's sole remedy for the violations occurring during the period of time to which the liquidated damages apply.

(1) For failure to complete construction and installation of a system in accordance with this Franchise Agreement: \$200 per day for each day the construction or installation is delayed beyond a thirty day cure period if the system is at least 95% complete but less than 100% complete; \$500 per day for each day the construction or installation is delayed beyond a thirty day cure period if the system is at least 85% complete but less than 95%

complete; and \$1,000 per day for each day the construction or installation is delayed beyond a thirty day cure period if the system is less than 85% complete;

(2) For failure to comply with requirements of Section 7(a) for PEG use of the system: \$200 per day for each day compliance is delayed beyond a fourteen day cure period;

(3) For failure to provide complete and accurate information, reports, or filings lawfully required under this Franchise Agreement or applicable law or by the County: \$200 per day for each day that each such filing is delayed beyond a thirty day cure period;

(4) For each day during which the County determines that the Grantee has violated customer service standards pursuant to Section 6(j), except for those standards set forth in Subsections 5 and 6 below: \$200 per violation, treating each failure to comply as a separate violation, following a 7 day cure period, except that such cure period does not apply to customer service standards that themselves provide a time to act or a specific cure period;

(5) For failure to issue refunds or credits pursuant to 47 C.F.R. § 76.309(c)(3): \$200 per violation, treating each failure to comply as a separate violation, following a 7 day cure period;

(6) For failure to meet customer service standards with regard to telephone answering time, time to transfer a call to a customer service representative, or excessive busy signals: if such standards are not met according to the terms in which such standards are established in 47 C.F.R. § 76.309(c)(1)(ii) and 76.309(c)(1)(iv), as such standards may be amended from time to time: \$500 for each quarter in which such standards were not met if the failure was by less than 5%; \$1,000 for each quarter in which such standards were not met if the failure was by 5% or more but less than 15%; and \$2,000 for each quarter in which such standards were not met if the failure was by 15% or more;

(7) For failure to render payment for reimbursement of any franchise expenses, or failure to pay capital grants or expenditures, or liquidated damages: \$100 for each day each such payment is delayed, following written notification by the County;

(8) For failure to file, obtain or maintain the required performance bond or other security instruments in a timely fashion: \$200 per day, following a fourteen day cure period;

(9) For failure to bring into compliance any violation of construction standards specified in Section 5(b) within the appropriate time periods as specified in Section 5(c)(9) of this Agreement: \$200 per violation;

(10) For violation of technical standards established by the FCC or other lawful authority: \$100 per day for each day the violation continues after a thirty-day cure period after the County gives the Grantee notice of such violation;

(11) For failure to restore damaged property: \$50 per day for each day such property is not replaced beyond a ten day cure period, in addition to the cost of the restoration as required in the Communications Ordinance or this Franchise Agreement;

(12) For any other significant violations of this Franchise Agreement or the Communications Ordinance: \$50 per day for each violation for each day the violation is not remedied beyond a thirty day cure period.

(f) Revocation or Termination of Franchise

(1) Upon completion of the term of any Franchise granted under this Agreement, if a new, extended, or renewed Franchise is not granted to the Grantee by the County, the Grantee's right to occupy the Public Rights-of-Way and public land shall terminate, subject to applicable federal law.

(2) The County shall have the right to revoke the Franchise for the Grantee's material violation of this Agreement pursuant to Section 12(1)(2).

(3) To revoke the franchise, the County shall give the Grantee written notice of the default in its performance. If within sixty calendar days following such written notice from the County to the Grantee, or such other period as this Franchise Agreement shall require or the Grantee and the County shall agree, the Grantee has not taken corrective action to the reasonable satisfaction of the County, the County may give written notice to the Grantee of its intent to revoke the Franchise, stating its reasons; provided that no opportunity to cure shall be provided where the Grantee is shown to have defrauded or attempted to defraud the County or its Subscribers in connection with this Agreement or Cable Service in any way that has a material adverse effect on Grantee's provision of Cable Services pursuant to this Agreement.

(4) Prior to revoking the Franchise, the County shall hold a public hearing, after providing thirty days' written notice to the Grantee, specifying its reasons for revoking the Franchise, at which time the Grantee and the public shall be given an opportunity to be heard. Following the public hearing, the County may determine whether to revoke the Franchise based on the information presented at the hearing, and other information of record, or, where applicable, grant additional time to the Grantee to effect any cure. If the County determines to revoke the Franchise, it shall adopt an ordinance that revokes the Franchise and sets forth the reasons for its decision. Unless the ordinance specifies a date upon which the revocation shall take effect, the Franchise shall be revoked upon the Board's adoption of the ordinance. A copy of such ordinance shall be transmitted to the Grantee.

(5) If the County revokes the Franchise, or if for any other reason the Grantee terminates the Franchise, the following procedures and rights are effective:

(A) The County may require the former Grantee to remove its facilities and equipment located in the Public Rights-of-Way or on public land at the former Grantee's expense and to restore such affected sites as required in Section 5(b)(9) or permit the former Grantee to abandon such facilities in place, subject to the provisions of Section 5(b)(14). If the former Grantee fails to remove its facilities within a reasonable period of time after the County orders it to do so, and such removal is necessary to make room for other facilities or to remove potential safety hazards as required by sound engineering practices, then the County may have the removal performed at the former Grantee's and/or surety's expense.

(B) The County may require the former Grantee to continue operating Grantee's Cable System as specified in Section 4(c).

(C) In the event of revocation, the County, in accordance with state law, may acquire ownership of or effect a transfer of Grantee's Cable System at an Equitable Price.

(g) *Condemnation.* This Franchise Agreement shall not limit any authority of the County in accordance with state law to condemn, in whole or in part, the Franchise and/or any other property of the Grantee, provided that the Grantee shall receive whatever condemnation award the Grantee would normally be entitled to recover as a matter of state law. Partial condemnation of the Grantee's Franchise or property shall not terminate this Agreement except in accordance with the terms of this Agreement.