

## Gap Agreement Regarding Provision of IP Video Services By AT&T

This memorializes the agreement ("Agreement") between Pacific Bell Telephone Company, a California corporation doing business as AT&T California ("AT&T") and the City of Foster City ("City") concerning the provision of Internet Protocol ("IP") enabled Video Service ("IP Video Service") by AT&T to City residents over AT&T's communications network facilities in City's public rights of way.

NOW, THEREFORE, the parties hereby agree to this Video Services Agreement.

### 1. AB 2987.

The Parties acknowledge the passage of AB 2987 by the California Legislature on August 31, 2006, and its subsequent execution into law by the Governor on September 29, 2006. The City and AT&T want to bring the benefits of AT&T IP Video Service competition to City residents as soon as possible. Accordingly, AT&T and the City agree that they will voluntarily comply with the following provisions of AB 2987 in their entirety (together with those portions of Sec. 3, § 5830 that define terms in the following provisions), except where otherwise excluded herein, until AT&T files and receives a state franchise under AB 2987 to serve the City:

- Sec. 3, §5860 (concerning the franchise fee);
- Sec. 3, §5870 (concerning Public, Educational, and Governmental programming and support "PEG");
- Sec. 3, §5880 (concerning Emergency Alert System requirements);
- Sec. 3, §5885 (concerning construction and the encroachment permit process);
- Sec. 3, §5900 (concerning customer service and protection), except subsection (k) (concerning renewal of state-issued franchise);
- Sec. 4, §107.7(a)-(e) (to be codified in the Revenue & Taxation Code).

City and AT&T agree that the foregoing provisions of California Law shall govern the delivery of IP Video Services by AT&T to City residents and City shall not impose any additional or different requirements except as authorized under this Agreement. For the purposes of this Agreement, the terms, phrases, words, and their derivations shall have the meaning ascribed to them in AB 2987 unless otherwise provided herein.

### 2. PEG Grant; Fee Recovery.

- a. PEG Grant—AT&T will pay the City a single, non-renewable, non-refundable grant in the amount of Twenty Five Thousand Dollars (\$25,000) ("Grant") in support of PEG Capital needs.

- b. PEG Capital Support Fee Recovery – AT&T at its option may recover the amount of any fee remitted to City in accordance with the provisions of Sec. 3, § 5870(o) of AB 2987.

**3. PEG Channel Capacity.**

The parties shall comply with the requirements of Sec. 3, §5870 of AB 2987; provided, however, that the City hereby provides notice to AT&T effective June 3, 2007 to provide PEG Channel capacity to its residents, and before August 31, 2007, AT&T shall not be obligated to provide any PEG Channel capacity designated by the City.

**4. Term.**

- a. This Agreement shall begin as of the date that it is executed by both parties ("Execution Date"), and shall expire as soon as AT&T receives a state franchise under the terms of AB 2987 to provide video services to City residents. To the extent necessary, this document constitutes the authorization for AT&T to provide video services in the City pursuant to AB 2987, Sec. 3, §§ 5840 and 5830(f). Once AT&T receives a state-issued franchise pursuant to the terms of AB 2987 to provide video services to Foster City residents, this authorization shall immediately terminate and the terms of the state-issued franchise shall govern the delivery of AT&T's IP Video Services to City residents.
- b. AT&T shall apply for a state franchise pursuant to the terms of AB 2987 by May 31, 2007, or as soon as the State Public Utilities Commission is prepared to accept applications, whichever is later. In the event AB 2987 is declared invalid prior to the time AT&T obtains a state franchise pursuant to its terms, this Agreement shall remain in full force and effect unless (i) this Agreement has been superceded by a successor agreement negotiated in good faith by the parties; or (ii) this Agreement has been invalidated in accordance with Applicable Laws. Nothing herein shall be construed to require AT&T to pay a renewal of the Grant or any additional grants during the initial term of this Agreement or in a successor agreement.
- c. The foregoing notwithstanding, AT&T California reserves the right to terminate this Agreement upon 30 days prior written notice to City and, if it does so, it shall discontinue providing IP Video Service in City.

**5. Defense of Certain Claims.**

In the event that the incumbent video service provider(s) in the City files a claim against the City in state or federal court arising out of the fact that the City entered into this Agreement, challenging the lawfulness of this Agreement

and/or seeking to modify its obligations under its existing cable franchise on the basis that the City entered into this Agreement, the Company shall cooperate with the City to provide information that may assist the City in responding to such claim. At the City's request, the Company will intervene in any such action and participate in the defense of any claim. In such event, the Company shall assume, at its expense, the sole defense of the claim through counsel selected by the Company and shall keep the City fully informed as to the progress of such defense. Upon reasonable request by the Company and at the Company's expense, the City shall cooperate with Company in the defense of the claim. At its option and expense, the City may retain or use separate counsel to represent it, including in-house counsel. However, the Company shall maintain control of the defense and resolution or settlement of the claim, except that if the settlement of a claim would adversely affect the City, the Company may settle the claim as to the City only with its consent, which consent shall not be unreasonably withheld or delayed.

#### **6. Insurance.**

Upon the Effective Date or renewal AT&T shall, at its sole expense, take out, and maintain during the life of this Agreement and furnish to the City, a policy of liability insurance as required by the State of California for Workers' Compensation, and a policy of liability insurance described as follows:

a. The amount of the liability insurance shall not be less than the following:

Combined Single Limit Coverage applying to Bodily and Personal Injury and Property Damage: Two Million Dollars (\$2,000,000) per occurrence.

b. The following endorsements shall be attached to the liability policy:

(1) The policy shall cover on an "occurrence" basis, if reasonably available at comparable costs to "claims made" coverage.

(2) The policy shall cover Personal Injury as well as Bodily Injury.

(3) The policy shall cover blanket contractual liability subject to the standard universal exclusions of contractual liability included in the carrier's standard endorsement as to bodily injuries, personal injuries and property damage.

(4) Broad Form property damage liability shall be afforded.

(5) City shall be named additional insured on the policy.

(6) An endorsement shall be provided which states that the coverage is primary insurance and that no other insurance effected by the City will be called upon to contribute to a loss under this coverage.

(7) Standard form of cross-liability shall be afforded.

(8) An endorsement stating that the policy shall not be cancelled without thirty (30) days notice of such cancellation given to City.

c. AT&T shall submit to City documentation of the required insurance including a certificate of insurance signed by the insurance agent and companies named, as well as all properly executed endorsements. City will accept self-insurance in lieu of commercial insurance policies. AT&T shall issue City a statement of self-insurance for general liability (including bodily injury), Workers' Compensation, and automobile liability.

d. AT&T hereby indemnifies City for any damage resulting to it from failure of either AT&T or any subcontractor to comply with this paragraph.

#### **7. Renewal.**

Any renewal of this Agreement shall be performed in accordance with this Agreement and Applicable Laws as defined in paragraph 8 below.

#### **8. Compliance with Laws.**

Throughout the term of this Agreement, the parties shall take all lawful and necessary steps to ensure that their respective performance under this Agreement is conducted in such a manner that complies with all applicable and relevant laws, rules, regulations, codes, permitting requirements and orders of any court or regulatory authority of competent jurisdiction governing the performance of the parties hereunder ("Applicable Laws"). In the event of a final, non-appealable order or ruling that any provision of this Agreement is inconsistent with Applicable Laws as determined by a judicial or regulatory authority of competent jurisdiction, that provision shall have no further force or effect and the parties shall promptly meet to modify such provision so as to eliminate the inconsistency or conflict while keeping any remaining parts of such provision, and of the Agreement, consistent with the original intent of the parties, subject to all applicable legal and regulatory requirements. Nothing in this Agreement shall be construed to restrict, limit, or waive either party's rights or claims asserting or defending against the applicability of any law, rule, regulation, code, permitting requirement or order of any court or regulatory authority.

#### **9. Acknowledgment of Validity of Agreement.**

The parties acknowledge that they have had an opportunity to review the terms and conditions of this Agreement and that under the shared interpretation of current law the parties believe that said terms and conditions are not unreasonable

or arbitrary, and that the parties believe that the City has the power to make the terms and conditions contained in this Agreement.

**10. Force Majeure.**

AT&T shall not be held in default under, or in noncompliance with, the provisions of the Agreement, nor suffer any enforcement or penalty relating to noncompliance or default (include termination, cancellation or revocation of the Agreement), where such noncompliance or alleged defaults occurred or were caused by strike, riot, war, earthquake, flood, tidal wave, hurricane, tornado or other catastrophic act of nature, failure of utility service necessary to operate the System, governmental, administrative or judicial order or regulation or other event that is reasonably beyond AT&T's ability to control.

**11. Execution of Agreement.**

- a. AT&T shall execute and deliver this Agreement within thirty (30) days of its approval by the City Council, unless the time for execution is extended by City. In the event AT&T fails to execute this Agreement, this Agreement shall be null and void.
- b. Upon execution of this Agreement, AT&T and City shall be bound by all the terms and conditions contained herein.
- c. AT&T shall execute and deliver this Agreement in the following manner:
  - i. This Agreement will be properly executed and acknowledged by AT&T and delivered to City.
  - ii. With its acceptance, AT&T shall also deliver any payments required and owed herein.

This constitutes the full and complete agreement between the City and AT&T concerning these matters, and supersedes all prior agreements, understandings, representations, or offers.

CITY OF FOSTER CITY

By:

Ron Cox

Name:

RON COX

Title:

MAYOR

Date:

1.05.07

PACIFIC BELL TELEPHONE

COMPANY d/b/a

AT&T CALIFORNIA

By:

Sylvia Samano

Name:

Sylvia Samano

Title:

Vice President - External Affairs - Bay Area

Date:

12/21/06

*attest:*

*Sherese Calic*

*CITY CLERK*