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**ADMITTED TO PRACTICE IN COLORADO AND TEXAS
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MEMORANDUM

TO: Council President Bennett and Members of City Council
City of Colorado Springs, Colorado

FROM: Ken Fellman, Esq.

cc: Wynetta Massey, City Attorney
Thomas J. Florczak, Deputy City Attorney

DATE: April 24, 2015

RE: Cable Franchise Agreement Renewal with Comcast

Federal law dictates the process and scope of the City's authority to address issues in a cable franchise. In general, City staff, elected officials, and consultants examine the past performance of the cable operator, identify the community's future cable needs and interests, and then determine what franchise terms are appropriate for the citizens and City government. In advance of our discussion with you on May 11th, this memo is intended to describe the overall franchise renewal process, the needs assessment process, the legal framework in which the franchise renewal process will operate, and specific legal issues that are implicated in franchise renewal negotiations.

I. EXECUTIVE SUMMARY

Cable operators have a Federal statutory presumption of an entitlement to franchise renewal. However, an incumbent cable operator must agree to a franchise that meets the cable-related needs of the community. The City staff has undertaken a brief study to help determine those needs, as described below. The City's franchise authority allows it to negotiate for certain franchise benefits like franchise fees, access channels, audit obligations, insurance requirements, violation procedures and others, although Federal law puts limits on how far the City may go in some of these areas. The limits of this authority are also described in this memo. The City also has legal authority to adopt and enforce customer service standards, which are often addressed concurrently with franchise negotiations, but are technically a separate matter, and any amendments to the City's standards will be adopted separately from the new franchise. Key issues in the upcoming negotiations will include addressing the impacts of new technology on the cable system and in particular, Public, Educational and Government Access channels, and making programming on those channels available in high definition and on-demand.

The City and Comcast will negotiate informally in the hopes of agreeing to a franchise that can be presented to Council for approval. This process would be legislative. If the City and Comcast are not able to informally reach agreement on a new franchise, Federal law provides for a structured, formal procedure, which could either lead to a new agreement, or to litigation if the City rejects Comcast's best offer. This statutory "formal" process would involve significant expense and it will be our intent to avoid that process if at all possible. The formal franchise renewal process is a quasi-judicial process, and will be addressed in more detail below.

II. FRANCHISE RENEWAL PROCESS

A. A Brief Description of Cable Franchising.

A cable franchise is a contract between the cable operator and the local government that the cable operator serves. To provide cable services to subscribers, cable companies must locate facilities within public rights of way, either on utility poles or underground. In consideration for a cable operator's right to utilize the City's rights of way the City requires the cable operator to enter into a franchise agreement. Federal law governs what issues can be addressed in that contract.

Franchise agreements cover a wide range of topics including: categories of programming that must be offered to subscribers; compensation paid to the City by the cable company (the *franchise fee*); requirements for provision of public, educational and government access channels (commonly referred to as *PEG channels*) and financial support for capital expenditures related to PEG channels; requirements of compliance with conditions under which work in the rights of way can be conducted; customer service standards; the variety of cable services provided; compliance with federal technical standards; insurance and indemnification; procedures for addressing franchise transfers; procedures for remedying franchise violations; and franchise termination. By law, franchise agreements are non-exclusive, but to date, cities have seen very little competition. As you know, Colorado Springs is one of the exceptions, with CenturyLink and Falcon Broadband providing cable services pursuant to their franchise agreements with the City.

B. Federal Entitlement of Franchise Renewal.

Under federal law, Comcast is *entitled* to a franchise renewal if it has materially complied with the terms of its current franchise, and it offers and has the legal, technical, and financial ability to comply with a new franchise agreement that meets the future cable-related needs of the City. Since Comcast clearly has the capability to comply with almost any franchise condition, the foundational question becomes whether Comcast will agree to a franchise document that will meet the City's future cable-related needs. As described in more detail in Section D below, the City has undertaken a preliminary "needs assessment" to assist the Council in determining the future cable-related needs of the community.

Federal law provides for two types of franchise renewals. The first, and more common, is an informal renewal process. In an informal process, the parties meet and negotiate a mutually acceptable franchise. The informal process is less structured, usually less confrontational, and less costly.

If the City and Comcast are unable to informally negotiate an acceptable franchise, under the federal Cable Act, either party may pursue a formal franchise renewal. To commence a formal franchise renewal proceeding, a cable operator may make a written demand for formal proceedings, or the City may notify Comcast that it is commencing the formal process. Within a very structured and statutorily directed time period, the City will finalize a determination of its future cable-related needs and submit that information to Comcast. Comcast then submits a proposed franchise. The City, within four months of the submission date, must make a preliminary assessment of whether it will accept or deny Comcast's offered franchise. If the City does not accept the proposed franchise, the end result, in all likelihood, is federal court litigation. It is not uncommon however, that even when the parties are proceeding through a "formal" renewal process, they will continue to negotiate informally, and the threat of litigation at the end of the process often leads to an eventual "informal" resolution. As noted above, because the formal renewal process is quasi-judicial, and because we do not know at this point whether we will end up in the formal process, it is staff's recommendation that Council members should refrain from discussing the terms of the franchise and the status of negotiations outside of your Council meetings.

C. Understanding Cable Services, and Federal and State Limitations on City Authority.

Most often, people think of cable services as video programming. As will be discussed below, the City cannot require Comcast to provide specific channels, but may require it to provide certain broad categories of programming. As channel capacity expands, there is more room on the cable system to provide additional programming choices. The City has authority to require a cable system with sufficient capacity to address the community's diverse programming interests.

Federal law authorizes the City to require one or more public, educational or governmental ("PEG") access channels. These are three distinct categories. The City operates government access channels. Operating a channel includes acquiring the capital equipment, developing programming, and staffing. As you probably know, government access channels include programming such as community message boards, City planning and zoning meetings, City Council meetings, and other programming providing information about local issues. This channel may also be used in conjunction with other governmental entities.

Educational access channels are generally used by public schools and higher education for broadcasting school board meetings, athletic activities, performing arts, programming created by students, or other scholastic/educational type events. As you know, these channels are in use by Colorado Springs K-12 and higher education organizations through the Southern Colorado Educational Television Consortium (SCETC).

The general public may also operate a public access channel. At present, there is no public access entity providing video programming in Colorado Springs. When in use, a public access channel should remain separate from the government and educational access channels. Content programmed on government and educational access is controlled by the governmental entity, and can be limited to government and education-related issues. Public access is open to anyone, and the content of the programming is subject to First Amendment protections.

Federal law classifies telephony and internet as “telecommunications services.” To the extent there is regulation of these services, the governmental entity with regulatory authority is either the Colorado Public Utilities Commission or the Federal Communications Commission. These services are not governed by a local cable television franchise. The Colorado General Assembly passed legislation in 1996 that specifically preempts local government from requiring a franchise or otherwise regulating telecommunications service providers. While Comcast provides telecommunications services, the franchise agreement only addresses its cable services.

There are specific *limitations* imposed by federal law. The City may require an upgrade of the cable system to provide a level and quality of cable services and can require that the cable operator meet the technical standards that have been promulgated by the FCC, but cannot require specific transmission technologies (e.g., fiber to the home). The City may not use the franchise to negotiate terms regulating communications services that are not considered cable services under Federal law, such as telephone or Internet services, nor can the City charge franchise fees on non-cable service revenues. The City may not require Comcast to offer particular channels (e.g., ESPN or CNN), but may require Comcast to offer particular programming categories (e.g., sports channels or news channels). Federal law *does* allow the City to adopt customer service standards that may be more stringent than the federal standards, without Comcast’s consent. Because the City has more authority with respect to customer service standards, these standards should be adopted separate from the adoption of the franchise agreement.

The City may require financial consideration, which is usually called franchise fees. These fees are often considered to be rent for the use of the public rights of way. Most cities impose a franchise fee of 5% of the gross revenues received by the cable operator from the operation of cable system and provision of cable services in the community. While some cities use these revenues for a variety of cable-related support, most franchise fees end up as general fund revenue – again, based upon the understanding this is a rental fee for the use of public property. In addition, Federal law allows local governments to require additional consideration for PEG channels (over and above the franchise fee), but limits the use of these PEG funds for capital (and not for operational) expenses. It is common in Colorado for Comcast to pay fifty cents per subscriber per month to local franchising authorities as a PEG fee. Cable operators are allowed to pass through to subscribers the costs incurred in complying with the franchise agreement and with the City’s customer service standards. In addition, federal law allows cable operators to pass through any government imposed fees or taxes to their subscribers. Therefore, the fees that the City may choose to impose will show up on customer bills.

Colorado Springs is very unique in that it has in its past cable franchises, chosen not to impose a franchise fee based upon a percentage of gross revenues. The current franchise imposes a charge of \$1.53 per subscriber, which is classified as a grant to be utilized to support educational and governmental access, telecommunication and information technology programs of the City and SCETC. The City Council will need to decide whether to continue under the current framework, or to include provisions in the new franchise imposing a more traditional franchise fee and PEG fee.

D. Assessing Community Needs to Support Negotiations

City staff initially considered undertaking a comprehensive community needs assessment, which would include a combination of surveys, focus groups, public meetings, web feedback and other methods, to obtain data about PEG usage, citizens' viewership of PEG channels, programming choices offered, customer service, technical issues, and other issues related to the cable system. For some communities, this kind of process (which can be costly) is very important at the outset of negotiations. However, over the past two years, Comcast has concluded new franchise agreements with Denver and Aurora, and has agreed to take a "model" version of those agreements and replicate it in other Colorado jurisdictions, making edits where appropriate to address unique community needs and interests. The Denver and Aurora negotiations took just over two years to complete, and resulted in agreements that were very good for the cities. Colorado Springs staff has reviewed that model agreement and believes it is appropriate to use as a foundation for these upcoming franchise negotiations.

As a result, the City has conducted a more limited needs assessment, interviewing relevant City departments as well as SCETC regarding their cable needs and interests. We do not believe it is necessary to make the additional investment for a more comprehensive needs assessment at this time, since we are comfortable with many of the model agreement's terms. That being said, if we are unable to reach agreement informally with Comcast, the City retains the ability to do a more comprehensive needs assessment at a later date, in order to develop more information to support the City's positions in negotiations. Should we have difficulty reaching agreement with Comcast on key issues through informal negotiations, staff would expect to meet with City Council in executive session to advise on the status of negotiations, seek Council direction on negotiation priorities, and advise on the potential legal implications of pursuing various negotiating strategies.

As noted above, an example of one area where the City does have some legal authority is addressing new technologies and PEG channels. As you probably know, many cable programs can now be viewed on-demand. Comcast has been hesitant to provide on-demand programming for PEG channels. In the relatively new Aurora franchise, Comcast agreed to provide some support for enhancing on-demand programming that is streamed over the internet (and therefore available to anyone with a broadband connection – not just Comcast subscribers). It would *not* agree to provide on-demand PEG programming on its cable system. If Aurora would have tried to force Comcast to make PEG programming available on-demand on the cable system, a court would have looked at how much demand there truly was in the City from subscribers to watch PEG programming on-demand, what the cost would be to make it available in that community,

and the relationship of that cost to the number of subscribers and the general economics of that particular cable system. Aurora actually preferred the benefit of being able to enhance its on – demand web-based programming, as opposed to having its government channel in the cable television on-demand line up. Other Colorado jurisdictions have received this benefit from Comcast in their new franchises over the past year or so.

In addition, many cable channels can currently be viewed in both standard definition (SD) and high definition (HD). Those cable channels that are not currently available on HD will likely be made available in HD format during the term of the next franchise. For a period of time all cities will have some citizens that continue to watch video programming in SD, while others will (or already have) chosen to watch most of their programming in HD. Most cities believe that it is important to make access channels available to subscribers in both SD and HD. Generally, Comcast prefers not to give additional bandwidth to local governments to allow for access channels to be seen in both SD and HD, since Comcast is not paid for that bandwidth by the City or SCETC. However, based upon the new Aurora and Denver franchises, there will be an opportunity to obtain an HD channel for at least some of the City’s access channels. How much bandwidth we will be able to require puts us into the gray area of the law, and if the parties are not able to reach an acceptable compromise, we would be in a situation where a court might have to decide what number of HD channels are reasonable. Because this is new and emerging technology, we have no prior court cases to look to for guidance.

III. NEXT STEPS

Staff is looking forward to obtaining Council feedback and answering Council’s questions on May 11th. After that time we will begin to finalize a proposed draft franchise agreement to reflect the direction provided by Council, and we will begin negotiations with Comcast. Staff expects to check in with Council periodically to advise as to the status of the negotiations and to seek Council direction on issues that may be outstanding from time to time. Our hope would be to bring a recommended agreement to you for approval prior to the expiration of the current franchise on November 7, 2015. However, if at any point in the negotiations, it appears that we are approaching impasse, and the possibility of the formal statutory renewal process may be more likely, we will advise you at that time, and will not pursue a formal renewal process without clear Council direction.

I look forward to discussing these issues with you on May 11th.