

**FUNDING AND REIMBURSEMENT AGREEMENT  
BY AND BETWEEN  
THE CITY OF SAN JOSE  
AND  
COMCAST OF CALIFORNIA II, LLC  
FOR PERMITTING COSTS  
RELATED TO THE PERMITTING OF WIRELINE FIBER OPTIC  
INFRASTRUCTURE IN THE PUBLIC RIGHT OF WAY**

THIS AGREEMENT is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_ 2019, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("CITY"), and Comcast of California II, LLC, a Delaware company authorized to business in the State of California ("COMPANY").

**RECITALS**

**WHEREAS**, COMPANY intends to install and expand its cable system infrastructure (hereinafter "Facilities") within the City of San José. "Cable system" is defined as set forth in Section 522 (7) of Title 47 of the United States Code; and

**WHEREAS**, COMPANY and CITY are entering into this AGREEMENT for the purpose of COMPANY depositing with CITY certain funds (as specified below) that CITY may draw upon when processing COMPANY'S permit applications;

**NOW, THEREFORE**, subject to the terms, provisions and conditions hereinafter set forth, the parties hereto agree as follows:

**1. Payment of Funds.**

**1.1 Payment of CITY's Costs.** COMPANY shall advance funds to pay for CITY PERMITTING costs for work that will be required to install and expand its Facilities (referred to herein as the "WORK"), including WORK performed by CITY's staff.

**1.2 Payment Schedule.**

**1.2.1 Payment.** COMPANY shall make an initial payment with CITY of Two Hundred Thousand Dollars (\$200,000.00) ("Payment") to pay for CITY's permitting costs related to the WORK. The Payment shall be made immediately following execution of this AGREEMENT by CITY and COMPANY.

**1.2.2 Additional Payment.** COMPANY shall make additional payment to CITY of One-Hundred Fifty Thousand Dollars (\$150,000.00) to replenish the Account as necessary pursuant to this AGREEMENT within thirty (30) calendar days after receipt of a written request for additional funds from

the Director of Public Works or the Director of Public Works' authorized designee (the "Designee").

### **1.3 Accounting.**

- 1.3.1 The CITY will establish a Billing Account ("Account") to which costs incurred pursuant to this AGREEMENT will be charged. CITY will bill work against the Account at hourly rates based on CITY's nondiscriminatory direct and indirect costs for the work, including, but not limited to salaries, benefits, overhead and other administrative expenses, as reflected in the Department's schedule of fees and charges approved by City Council resolution and in effect at the time of billing. Costs of any consultants hired by CITY in connection with the scope of the WORK described in Section 2 below shall be billed at the rate actually incurred by CITY, without any markups. (see section 2 below)
- 1.3.2 The CITY will keep records of all funds advanced by COMPANY pursuant to this AGREEMENT and of all expenditures of such funds. If requested by COMPANY, CITY will provide such records to COMPANY in the form of a quarterly computer printout summarizing the deposits and charges to the Account. Within thirty (30) calendar days following the expiration date, as defined in Section 3.1 below, or earlier termination of this AGREEMENT, the Department will submit to COMPANY a final written accounting of the Account.

### **1.4 Refunds.**

- 1.4.1 If this AGREEMENT expires or is terminated as provided herein, either by COMPANY or CITY, the balance of any remaining Payments made by COMPANY that are not required to pay for costs already incurred by CITY in accordance with this AGREEMENT prior to the expiration date or the date of the termination notice, shall be refunded to COMPANY within thirty (30) calendar days of the final accounting pursuant to Section 1.3.2 of this AGREEMENT. CITY shall not refund any funds expended from the Payments prior to the expiration date or the date of the termination notice, nor be responsible for any reimbursement of such expended funds to COMPANY.

### **1.5 Interest.**

- 1.5.1 Interest shall not accrue on any Payment and shall not be paid by CITY in refunding a Payment or any portion thereof.

### **1.6 No Commitment by CITY.**

1.6.1 COMPANY acknowledges and understands that this AGREEMENT is only for the purpose of providing a funding mechanism to allow CITY staff and CITY consultants to perform necessary tasks connected with permitting WORK in the public right of way. COMPANY agrees and acknowledges that this AGREEMENT in no way commits CITY to approving non-compliant encroachment permit requests, nor in any other way commits CITY regarding the WORK.

## **2. Procurement of Consultants.**

2.1 If consultant services are required for the Work, CITY shall request approval from Company prior to selecting and retaining the services of a consultant or consultants ("Selected Consultant") to conduct the WORK. The Selected Consultant may engage sub consultants as approved and deemed appropriate by CITY. CITY shall direct and control the Selected Consultant's services and determine the scope of the WORK to be performed by CITY staff and the Selected Consultant.

## **3. Termination and Expiration.**

3.1 Either COMPANY or CITY may terminate this AGREEMENT by delivering to the other party thirty (30) calendar days' advance written notice of election to terminate. COMPANY's obligations to reimburse CITY for any outstanding amounts due, however, shall survive, and remain enforceable after, the termination or expiration of this AGREEMENT.

## **4. Indemnification.**

4.1 The Company shall indemnify the City, its officers, boards and employees, and save the City harmless from and against all claims, damages, losses and expenses, including attorney's fees, sustained by CITY on account of any suit, judgment, execution, claim or demand whatsoever, arising out of the City's execution and enforcement of this Agreement

4.2 CITY agrees to reasonably cooperate with COMPANY in the defense of any third-party proceeding subject to this indemnification. If CITY chooses to have counsel of its own where COMPANY has already agreed to indemnify and defend the City pursuant to this Agreement, the fees and expenses of the additional counsel selected by CITY shall be paid by CITY.

4.3 COMPANY's defense and indemnification of CITY set forth herein shall remain in full force and effect throughout all stages of litigation including any and all appeals of any lower court judgments rendered in the proceeding.

## **5. Miscellaneous Provisions**

**5.1 Notices.** All notices to be given hereunder shall be in writing and shall be served, either personally or by mail, postage prepaid, to the addresses set forth below, or to any other address provided by one party to the other in writing.

To CITY:                   City of San José  
Development Services Division  
Department of Public Works  
200 E. Santa Clara Street, 5th Floor Tower  
San José, CA 95113  
Attn: Director of Public Works

To COMPANY:   Comcast  
3055 Comcast Place  
Livermore, CA 94551  
Attn: VP of Engineering

The effective date of such written notice shall be the date of personal delivery or the date of receipt by certified mail or three calendar days after mailing in the United States Mail.

**5.2 Entire Agreement.** This AGREEMENT contains the entire understanding between the parties with respect to the subject matter herein. This AGREEMENT supersedes any and all prior representations, agreements, arrangements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this AGREEMENT. This AGREEMENT may not be amended except pursuant to a written instrument signed by all parties.

**5.3 Assignment.** COMPANY shall not assign any interest in this AGREEMENT and shall not transfer any interest in the same (whether by assignment or notation), without the prior written approval of CITY; provided that COMPANY may assign any interest in this AGREEMENT to any entity that is a member of COMPANY or to any successor owner of the Subject Property with notice to CITY but without CITY's consent.

**5.4 Waiver.** The parties agree that waiver by either party of any breach of one or more of the terms, covenants or conditions under this AGREEMENT or any default in the performance of any obligations under this AGREEMENT shall not be construed as waiver by that party of any other term, covenant, condition or obligation; nor shall a waiver of any incident of breach or default constitute a continuing waiver of same.

**5.5 Applicable Law and Venue.** This AGREEMENT shall be governed by and interpreted in accordance with the laws of the State of California. In the event that suit shall be brought by either party to enforce or interpret the terms of this AGREEMENT, the parties agree that venue shall be exclusively vested in the

state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

**5.6 No Third Party Beneficiaries.** This AGREEMENT shall not be construed as, or deemed to be an AGREEMENT for the benefit of, any third party or parties; and no third party or parties shall have any right or action hereunder for any cause whatsoever.

**5.7 No Joint Venture.** Neither this AGREEMENT, nor the reimbursements made hereunder, shall constitute or create any form of association, joint venture, partnership, or cooperative activity of any nature whatsoever for any purpose between CITY and COMPANY.

**5.8 Counterparts.** This AGREEMENT may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same AGREEMENT.

WITNESS THE EXECUTION HEREON on the day and year first hereinabove written.

APPROVED AS TO FORM:

"CITY"

CITY OF SAN JOSE,  
a municipal corporation

\_\_\_\_\_  
ELIZABETH KLOTZ  
Senior Deputy City Attorney

By \_\_\_\_\_  
LEE WILCOX  
Chief of Staff, Office of the City Manager

"COMPANY"

Comcast of California II, LLC, a Delaware  
limited liability corporation

By \_\_\_\_\_  
Print Name: JEFFREY VOTAW  
Title: RVP ENGINEERING