

**TAB C2**

Supplemental Filing:  
The Impact of Cable Modem Service on the Public Right of Way

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This is a supplemental discussion of the burden imposed by cable modem service on the public rights of way (ROW). Contrary to the suggestions made by other submissions in this proceeding, the provision of cable modem service does require a far more elaborate cable system than does video.’

It is simply incorrect to contend, as do some filings, that adding cable modem service to a video-only cable system entails infrastructure and equipment changes only at the headend and subscriber premises (Matt-does this need cite?). On the contrary, significant, costly, and burdensome physical upgrades are necessary to transition a video-only system to advanced two-way services, as is discussed in detail in Columbia Telecommunications Corporation’s (CTC) filing of June 15,2002.

For example, consider the burden imposed by the construction of conduit in the public ROW to house all the additional fiber necessary to offer advanced, two-way services. Most of this fiber, and the conduit, is not necessary in a system that provides only digital and analog video services.

Fiber optic cable must be housed in conduit or must be armored. Unless armored, it cannot be direct-buried, which would be cheaper and less burdensome to the public ROW. The cable industry generally uses conduit to house underground fiber optic cable because conduit provides greater flexibility, scalability, and ease of repair.

The construction of conduit in the public ROW is usually accomplished by trenching (digging a trench down the ROW, laying the conduit in it, and then burying the conduit) or by boring (tunneling under the ROW approximately every 30 feet or more and then linking the tunnels).

The burden on the public ROW is not limited to the actual construction and placement of conduit. Related burdens include locating pull-boxes, vaults, or manholes in the public ROW approximately every 500 feet and at every intersection for the following reasons:

- To provide **for** future access to the conduit;
- To provide for future interconnection sites for the fiber;
- To store cable slack that will enable future repair or relocation;
- To protect cable splices, which have to be in sealed splice enclosures and cannot be direct-buried; and
- To place the conduit under the road.

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<sup>1</sup> This Report refers frequently to “video-only” or “video” cable services. These terms are meant to refer to both analog and digital cable services, including traditional broadcast, pay-per-view, and multiple-channel programming (such as sports events with choice of camera angle or audio).

Pull-boxes and vaults range in size from a small to a large refrigerator. They generally do not enable access other than by hand and allow for only limited storage of slack or splicing.

Manholes tend to be far larger, sometimes as large as a room-size vault. They enable underground entry by cable company personnel in order to enable splicing, cable break-out, storage of slack, and other cable maintenance. Both pull-boxes and manholes are generally accessed through a hand-hole or manhole in the public ROW.

Burying such boxes underground requires digging large holes in the public ROW, frequently in the road itself. Extensive repair is necessary to the public ROW, particularly the roadway, after the construction of conduit. Unfortunately, the repairs are frequently substandard and inadequate to return the public ROW to its pre-construction condition. As a result, the long-term burden of repair and reconstruction falls on the local government and on taxpayers.

**TAB D**

**SUMMARY OF ED WHITELAW ECONOMIC REPORT**  
**Attached as Exhibit C to ALOAP Reply Comments, CS Docket No. 02-52**

Attached as Exhibit C to the ALOAP Reply Comments is the Declaration and Curriculum Vitae of Ed Whitelaw (the “Whitelaw Report”). Dr. Whitelaw holds a Ph.D. in Economics from MIT and is President of ECONorthwest, an economics consulting firm.

The Whitelaw Report explains that even if a cable modem service provider is already paying a fee based on its revenues from providing cable service, economic principles require that the provider pay an additional amount, to reflect the additional value to the provider of the additional use it is making of the rights-of-way. Not charging a fee would distort economic incentives and, from the point of view of society, lead to overconsumption or other wasteful and inefficient uses of the right-of-way.

Sound economics concludes the societal point of view should control. A cable operator may be using the right-of-way very efficiently from its own perspective – *i.e.*, at low direct cost to the cable operator – but that use may at the same time be wasteful from the point of view of other potential users, or the sum total of all users.

Any use by a service provider imposes costs on others, including not only the costs of repairing the roadbed, but less tangible costs such as traffic delays. Inefficient use by one provider may also impose additional costs on other right-of-way users, through unnecessary make-ready, design, modification, and repair costs. The cable operator may be providing many services and using the right-of-way very profitably – but if it is not paying fair market value for that use, society as a whole may be worse off.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of	)	
	)	
	)	
Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52
	)	

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**DECLARATION OF ED WHITELOW, Ph.D.  
IN SUPPORT OF  
REPLY COMMENTS OF ALLIANCE OF LOCAL ORGANIZATIONS  
AGAINST PREEMPTION (“ALOAP”)**

1. I am president of ECONorthwest (“ECO”). ECO provides economic and financial analysis and expert testimony for businesses and government. I am also a professor of economics at the University of Oregon. I received a Ph.D. in economics from the Massachusetts Institute of Technology in **1968**. I have testified in administrative, legislative and Congressional hearings, and in courts in the Pacific Northwest and elsewhere in the country on economic matters. A copy of my curriculum vita is attached hereto as Exhibit 1.

2. The Alliance of Local Organizations Against Preemption (“**ALOAP**”) has retained ECO to evaluate and express an opinion on the pricing structure that many local governments have used to charge providers of cable-modem service for using the local right-of-way (“**ROW**”). **As I** understand it, many municipalities have charged cable operators a fee equal to 5% of the revenues derived from the provision of cable-modem service within their respective communities. **As I** also understand it, many cable operators have agreed to pay this fee in their respective franchise agreements with municipalities in return for franchises that grant the right to provide both cable services and non-cable services. I understand the FCC has issued a declaratory ruling that cable-modem service is not a cable service.
3. **As I** understand it, some cable operators contend that requiring fees to be paid on revenues derived from the sale of cable-modem service would deter roll-out of the service. I also understand that some operators question why localities should be allowed to recover rents based on cable-modem revenues, **as** opposed to recovering rents based on revenues from what the FCC has classified as cable services. Operators have argued that the same facilities are used to provide the cable-modem service as the cable service, and argue that as there is no additional burden on the right of way, there should be no fees on services such as cable-modem service. The engineering assumptions implied by this argument do not affect the economic principles I address in this declaration.
4. Charging a fee to use a city’s ROW makes good economic sense because it forces ROW users to take into account the ROW’s value. The occupation of a finite amount of physical space by cable facilities within the ROW displaces use of that

same space by other facilities. Charging a fee helps ensure that the ROW will be used efficiently, that is, that the ROW won't be misused or wasted. Furthermore, the closer the fee approximates the relevant market price, the more likely the ROW will be used in an economically efficient manner, a fundamental criterion by which economists evaluate the performance of a market and overall social welfare.

5. Not charging a fee, or pricing at an artificially and therefore inefficiently low level, would treat the ROW as if it were a free good. To paraphrase Nobel laureate economist Milton Friedman, there's no such thing as a free ROW. This is particularly obvious given the external costs imposed on third parties by ROW use (traffic delays from repair or installation of ROW facilities, degradation of the roadbed, and so on). More important, free or underpriced access to a city's ROW would fail to impose any market discipline on potential users. Free access or underpriced access would fail to allocate the ROW to its highest and best use, an important social and economic goal.
6. This is easily prevented by charging a rental fee that reflects the ROW as a valuable asset or resource for which there are important and competing uses. Free or underpriced access to a city's ROW would increase the demands on the ROW and place substantial economic burdens on the city through additional inspection, maintenance and construction costs. Free or underpriced access would also increase the costs to other ROW users through unnecessary make-ready expenses, unnecessary design and modification expenses, and unnecessary repairs and disruptions caused by overuse or unnecessary use of the resource.

7. The concept that consumption of public lands should be priced based on the value conveyed is written into Oregon and Federal regulations and guidelines. The Oregon Division of State Lands (“DSL”), the agency responsible for managing state lands including rivers and forests, requires that interested parties pay fair market value for using state property. For example, the rules for granting easements and temporary use permits on trust and non-trust land includes the following language:<sup>1</sup>

[T]he State Land Board, through the Division [of State Lands], has the constitutional responsibility to manage all land ... under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.

[T]he Division is required to manage its Trust Land to ensure that full market value is obtained from any use of this asset.

The Division shall, prior to granting an easement, require an applicant to submit to the Division a compensatory payment for each individual crossing of state-owned land in the greater of:

- (a) One-hundred percent (100%) of the fair market value of the area requested for the easement;
- (b) Two-hundred and fifty dollars (\$250); or
- (c) The highest comparative compensatory payment.

The DSL defines “fair market value” and “comparative compensatory payment” as:

‘Fair Market Value’ is the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable

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<sup>1</sup> State of Oregon, Division of State Lands. “**OR** 141-083-0800 through 141-083-0860 provide guidance for the issuing of easements for fiber optic and other cables on state-owned submerged and submersible land within the Territorial Sea. **OR** 141-122-0010 through 141-122-0110 are the rules for granting easements and temporary use permits on Trust and Non-Trust Land.” <<http://statelands.dsl.state.or.us/easements.htm>>

knowledge of the relevant facts concerning the property.

‘Comparative Compensatory Payment’ is the amount of money paid for an easement to the owners of similar land adjacent to, or in the vicinity of Division-managed parcels.

A report by Springsted Incorporated’ addresses the concept of the value of a municipality’s ROW:

In some cases, the demand [for ROW access] threatens to exceed the limited available space in the public right-of-way. Uncontrolled use of the public right-of-way for utility placement increases construction and installation costs of future users and reduces availability of limited space. The space above and beneath the surface of the public right-of-way is a limited resource which has value to public investor-owned utilities, as well as to other for-profit service providers.

On this topic, the Public Utility Commission of Oregon notes:

The streets, alleys and highways of Oregon’s municipalities, over and through which the access lines of the telecommunications utilities run, are real property with economic values. Private owners normally charge for the use of their property, and municipalities are either owners of municipal streets, alleys and highways or they hold them in trust for their citizens. Telecommunications utilities make exclusive use of these streets, alleys and highways, and there does not seem to be any reason why municipalities should not charge, and utilities pay, for that use.

8. The federal government has also traditionally recognized that the ROW has economic value and users of the ROW should pay for access. A report by the National Ocean Service on the fair market value for a permit to allow a fiber-optic cable to pass through national marine sanctuaries states:<sup>4</sup>

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<sup>2</sup> Springsted Incorporated. *Public Right-of Way Cost Recovery Plan Mid-America Regional Council*. May 1998. Page III-2.

<sup>3</sup> Public Utility Commission of Oregon AR 218. Order No. 90-1031. June 29, 1990, Page 5.

<sup>4</sup> National Ocean Service. *Final Report Fair Market Value Analysis For A Fiber Optic Cable Permit In National Marine Sanctuaries*. National Marine Sanctuaries Program. December 2000. Page 6.

According to the NMSA [National Marine Sanctuaries Act], the Secretary [of Commerce] may assess and collect a fee that includes the cost of issuing the permit, as well as monitoring and other costs incurred as a result of the permitted activity. In addition, the fee must include ‘an amount which represents the fair market value of the use of the sanctuary resource.’

The appraisal literature’ describes a number of methods of calculating the market value of the ROW. I describe four methods:

**A.** Land-based appraisals calculate the value of a ROW based on the value of land adjacent to the ROW. This is sometimes referred to as the across-the-fence (“ATF”) method. **A** variation on the ATF method acknowledges, that because the ROW provides a continuous corridor, ROW has a higher value than the disparate, unassembled adjacent parcels. This corridor value “typically exceeds ATF appraisals by a factor of two to six. In more recent transactions involving fiber optic corridors, the prices paid exceed the **ATF** land values by much higher multiples.”<sup>6</sup>

**B.** The willing-buyer-and-willing-seller method attempts to replicate free-market negotiations over the value of the ROW. The seller considers his or her opportunity costs, or the value he **or** she could earn from other uses of the land. The buyer considers the income-generating potential of the ROW and the costs of alternative routes. **As** the potential revenue from using the ROW increases, such as the addition of cable-modem services, a willing buyer would naturally pay more to use the ROW.

**C.** Income-based methods of valuation start with the fact that a variety

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< [http://www.apwa.net/documents/ResourceCenter/Fair Market Value Analysis.pdf](http://www.apwa.net/documents/ResourceCenter/Fair_Market_Value_Analysis.pdf) >

<sup>5</sup> *Ibid.* Pages 7-13.

<sup>6</sup> *Ibid.* Page 9-10.

of assets contribute to a firm's income or value. A ROW may be one of many income-generating assets from which a firm would expect to earn a reasonable return. The market value of the ROW is based on the return the asset generates for the firm.<sup>7</sup>

D. The comparable-transactions method estimates market value based on sales of similar ROW. While it's difficult finding comparable properties, past transactions can provide a general guide to values

9. The US Bureau of Reclamation ("BOR) conducted a study of market values of ROW for fiber-optic lines. The report found that valuations conducted by government agencies typically underestimated the true market value of the ROW.

A report that summarized the results of the BOR analysis states:<sup>8</sup>

The BOR report noted that government valuation of fiber optic easements ...had not responded to the changing market conditions. Traditional across-the-fence or 'fee simple' values were the most common approach. In the private sector, however, prices were being negotiated based on market factors such as the convenience of a particular geographic route, the income stream generated, and proximity to a metropolitan area. The report concluded that 'supply and demand influences have driven the value of this type of easement to levels way beyond the fee-simple value.'

Examples of actual market values of municipally owned ROW include:

A. Denver's ROW has an acquisition value of \$5.5 billion and a rental value of \$483 million.<sup>9</sup>

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<sup>7</sup> Nunn, Samuel and Rubleske, Joseph. Pricing the Use of Public Rights-of-way. *Public Works Management & Policy*. 3:4, April 1999. Pages 304-316.

<sup>8</sup> *National Ocean Service, supra*, Page 26.

<sup>9</sup> City of Dayton, Ohio. *Telecommunications Report and Plan* (no date) Page 17 < <http://www.apwa.net/documents/organization/DaytonTelecomRptPln.pdf> >

B. The Massachusetts Turnpike Authority sold a 135-mile ROW along Interstate 90, which it built and maintains, to a fiber-optic company for \$50 million.<sup>10</sup>

C. According to information from the City of Portland, the approximately 2,000 miles of ROW that makes up the City's transportation system has a replacement value of \$2.63 billion, measured in year 2000 dollars.<sup>11</sup>

10. Imposing a fee that is a percent of gross revenues is a reasonable way to price the ROW. Calculating the market value of ROW access using gross revenues has advantages over alternative methods. It is straightforward and has low transaction costs.<sup>12</sup> Both the municipality and the service provider can resolve the amount owed with minimal accounting and auditing. And the price paid relates directly to the value conveyed to the service provider.

11. Moreover, as I stated previously, calculating the market value of ROW as a percentage of gross-revenue is an accepted appraisal technique. Furthermore, it meets the generally accepted standard in economies for efficient compensation in exchange for goods or services, namely, a price that reflects the value of the good or service to the buyers and sellers. ROW, like other real estate assets, conveys value to occupants and other users. A service provider's use of a city's ROW conveys or adds value to that provider.

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<sup>10</sup> *National Ocean Service, supra*. Page 26.

<sup>11</sup> City of Portland, Oregon. *Portland Transportation System Status, Condition & Value*. July 2000.

<sup>12</sup> *Nun and Rubleske., supra*

12. It is my understanding that cable-modem services require more elaborate cable systems than does video-only cable service, increasing the so-called “footprint” on any ROW.<sup>13</sup> Even if that were not the case, the increased revenue generated from the addition of cable-modem services passing through the public ROW would justify higher fees based on the economic analysis summarized in this declaration. Also, since the percent underlying the fee remains constant across different levels of revenue, the fee doesn’t place new firms, whether potential or actual entrants to the industry, at a cost disadvantage relative to established firms, and therefore doesn’t qualify as a barrier to entry that would delay or prevent the development of additional broadband services.

### **Verification**

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on August 1, 2002, in Eugene, Oregon.

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**Ed Whitelaw**

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<sup>13</sup> Columbia Telecommunications Corporation. *The Impact of Cable Modern Service on the Public Right of Way*. June 2002. Page 1.

# **TAB E**



## **IMPORTANT LEGAL NOTICE**

INCLUDED IN THIS MONTH'S BILLING STATEMENT IS A REVISED VERSION OF AT&T BROADBAND'S NOTICE TO CONSUMERS REGARDING POLICIES, COMPLAINT PROCEDURES AND DISPUTE RESOLUTION (THE "NOTICE").

THE NOTICE CONTAINS IMPORTANT INFORMATION CONCERNING YOUR USE OF AT&T BROADBAND'S SERVICES. AMONG OTHER CHANGES, WE HAVE IMPLEMENTED A NEW COMPLAINT RESOLUTION PROCEDURE INCLUDING PROVISIONS FOR FINAL AND BINDING ARBITRATION OF DISPUTES. THE REVISED DISPUTE RESOLUTION IS FOUND IN SECTION 10 OF THE NOTICE. THESE PROVISIONS AFFECT LEGAL RIGHTS THAT YOU MAY HAVE HAD PREVIOUSLY. IT IS IMPORTANT THAT YOU READ THE NOTICE CAREFULLY.

X76006 8772-1000

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# IMPORTANT NOTICES TO OUR CUSTOMERS

Your Local Cable Company's Policies & Practices  
Notice to Customers Regarding Policies, Complaint Procedures & Dispute Resolution



Book II Revised 8/02 Reg. X75456F 8772-1000 (5010-5970)

## NOTICE TO CUSTOMERS: THIS DOCUMENT CONTAINS IMPORTANT INFORMATION REGARDING OUR POLICIES AND PRACTICES, INCLUDING COMPLAINT PROCEDURES, ARBITRATION AND DISPUTE RESOLUTION

This notice is being provided to you, as a new or existing customer of ATBT Broadband, LLC, to inform you of the terms and conditions governing your cable service. In addition, this notice is being provided to you in order to comply with the Company's obligations under the rules of the Federal Communications Commission (FCC), which require us to inform our customers at the time of installation and at least annually thereafter of the current terms and conditions governing our service, including with respect to the Company's billing and complaint procedures, procedures for the resolution of complaints about television signal quality, installation and service maintenance policies and the conditions of subscription to programming and other services. Other information relating to the products and services which we offer, the prices, options and channel positions of programming services we offer and instructions on how to use our cable services are provided to you at installation and/or from time to time during the year under separate cover. Please read this document carefully.

For those of our customers receiving service through commercial accounts, bulk rate arrangements with multiple dwelling owners, or similar arrangements, some of the policies, procedures and services herein may not apply. Please refer to the terms and conditions of documents reflecting such separate arrangements. Where such documents are inconsistent with the policies, procedures and information relating to service set forth herein, the terms and conditions of such separate arrangements shall apply.

### AT&T BROADBAND'S POLICIES AND PRACTICES

The following Policies and Practices, set forth below, are terms and conditions that apply to you when you accept our cable television and other cable Services. We may change them in the future and will notify you if that occurs. We will continue to review our Policies and Practices as part of our commitment to continually review and improve the quality of Services we provide. We will send you a written, electronic, or other appropriate notice informing you of any changes and the Effective Date. If you find the change unacceptable, you have the right to cancel your Service. However, if you continue to receive Service after the Effective Date of the change, we will consider this your acceptance of the change.

### 1. DEFINITIONS

As used in these Policies and Practices:

"We", "Company", "us", or "our" means AT&T Broadband, LLC and all affiliated entities using the brand name "ATBT Broadband", including your local cable company, its employees, authorized agents, and its parents, subsidiaries and affiliated companies.

"You", "pur" or "Customer" means the customer identified in the work order that was signed when you began your cable TV service and any other person using the Services provided to you or authorized by you to access or modify your account.

"Home" means the place you live, including a single-family home, apartment, other residence, or any other type of dwelling unit, where your Service is installed.

"Service(s)" means the cable TV programming and any other cable service we provide to you, and cable Internet access.

"Hourly service charge" means the hourly charge you pay us for certain services. The hourly service charge is calculated using the rules and regulations of the Federal Communications Commission ("FCC"). It is designed to recover the costs of servicing, installing and maintaining customer equipment.

"Installed" means either installed or activated.

"InsideWire" or "Inside Wiring" means the cable that runs inside your home to a point 12 inches outside of your home, and includes any extra outlets, splitters, connections, fittings or wall plates attached to it.

"Equipment" means one or more of the following: cable modem, digital consumer terminal or digital receiver ("DCT"), converter, converter-descrambler, remote control unit, security device, addressable control module, A/B switch, coaxial cable ("cable") which is not inside wiring, parental lock-out device, or any other device installed in or around your home, whether or not provided by us, necessary or convenient for you to receive cable TV programming or other Services from us. Inside wiring is not Equipment.

### 2. PAYMENT FOR SERVICE

If you are a new customer, we may conduct a customer risk assessment and require a deposit before we install service. AT&T Broadband shall not discriminate in the application of its local risk assessment and deposit policy on the basis of race, color, sex, creed, religion, nationality, sexual orientation, or marital status. Any risk assessments conducted by either AT&T Broadband or its third party credit bureau will be done in conformance with the requirements of all applicable state or federal laws.

otherwise agreed. Charges for Service start within 14 hours after Service is installed. The charges for one month's Service, any deposits, and any installation or equipment lease fees are payable when Service is installed. After that, we will bill you each month in advance for Service (except for pay-per-view movie or events, which are sometimes billed after they are provided to you).

The bills you receive will show the total amount due and the payment due date. You agree to pay us monthly, in full, by the payment due date for that Service and for any other charges due us, including any administrative late fee(s) and related fees, charges and assessments due to late payments or nonpayments, and any returned check fees, plus other separate and additional charges as described below.

If we do not receive your payment by the due date stated on the bill, you may be charged such fees, charges and assessments, plus the other separate and additional charges.

The administrative fee(s), charges and assessments related to late payment and nonpayment are intended to be reasonable advance estimates of costs resulting from late payments or nonpayments of our customers. We will tell you the amount of these fees and other separate or additional charges at or before the time you subscribe to and receive our Services, prior to the time we implement or assess new ones, and in our annual mailings to you hereafter. You may avoid these fees and other separate or additional charges relating to late payment and nonpayment by making sure that your payment is received by us on or before the due date on the bill. If your payment is not received by the due date on the bill, you agree to voluntarily pay these fees and any other separate and additional charges, fees, and assessments as a condition of receiving our Services.

We do not anticipate that you will make partial payments or pay your bill late, and the administrative late fee(s) and other related charges, fees, and assessments related to late payment and nonpayment are set in advance because it would be difficult to know in advance: (a) whether or not you will pay your bill on time, (b) if you do pay late, when you will actually pay your bill, if ever, and (c) what costs we will incur because of your late payment or nonpayment. We do not extend credit to our customers and the administrative fee(s), related fees, charges and assessments are not interest, a credit service charge or a finance charge. Our late fee practices may be revised to comply with applicable law.

Charger for your Service may be billed in you together with other Services that you receive from us or our affiliated companies. Payment of any such bill for multiple Services is due in full on the indicated payment due date. Any failure to pay such bill in its entirety after the due date may result in administrative or late fees and/or disconnection of Service with respect to any or all of the Services billed. Any partial payment of a bill will be allocated by us among and between such Services and amounts charged at our discretion, subject only to applicable law.

If you change the Services you receive, we may charge you a change of service fee such as upgrade or downgrade charge. The amount of such fee may vary by office location. If you have any questions, please contact your local cable company identified on your bill in your monthly billing mailings or ask the representative you talk to when requesting a change in Service. A listing is also provided to our customers annually in a mailing or bill stuffer.

You may pay your bill by mailing payment to the address specified on your bill. We do not assume the risk of undelivered mail. Payment shall be deemed made on the business day received by us, except that, if payment is received on a day that is not a business day, it shall be deemed received on the next business day. If we have an office that we have designated as a payment center in your area, you may deliver your payment to the payment center, and it will be deemed received when delivered or, if not on a regular business day, on the next such day. If our representative collects payment from you at your home, there may be an additional charge for that service.

You agree to pay all taxes, franchise fees, and other charges, if any, which are now or in the future may be assessed because you receive our Service.

those to our attention within six (6) months of the time you receive a bill for which you are seeking correction, unless applicable law provides for a longer period which cannot be waived or otherwise modified.

Payments received from you will be deemed to be paid volum

**3. COMPANY CHANGES IN SERVICES AND CHARGES**  
Subject to applicable law, we have the right to change our Services, Equipment and our prices or fees, at any time. We also may delete, add to or otherwise change the Service provided on Service or other levels of Service. If the change affects you, we will provide you notice of the change and its Effective Date. The notice will be provided on your monthly bill, as a bill insert, in a newspaper or other reasonable method of communication. If you find the change unacceptable, you have the right to cancel your Service. However, if you continue to receive Service after the Effective Date of the change, we will consider this your acceptance of the change. Please take the time to read the monthly messages and to review your bill carefully to make sure your name and address are correct. You will generally be billed the same time each month.

After notice to you of a redefining of our Services or a price increase, you may obtain changes in service tiers at no additional charge. Changes by you of the Services you receive may result in downgrades or change of service charges. Please refer to the Services Price List we have supplied to you for details of the number on your monthly bill if you have questions. A list is also provided to our customers annually in a mailing or bill stuffer.

#### 4. TERMINATION OF SERVICE

You may not assign or transfer the service without our written consent.

The provisions of these Policies and Practices, including the dispute resolution process (Section 10) shall survive termination, expiration of your relationship with the Company, your termination of Services, or any other relationship between us.

a. Voluntary Termination. Unless you have otherwise agreed where you have agreed in advance to receive Service over a period of time, you have the right to cancel your Service at any time by giving us notice. We will refund any amount to you approximately thirty (30) days of the later of (i) the date you give us notice of the discontinuance of Service or (ii) the return of any equipment you may have.

b. Involuntary Termination/Effect on other AT&T Services. To the extent applicable law, if you fail to pay your bill when it is due, we may, without limitation, terminate your Service or any other Services included within your bill. We may also, without limitation, require you to pay all past due charges, an installation charge, a deposit, and a minimum of one month's advance charges before we reconnect Service. Further, if you do not reconnect, any rental equipment will be returned to us. A handling fee may be charged for returned checks.

In either termination event, if you have a payment credit for your Service (including, without limitation, an unreturned security deposit or prepayment) at the time of your termination of service, such credit will be set off against any amounts which you owe us for your Service or remittance to you.

#### 5. EQUIPMENT

Except for the inside wiring which we consider your property, all equipment installed by us or other third parties, unless purchased by you, belongs to us and we may, at our option, supply new or replacement equipment to you.

You must have our prior written consent to sell or give away our Equipment, and our Equipment may only be used in your home.

If you cease to be our customer, you are responsible for returning our Equipment to us or our designee. If you move, do not leave our Equipment in your vacant home or with anyone else. Our Equipment must be returned to us or one of our representatives in your area.

ORIGINAL

normal wear and tear excepted, or you will be charged the amount set forth in the current Products and Services Price List, or the revised amount of which you have subsequently been given notice, or if no amount has been specified for the particular model of Equipment involved, or replacement costs for such unreturned Equipment

You are responsible for preventing the loss of or damage to our Equipment within your home. We suggest that our Equipment in your possession be covered by your homeowners, renters, or other insurance. You will be directly responsible for repair, replacement and other costs, damages, fees and charges if you do not return our Equipment to us in an undamaged condition.

If you have us repair or maintain the Inside Wiring, we will charge you additionally, either by the hour or flat fee, for that service. We are not responsible for problems with the operation of your television or television-related equipment. We do not service television receivers or any other television-related equipment (such as VCR's, home antennas, or other cable-compatible equipment) not owned by us, when it is attached to the cable or Equipment.

None of the Equipment supplied by us nor any of our cable placed outside your home or property in connection with the installation of the Equipment and service shall be deemed fixtures, or in any way part of your real property, unless you purchase our cable to the extent permitted by applicable law when Service ends. The Equipment supplied by us may be removed by us, at our option, at any time during or following the termination of your Service, and you agree to allow us access to your home for such purposes.

We consider Inside Wiring to be your property, regardless of who may have installed it. Unless otherwise agreed upon by Company and you in writing, you will continue to be responsible for the repair and maintenance of the Inside Wiring. You may install Inside Wiring, such as additional cable wiring and outlets. Regardless of who does the work, the internal wiring within your home must not interfere with the normal operations of your local cable system. Inside Wiring maintenance may not be your responsibility if you rent your home. Contact your landlord or building manager to determine responsibility.

**NOTICE OF AVAILABILITY OF CONVERTERS FOR ADDITIONAL OUTLETS.**

Subscribers who install their own additional receiver connections may not be able to receive all stations carried on our cable system without additional equipment. For those television sets that are not truly compatible with the cable system, some television stations may not be receivable without additional equipment.

**6. ACCESS TO CUSTOMERS' HOMES**

You authorize us or our designees to enter into your home, in your or your representative's presence, or upon your property during normal business hours or by appointment, to install, inspect, maintain, replace, remove or otherwise deal with the Service and Equipment supplied by us. This authorization includes allowing us or such designee to be on your property outside your home at reasonable times even if you are not at home. You authorize us or our designee to make connections and perform other tasks that are necessary or desirable to enable us to provide Service to you or others, including connecting and making necessary attachments to your Inside Wiring. If you are not the owner of your home, you are responsible for obtaining any necessary approval from the owner to allow us into your home to perform the functions specified above. In addition, you agree to supply us or our designee, if we ask you to, with: (a) the owner's name, address and phone number; (b) proof that you may give us access on the owner's behalf; or (c) consent from the owner of the home. You can be assured that our employees or designees are easily identified by their I.D. badges and our vehicles are clearly marked so they're easy to spot.

**7. PRIVATE VIEWING OF UNAUTHORIZED SERVICE AND USE OF EQUIPMENT**

We provide Service to you for your private home viewing, use and enjoyment. You agree that the programming provided over the cable system will not be viewed in areas open to the public. The programming may not be rebroadcast, transmitted or performed, nor may admission be charged for its viewing without first obtaining written consent, in advance, from us and our programming supplier(s). This consent may be withheld at the sole discretion of either of us.

Your local cable company may not have the right to distribute pay-per-view programming to commercial establishments. You may not order or request pay-per-view programming for receipt, exhibition or taping in a commercial establishment. You may neither exhibit nor assist in the exhibition of pay-per-view programming in a commercial establishment unless explicitly authorized to do so, in advance, by us and our program provider(s). You may not move your converter to another location or use it at any time at an address other than your home or location where Service was installed by us without our prior written authorization. If you fail to abide by this restriction, you will be held liable for any claims made against you or Company on account of any unauthorized commercial exhibition.

You agree not to attach any unauthorized device to our Equipment. If you make any unauthorized connection or modification to the Equipment or any other part of the cable TV system, you will be in breach of these Policies and Practices, and we may terminate your Service and recover such damages as may arise as a result of your breach.

Much of the Equipment necessary to receive our Services is available both from us and others. Regardless of whether you purchase such Equipment or lease such Equipment from us, you are responsible for assuring that such Equipment does not interfere with the normal operations of our local cable system and other communications systems and devices. For example, you agree not to install anything to intercept or receive or to assist in intercepting or receiving, or which is capable of intercepting or receiving any Service offered over our cable system, unless specifically authorized to do so by us. You are responsible to pay for all Services received or otherwise provided to your household. You also agree that you will not attach anything to the Inside Wire or Equipment, whether installed by you or us, which singly or together results in a degradation of our cable system's signal quality or strength. You may not attach any device or equipment to your Inside Wiring in a way that impairs the integrity of our local cable system, such as creating signal leakage, which may cause a violation of government regulations, or attaching devices or equipment which, alone or together, result in a degradation of signal quality. Further, Services or signals provided by us which are carried on or transmitted through the Inside Wire or Equipment provided by us may not be commingled with signals or services provided by others.

We can recover damages from you as provided by applicable law for tampering with any of our Equipment or any other part of our cable system or for receiving unauthorized service.

You must return our Equipment when you are no longer a customer. In the future, you may also choose to buy Equipment from an independent store. However, analog converters with descrambling capabilities should only be obtained from us. In fact, should you see advertisements for cable converters that have descramblers in them (so-called "pirate boxes" or "black boxes"), you should understand that these devices may be illegal to sell or use, unless authorized by us. Because of the need to protect our scrambled Services, we will not authorize the use of any analog converter/descrambler not provided by us. A digital converter/descrambler purchased at a retail store must be authorized by us through the use of a special security device. People who use illegal converters/descramblers may be stealing cable service. This practice may unfairly result in increased prices to our honest customers.

**8. LIMITED 30-DAY WARRANTY AND LIMITATION OF LIABILITY**

EXCEPT AS EXPLICITLY SET FORTH IN THE TERMS AND CONDITIONS OF SPECIFIC SERVICES WE PROVIDE TO YOU, WE WARRANT FOR A PERIOD OF 30 DAYS FROM THE DATE OF OUR INSTALLATION OR REPAIR AT YOUR HOME THAT OUR SERVICE AND THE EQUIPMENT WE HAVE INSTALLED OR REPAIRED WILL MEET ACCEPTED INDUSTRY STANDARDS AND BE FREE FROM DEFECTS IN MATERIALS OR WORKMANSHIP. IF YOU REPORT ANY FAILURE TO US WITHIN THAT 30-DAY PERIOD, WE WILL REPERFORM THE NONCONFORMING SERVICES AND REPAIR OR REPLACE THE NONCONFORMING EQUIPMENT. SUCH REPERFORMANCE OR REPAIR OR REPLACEMENT OF NONCONFORMING EQUIPMENT SHALL CONSTITUTE OUR ENTIRE LIABILITY AND YOUR SOLE REMEDY UNDER THIS WARRANTY, WHETHER CLAIMS OR REMEDIES ARE SOUGHT IN CONTRACT OR TORT (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE, STRICT LIABILITY, OR OTHERWISE).

THE FOREGOING WARRANTIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN OR IMPLIED, IN FACT OR IN LAW, WE, TO THE EXTENT PERMITTED BY APPLICABLE LAW, DISCLAIM ANY AND ALL WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

EXCEPT AS EXPRESSLY REQUIRED BY APPLICABLE LAW, WE WILL NOT BE LIABLE FOR ANY DELAY OR FAILURE TO PERFORM OUR OBLIGATIONS, INCLUDING INTERRUPTIONS IN SERVICE, IF SUCH DELAY OR NONPERFORMANCE ARISES IN CONNECTION WITH ANY ACTS OF GOD, FIRES, EARTHQUAKES, FLOODS, STRIKES OR OTHER LABOR DISPUTES, UNUSUALLY SEVERE WEATHER, ACTS OF ANY GOVERNMENTAL BODY, OR ANY OTHER CAUSE BEYOND OUR REASONABLE CONTROL.

THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS.

IN NO EVENT SHALL WE OR OUR EMPLOYEES OR AGENTS HAVE ANY LIABILITY FOR PUNITIVE, TREBLE, EXEMPLARY, SPECIAL INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES RESULTING FROM OUR PROVISION OF OR FAILURE TO PROVIDE AN EQUIPMENT OR SERVICES TO YOU. OR FROM ANY FAULT, FAILURE, DEFICIENCY OR DEFECT IN SERVICE, LABOR, MATERIALS, WORK OR EQUIPMENT FURNISHED TO YOU. OR FROM OUR BILLING, ADVERTISING OR OTHER PRACTICES WHICH ARE IN ANY WAY RELATED TO OUR OFFERING OR PROVISION OF SERVICES OR EQUIPMENT TO YOU. SUCH LIMITATION OF LIABILITY APPLIES IN ALL CIRCUMSTANCES, REGARDLESS OF WHETHER SUCH DAMAGES MAY BE AVAILABLE UNDER APPLICABLE LAW, AND THE PARTIES HEREBY WAIVE THEIR RIGHTS, IF ANY, TO RECOVER ANY SUM DAMAGES.

YOUR SOLE AND EXCLUSIVE REMEDIES UNDER THIS AGREEMENT ARE AS EXPRESSLY SET FORTH IN THIS AGREEMENT, UNLESS APPLICABLE LAW PROVIDES THAT CERTAIN REMEDIES, DAMAGES AND/OR WARRANTIES CANNOT BE WAIVED, LIMITED OR OTHERWISE MODIFIED. IF CERTAIN REMEDIES, DAMAGES AND/OR WARRANTIES CANNOT BE WAIVED, LIMITED OR OTHERWISE MODIFIED, THE LIABILITY OF THE COMPANY AND ITS AFFILIATES IS LIMITED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

## 9. CUSTOMER COMPLAINT PROCEDURES

If you have any complaint regarding the Service, including billing service and quality of the television signals we deliver, you should contact us at the telephone number on your monthly bill or in writing to inform us. If you can see images or hear sound from scrambled premium or adult channels that you do not subscribe to, you may have these channels blocked free of charge. We also maintain a local business office that is open weekdays, except holidays, for customer visits. We will promptly try to resolve the problem if you are dissatisfied with our resolution of the complaint; you may notify the responsible official for your community (please refer to your cable bill for the agency's name and address).

We maintain a toll-free telephone access line that will be available to you 14 hours a day, seven days a week, every day of the year. When you call about a service problem, a customer service representative (CSR) will attempt to determine the nature of the problem. If possible, the CSR will help you resolve the problem over the telephone. If the problem cannot be resolved during the call, the CSR will schedule a service technician to visit your home. If our workload permits, the service technician will be dispatched the same day. Our CSRs and service technicians are well-trained and have authority to attempt to resolve a customer's problem, including replacement of any non-operating equipment in order to provide quality service.

We offer an "appointment window" for installation, service calls, or other installation activities that is either a specific time, or, at a maximum, a four-hour time block during normal business hours. We commit to a *pori*W not cancel our appointment with you after the date of business in the business day prior to a scheduled appointment. If we are running late for an appointment, we will attempt to contact you and will, as necessary, attempt to reschedule to a time that is convenient for you.

Emergencies that affect signal quality, such as fallen utility poles, violent storms or very cold weather, may interfere with reception of cable Service. We are committed to have one of our crews promptly correct

outages or other service-related problems occurring as a result of an emergency situation. We pledge a prompt response at any time if a large area of the system is experiencing technical difficulties.

We will maintain complaint records for at least a one-year period. In addition, those records will be available for inspection by the franchise authority or the FCC.

We urge you to call us at the phone number printed on your bill any time you have questions or concerns about your Service, including VCR hookup questions or problems.

If you are unsatisfied with our handling of your complaint, you may contact the local franchising authority. The address of the responsible officer for your franchising authority is noted in section 15.

## 10. MANDATORY AND BINDING ARBITRATION

IF WE ARE UNABLE TO RESOLVE INFORMALLY ANY CLAIM OR DISPUTE RELATED TO OR ARISING OUT OF THIS AGREEMENT OR THE SERVICES PROVIDED, WE HAVE AGREED TO BINDING ARBITRATION EXCEPT AS PROVIDED BELOW. YOU MUST CONTACT US WITHIN ONE (1) YEAR OF THE DATE OF THE OCCURRENCE OF THE EVENT OR FACTS GIVING RISE TO A DISPUTE (EXCEPT FOR BILLING DISPUTES WHICH ARE SUBJECT TO PARAGRAPH 3, RATES AND CHARGES, ABOVE). OR YOU WAIVE THE RIGHT TO PURSUE A CLAIM BASED UPON SUCH EVENT, FACTS OR DISPUTE.

THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS SIMILARLY SITUATED UNLESS YOUR STATE'S LAWS PROVIDE OTHERWISE.

As the first step in the arbitration process, you may select an arbitration organization from the choices below to preside over your dispute with the Company:

a) American Arbitration Association ("AAA")  
335 Madison Ave., Floor 10  
New York, NY 10017-4605  
1-800-778-7879  
www.adr.org

AAA will apply the Supplementary Procedures for Consumer-Related Disputes and the Consumer Dispute Resolution Procedures in arbitrating claims between you and the Company.

b) Judicial Arbitration & Mediation Service ("JAMS")  
1920 Main Street, Suite 300  
Irvine, CA 92614  
(949) 224-1810  
www.jamsadr.com

JAMS will arbitrate your dispute with the Company under either the Streamlined Arbitration Rules & Procedures or the Comprehensive Arbitration Rules & Procedures, depending on the amount of the claim in dispute.

c) National Arbitration Forum ("NAF")  
P.O. Box 50191  
Minneapolis, MN 55405-0191  
1-800-474-2371  
www.arbitration-forum.com

NAF will resolve all disputes brought before it using the NAF Code of Procedures.

The arbitration will take place at a location, convenient to you, in the area where you receive service from us. The Company will pay for all reasonable arbitration filing fees and arbitrator's costs and expenses, except that YOU ARE RESPONSIBLE FOR ALL COSTS THAT YOU INCUR IN THE ARBITRATION, INCLUDING, BUT NOT LIMITED TO, YOUR EXPERT WITNESSES OR ATTORNEYS. We have agreed that a single arbitrator will resolve the dispute. Moreover, participating in arbitration may result in limited discovery.

WE HAVE AGREED THAT THE FOLLOWING WILL NOT BE SUBJECT TO ARBITRATION. (1) ANY CLAIM FILED BY THE COMPANY TO COLLECT OUTSTANDING BALANCES FOR UNPAID SERVICE OR THE THEFT OF ANY SERVICE OR EQUIPMENT; (2) ANY DISPUTE OVER VALIDITY OF EITHER PARTY'S INTELLECTUAL PROPERTY RIGHTS OR OUR LICENSES TO OPERATE OUR BUSINESS; AND (3) ANY DISPUTE INVOLVING VIOLATIONS OF 47 U.S.C. § 551 (WHICH RELATES TO PROTECTION OF SUBSCRIBER PRIVACY), OR 18 U.S.C. §§ 2510-2521 (WHICH RELATES TO UNLAWFUL INTERCEPTION OF COMMUNICATIONS).

#### 11. NOTICE

Except as provided in paragraph 3 above or otherwise permitted by law, if we send you notice, it will be considered given when deposited in the U.S. mail, addressed to you at your last-known address, or hand delivered to you or to your home. We may provide electronic or telephone notice to you, which shall be deemed given when left with you. If you give notice to us, it will be deemed given when received by us.

#### 12. CHANGES TO POLICIES AND PRACTICES

These Policies and Practices are subject to amendment, modification or termination if required by law or regulation. We will notify you of changes to these Policies and Practices. Any changes proposed by you will only be effective when accepted in writing by one of our senior officers, within their sole discretion.

#### 13. ENFORCEABILITY AND SURVIVAL

If any portion of these Policies and Practices is determined to be illegal or unenforceable, then the remainder of such Policies and Practices shall be given full force and effect. The provisions of these Policies and Practices shall survive termination, amendment or expiration of this Agreement.

#### 14. PRODUCTS AND SERVICES PRICE LIST

Please note that our Products and Services Price List changes from time to time. The current version of our Products and Services Price List was provided to our existing customers earlier this year and is available from us under separate cover.

## 15. IMPORTANT INFORMATION

### PHONE NUMBERS

651-222-3333 (MIN)  
800-255-4640 (VWI)

### INTERNET TECHNICAL SUPPORT

866-447-7333  
888-262-6300

### OFFICE HOURS

Call Center is open 24 hours a day 7 days a week

### MAILING/OFFICE ADDRESS

AT&T Broadband  
10 River Park Plaza  
St. Paul, MN 55107

### LOCAL FRANCHISE AUTHORITIES

For the cities of Stillwater, Oak Park Heights, Bayport, Baytown Township, and Stillwater Township, contact:

Central St. Croix Valley Cable Commission  
1492 Frontage Road West  
Stillwater, MN 55082  
(651) 439-8803

For the city of Oak Grove, contact:

City of Oak Grove  
19900 Nightingale St. NW  
Cedar, MN 55011  
(763) 753-1920

For the city of Coon Rapids, contact:

City of Coon Rapids  
11155 Robinson Dr.  
Coon Rapids, MN 55433  
(763) 767-6459

For the cities of Brooklyn Center, Brooklyn Park, Crystal, Golden Valley, Maple Grove, New Hope, Osseo, Plymouth, and Robbinsdale, contact:

Northwest Suburbs Cable Commission  
6900 Winnetka Ave. N.  
Brooklyn Park, MN 55428  
(763) 533-8196

For the cities of Corcoran and Hamel, contact:

City of Corcoran  
8200 County Road 116  
Hamel, MN 55340  
(763) 420-2288

For the city of Hanover, contact:

City of Hanover  
11250 5<sup>th</sup> Street NE  
Hanover, MN 55341  
(763) 497-3777

For the city of Rogers, contact:

City of Rogers  
P.O. Box 70  
12913 Main Street  
Rogers, MN 55374  
(763) 428-2258

For the cities of Birchwood, Dellwood, Grant, Mahtomedi, Vadnais Heights, White Bear Lake, White Bear Township, Wilmerville, Lake Elmo, Maplewood, North St. Paul, and Oakdale, contact:

Ramsey/Washington Suburban Cable Commission  
2460 East County Road F  
White Bear Lake, MN 55110  
(651) 779-7144

For the city of Gem Lake, contact:

City of Gem Lake  
1369 East County Road E  
Gem Lake, MN 55110  
(651) 426-6443

For the city of Pine Springs, contact  
City of Pine Springs  
6145 Warner Ave. S.  
Pine Springs, MN 55115  
(651) 770-5720

For the city of Hugo, contact  
City of Hugo  
Hugo City Hall  
14669 Fitzgerald Ave. N.  
Hugo, MN 55038  
(651) 762-6312

For West Lakeland Township, contact  
West Lakeland Township  
13520 Greenwood Trail  
Stillwater, MN 55082  
(651) 436-4773

For the cities of Lakeland, Lakeland Shores, St. Croix Beach, Afton, and  
St. Mary's Point, contact  
Lower St. Croix Valley Cable Commission  
1805 Woodlane Drive  
Woodbury, MN 55125  
(651) 735-9340

For the cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada,  
Mounds View, New Brighton, North Oaks, Roseville, St. Anthony,  
and Shoreview, contact  
North Suburban Cable Commission  
950 Woodhill Dr.  
Roseville, MN 55113  
(651) 482-1261

For the city of Hastings, contact  
Hastings City Hall  
101 4<sup>th</sup> Street East  
Hastings, MN 55033  
(651) 437-4127

For the city of St. Paul, contact  
City of St. Paul  
Office of Cable Communications  
15 West Kellogg Blvd.  
St. Paul, MN 55102  
(651) 266-8870

For the cities of Inver Grove Heights, Lilydale, Mendota, Mendota Heights,  
South St. Paul, Sunfish Lake, and West St. Paul, contact  
Northern Dakota County Cable Communications Commission  
5845 Blaine Avenue  
Inver Grove Heights, MN 55076  
(651) 450-9891

For the cities of Burnsville and Egan, contact  
Burnsville/Egan Telecommunications Commission  
4155 Old Sibley Memorial Hwy.  
Egan, MN 55122  
(651) 894-0208

For the cities of Anoka, Andover, Champlin, and Ramsey, contact  
Quad Cities Cable Commission  
737 East River Road  
Anoka, MN 55303  
(763) 427-1411

For the city of Landfall, contact  
City of Landfall  
One 4<sup>th</sup> Ave. No.  
Landfall, MN 55128  
(651) 739-4123

For the cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington,  
Lino Lakes and Spring Lake Park, contact  
North Metro Telecommunications Commission  
1630 101<sup>st</sup> Avenue NE  
Blaine, MN 55434  
(763) 780-8241

For the cities of Cottage Grove, Woodbury, Newport, St. Paul Park,  
Denmark Township, and Grey Cloud Island, contact  
South Washington County Cable Commission  
7584 80<sup>th</sup> St. So.  
Cottage Grove, MN 55016  
(651) 458-9241

For the city of Medicine Lake, contact  
City of Medicine Lake  
10609 South Shore Dr.  
Medicine Lake, MN 55441  
(763) 542-9701

For the city of Columbia Heights, contact  
Columbia Heights Cable Commission  
590 40<sup>th</sup> Avenue NE  
Columbia Heights, MN 55421  
(763) 706-3600

For the city of Hilltop, contact  
City of Hilltop  
4555 Jackson Street NE  
Hilltop, MN 55421  
(763) 571-2023

For Troy Township, WI, contact  
Troy Township  
706 Coulee Trail  
Hudson, WI 54016  
(715) 425-2665

For the cities of Hudson and North Hudson, WI, contact  
Hudson/North Hudson Cable Commission  
Hudson City Hall  
505 3<sup>rd</sup> Street  
Hudson, WI 54016  
(715) 386-4765

For the city of River Falls, WI, contact  
River Falls Cable Communications Advisory Board  
River Falls City Hall  
123 East Elm Street  
River Falls, WI 54022  
(715) 425-0900

For the city of Prescott, WI, contact  
Prescott Cable Commission  
Prescott City Hall  
800 Borner Street  
Prescott, WI 54021  
(715) 262-5544

## H

United States Court of Appeals,  
Ninth Circuit.

CHARTER COMMUNICATIONS, INC., a  
Delaware corporation; Charter Communications  
Properties, LLC; Paul G. Allen, Plaintiffs-Appellees,  
v.  
COUNTY OF SANTA CRUZ, Defendant-Appellant.

Nos. **01-15846, 01-16975.**

Argued and Submitted May 14, 2002  
Filed Sept. 20, 2002.

Cable television operator and proposed acquirer brought action for declaratory judgment against local franchise authority (LFA), challenging denial of consent to change of ownership. The United States District Court for the Northern District of California, William H. Alsup, J., 133 F.Supp.2d 1184, held that denial of consent was unreasonable, and LFA appealed. The Court of Appeals, Michael Daly Hawkins, Circuit Judge, held that: (1) LFA's decision was a legislative action, subject to a deferential standard of review; (2) the decision was reasonable, based on failure of operator and proposed acquirer to affirmatively demonstrate financial qualifications to operate a cable system, and based on LFA's articulated concern for keeping stable the subscriber rates in the future, in light of fact that acquisition offer was substantially higher than the market price; and (3) operator had waived its right to claim that a denial of a transfer violated its First Amendment rights.

Reversed

### West Headnotes

**[1]** Telecommunications  **458(1)**  
372k458(1) Most Cited Cases  
(Formerly 372k449.10(1))

Because the ultimate question in challenge to denial by local franchise authority (LFA) of consent to change of ownership of cable television franchise was whether the LFA could reasonably have denied its consent under the circumstances, a mixed question arose, but this question was not an essentially factual inquiry, so that Court of Appeals assessed the district court's conclusions under the de novo standard.

**[2]** Telecommunications  **458(1)**  
372k458(1) Most Cited Cases  
(Formerly 372k449.10(1))

Decision of local franchise authority (LFA) on whether to consent to change of ownership of cable television franchise was a legislative action, subject to a deferential standard of review, to determine whether the decision was reasonable, even if First Amendment rights were implicated through secondary effects, and under this deferential standard, the LFA's denial of consent should be upheld as long as there was substantial evidence for any one sufficient reason for denial. U.S.C.A. Const. Amend. I.

**[3]** Licenses  **22**  
238k22 Most Cited Cases

A governmental entity has broad discretion to request information in order to evaluate an application for government privileges, and a denial of that privilege not arbitrary when a government's information request is refused.

**[4]** Telecommunications  **458(1)**  
372k458(1) Most Cited Cases  
(Formerly 372k449.10(1))

Even if local franchise authority's (LFA's) denial of consent to change ownership of cable television franchise was an administrative matter, rather than a legislative one, deference was owed under traditional administrative law principles, and whether the LFA denied consent reasonably was a question governed not by a preponderance of evidence standard, but by a substantial evidence test.

**[5]** Telecommunications  **455(1)**  
372k455(1) Most Cited Cases  
(Formerly 372k449(6.1))

Decision of local franchise authority (LFA) to deny without prejudice consent to change of ownership of cable television franchise was reasonable, based on failure of cable company and proposed acquirer to affirmatively demonstrate financial qualifications to operate a cable system, despite proffer of acquirer's personal "balance sheet" as evidence for his financial qualifications, where at no time were acquirer's personal assets contractually pledged in support of performance of the franchise obligations.

**[6]** Telecommunications  **455(1)**

372k455(1) Most Cited Cases  
(Formerly 372k449(6.1))

Decision of local franchise authority (LFA) to deny without prejudice consent to change of ownership of cable television franchise was reasonable, based on LFA's articulated concern for keeping stable the subscriber rates in the future, in light of fact that acquisition offer, based on a per subscriber basis, was incontrovertibly and substantially higher than the market price, though there would be no debt to service.

[7] Telecommunications 455(2)  
372k455(2) Most Cited Cases  
(Formerly 372k449(7))

A local franchise authority (LFA), serving as steward of the public good, was entitled to be properly concerned about the long term consequences of a significantly above market-value purchase of a cable provider, in deciding whether to consent to transfer, even though, under the then-current rules, provider would not have been able to raise rates on this basis.

[8] Telecommunications 455(2)  
372k455(2) Most Cited Cases  
(Formerly 372k449(7))

Merely because the request by local franchise authority (LFA) that cable television franchisee fund and have prepared a due diligence study, in connection with request for approval of change of ownership, was inconsistent with custom did not mean that it was unreasonable.

[9] Telecommunications 455(1)  
372k455(1) Most Cited Cases  
(Formerly 372k449(6.1))

Since the judgment of local franchise authority (LFA) in denying consent to change of ownership of cable television franchise was reasonable, it necessarily followed that its decision to deny the transfer on the basis of that judgment was supported by a legitimate governmental interest.

[10] Constitutional Law 43(1)  
92k43(1) Most Cited Cases

Since cable television provider voluntarily entered into a franchise agreement under which the local franchise authority (LFA) had to approve any transfer of the franchise, to that extent it waived its right to

claim that a denial of a transfer violated its First Amendment rights, and LFA's interest in enforcement of the agreement was not outweighed in the circumstances by a public policy harmed by enforcement, as public policy favored the LFA's decision to be careful in its role as steward, and provider was a sophisticated party represented by counsel. U.S.C.A. Const.Amend. 1

[11] Constitutional Law 43(1)  
92k43(1) Most Cited Cases

First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent, but court will not enforce a waiver if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement. U.S.C.A. Const.Amend. 1.

\*929 Robert S. Bower (argued) and Todd O. Litfin, Rutan & Tucker, Costa Mesa, California, for the defendant-appellant

Julia M.C. Friedlander (argued) and Lisa S. Gelb, City of San Francisco, San Francisco, California, for amici curiae City and County of San Francisco, on behalf of the defendant-appellant.

Richard R. Patch (argued) and A. Marisa Chun, Coblentz, Patch, Duffy & Bass, San Francisco, California, for the plaintiffs-appellees.

Jeffrey Sinsheimer, California Cable Television Association, Oakland, California; National Cable & Telecommunications Association, Washington, D.C.; and American Cable Association, Pittsburgh, Pennsylvania, amici curiae, on behalf of the plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of California; William H. Alsup, District Judge, Presiding. D.C. No. CV-99- 01874-WHA(BZ).

Before HAWKINS and SILVERMAN, Circuit Judges, and RESTANI, [FN\*] Judge.

FN\* The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

HAWKINS, Circuit Judge.

These cases surround one central issue: did Santa Cruz County reasonably withhold consent to a change in ownership of a cable franchise? Because we determine the County's denial of consent was reasonable and lawful, we reverse the district court's decision on the merits, mooted the issue of attorney's fees in the companion case.

### \*930 I. FACTUAL BACKGROUND

The core dispute here involves a lengthy set of negotiations between the County and Charter. While time-consuming and intensive, these negotiations boil down to whether the County's requests for financial and other information from Charter were reasonably related to the exercise of the County's approval authority. A full version of the negotiations can be found in the district court opinion, *Charter Comms. Inc. v. Counts of Santa Cruz*, 133 F.Supp.2d 1184, 11x7-1200 (N.D.Cal.2001).

In brief, in 1998, Microsoft co-founder Paul Allen sought acquisition of Charter Communications, Inc. ("CCI"), which owned a subsidiary, Charter Communications LLC ("Charter"). [FN1] Charter had a cable television franchise with the County of Santa Cruz ("the County"); the franchise was administered by the County Board of Supervisors. The County's consent to the change in ownership was necessary for CCI to operate Charter's cable franchise. Under the relevant agreement, such consent could not be unreasonably denied.

[FN1] Unless there is a need to specify otherwise, we refer generically to the plaintiffs-appellees in this action as "Charter."

After Charter submitted the appropriate forms, [FN2] the County became concerned, *inter alia*, that the price Allen was paying might impact the level and cost of service to constituents in the franchise service area; the County thus sought further detailed information from Charter. Charter complied but later balked when the County sought still more information. When it became clear that Charter would not provide the additional information, the County Board formally decided, without prejudice, to withhold consent to the change in Charter's ownership. The County made detailed findings in support of its decision. When subsequent efforts to

resolve the dispute failed, Charter, CCI, and Allen filed suit in district court. Having lost in district court, the County now appeals the district court's two principal conclusions: first, that the County unreasonably withheld consent and, second, the award of attorney's fees to Charter. [FN3]

[FN2] Federal law recognizes the power of an LFA to approve transfers but imposes certain regulations governing this process. One such regulation, promulgated by the Federal Communications Commission ("FCC"), requires the use of a specific form, Form 394, to be used to seek approvals from franchising authorities. See 47 C.F.R. 76.502.

[FN3] Charter contended at trial that the County acted unlawfully, and therefore unreasonably, in its attempts to gather information beyond what was permitted by Section 617 of the Cable Act and the FCC regulations. The district court agreed with Charter. We do not. As we explain in the analysis, the district court's obligation was to review the legislative findings of the County in its Denial resolution and to examine whether substantial evidence supported any one of the reasons offered by the County. Because the record substantially supports at least some of the reasons offered by the County, we see no reason for either the district court or this panel to reach the issues regarding the Cable Act.

### II. STANDARD OF REVIEW

[1] The district court's findings of facts are reviewed for clear error and its legal conclusions are reviewed de novo. *Dolman v. Agee*, 157 F.3d 708, 711 (9th Cir.1998). Mixed questions of law and fact are generally reviewed de novo, *Diamond v. City of Taft*, 215 F.3d 1052, 1055 (9th Cir.2000), although to the extent that a mixed question presents an "essentially" factual inquiry, then review is for clear error. *Koirala v. Thai Airways Int'l Ltd.*, 126 F.3d 1205, 1210 (9th Cir.1397). Because the ultimate question is whether the County could reasonably have denied its \*931 consent under the circumstances, a mixed question arises; this question is not an "essentially factual" inquiry, though, and therefore this panel assesses the district court's conclusions under the de

novo standard

### 11. SUMMARY OF ARGUMENTS

#### The County's Position

The County contests the district court's application of the standard of review during the bench trial, as well as the First Amendment-related decisions. The County's theory on appeal is that under its state law contract claim, Charter must show that the County acted arbitrarily or without evidentiary support in carrying out its legislative function by denying consent. The County relies upon a long line of authorities requiring reviewing courts to accord legislative determinations proper deference. It argues that: instead of showing deference, the district court undertook its own independent review, and in making its decision, the district court erred in interpreting the Cable Act of 1992 as precluding the County from making these kinds of inquiries of a transfer applicant; to compound error, the district court, after finding for Charter under the contract claim, addressed constitutional claims that appear to have been unnecessary for resolution of the case; once it addressed the constitutional claims, the County asserts, the district court misapplied the appropriate standard and then held that the County's cable ordinance was unconstitutionally vague, despite Charter's prior waiver of any objection to the ordinance.

#### Charter's position

Charter's argument is that the County was entitled to request only reasonable information, and because the information the County was seeking went well beyond what the law permitted, the County acted unreasonably in propounding its requests and denying its consent on the basis of not having received answers to its requests. Charter also accuses the County of improperly conditioning its consent upon illegal fees or concessions: e.g., a \$500,000 mitigation fee, prefunding for a due diligence survey, and a long-term rate freeze. Because its expression was curtailed by the regulation of the cable franchise, Charter argues that the County's behavior amounts to a violation of the First Amendment.

### IV. ANALYSIS

We begin by focusing on the central question: was the County's denial of consent unreasonable? The district court said yes, finding that the County's denial was unreasonable and unlawful under the contract, the First Amendment, and the Cable Act and its FCC

implementing regulations; consequently, the County's decision to deny consent was an *unreasonable* withholding of consent, thus constituting a material breach of the Franchise Agreement, which only allows for reasonable withholdings of consent. In reviewing the district court's judgment, we must answer a preliminary question: is the County owed any deference to its determinations of what is reasonable under the circumstances?

#### *Deference*

[2] The franchise agreement at issue places the discretion to approve the transfer in the County's hands. When reviewing disputes emerging from this franchise agreement, a court must determine whether the County could have deemed it reasonable to deny consent; this is a much more forgiving standard than whether the district court judge would have denied consent himself if he were acting as the County's agent.

\*932 We note that in assessing the reasonableness of the County's decision, we are reviewing a discretionary decision of the County Board of Supervisors, a legislative body. As Charter concedes, grants, renewals, and consents to rate increases are all legislative acts "because they involve policy decisions regarding the terms and conditions of the use of the public rights-of-way." Charter cites no case law for the proposition that consents to transfers are treated differently, *i.e.*, less deferentially, by courts. It argues that the County merely administers a contract in consenting to a transfer of ownership.

This characterization is wrong. As the County points out, if renewals are legislative, even though they involve the evaluation of a known entity, a transfer of ownership should, a fortiori, be viewed as a legislative action also, since the County must assess "a new entity operating under different financial and management circumstances." Moreover, the agreement between the parties incorporates the County Cable Ordinance, which, as a legislative act, operates for the benefit of all in the County.

[3][4] The County's position is further strengthened by case law indicating that a county's discretion is not limited by an agreement that contemplates future discretionary approvals. See *Santa Margarita Area Residents Together v. County of San Luis Obispo*, 84 Cal.App.4th 221, 227, 233, 100 Cal.Rptr.2d 740 (2000). A government's discretion is treated deferentially by courts especially when its requests

for information are necessary to evaluate an application for government privileges; a denial of that privilege is hardly arbitrary when a government's information request is refused. Gifford v. City of Los Angeles, 88 Cal.App.4th 801, 806, 106 Cal.Rptr.2d 164 (2001). This is not to say that government bodies can elicit information of any kind or any quantity, but that the discretion within which the government operates is broad. [FN4]

FN4. Even if we viewed the County Board's action here as an administrative matter, rather than a legislative one, deference is owed under traditional administrative law principles. Seen in this way, whether the County denied consent reasonably is a question governed not by a preponderance of evidence standard, but rather a substantial evidence test. See In re Van Ness Auto Plaza, 120 B.R. 545, 546 (Bkrcty.N.D.Cal.1990), cited with approval in Ferrari N. Am. Inc. v. Sims (In re R.B.B. Inc.), 211 F.3d 475, 477-78 (9th Cir.2000) ("withholding of consent is reasonable if it is based on factors related to the proposed assignee's performance as a dealer and is supported by substantial objective evidence."). The Van Ness court also noted that in determining the suitability of transfers of franchisees, courts ought to "be somewhat cautious in requiring the [franchising authority] to enter into such a relationship involuntarily." Id. at 548-49.

The structure and substance of the district court's decision render apparent that no such deference was accorded; rather, the district court failed to address many of the reasons proffered by the County. Instead of merely asking whether the County's reasoning was fairly debatable, the district court substituted its judgment for the County's. Precedent, however, commands that courts should not stray from a deferential standard in these contexts, even when First Amendment rights are implicated through secondary effects. See City of Los Angeles v. Alameda Books, 535 U.S. 425, 122 S.Ct. 1728, 1736, 152 L.Ed.2d 670 (2002) (local government may, in furtherance of substantial governmental interests, rely on evidence 'reasonably believed to be relevant'); see also Board of County Comm'rs v. Umbehr, 518 U.S. 668, 678, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (the government's "interest in being free from intensive judicial supervision of its daily

management functions [requires that] \*933 ... deference is therefore due to the government's reasonable assessments of its interests"); One World One Family Now v. Honolulu, 76 F.3d 1009, 1013 (9th Cir.1996).

Under this deferential standard, the County's denial of consent should be upheld as long as there is substantial evidence for any one sufficient reason for denial. See FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (attacks on legislative arrangements have burden of refuting each conceivable basis that might support it); Desmond v. County of Contra Costa, 21 Cal.App.4th 330, 336-37, 25 Cal.Rptr.2d 842 (1993) ("As long as the Board made a finding that any one of the necessary elements enumerated in the ordinance [ ] was lacking, and this finding was itself supported by substantial evidence, the Board's denial of appellant's application must be upheld."); Saad v. City of Berkeley, 24 Cal.App.4th 1206, 1214, 30 Cal.Rptr.2d 95 (1994) ("The burden is on the petitioner to show there is no substantial evidence whatsoever to support the findings of the board."). The district court did not examine whether all of the reasons detailed in the County's extensive Denial Resolution were spurious or unlawful. This was mistaken. Cf. United States R. R. Ret. Bd. v. Fritz, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.") (internal citation omitted).

We must therefore examine whether any one of the reasons offered by the County Board in its decision and attached exhibits survives scrutiny under a deferential standard.

#### *Was There Sufficient Basis for the County? Decision to Deny Consent Without Prejudice?*

[5] The County's Denial Resolution explained its decision to deny consent based on various factors. One was Charter and Allen's failure to affirmatively demonstrate financial qualifications to operate a cable system. In its submissions, Charter offered Paul Allen's personal "balance sheet" as evidence for his financial qualifications to take over the obligations of the franchise. However, at no time were Allen's personal assets contractually pledged in support of performance of the franchise obligations. The ability

of a cable operator to adequately service the franchise throughout its term is a legitimate concern. But the district court did not address this concern or the testimony of a financial expert who testified that the materials submitted by Charter were insufficient to answer questions about liquidity or to determine Allen's true net worth. [FN5] Instead, the district court conducted its own analysis, announcing that in light of Allen's substantial wealth and the equity-only nature of the deal, his financial qualifications were incontrovertibly established. [FN6] We conclude that it was not unreasonable for the County to be concerned about Allen's true net worth and about the relationship \*934 of that wealth to the viability of the enterprise. [FN7]

FN5. Charter claims that this expert was discredited on cross-examination, but the district court did not find this to be the case.

FN6. Charter's briefs do not even mention, let alone adequately respond to, the issue of whether Allen's wealth was contractually obligated. In so doing, Charter makes the same error the district court did: ignoring a justifiable reason identified by the County as the basis for its decision.

FN7. We also observe that Charter had itself commissioned a privately-prepared due diligence study that would have satisfied virtually all of the County's requests for information. At argument, the County's lawyer said that had Charter turned over that study, instead of petulantly drawing a line in the sand, it would have sufficed. The County only found out about the study during discovery.

[6] The district court **also** failed to give deference to the County's articulated concern for keeping stable the subscriber rates in the future. Allen's offer, based on a per subscriber basis, was incontrovertibly and substantially higher than the market price. A high price might imperil the possibility of achieving a reasonable return on equity and thereby jeopardize the company's financial health, the stability of rates, and the quality of service. Fear of this high price then is also a legitimate concern. Nonetheless, the district court rejected this concern, reasoning that the "normal" fear would be whether there would be

enough cash flow to service debt, and because there was no debt, there was no cause for concern, and therefore no cause for the information requests that would generate reliable inferences about prospective rates of return. *Charter*, 133 F.Supp.2d at 1211.

Experts from both sides, however, testified that rates of return on equity are key factors in analyzing transactions of this type. This suggests that the County's concerns were reasonable. In a world where cable operators have scaled back franchises because "the initial franchise was economically unviable," House Rcp. No. 98-934 at 21, *reprinted in* 1984 U.S. Code Congressional & Administrative News at 4659, and where courts have in the past held that it would be unconstitutional for a government to prevent a utility company from collecting a constitutionally reasonable rate of return on their investments, *see Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587, 596 (6th Cir.2001), it could hardly be unreasonable for the County to be worried about the long-term viability of the Allen purchase and its effects on the County's responsibility to assure a stable cable franchise for its citizens. [FN8] Nonetheless, the district court decided due diligence was improper, largely because few other local franchising authorities undertook this review. But as the amicus brief submitted by a host of local franchising authorities (LFAs) and the National League of Cities points out, this kind of due diligence does not typically occur, not because it is unnecessary but because the limited resources of local governments often prevent such scrutiny.

FN8. Compare *Guntert v. City of Stockton*, 43 Cal.App.3d 203, 215- 217, 117 Cal.Rptr. 601 (1974), where the reviewing court found that the city acted **arbitrarily by failing to attain enough information** about the financial viability of a developer.

[7] The County government, serving as steward of the public good, is entitled to be properly concerned about the long term consequences of a significantly above market-value purchase of a cable provider. While it is true that under the then-current FCC rules, Charter would not have been able to raise rates on this basis, those rules are subject to **change**; indeed, the rules have already been amended and may be amended again. *See* Brief of County Amici at 16-17.

The concerns we have highlighted here, which were articulated by the County in its denial of consent,

were sufficient to justify the County's decision. Although we do not endorse every drib and drab of \*935 the County's actions during its negotiations with Charter, we cannot say the County acted without a rational basis or without substantial evidence for its decision to deny consent without prejudice. We therefore reverse the district court's judgment on these grounds and vacate its decision. We note that even if we thought the County had acted unreasonably, our view would be deferential not only because precedent so commands, but also because methods exist to promote self-correction in the future: citizens can vote out their local representatives and cable operators can refuse to enter into franchise agreements with notoriously difficult LFAs.

[8] Charter attempts to persuade us of the County's had faith behavior by pointing to the County's apparently unusual request that Charter fund and have prepared a due diligence study. But the relative oddity of this precaution is not of much moment given the deference accorded to legislative actions. More to the point, merely because the request is inconsistent with custom does not mean that it is in anyway unreasonable--think of Judge Hand's famous opinion in The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.1932) (because an entire industry may be negligent, industry custom is only some evidence of what is reasonable).

[9][10][11] Finally, since the County's judgment was reasonable, it necessarily follows that its decision to deny the transfer on the basis of that judgment was supported by a legitimate governmental interest. Charter voluntarily entered into an agreement under which the County had to approve any transfer of the franchise, and thus, to that extent, waived its right to claim that a denial of a transfer violated its First Amendment rights. [FN9] We therefore need not reach the other issues addressed by Charter and the district court.

[FN9] Our Court has expressly recognized that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent." See Leonard v. Clark, 12 F.3d 885, 889-90 (9th Cir.1993) ("If the Union felt that First Amendment rights were burdened by [the contract provision], it should not have bargained them away and signed the agreement."). Our Court will not enforce a waiver "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the

agreement." *Id.* That circumstance does not apply here, as public policy favors the government's decision to be careful in its role as steward. Moreover, in a case like this one, where sophisticated parties are represented by counsel, we think Charter was aware of what it was getting itself into. See Paragould Cablevision, Inc. v. City of Paragould, Ark., 930 F.2d 1310, 1314 (8th Cir.1991) (waiver of constitutional rights can be implied from terms and conditions of a contract where party claiming right is sophisticated and represented by counsel; "Cablevision forgets that it bargained for its franchise agreement. Cablevision voluntarily entered into the franchise agreement, presumably for its own economic gain. The forum for protecting its free speech rights was the bargaining table, not the courtroom....").

## V. CONCLUSION

The district court's judgment on the underlying dispute is reversed. Our decision moots the district court's award of attorney's fees to Charter. The district court's decisions in both cases under review here are vacated.

## REVERSED.

304 F.3d 927, 2 Cal. Daily Op. Serv. 9670, 2002 Daily Journal D.A.R. 10,933

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