TO:        HONORABLE CITY COUNCIL
FROM:      CITY MANAGER   DEPARTMENT: ADMINISTRATIVE SERVICES
DATE:      NOVEMBER 22, 2004    CMR: 466:04
SUBJECT:   RESOLUTION APPROVING A COMPROMISE AND SETTLEMENT AGREEMENT BETWEEN THE CITY OF PALO ALTO AND COMCAST OF CALIFORNIA IX, INC.

RECOMMENDATION
Staff recommends that Council adopt a resolution approving a compromise and settlement agreement between the City of Palo Alto and Comcast Corporation.

BACKGROUND
In 1983, a Joint Exercise of Powers Agreement (JPA) was entered into by and between the cities of Palo Alto, Menlo Park, East Palo Alto, Atherton, and portions of San Mateo and Santa Clara counties for the purpose of obtaining cable television services for residents, businesses and institutions within these jurisdictions. The JPA gives Palo Alto the authority to grant and administer a cable television franchise agreement (Franchise Agreement) on behalf of all of the JPA members.

In 1986, a Franchise Agreement was executed with Cable Co-op. In 2000, the City Council approved a transfer of the cable system from Cable Co-op to TCI, a wholly owned subsidiary of AT&T, and a new Franchise Agreement with TCI. In July 2002, the Council approved the transfer of control of the franchise to Comcast Corporation after Comcast Corporation acquired AT&T Broadband. In 2003, Comcast Corporation began running the cable system under the name Comcast of California IX, Inc. (Comcast). As the administrative agency for the cable television JPA, the City is the regulatory agency responsible for overseeing and enforcing the Franchise Agreement with Comcast.

The Franchise Agreement required Comcast to complete an upgrade of the cable system, which included the construction of an institutional network (I-Net) within 36 months of the Franchise Agreement effective date, or by July 23, 2003. As one of the key conditions of the AT&T/Comcast transfer approved by the Palo Alto City Council in July 2002, Comcast reaffirmed its commitment to meeting the upgrade deadline.

The Franchise Agreement with Comcast establishes procedures for resolving Municipal Code and Franchise Agreement violations. These procedures require the City to notify Comcast in
writing of alleged violations. The notice must describe the violation and direct Comcast to cure the violation. If the City concludes, after reviewing Comcast’s response, that Comcast has failed to explain to the City’s satisfaction why no violation occurred or has failed to cure the violation, the City may schedule an administrative hearing where Comcast will be asked to demonstrate why it should not be found in violation of the Franchise Agreement. Comcast must be given 30 days’ prior written notice of such a hearing. If, after conducting the hearing, the Council determines that Comcast has failed to satisfy its obligations, it may issue an order assessing liquidated damages on Comcast.

The Franchise Agreement specifies liquidated damage amounts for: 1) failing to meet the system rebuild requirements at $1,250 per day; 2) failure to comply with transfer provisions at $1,000 per day; and 3) material violations at $150 per day.

On October 27, 2003, staff provided Council with an update on the cable system rebuild project (CMR: 478:03, Attachment A). The update was based on a final inspection of the rebuilt cable system conducted by Columbia Telecommunications, Corp. (CTC), a City contractor. The inspection uncovered a number of alleged violations pertaining to the cable system rebuild. The Council was informed that a Notice of Franchise Violation letter was sent to Comcast on October 23, 2003 (Attachment B) addressing the apparent violations. In this letter, the City alleged that Comcast had violated the Franchise Agreement and transfer provision requirements pertaining to: 1) failure to complete the cable system rebuild by the deadline of July 23, 2003; 2) failure to properly construct and make operational the I-Net; 3) failure to provide an emergency override system that can be activated by JPA officials; 4) failure to comply with cable plant construction standards and applicable safety codes; and 5) failure to remove abandoned equipment in the City right-of-way. These violations are described in more detail in Attachment C. The City requested that Comcast cure these violations in accordance with the requirements of the Franchise Agreement. The City anticipated that Comcast’s cure would include promptly coming into compliance and the payment of liquidated damages for the period of time the violations occurred. Staff anticipated returning to Council in January 2004 should an administrative hearing be required to address the alleged violations.

On October 27, 2003, the City Auditor also initiated a triennial review of Comcast’s overall performance. This review is provided for in the Franchise Agreement and allows the City to consider whether Comcast has complied with its obligations under the Franchise Agreement and applicable law, including whether customer service standards, technical standards and franchise fee payment requirements have been met. Staff planned to combine the triennial performance review process with the cable system rebuild franchise violation process. However, due to a delay in gaining access to Comcast information, the performance audit progressed more slowly than anticipated. As a result of this delay, staff decided to move forward with the cable system rebuild franchise violations separate from the triennial performance review.

**DISCUSSION**

On November 21, 2003, Comcast responded to the Notice of Franchise Violation (Attachment D). Comcast generally took the position that it had not violated the provisions of the Municipal Code and the Franchise Agreement set forth in the October 23 Notice. As a result, Comcast’s response offered no cure for the alleged violations. Consequently, on April 15, 2004, the City
provided Comcast with 30 days’ written notice of an administrative hearing before Council to be held on May 17, 2004 (Attachment E).

On May 3, 2004, prior to the administrative hearing, Comcast contacted the City with a request to commence a concerted effort to resolve the alleged franchise violations. Staff agreed to meet with Comcast and postponed the May 17 administrative hearing to a later date.

The City initiated negotiations with Comcast on May 12, 2004. The parties held a series of meetings to develop a negotiated resolution to the franchise violations. On September 7, 2004, Comcast and the City agreed to the terms of a proposed settlement. The terms of the tentative settlement require Comcast to perform the following:

1) Within eight months of the effective date of the settlement agreement, construct additional fiber optic cable to 27 I-Net sites on the D (Menlo Park) and E (Atherton) busses. This solution resolves the capacity, security, reliability and maintenance issues that currently exist at these locations.
2) Within eight months of the effective date of the settlement agreement, construct a new dedicated fiber optic connection between the C (East Palo Alto) and E (Atherton) and hubs on the I-Net. This additional fiber segment brings the I-Net into conformance with the original design and provides redundancy among the I-Net hub sites, a feature not included prior to the settlement. This has an estimated value of $300,000.
3) Within six months of the effective date of the settlement agreement, install and configure equipment to allow each member of the JPA the capability to override the video and audio on the cable system in the event of an emergency. The emergency alert system section of the Franchise Agreement would be satisfied with this solution.
4) Within six months of the effective date of the settlement agreement, purchase I-Net connection equipment in support of JPA area schools and agencies. The provision of this equipment will make it possible for entities to immediately connect to the I-Net. The cost of this equipment was previously not fully funded and some entities would have been delayed in connecting to the I-Net while they acquired funding for equipment. This equipment will help improve data networking capabilities in the schools and JPA agencies. The estimated value is $500,000.
5) Within 30 days of the effective date of the settlement agreement, pay the JPA a total sum of $175,000 for I-Net connection assistance. This funding will provide needed technical support to agencies as they implement their I-Net connection plans.
6) Within ten days of the effective date of the settlement agreement Provide a statement attesting that the plant construction and safety code violations have been rectified.
7) Within ten days of the effective date of the settlement agreement Provide a statement attesting to the clean-up and removal of abandoned equipment in the City right-of-way resulting from the rebuild of the cable system.
8) Once Comcast has provided the required notice of completion required in the agreement the City will have 90 days to inspect and test the system for compliance with the agreement.

The proposed settlement resolves all of the outstanding franchise violations described in the October 23 Notice and Attachment C. The settlement becomes effective on the date of adoption.
of the resolution approving the compromise and settlement agreement (Attachment F). The settlement is valued at approximately $975,000.

The original value of liquidated damages at the time of the franchise violation public hearing on May 17, 2004 was approximately $1,600,000. Given the uncertainties the City would encounter in terms of time and cost if it decided to litigate, staff believes it is appropriate to settle this dispute. Staff believes the settlement amount of $975,000 adequately compensates the JPA for any damages resulting from these violations. More importantly, it would allow the JPA to attain completion of the cable rebuild sooner than if litigation had been initiated and enable the JPA schools to finally gain access to the I-Net after much delay. This amount and the resulting settlement agreement will allow the implementation of the I-Net to proceed and will provide much needed I-Net connection equipment and assistance to I-Net entities.

**RESOURCE IMPACT**
The proposed settlement, valued at approximately $975,000, compensates the JPA communities for damages resulting from the alleged franchise violations described in this report. This money and equipment will be allocated to JPA members for their I-Net needs.

**POLICY IMPLICATIONS**
This recommendation is consistent with existing City policy.

**ATTACHMENTS**
Attachment A: Status of Cable System Upgrade and Institutional Network (CMR:478:03)
Attachment B: October 23, 2003 Notice of Franchise Violation
Attachment C: Summary of Franchise Violations
Attachment D: November 21, 2003 Response to Notice of Franchise Violation
Attachment E: April 15, 2004 Administrative Hearing Notice
Attachment F: Resolution Approving Compromise and Settlement Agreement

**PREPARED BY:**

DAVID RAMBERG  
Cable Franchise Manager

**DEPARTMENT HEAD APPROVAL:**

CARL YEATS  
Director, Administrative Services

**CITY MANAGER APPROVAL:**

EMILY HARRISON  
Assistant City Manager