

PUBLIC, EDUCATIONAL AND GOVERNMENT TELEVISION SUPPORT AGREEMENT

THIS AGREEMENT, dated for purposes of identification only this _____ day of _____, 2009 (“Effective Date”) is entered into between the CITY OF MILPITAS, a municipal corporation (“Milpitas” or “City”) and Milpitas Community Television., a private non-profit corporation of the State of California (“MCTV”).

RECITALS

WHEREAS, Milpitas offered the use of identified City assets to operate Cable Television Public, Educational and Government (PEG) Channels; and

WHEREAS, following evaluation and negotiation MCTV was deemed a qualified operator by the City; and

WHEREAS, MCTV desires to provide it services to the residents of Milpitas and, in order to do so desires to operate and maintain certain City-owned equipment as specified in accordance with the terms, provisions and conditions contained in this Agreement; and

WHEREAS, Milpitas desires to have the Services provided by MCTV available for use by Milpitas and its citizens, businesses and guests in accordance with the terms, provisions, and conditions contained in this Agreement; and

Now, Therefore, For And In Consideration Of The Mutual Promises, Covenants And Conditions Herein Contained, The Parties Hereto Agree As Set Forth In The Recitals Above And As Follows:

1. **TERM OF AGREEMENT** — The Term of this Agreement shall be for 3 years and will automatically renew for one additional renewal term of 3 years unless notice of non-renewal is timely given in the manner hereinafter provided (collectively “Term”). MCTV may give written notice of non-renewal to Milpitas at least 3 months prior to the end of the original term or a renewal term. Milpitas may give written notice of non-renewal to MCTV at least 3 months prior to the end of the original term or a renewal term.
2. **PEG OPERATIONS** — MCTV shall provide the following services:
Operation and Management of the Milpitas Public Access Channel and Staffing of the PEG Studio
3. These services are detailed in EXHIBIT B and are subject to the provisions listed in EXHIBIT C. During the Term of this Agreement, MCTV is authorized to install and operate equipment, (“Equipment”) as approved by City. MCTV may utilize the City’s PEG Studio and all associated equipment in order to provide

public access to such studio for the production and broadcast of public access and educational programming. MCTV agrees to operate the studio and channels in accordance with the conditions specified in any franchise agreements executed by the City and to follow any applicable policies, ordinances or regulations adopted by the Milpitas City Council.

4. **INDEPENDENT CONTRACTOR** — MCTV, in the performance of the work and Services agreed to be performed pursuant to this Agreement, shall act as and be an independent contractor and not an agent or employee of Milpitas. MCTV shall have the discretion to operate the Network as MCTV determines provided that such operation shall at all times be in accordance with the requirements of this Agreement and any and all applicable Federal, State and local laws, statutes, rules, regulations and ordinances.
5. **FORCE MAJEURE** - Neither party shall be responsible for any of its obligations under this Agreement prevented or delayed by reasons which are not reasonably foreseeable and not reasonably avoidable, including Acts of God, floods, fires, hurricanes, tornadoes, earthquakes or other unavoidable casualty, acts of public enemy, insurrection, war, riot, sabotage, epidemic, strike or other labor disputes, freight embargoes, shortages or unavailability of materials or supplies, delays or restrictions due to governmental action, unusually severe weather conditions, concealed and unknown conditions below the surface of the ground differing materially from those ordinarily encountered and generally recognized as inherent in construction work or which are not reflected on current maps or drawings of underground conditions, or wrongful physical obstruction by any Person at any installation site (“Force Majeure Event”). The time within which any obligation must be performed under the terms of this Agreement shall be extended for a reasonable period to be determined jointly by the City and MCTV where timely performance is prevented due to a Force Majeure Event. MCTV or the City shall promptly notify the other party of any Force Majeure event described in this Section and, in such notice, shall indicate the anticipated extent of such delay and shall indicate whether, and to what extent, if any, the delayed party anticipates that such event shall affect the timely performance of such party’s obligations under this Agreement.
6. **ASSIGNABILITY** — Neither party shall have the right to assign or otherwise transfer this Agreement, in whole or in part, without the prior, written consent of the other party which consent shall not be unreasonably withheld, provided that after the Network is operating then MCTV shall be entitled to transfer the Network and its operations to entities in the future and further provided that MCTV may freely assign this Agreement, in whole but not in part, in connection with a merger or other corporate reorganization. This Agreement shall be binding upon and inure to the benefit of the Parties and their successors and permitted assigns. In addition, MCTV shall have the right to subcontract Services to its business partners that perform services.

7. INDEMNIFICATION — As respects bodily injury, death, personal injury, or third-party property damage, MCTV agrees to indemnify, defend with counsel to whom Milpitas does not have reasonable objections, and hold harmless Milpitas, its officials, officers, employees, agents, and representatives from and against any and all claims, losses, damages, defense costs, or liability, of any kind or nature (collectively referred to hereinafter as “Claims”), arising out of or in connection with MCTV’s (or MCTV’s contractors’ or subcontractors’, if any) (i) acts, errors, omissions, or unsafe acts, or (ii) work performed by, or on behalf of, MCTV, relative to this Agreement; except to the extent those Claims arise out of the gross negligence or willful misconduct of Milpitas. As respects any damage or loss which does not arise out of bodily injury, death, personal injury, or third-party property damage, MCTV agrees to indemnify, defend with counsel approved by Milpitas, and hold harmless Milpitas, its officials, officers, employees, agents, and representatives from and against any and all claims, losses, damages, defense costs, or liability, of any kind or nature (collectively referred to hereinafter as “Claims”), arising out of or in connection with MCTV’s (or MCTV’s contractors’ or subcontractors’, if any) negligent or wrongful performance under this Agreement; except to the extent that such Claims arise out of the gross negligence or willful misconduct of Milpitas. The obligations set forth in this Indemnification provision (i) shall be in effect without regard to whether or not Milpitas, MCTV, or any other person maintains, or fails to maintain, insurance coverage, or a self-insurance program, for any such Claims; and (ii) shall survive the termination of this Agreement. Nothing herein shall prevent MCTV’s insurer(s) from satisfying MCTV’s obligations under this Section.

8. INSURANCE - MCTV will procure and maintain, at its sole cost and expense, insurance coverage with insurance companies possessing an *A. M. Best’s* rating of A-VII or higher that satisfies or exceeds the below minimum:

Workers Compensation and Employers Liability

Workers Compensation: Statutory limits

Employers Liability: \$1,000,000 each Accident - Bodily Injury by Accident; \$1,000,000 Each Employee - Bodily Injury by Disease; and \$1,000,000 Policy Limit - Bodily Injury by Disease.

Commercial General Liability Insurance

Limit of liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability; \$1,000,000 personal and advertising injury; \$2,000,000 general aggregate .

Also Contractor has a \$1,000,000 umbrella/excess liability policy that is on top of the above coverage. Contractor is entitled to allow a combination of primary and excess policies to meet these requirements.

Coverage: Premises liability; Contractual liability; Personal and Advertising Injury liability;

Commercial Automobile Liability

Limit of liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.

Coverage: Owned, non-owned and hired vehicles.

Umbrella or Excess Liability

Limit of liability: \$1,000,000 per occurrence

9. MCTV will submit thirty days after receipt of the initial annual payment as specified in this agreement, at the City's request, certificates of insurance and endorsed copies of insurance policies evidencing the required coverages prior to the commencement of operations.
10. MCTV may obtain any part or all of the insurance policies required under this Section with a deductible or self-insured retention chosen by MCTV, or by a combination of primary and excess policies, without the prior written approval of the City or any other entity. If at the time of commencement of the work under this Agreement, MCTV self-insures its workers' compensation or automobile liability, MCTV may, in lieu of the foregoing, furnish to the City a current copy of the state certification form for self-insurance or a current copy of the State letter of approval, whichever is appropriate.
11. The parties agree the insurance (including self-insurance) requirements of this Section are not intended to, and do not, (a) expand or limit the indemnifications made in this Agreement by MCTV to the City, or (b) expand or limit MCTV's liability to the City as provided in this Agreement.
12. TERMINATION — This Agreement may be terminated by either party upon 90 days written notice.
13. GOVERNING LAW — This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of California, without regard to the conflict of law provisions thereof. Any action brought relating to the interpretation or enforcement of this Agreement may be brought in any court located in Santa Clara County, California, or the Federal Court for the Northern District of California.
14. COMPLIANCE WITH LAWS – MCTV will comply with all applicable laws, ordinances and regulations as set forth anywhere in this Agreement. Milpitas agrees to facilitate the process of approvals by departments of Milpitas so that additional costs or delays do not occur.
15. APPROVAL – If the approval or consent of any party is required under this Agreement, such approval or consent may only be given in writing, and shall not be unreasonably withheld or delayed.

16. WAIVER - The failure of a Party at any time or times to require performance of any provision hereof shall in no manner affect its right at a later time to enforce the same. No waiver by a Party of any condition or of any breach of any term, covenant, representation or warranty contained in this Agreement shall be effective unless in writing, and no waiver in any one or more instances shall be deemed to be a further or continuing waiver of any such condition or breach in other instances or a waiver of any other condition or breach of any other term, covenant, representation or warranty. The headings preceding the text of articles and sections included in this Agreement and the headings to exhibits and schedules attached to this Agreement are for convenience only and shall not be deemed part of this Agreement or be given any effect in interpreting this Agreement. Unless otherwise indicated, words describing the singular number shall include the plural and vice versa, and words denoting each gender shall include the other gender and words denoting natural persons shall include corporations and partnerships and vice versa. The use of the terms “including” or “includes” shall in all cases herein mean “including, without limitation” or “include, without limitation,” respectively. Unless otherwise indicated, references to articles, sections, subsections, exhibits or schedules shall refer to those portions of this Agreement. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting or causing any instrument to be drafted.
17. BOOKS AND RECORDS—MCTV shall maintain any and all records as agreed to by the parties in signed paper writing and as required by law.
18. CONFLICT OF INTEREST — Milpitas and MCTV shall avoid all conflicts of interest or appearance of conflicts of interest in the performance of this Agreement. This agreement shall not preclude application for grants and other programs available through the City to non-profit organizations.
19. RESERVATION OF RIGHTS — This Agreement grants MCTV the right to use the equipment and facilities owned by Milpitas in the manner provided herein, Except as provided herein, Milpitas and MCTV agree that nothing contained in or contemplated by this Agreement is intended to confer, convey, create or grant to Milpitas any interest in any of MCTV’s tangible or intangible property or intellectual property.
20. NOTICES - Any notice, request, instruction or other document to be given hereunder by a party pursuant to this Agreement shall be in writing and shall be deemed to have been given: (a) when received if given in person or by courier or a courier service; (b) on the date of transmission if sent by telex, facsimile or other wire transmission; or (c) three (3) business days after being deposited in the U.S. mail, certified or registered mail, postage prepaid.

If to Milpitas:
City Clerk
455 E. Calaveras Blvd
Milpitas, CA 95035

with a copy to:
City Manager
455 E. Calaveras Blvd
Milpitas, CA 95035

If to MCTV:
President MCTV
455 E. Calaveras Blvd
Milpitas, CA 95035

or to such other individual or address as a Party may designate for itself by notice given as herein provided.

21. PRIOR AGREEMENTS AND AMENDMENTS — This Agreement constitutes the entire agreement between the Parties. Except as set forth herein, there are no promises, representations or understandings between the parties of any kind or nature whatsoever. Electronic communications and documents will not be sufficient to modify this Agreement however a facsimile transmission of signed paper writing is sufficient and shall be deemed to be a signed writing on paper.

22. EFFECTIVE DATE AND AUTHORITY – This Agreement shall become effective as of the Effective Date of this Agreement upon the authorized execution on behalf of both parties.

23. DISPUTE RESOLUTION PROCESS–

Any dispute between the Parties which arises during the Term of this Agreement and which the Parties cannot then resolve shall be subject to the following administrative remedy prior to termination of this Agreement or any litigation occurring between the Parties:

The Parties shall attempt to resolve any controversy, claim, problem or dispute arising out of, or related to, this Agreement (a “Dispute”) through good faith consultation in the ordinary course of business. In the event that the Dispute is not resolved by the project managers of the Parties, either Party may upon written notice to the other Party request that the matter be referred to the senior management official within each respective organization with express authority to resolve the Dispute ("Request for Internal Resolution"). A written Request for Internal Resolution shall be given by either Party within thirty (30) calendar days of the Parties' knowledge that the project managers were unable to resolve the Dispute. Senior management officials shall meet or confer at least once

in good faith, to negotiate a mutually acceptable resolution within ten (10) business days of the Request for Internal Resolution. For the purposes of this paragraph, the designated project manager for Milpitas shall be designated by the City Manager and for MCTV shall be the MCTV General Manager. The senior management official for Milpitas shall be designated by the City Manager; and for MCTV shall be the VP of MCTV. The project managers and/or senior management officials may be changed by notice given by the Party changing its personnel.

24. Notice. Project managers and senior management officials are each required to meet only once but either group may mutually agree to meet more than once if it appears that further meetings may successfully resolve the Dispute. If the Dispute is not resolved to the mutual satisfaction of the Parties by the project managers or senior management officials, then either Party may provide written notice to the other Party requesting mediation of the Dispute ("Request for Mediation"). A Request for Mediation shall not be given prior to the –required meeting of the senior management officials regarding the Dispute, or at least fifteen (15) business days after the request for Internal Resolution, whichever is earlier, and shall not be given any later than ninety (90) calendar days following the date of the first senior management officials meeting. The Request for Mediation shall set forth all of the issues that Party deems outstanding that must be submitted to mediation. The Party in receipt of the Request for Mediation shall respond within twenty (20) business days listing any issues it deems appropriate for submission to the Mediator.
25. Mediation. Any Disputes, except those for which the remedy requested is injunctive relief, shall be mediated in non-binding mediation within sixty (60) calendar days of the date on the written Request for Mediation, or the soonest date thereafter that the mediator is available.
26. Mediator. The Mediator shall not be employees or contractors for either Party or in any way have an economic interest in the success or failure of the business of either Party. If the Parties are unable to agree upon a Mediator within ten (10) business days following the date of the Request for Mediation, that matter shall be submitted to the Judicial Arbitration and Mediation Service (JAMS) which shall provide the Parties with the names of three potential Mediators. Within two (2) business days following receipt of such names, MCTV shall strike one of the names and notify Milpitas of the name stricken. Within two (2) business days thereafter, Milpitas shall strike one of the remaining names and notify MCTV of the name stricken. The remaining name shall be the person who shall serve as the Mediator and JAMS shall immediately be so notified and a mediation date determined.

27. Costs. The costs of mediation shall be borne by the Parties equally.
28. Condition Precedent to Filing Suit. Except for equitable remedies, including without limitation, injunctive relief and specific performance, Mediation under this section is a condition precedent to a Party filing any judicial proceedings unless either: (i) that Party has made demand for mediation and the other Party has failed or refused to engage in mediation, or (ii) such judicial proceedings are necessary to avoid the expiration of a limitations period that would otherwise bar such judicial proceedings after the end of any dispute resolution process provided herein.
29. Attorney Fees. In the event of litigation arising out of any dispute related to this Agreement, the Parties shall each pay their respective attorneys fees, expert witness costs and cost of suit, regardless of the outcome of the litigation.

30. ACCEPTANCE OF AGREEMENT –

Execution of this Agreement by MCTV and the Milpitas City Manager shall constitute the acceptance of the Agreement.

IN WITNESS WHEREOF, the Parties acknowledge and accept the terms, conditions and obligations of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the Effective Date.

CITY OF MILPITAS

Thomas C. Williams, City Manager

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

APPROVED AS TO CONTENT:

Department/Division Head

ATTEST:

Mary Lavelle, City Clerk

MCTV

By: _____ By: _____

Name: _____ Name: _____

Title: _____ Title: _____

EXHIBITS

Exhibit A: Definitions

Defined terms not otherwise defined in this Agreement will have the meanings set forth below.

- a. "Council" or "City Council" means the City Council of Milpitas.
- b. "Deliverable(s)" means the work and result of the implementation, installation or consulting services that are provided to Milpitas under this Agreement resulting in a component of the Network or the Services.
- c. "Party" means either of Milpitas or MCTV.
- d. "Parties" means both Milpitas and MCTV.
- e. "PEG" means Public, Educational and Government access
- f. "Person" means any individual natural person, firm, partnership, joint venture, entity, society, organization, club, association, trustee, trust, corporation, company or organization of any kind.
- g. "Resident" means any Person, including without limitation the City that is entitled to PEG services under any agreement that the City has with cable TV or similar services. "Subscriber Access Agreement" means the agreement MCTV requires Subscribers to accept or agree to in order to access and utilize the Services via the Network.
- h. "Services" includes the services described in this agreement and its attachments.
- i. "Studio" is defined as the facilities and equipment installed by or on behalf of MCTV in the City used to provide the PEG services described in this Agreement.
- j. "Underlying Rights" means all deeds, leases, easements, rights-of-way agreements, licenses, franchises, permits, grants and other rights, titles and interests that are necessary for the installation, maintenance, operation, use or repair of the PEG system.
- k. "Users" see Resident above.

Exhibit B—Services Provided

Services Provided by MCTV:

MCTV shall operate the City of Milpitas Public Access studio and channel for the use of the residents of Milpitas. Specifically MCTV will provide the following:

Broadcast of programming on the Public Access Channel for a minimum of 15 hours per day, 7 days per week. Programming will be in accordance with the City Council approved Community Television programming standards.

Staffing of the Public Access studio for a minimum of 20 hours per week for the production and editing of television programming. Staff will be available to assist with recording or editing.

Studio training once per month such as needed to operate equipment for the recording of programming in the studio. MCTV will keep a record of those trained to operate studio equipment.

A monthly schedule of programming to be posted on the Internet and a schedule of open studio hours and training sessions.

Services and Equipment Provided by City of Milpitas:

The City shall provide the below listed equipment and facilities to MCTV at no cost for the purpose of providing the services detailed in this agreement. Use of City facilities or other City assets not listed within this agreement will be provided at the City's discretion at no cost to MCTV. The City will provide up to 20 hours per month of staff resources to assist in the provision of PEG services

Facilities and Equipment Provided

- a) The Studio facility located on the first floor of Milpitas City Hall. The City will be responsible for the repair and maintenance of the physical plant to include payment of all utilities.
- b) The equipment installed within the studio to include those items that are mounted in enclosures and such portable equipment as is required for the operation of the studio.
- c) Access to PEG channels as provided by the agreements and franchises between the City and telecommunications providers.
- d) Portable equipment contained within the studio to include:

- 1- 1 – DV mini recording Camera
- 2- 1 – VHS recording Camera
- 3- Portable editing suite to include computer and software

e) Rights to broadcast programming produced or obtained by the City of Milpitas.

Funding Provided by the City

Funding will be provided by the City according to the following schedule:

Year 1 \$31,000 Year 2 \$31,000 Year 3 \$29,500

Exhibit C – Additional Performance and Safety Requirements

Charges for Usage

If MCTV proposes to charge residents for studio usage or other services covered under this agreement, a fee schedule will be presented to the City annually for approval.

Security and Asset Protection

MCTV will ensure that the facilities remain secured after designated operating hours. Tracking of assets to include equipment that may be “checked out” is the responsibility of MCTV. MCTV will develop procedure for equipment check out.

Employee and Volunteer Screening

Employees and Volunteers of MCTV will complete the volunteer application process of the City of Milpitas and are required to pass the standard City screening process. MCTV will not knowingly employ or utilize volunteers who have not completed the screening process. MCTV will provide the City with a listing of all employees and volunteers on a monthly basis. The City reserves the right to deny access to City facilities to any MCTV employee or volunteer.

City Access to Equipment and Facilities

The City reserves the right to utilize the equipment and facilities referenced in this document on a non-interference basis. In the event of a natural disaster or other emergency event, the City shall have unrestricted use of the equipment and facilities.

Exhibit E – Multi-Year Expenditure Plan

Comcast Public, Educational and Government (PEG) Support

The following figures represent the balance of PEG payments to date and the anticipated payments as per the City's franchise agreement.

Current Balance (1/30/2009)	\$43,396
Contractually Obligated Future Payments	\$50,000
Projected Total	\$93,396
Payments to MCTV Under This Agreement (3 years)	\$91,500