

Ordinance Governing
TELECOMMUNICATIONS
in the
CITY OF ARLINGTON
TEXAS

Adopted by Ordinance No. 99-96
(August 10, 1999)

(Chapter Designator: TELECOMMUNICATIONS)

ORDINANCE HISTORY

<u>Number</u>	<u>Date of Adoption</u>	<u>Comments</u>
94-144	10/11/94	Adopt new "Telecommunications" Chapter of the Code of the City of Arlington.
98-67	05/26/98	Amending Ordinance No. 94-144 to clarify the intended scope of application of the ordinance by amending Section 1., Definitions , to add the definition of "Certificated Telecommunications Utility" and amend the definition of "Telecommunications Services" or "Telecommunications Service"; Amend Section 2., Grant of Franchise and Term , Subsection (A).
99-96	08/10/99	Amend Article V , to add new Section 41, Nonapplicability .

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ARTICLE I

GENERAL PROVISIONS

Section 1 Definitions

For the purpose of this ordinance, the following terms, phrases, words, abbreviations and their derivations shall have the meaning given herein unless more specifically defined within other sections of this ordinance. Unless inconsistent with the context, words used in the present tense include the future tense, words in the single number include the plural number. The word "shall" is always mandatory and not merely directory. Unless inconsistent with the context, noncapitalized words shall mean the same as those words capitalized below.

"Backbone" shall mean a network topology that includes a continuous fiber optic circuit connecting all nodes through which messages are routed and from which distribution service is provided.

"Certificated Telecommunications Utility" shall mean any person, partnership or other legal entity granted a certificate to provide local exchange services by the Public Utility Commission of Texas, including, but not limited to, a certificate of convenience and necessity, a certificate of authority, a service provider certificate of authority, or a successor certificate or other authorization. (Amend Ord 98-67, 5/26/98)

"City" shall mean the City of Arlington, Texas.

"City Manager" shall mean the present or succeeding chief executive officer of the City who is appointed by the City Council or any person designated by the City Manager to act in his or her behalf for the purpose of fulfilling the responsibilities imposed by this ordinance.

"Company" shall mean a GRANTEE.

"Council" or "City Council" shall mean the governing body of the City of Arlington, Texas.

"Customer" shall mean any person, firm, partnership, corporation, municipality, cooperative, organization, governmental agency or other form of legal entity provided with services by a GRANTEE.

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"Day or Days" shall mean calendar day or days.

"Depreciated Value" shall mean the original cost of all of the Company's tangible assets less all accumulated depreciation recorded on a GRANTEE's books and audited financial statements in accordance with generally accepted accounting principles, unless otherwise defined or regulated by federal, state or local statutes or regulations with specific application in effect at or on the date the City exercises its purchase option rights under this ordinance.

"Director" shall mean the Director of the Finance Department of the City or his designee.

"Federal Communications Commission or FCC" shall mean that federal agency as presently constituted by the Communications Act of 1934, as amended, or any successor agency.

"Fiber Optic Telecommunications Network" shall mean the Company's system of cables, wires, lines, towers, wave guides, optic fiber, microwave, laser beams and any associated equipment converters, whether backbone, loops or other configuration, or facilities designed and constructed for the purpose of producing, receiving, amplifying or distributing, by audio, video or other means, electronic signals to or from customers or locations within or outside the City. No portion of the Fiber Optic Telecommunications Network shall constitute all or any portion of a cable television system, as defined by City ordinances and Federal law as amended, except with the prior authorization of the City.

"Franchise" shall mean the nonexclusive right, whether an initial authorization or a renewal thereof, to construct and operate a Telecommunications System along the public ways in the City or within specified areas in the City. It is not intended to include or supersede or otherwise affect any license or permit required for the privilege of transacting and carrying on a business within the City, as may be required by other ordinances of the City.

"GRANTEE" or "COMPANY" shall mean any person, partnership, corporation or other legal entity granted a Franchise by the City Council under this ordinance and its lawful successor, transferee or assignee.

"GRANTOR" shall mean the City of Arlington, Texas.

"Gross Receipts" or "Gross Revenue" shall mean all revenues received, earned or accrued by GRANTEE for all communications and related operations and services, including any gross revenue attributable to GRANTEE's transacting business within the corporate limits of City, as well as any other revenue arising from the operation or possession of a Franchise. Gross revenues shall include, but not be limited to all Network, non-network and Telecommunications Service fees, connector rentals or sales and advertising revenue. Gross revenue shall not include refunds to subscribers by GRANTEE, or receipts from sales or use taxes or any other taxes that GRANTEE collects on behalf of any taxing authority. By way of example, but without limitation, "Gross Revenue" includes:

1. Receipts derived from cash sales, customer credit account sales, property of any kind or nature or from any service whatever received or accruing to GRANTEE directly or indirectly arising from or attributable to the sale or exchange of Telecommunications and/or Network Services by GRANTEE within the City from the operation of Company recorded and reported on a full accrual basis of accounting in accordance with generally accepted accounting principles;
2. All Telecommunications Service revenues charged on a flat rate basis;
3. All Telecommunications Services charged on a usage sensitive or mileage basis;
4. All revenues from installation service charges;
5. All revenues from connection or disconnection fees;
6. All revenues from penalties or charges to customers for checks returned from banks, net of bank costs paid;
7. All revenues from equipment sold or rented to customer upon customer premises;
8. All revenues from local service;
9. All revenues from authorized rental of conduit space;

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10. All revenues from charges for access to local and long distance networks;
11. All revenues from authorized rentals of any portion of Company's network, including plant, facilities or capacity leased to others;
12. All other revenues collected by Company from business pursued within the City;
13. All revenues from enhanced data service;
14. All interconnect revenues from interexchange carriers;
15. All revenues derived from co-location connection fees;
16. All revenues from subsidiary or affiliate entities or entities renting conduit space or any other part of the network derived from use of fiber optic network;
17. Receipts from the sale or lease of customer premise equipment, installation charges, access charges paid to the Company by other carriers, franchise fees and occupation taxes surcharged to customer, and the lease or re-sale of lines or circuit paths to third parties.
18. **"Gross Revenue from City"**

"Gross Revenue from City" In the case of revenues attributable to Customers due to GRANTEE's transacting business, gross revenue from City shall mean and shall be computed on a Customer-by-Customer basis as follows:

1. If all the locations of a given Customer receiving service from GRANTEE are in City, Gross Revenue from City shall include all revenues received from that Customer.
2. If some but not all of the locations of a given Customer receiving service from GRANTEE are in the City, the revenues attributable to the City shall be computed separately for each class of service taken by Customer. For each separate service taken, the revenues attributable to the City are

all revenues received from that service times a fraction whose numerator is the number of locations of the Customer within the City taking that service and whose denominator is all the Customer's locations taking that service.

3. If (such as with an interexchange carrier which contracts for capacity from GRANTEE, so as to connect with its customers through GRANTEE's network) a Customer uses GRANTEE's network to connect to third parties, such third parties shall be treated as Customers (or Customer locations, as the case may be) for purposes of this definition and revenue attribution thereunder.
4. Examples of computations under this section are shown below, including examples with locations in cities other than the City of Arlington.

Example 1

A Customer leases a 56 kbps data channel for \$5,000/month which serves/may be accessed by one (1) Customer location in Arlington and two (2) cities other than Arlington. \$1,666/month is Gross Revenue from City ($1/3$ times \$5,000).

Example 2

A Customer leases three (3) T-1 telephone lines at \$400 per month for each line to connect to MCI for a total of \$1,200.00. Gross Revenue from City is computed separately for each as follows:

The first connects a location in a city other than Arlington to an MCI Point of Presence in Arlington. \$200/month is the Gross Revenue from City for this service ($1/2$ times \$400).

The second connects a location in Arlington to the same MCI Point of Presence. All \$400 is Gross Revenue from City for this service.

The third connects a location in a city other than Arlington to a different MCI Point of Presence located in a city other than Arlington and may or may not be installed within the City of Arlington. There is no Gross Revenue from City for this service.

Example 3

Sprint, an interexchange (long distance) carrier, leases a large amount of capacity from GRANTEE for \$50,000/month, so that persons desiring to use its services may connect with it directly and not have to go through the local Southwestern Bell central office. Sixteen (16) customers take advantage of this service, comprising 42 locations, of which 28 locations are in Arlington. Sprint's Point of Presence is also in Arlington.

\$41,667 is Gross Revenue from City, computed as follows:

\$25,000 (half of the \$50,000) is included, because all the circuits (wherever the Customer is located) connect to the Point of Presence in Arlington, i.e., each Customer circuit is composed of two (2) locations (one at the customer, one at Sprint), one of which is in Arlington.

\$16,667 (28/42 of \$25,000), because the other half of the \$50,000 is attributable to the specific Customer locations being connected to Sprint, of which 28 out of 42 are in Arlington.

"Net Income" shall mean the balance remaining to stockholders, partners or owners after deducting from gross revenues all direct and indirect operating expenses associated with the operation of a telecommunications system, including the franchise fee, interest, depreciation, amortization and federal, state and local taxes determined, in accordance with generally accepted accounting principles.

"Network" shall mean **Fiber Optic Telecommunications Network.**

"Person" shall mean and extend to associations, firms, partnership and bodies political and corporate, as well as to individuals.

"Rights-of-Way" shall mean those streets, City rights-of-way and City easements within the corporate limits of the City set forth in this ordinance, as from time to time amended.

"State of the Art" shall mean a Network with technical performance, capacity, equipment, components and service equal to that which has been developed and demonstrated to be more modern than generally accepted and used in the

communications industry for comparable areas of equivalent population.

"Street" shall mean the entire width between the boundary lines or sections of every highway, alley, street, avenue, easement, public place or square, bridge, viaduct, tunnel and causeway in the City, dedicated, deeded, devoted or abandoned to public use. Boundary lines for a street will be the outermost curb lines or the outermost edges of any pavement.

"Telecommunications Services" or "Telecommunications Service" shall mean (1) services interconnecting interexchange carriers for the purpose of voice or data transmission; (2) services connecting interexchange carriers or competitive carriers to telephone companies providing local exchange services for the purpose of voice or data transmission; (3) services connecting interexchange carriers to any entity, other than another interexchange carrier, or telephone company providing local exchange services for the purpose of voice or data transmission; or (4) services providing private line point-to-point service for end users for voice, video and data transmission. Notwithstanding the above definitions, Telecommunications Services do not include (1) the provision of open video systems, enhance services related to open video, advanced video gateways, other related non-programming open video functions or similar types of services, gateways, platforms or functions; (2) the provision of video common carriage services; (3) "cable services", as that term may be defined from time to time under City ordinance, Texas law, the Communications Act of 1934, as amended, or applicable rulings of the courts or FCC; (4) leasing or subleasing poles, conduits or space on or in same to third parties, or overlashing wires or other facilities to the Fiber Optic Telecommunications Network; (5) switched local exchange service provided by a certificated telecommunications utility, or (6) personal communications service. (Amend Ord 98-67, 5/26/98)

Section 2 Grant of Franchise and Term

A. CITY may grant to a Company, its successors and assigns, subject to the reasonable and timely compliance by Company with the provisions contained herein, the nonexclusive right and privilege to have, acquire, construct, expand, reconstruct and maintain in, along, across, on, over, through, above and under the rights-of-way, a Fiber Optics Telecommunications Network to provide therewith Telecommunications

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Services to customers on or abutting such rights-of-way. This chapter does not apply to a Certificated Telecommunications Utility. (Amend Ord 98-67, 5/26/98)

- B. GRANTEE shall not provide services directly regulated by the Texas Public Utility Commission (hereafter referred to as the "PUC") under the Texas Public Utility Regulatory Act, unless authorized by the PUC. GRANTEE shall not provide cable services or operate a cable system, as defined in the Communications Act of 1934, as amended, 47 U.S.C.A., Section 521, et seq., or as recognized by the Federal Communications Commission (hereafter referred to as the "FCC") without first obtaining a separate cable franchise from the City. GRANTEE shall not provide video dial tone or Personal Communication Service (PCS) without first obtaining a separate franchise from the City.
- C. Any franchise is granted to GRANTEE solely for the purpose of directly serving its end-user customers and interexchange carriers.
- D. This ordinance does not permit or require GRANTEE to provide ubiquitous service throughout the entire City as a public service provider. However, GRANTEE is required to provide service on a non-discriminatory basis, at its standard rates, to any person on or abutting the authorized routes who desires service and is obligated to provide continuous service to its customers.
- E. Nothing herein contained shall ever be held or construed to confer upon GRANTEE, its successors and assigns, exclusive rights or privileges of any nature whatsoever. GRANTOR reserves the right, at its discretion, to grant franchises under such terms, as GRANTOR in its sole discretion may determine, to other telecommunications franchise Grantees.
- F. The service area for the network shall be the properties abutting the authorized routes set forth in this ordinance. GRANTOR and GRANTEE may agree to future extensions of GRANTEE's network, in accordance with this ordinance.
- G. GRANTEE hereby accepts a franchise and warrants and represents that it has examined all of the provisions of this ordinance and accepts and agrees to all of the provisions contained herein.

- H. GRANTEE agrees that it shall at all times during the term of a franchise be subject to all lawful exercise of the police power of GRANTOR and to the absolute right of GRANTOR to maintain control over its streets, rights-of-way, easements or other public ways, and to adopt such reasonable regulations relating to streets and public ways as the City and/or its departments may provide.
- I. GRANTEE, within thirty (30) days after receipt of GRANTOR's itemized statement, shall reimburse GRANTOR for its costs incurred in completing this ordinance, including without limitation, all costs for legal fees, outside consultants, customer surveys, needs assessments and publication costs.
- J. The decision or decisions of the City Council concerning the selection of GRANTEE and the award of a franchise is final, and GRANTEE shall agree as a condition of a franchise not to contest the Council's decision in any court of law or before the FCC or PUC or any other governmental entity.
- K. GRANTEE shall not apply for any waivers, exceptions or declaratory rulings from the FCC, the PUC or any other federal or state regulatory agency without informing the City Manager and providing copies of all filings with respect to any matters materially affecting construction, operation or regulation of a Telecommunications System or services provided through such a system. Copies of material responses or any other communications from any regulatory agency to GRANTEE shall likewise be provided immediately upon receipt to the City Manager.
- L. GRANTEE agrees, by the acceptance of a franchise, to accept the validity under present law of the terms and conditions of such franchise in its entirety, and that it will not, at any time, proceed against the City in any claim or proceeding under present law challenging any term or provision of such a franchise as unreasonable, arbitrary or void, or that the City did not have the authority to impose such term or condition.
- M. GRANTOR reserves the right to adopt and promulgate ordinances as it shall find reasonably necessary in the lawful exercise of its police powers.

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- N. It is explicitly understood that this ordinance may be amended or modified in any manner necessary to comply with any franchise or licensing requirements of the State of Texas or the requirements of federal law.
- O. GRANTOR reserves the right to exercise the power of eminent domain to acquire the property of GRANTEE's Telecommunications System and to purchase, own and/or operate the system so acquired consistent with local, state and federal law.
- P. Any Franchise is subject to the right of GRANTOR:
1. To revoke or cancel a franchise for failure to comply with the provisions of this ordinance or any other local, state or federal laws or FCC or PUC rules or regulations.
 2. To require proper and adequate Telecommunications Services and maintenance thereof at the highest reasonably practicable and commercially feasible standard of efficiency in accordance with law.
 3. To control and regulate the use of its public ways and public places. GRANTEE shall pay such part of the costs, fees, damages or expenses of any kind relating to improvement or maintenance of the public ways and public places, as shall arise from its use thereof, and shall protect, defend and save GRANTOR harmless from all damages arising from GRANTEE's use, provided that GRANTEE is given both timely written notice of claims for such damages and the right to fully defend against same.
 4. To install and maintain without charge its own equipment upon any GRANTEE poles or conduits, upon the condition that GRANTOR's equipment shall not interfere with the present or planned operations of GRANTEE, and that City's use of such equipment will be exclusively for noncommercial purposes only which do not compete with GRANTEE's business.
 5. Through its appropriately designated representatives, to inspect all construction or installation work performed, subject to the provisions of this ordinance, and make such inspections as it shall find necessary to ensure compliance with the terms

of this ordinance and other pertinent provisions of law.

6. Upon the expiration of the term of a Franchise or upon its termination or cancellation, as provided herein, to require GRANTEE to remove, at its own expense, any portions of the Network from the public ways within the City.

Section 3 Limits on GRANTEE's Recourse

- A. GRANTEE acknowledges that it has not been induced to accept a Franchise by any promise, oral or written, by or on behalf of the City or by any third person regarding any term or condition of this ordinance not expressed therein. GRANTEE further shall pledge that no promise or inducement, oral or written, has been made to any City employee or official regarding receipt of a Franchise.
- B. Nothing in this section or in the Communications Act of 1934, as amended, or in the Texas Public Utility Regulatory Act or other federal or state law shall be construed as creating or authorizing liability of any kind, under any law, for any action or failure to act relating to Telecommunications Services or the granting of a franchise by City or any official, member, employee or agent of such authority or entity.

Section 4 Reserved

Section 5 Conformance with Master Plan

- A. Before Company acquires any interest in real property for the installation or relocation of service lines, or any other Company equipment or facilities along or adjacent to any existing street or thoroughfare or any proposed street or thoroughfare, as reflected on the City's then current Thoroughfare Development Plan, Company shall give the City Manager written notice of such planned acquisition no later than thirty (30) days before the date of said acquisition. The City's Directors of Capital Improvements, Community Development, Planning, Transportation and Utilities will review the proposed acquisition to see that same does

not conflict or interfere with any proposed street, thoroughfare expansion or other capital improvements.

- B. If any of the above-mentioned directors determine that the proposed acquisition will conflict or interfere with the Thoroughfare Development Plan, that director will notify the Company of the potential conflict or interference. Thereafter, the City and the Company will endeavor in good faith to resolve the potential conflict or interference.

Section 6 Failure of City to Enforce Compliance

GRANTEE shall not be excused from complying with any of the terms and conditions of this ordinance by any failure of the City, upon any one or more occasions, to insist upon GRANTEE's performance or to seek GRANTEE's compliance with any one or more of such terms or conditions.

Section 7 Leasing or Dedication of Facilities

Company, without the written consent of the City, shall not lease any of the rights-of-way it uses, in connection with its system, to any non-Company entity. GRANTEE will not lease any conduit space in the system to any non-Company entity for the placement of any additional cable without the express prior written consent of the City.

Section 8 GRANTEE's Employment Practices

Equal opportunity in employment shall be afforded by GRANTEE to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin, age, disability or sex. GRANTEE shall establish, maintain and carry out a positive continuing program of specific practices designed to assure equal opportunity to every aspect of employment policy and practice.

Section 9 Time is of the Essence

Whenever this ordinance sets forth any time for any act to be performed by or on behalf of a GRANTEE, such time shall be deemed of the essence, and GRANTEE's failure to perform within the time allotted in all cases shall be

sufficient grounds for the City to invoke liquidated damages, injunctive relief, specific performance, default proceedings, revocation of a franchise or any other remedies provided herein or available at law or in equity.

Section 10 Unlawful Acts; Penalties

- A. It shall be unlawful for any person, firm or corporation to establish, operate or carry on the business of distributing to any persons in the City any Telecommunications Services unless a Franchise therefor has first been obtained, pursuant to the provisions of this ordinance, and unless such Franchise is in full force and effect.
- B. It shall be unlawful for any person, firm or corporation to construct, install or maintain within any public street in the City, or within any other public property of the City, or within any privately-owned area within the City which has not yet become a public street but is designated or delineated as a proposed public street on any tentative subdivision map approved by the City, any equipment or facilities for distributing any signals, unless a Franchise authorizing such use of such street or property or area has first been obtained and unless such Franchise is in full force and effect.
- C. It shall be unlawful for any person, firm or corporation to make any unauthorized connection, whether physically, electrically, acoustically, inductively or otherwise, with any part of a franchised Network within the City for the purpose of enabling himself or herself or others to receive any television signal, radio signal, picture, program or sound, without payment to the owner.
- D. It shall be unlawful for any person, firm or corporation, without the consent of the owner, to willfully tamper with, remove or injure any cables, wires, equipment or Network used for distribution of telecommunications signals.
- E. Any person, firm, corporation, agent or employee thereof who violates any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined an amount not to exceed **Five Hundred Dollars and No Cents (\$500.00)** for

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each offense. Each day that a violation is permitted to exist shall constitute a separate offense.

ARTICLE II

FRANCHISE CONDITIONS

Section 11 Compensation

- A. In consideration for the rights and privileges herein granted, a GRANTEE, its successors and assigns, agrees to pay City those fees set forth in this section.
- B. A GRANTEE shall pay City a one-time fee equal to the sum of One Dollar (\$1.00) per linear foot of the City's Rights-of-Way traversed by GRANTEE's Network including without limitation new installation, extensions or uses as shown on the written work description, the "as built" plans required by this ordinance, and the mapping requirement of this ordinance. The per linear foot rate required under this subsection has a base date of January 1, 1994, and shall be adjusted on a percentage basis on each October 1 during the term of this ordinance in an amount equal to the percentage increase or decrease in the City of Arlington's Certified Value Roll as provided by the Tarrant Appraisal District annually in July during the term of this ordinance. At no time during the term of the ordinance will the per linear foot rate be less than the base date per linear foot rate set as of January 1, 1994. GRANTEE shall contact City prior to making such payments to determine the current per-linear-foot fee.
1. Backbone Payment. The payment under Section 11.B. for the Backbone as the Backbone is indicated in the materials required by Section 25.A. must be made in no more than three (3) years time from the day the City Council approves a Franchise, in installments of not less than Twenty Five Thousand Dollars (\$25,000.00), except a final payment extinguishing the amount owed. (This provision is not intended to waive GRANTEE's duty for payment at the rate of One Dollar (\$1.00) per linear foot of the network for other than the backbone portion.) Respective installments shall be due and payable, no later than thirty (30) days from the day the City Council approves a Franchise, and each annual anniversary date thereafter until the entire amount of the total payment has been made for the Backbone.
 2. Network Payment Other Than Backbone. The payment under Section 11.B. for the portion of GRANTEE's network other than the backbone as required in Section 25.A. shall be made no later than thirty (30) days from the date a franchise is approved by the Arlington City Council.

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3. Network Payment After Acceptance of A Franchise. Any payments for the Network whether Backbone or any other portion due to network added after approval of a Franchise whether by amendment to the Franchise, extension of the Network, or due to written work description filing in accordance with Section 13 or any other new installation, extensions, uses or "as built" plans shall be made at the time of written work description filing in accordance with Section 13.
- c. In consideration of the granting of a Franchise to use the public ways for the operation of a Network and the provision of Telecommunications Services, GRANTEE shall pay monthly to the City's Director of Finance the sum of five percent (5%) of GRANTEE's Gross Revenue during the prior month. The five percent (5%) payment will be calculated for each calendar month ("calculation month") and will be due and payable on the last day of the month immediately after the calculation month. Any payment not made by the last day of the month following the calculation month will be late.
- D. In order to aid in determining the Gross Revenue GRANTEE agrees that on the same date that payments are made in accordance with 11.C., it will file with the Director a sworn report showing all revenue, detailed by category, received by the Company from the operations of Company's network within the City for the calendar month preceding the date of payment. The City may, if it sees fit, have the books and records of the Company audited by a representative of City to ascertain the correctness of the sworn reports agreed to be filed herein.
- E. GRANTEE shall pay to City the sum of \$0.765 per linear or lineal foot per year on or before each January 31, for installation of service or transmission cable(s) installed in public ways that do not provide service within or generate revenues from the Telecommunications System authorized by this ordinance. A cable shall mean each separate sheath containing several individual fiber optic pairs. If two (2) or more cables are installed at a given location, the per lineal foot rate applies to each separate cable.

The per linear or lineal rate required under this subsection has a base date of January 1, 1994, and shall be adjusted on each October 1 during the term of this ordinance in an amount equal to the percentage increase or decrease in the City of Arlington's Certified Value Roll as provided by the Tarrant Appraisal District annually in July during the term of

this ordinance. The per linear or lineal rate assessed shall be the rate in effect on the effective date a franchise is approved by the City Council. At no time during the term of this ordinance will the per linear or lineal foot rate be less than the base date per linear or lineal foot rate set as of January 1, 1994.

- F. In order to aid in determining the payments in accordance with Section 11.B. and Section 11.E., GRANTEE agrees that on the same date that payments are made, as provided herein, GRANTEE will file with the Director a sworn report showing all portions of the network as defined in this ordinance for the calendar year preceding the date of payment. GRANTEE at this same time, will make a true up payment to City of any amounts due under this Section 11 for portions of the network for which compensation or installments thereof have not previously been paid.
- G. Except as otherwise required by law, no portion of a franchise fee shall be noted separately on any bill to any customer for use of services or commodities furnished by a Company.
- H. Any transactions which have the effect of circumventing payment of required franchise fees and/or evasion of payment of franchise fees by non-collection or non-reporting of Gross Receipts, bartering, or any other means which evade the actual collection of revenues for business pursued by Company are prohibited.
- I. In the event any monthly payment is made after the due date, the Company shall pay a late payment penalty of the greater of \$100.00 or simple interest at ten percent (10%) annual percentage rate or the rate allowed by law of the total past due.

Section 12 City Use of Facilities

- A. The Company shall provide to the City without charge, and solely for City's communications purposes, space in all of the Company's ducted and conduit facilities within the City limits, with sufficient space for necessary joints. Additionally, the Company shall provide adequate space on all non-ducted facilities constructed on, over, or within Rights-of-Way, for the City to attach transmission media for the City's use.
- B. In the case of new construction of the network the Company, at its sole cost and expense, shall provide to the City two (2) sets of dark fiber pair (a total of four (4) fibers) throughout the portion of the Network used for transmission purposes and suitable for City's needs. In addition, the GRANTEE shall provide lateral lines (including drops) connecting the City's locations to the network as required by the City Manager or designee based on City usage and projected

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usage and need. If the City's location is at or within three hundred feet (300') of the GRANTEE's network, then the GRANTEE shall provide such lateral lines and connections at no cost to the City. If the City's location is greater than three hundred feet (300') from GRANTEE's network, GRANTEE will provide the required lateral lines to the City at a cost to the City not to exceed GRANTEE's cost.

- C. A GRANTEE will provide or insure a seamless interface through Southwestern Bell's tandem switching network to the Tarrant County Emergency Number District's 9-1-1 system to include compatibility for automatic number identification (ANI) and automatic location identification (ALI).
- D. Upon the written request of City, a GRANTEE will provide capability for an Intelligent Vehicle Highway System communication link with a transmission rate of 180 megabytes for video monitoring, traffic count and advance signal coordination equipment.

Section 13 Construction

- A. A GRANTEE shall lay, maintain, construct, operate and replace its Network so as to interfere as little as possible with traffic and existing or planned utilities in City Rights-of-Way. All of the Network will be underground unless otherwise authorized in accordance with this ordinance. All construction within Street Right-of-Way, within a five (5) mile radius of "The Ballpark in Arlington", shall be completed three (3) hours prior to the start time of an event. In addition, any traffic lanes closed shall be opened and functional. Also, any work that may impact any convention center event shall be coordinated to minimize traffic conflicts and street closures.
- B. Before a GRANTEE constructs, extends or replaces its Network, it shall file with the City Manager or other City officials that the City Manager may designate from time to time, a written work description, including traffic control/detour plans, and scale drawings showing the Network's location and exact depth of the facilities. GRANTEE shall submit a work area traffic control plan to the Department of Transportation. GRANTEE will provide network elevation data that is compatible with CITY horizontal and vertical control in accordance with CITY's geographic information system and global positioning system or any future comparable system CITY may utilize. The plans will be reviewed by the City Directors of Transportation, Community Development, Capital Improvements and Water Utilities. Any comments will be provided to the Company within ten (10) working days. City agrees to expedite its review when conditions warrant. Before Company repairs its existing Network the Company shall give notice to the City's Director of Transportation as to the time and location of the proposed repairs. Company will provide a thirty (30) day advanced schedule of planned work at the beginning of each month. Daily work schedules shall be provided to City by 8:30 a.m. of each work day. When an emergency occurs, repairs shall be per-

formed by the Company and notice shall be given to the Director of Transportation within twenty-four (24) hours following emergency repairs.

- C. All work in rights-of-way and other surfaces will be performed in accordance with the City's ordinances, the *Standard Specifications for Public Works Construction* as issued by the North Central Texas Council of Governments (COG Specs) and the City Standard Specifications for Waterworks and Sewerage Improvements, as they may be amended from time to time. Also, GRANTEE will notify and coordinate as required by the Texas Department of Transportation, Railroad companies, Texas Utilities Electric Company and any other utilities or entities with any type of facility in or near the location of GRANTEE's network. The City may inspect any and all street repairs. CITY inspections, if any, do not relieve GRANTEE of the duty and responsibility for making proper repairs. All work done in connection with the laying, maintenance, construction, reconstruction, operation, expansion, repair and replacement of Company's network shall be in compliance with all other applicable laws, rules and regulations of the City, the State of Texas and the United States. GRANTEE shall obtain a street cut permit from the Capital Improvements Department prior to any work. Except in an emergency, GRANTEE shall not excavate any pavement in any public alley or street or significant amounts of any unpaved public Right-of-Way without first securing written permission of the Director of Capital Improvements and the Director of Transportation or Utilities, but such permission shall be given if the proposed excavation is in accordance with the terms of this ordinance. The Director of Capital Improvements shall be notified as soon as practicable regarding work performed under emergency conditions; and GRANTEE shall comply with the director's reasonable requirements for restoration of any disturbed public property.
- D. All excavations and other construction in the public streets, alleys and Rights-of-Way shall be carried on to interfere as little as practicable with the use of public and private property and in accordance with any direction given by City under the police and regulatory powers of the City.
- E. When GRANTEE performs or causes the performance of any work on any Right-of-Way or other public place, or so closely adjacent to such places as to create hazards for the public or themselves, the Company, its employees or contractor shall provide construction and maintenance signs and sufficient barricades at work sites to protect the public, equipment and workmen. Such devices shall conform to the City of Arlington's *Work Area Traffic Control Manual*. All excavations and other construction in the Streets, alleys and Rights-of-Way shall be carried on to interfere as little as practicable with the use of public and private property and in accordance with any direction given by the City under the police and regulatory powers of the City. The application of traffic control devices shall be consistent with the standards and provisions of the latest addition to the Texas Manual on Uniform Traffic Control Devices. Appropriate warning lights shall be used at all construction and maintenance zones where one or more traffic lanes are being obstructed during nighttime conditions. GRANTEE shall promptly restore the public streets and Rights-of-

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Way to their condition prior to GRANTEE's construction, maintenance or excavation, to the satisfaction of the Director of Capital Improvements. GRANTEE shall excavate only for the construction, installation, expansion, repair, removal and maintenance of all or a portion of its network.

- F. GRANTEE shall repair, clean up and restore all Rights-of-Way and other surfaces disturbed during the construction and repair of its Network and shall warrant the repairs and restoration of such rights-of-way and other surfaces for a period of two (2) years from the date of completion of same. Such repairs, clean up and restoration shall return the Rights-of-Way and other disturbed surfaces to substantially the same condition they were in before the Company's work began. The determination that the Rights-of-Way and other surfaces have been returned to substantially the same condition shall be made by the Director of Transportation and Capital Improvements or their designee.
- G. Within thirty (30) days of completion of each segment of GRANTEE's Network, GRANTEE shall supply the City with a complete set of "as built" drawings for that segment in such form as the Director of Capital Improvements may require. This may include submitting a computer file of the drawings in drawing exchange format (DXF) and/or a format compatible with the City Geographic Information System (GIS), Computer Aided Drafting and Design (CADD), AUTOCADD, ARC/INFO and any future language or system utilized by City. Further, after each replacement, relocation, reconstruction or removal GRANTEE shall promptly notify the City of the exact changes made and shall provide a new set of "as built" drawings and/or computer files in DXF format for each modification to the Director of Capital Improvements. GRANTEE shall provide annually a complete set of as-built drawings incorporating these changes.
- H. Before a GRANTEE constructs new network facilities or extends existing network facilities, or before it uses network facilities that were in existence in the City prior to the effective date of a Franchise any GRANTEE shall provide to the City's Directors of Transportation and Capital Improvements Company's fiber optics location data in conformance with City's standards. Such data shall adhere to City's leveling standards and pen assignments. City shall provide electronic base data to allow for accurate matching of street names and rights-of-way lines in drawing exchange format (DXF) on 4mm D.A.T. or QIC80 Mini Tape Media. The data shall be returned to City in the same format in which it was provided.
- I. City shall have the power at any time to order and require a Company to remove or abate any facility that is dangerous to life or property as determined by the City Manager or his designee and in the event Company, after notice, fails or refuses to comply, the City shall have the power to remove or abate same at the expense of Company, all without compensation and with GRANTEE liability for damages.
- J. A GRANTEE may elect or may be required by the City to attach portions of the Network to poles or to share conduit, duct trench space, maintained by other persons or entities, or to permit the wires or equipment of any other person or entity franchised by the City to be attached to the facilities owned and maintained by a

GRANTEE, upon reasonable, non-discriminatory terms and at fair market value. A GRANTEE may require any such person or entity to furnish evidence of adequate insurance covering GRANTEE and adequate bonds covering the performance of the person or entity attaching to GRANTEE'S facilities as a condition precedent to granting permission to any such person or entity to attach wires or equipment to GRANTEE'S facilities; provided GRANTEE'S requirements for such insurance shall be reasonable.

Section 14 Relocation of Network

- A. Company, at its own cost and expense, and at City's request (without claim for reimbursement or damages against the City), shall lower, relocate or relay existing network facilities located in City Rights-of-Way where necessary due to street construction or street reconstruction by or on behalf of the City, or due to the construction or relocation of City utility lines, including but not limited to water, sanitary sewer, storm drains, street lights and traffic signal conduits, or due to any other work in, over, through or under the City rights-of-way.
- B. If City requires Company to lower, relocate or relay its existing facilities pursuant to subsection A above, Company shall make the changes promptly upon receiving a written directive from City to do so. In the event Company fails to comply with the directive, the City shall have the right to lower, relay or relocate or cause to be lowered, relayed or relocated the affected parts of Company's network and Company shall reimburse City for all its costs, within thirty (30) days of receipt of written notice to GRANTEE from CITY.

Section 15 Removal of Obsolete Facilities

- A. When Company opens a trench, accesses a conduit or boring, or is working on aerial locations, it shall remove all obsolete network facilities it owns from such locations.
- B. When Company opens a trench or access to borings, it shall notify all other franchisees in advance of such work, so that they may remove their obsolete facilities from such locations. Company shall cooperate with such franchisees in their removal activities.
- C. When Company receives notification from another franchisee that it is opening a trench or access to borings, Company shall remove all of its obsolete facilities from such location while they are open.
- D. In the event a Franchise is terminated or expires without being renewed, the City may require the Company to remove its facilities from the Rights-of-Way within a reasonable period of time.
- E. Whenever a Company intends to discontinue using any Network facility within the Right-of-Way, Company shall submit to the Director of Transportation, Community Development and Capital Improvements for approval a completed application describing the facility and the date on which the Company intends to discontinue using the facility. Company may remove the facility or request

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that the City permit it to remain in place. Notwithstanding the Company's request that any such facility remain in place, the City may require the Company to remove the facility from the right-of-way or modify the facility in order to protect the public health and safety or otherwise serve the public interest.

- F. City may require a Company to perform a combination of modification and removal of the facility. Company shall complete such removal or modification in accordance with a reasonable schedule set by the City, if necessary to protect public health, safety or otherwise serve the public interest. Until such time as a Company removes or modifies the affected facility as directed by the City, or until the rights to and responsibility for the affected facility are accepted by another person or corporation having authority to construct and maintain such facilities, Company shall be responsible for all necessary repairs, relocations of the facility, and maintenance of the Right-of-Way in the same manner and degree as if the facility were in active use, and Company shall retain all liability.

Section 16 Use of Rights-of-Way by Others

- A. The City reserves the right to permit to be laid and repaired, sewer, gas, water and other pipelines, cables, conduits, and other similar facilities in, along, over or under any Rights-of-Way occupied by Company. The City further reserves the right to permit soil borings into and the installation of monitoring wells in or under any rights-of-way occupied by a Company.
- B. In permitting such work to be done, the City shall not be liable to a Company for any damages so caused, nor shall the City be liable to a Company for any damages arising out of the performance of said work by the City's contractors, licensees, invitees, franchisees or other City related entity; provided, however, nothing herein shall relieve any other person or corporation from liability for damage to a Company's network.
- C. If City requires a Company to remove, alter, change, adapt or conform its network to enable any other person, except the City or any person franchised by the City prior to the enactment of this ordinance, to use, or to use with greater convenience, the Rights-of-Way, a Company shall be obligated to make such changes to its network only if said person undertakes with solvent bond to reimburse Company for any loss and expense which will be caused by or which will arise out of such changes to a Company's network. The City shall not be liable for any reimbursement, loss or expense which is caused by or which arises out of such changes to Company's network.

Section 17 Liability for Damages and Indemnification

- A. The City shall not at any time be liable for injury or damage occurring to any person or property from any cause whatsoever arising out of the construction, maintenance, repair, use, operation, condition or dismantling of a GRANTEE's Telecommunication System and due to the act or

omission of any person or entity other than the City or those persons or entities for which the City is legally liable as a matter of law.

- B. GRANTEE shall pay all damages, liability and penalties which the City may legally be required to pay as a result of granting a Franchise. All damages, liabilities, penalties and expenses incurred as a result of actions brought against GRANTOR arising from or relating to a franchise ordinance shall be borne by GRANTEE unless otherwise provided by settlement between City and Company. GRANTEE shall pay all expenses incurred by the City in defending itself with regard to all liability, damages and penalties mentioned above. These expenses shall include all out-of-pocket expenses such as attorney fees and shall also include the reasonable value of any services rendered by the City Attorney or his assistants and/or any representative of the City.
- C. A GRANTEE shall, at its sole cost and expense, indemnify, defend and hold harmless the City, all associated, affiliated, allied and subsidiary entities of the City, now existing or hereinafter created, and their respective officers, boards, commissions, employees, agents, attorneys and contractors (hereinafter referred to as "Indemnitees"), from and against:
1. Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any act or omission of the GRANTEE, its personnel, employees, agents, contractors or subcontractors, resulting in personal injury, bodily injury, sickness, disease or death to any person or damage to, loss of or destruction of tangible or intangible property, libel, slander, invasion of privacy and unauthorized use of any trademark, tradename, copyright, patent, service mark or any other right of any person, firm or corporation, which may arise out of or be in any way connected with the construction, installation, operation, maintenance or condition of the network or a GRANTEE's failure to comply with any Federal, State or local statute, ordinance or regulation.
 2. Any and all liabilities, obligations, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and other consultants), which is imposed upon, incurred by or asserted against the Indemnitees by reason of any claim or lien arising out of work, labor, materials or supplies provided or supplied to a GRANTEE, its contractors or subcontractors, for the installation, construction, operation or maintenance of the network and, upon the written request of the City shall cause such claim or lien to be discharged or bonded within fifteen (15) days following such request.

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3. Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnities by reason of any financing or securities offering by GRANTEE or its Affiliates for violations of the common law or any laws, statutes, or regulations of the State of Texas or United States, including those of the Federal Securities and Exchange Commission, whether by the GRANTEE or otherwise.
- D. No recovery by the City of any sum by reason of the Letter of Credit required in this ordinance shall be any limitation upon the liability of a GRANTEE to the City under the terms of this section.
 - E. A GRANTEE undertakes and assumes for its officers, agents, contractors, subcontractors and employees, all risk of dangerous conditions, if any, on or about any City owned or controlled property, including public Rights-of-Way, and a GRANTEE hereby agrees to indemnify and hold harmless the Indemnitees against and from any claim asserted or liability imposed upon the Indemnitees for personal injury or property damage to any person arising out of the installation, operation, maintenance or condition of the network or a GRANTEE's failure to comply with any federal, state or local statute, ordinance or regulation.
 - F. In the event any action or proceeding shall be brought against the Indemnitees by reason of any matter for which the Indemnitees are indemnified hereunder, a GRANTEE shall, upon notice from any of the Indemnitees, at a GRANTEE's sole cost and expenses, resist and defend the same with legal counsel selected by the City; provided further, however, that a GRANTEE shall not admit liability in any such matter on behalf of the Indemnitees without the written consent of the City.
 - G. The City shall give a GRANTEE prompt written notice of the making of any claim or the commencement of any action, suit or other proceeding covered by the provisions of this ordinance. In all instances in which GRANTEE is required under this ordinance to indemnify City, such indemnification obligations shall be expressly conditioned upon prompt written notice of claims and upon GRANTEE having the right to investigate, compromise and defend against any such claims. City shall cooperate with GRANTEE in the defense of any litigation by furnishing such available information and assistance in the disposition of such matter as may be reasonably requested by GRANTEE. The GRANTEE shall pay all expenses incurred by the City with regard to a defense of any such actions, suits or proceedings. These expenses shall include all out-of-pocket expenses such as attorney fees and shall also include the reasonable value of any services rendered by or on behalf of the City Attorney, if such service is

determined necessary and appropriate by the City, and the actual expenses of the City's agents, employees or expert witnesses, and disbursements and liabilities assumed by the City in connection with such suits, actions or proceedings. No recovery by the City of any sum under the Letter of Credit shall be any limitation upon the liability of a GRANTEE to the City under the terms of this Section, except that any sum so received by the City shall be deducted from any recovery which the City might have against the GRANTEE under the terms of this Section.

Section 18 Insurance

A Company shall maintain the following insurance coverages and the respective policies thereof shall cover all risks related to the use and occupancy of the right-of-way and all other risks associated with, relating to or arising from a franchise:

A. Description of Insurance Coverages and Limits

1. Commercial General Liability Insurance - \$5,000,000 each occurrence. Coverage shall include but not be limited to independent contractors, products/completed operations, personal injury, contractual liability, explosion/collapse/underground property damage. Insurance shall be provided on an occurrence basis, be as comprehensive as the current Insurance Services Office (ISO) policy and have no standard coverages excluded by endorsement.
2. Pollution Liability Insurance - \$1,000,000 each occurrence. Coverage shall be provided for bodily injury and property damage resulting from pollutants which are discharged suddenly and accidentally. Also, the insurance will provide coverage for clean-up costs.
3. Workers' Compensation Insurance - Statutory Limits. Employer's Liability - minimum \$500,000 for each accident/disease - each employee/disease-policy limit.
4. Automobile liability insurance covering all owned, hired and nonowned vehicles in use by the GRANTEE, its employees and agents, with personal protection insurance and property protection insurance to comply with the provisions of the Texas Law, including liability insurance with minimum limits of Two Million Dollars (\$2,000,000) as the combined single limit for each occurrence for bodily injury and property damage.
5. All policies other than those for Pollution Liability shall be written on an occurrence and not on a claims made basis. Should Pollution Liability be provided on a claims made form, this policy must be maintained for a period of four (4) years after the expiration of any Franchise granted in accordance with this ordinance or extended reporting or "tail" coverage shall be provided.

B. Other Insurance Provisions:

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1. The City, its officers, agents, employees, representatives and volunteers shall be named as an additional insured on the Commercial General Liability and Automobile Liability Insurance policies. These insurance policies shall contain the appropriate additional insured endorsement signed by a person authorized by that insurer to bind coverage on its behalf.
2. Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days prior written notice has been provided to the City.
3. Insurance is to be placed with insurers with a Best rating of A VII or higher. The company must also be duly authorized to transact business in the State of Texas.
4. Workers' Compensation and Employers' Liability Coverage: The insurer shall agree to waive all rights of subrogation against the City, its officials, employees and volunteers for losses arising from the activities under franchise.
5. Not more frequently than once during each franchise year during the Term of a franchise, the City may review the insurance coverages to be carried by the GRANTEE. If the City determines that additional or other insurance is necessary to protect the interests of the City or the Additional Insureds, a GRANTEE shall be so notified and shall obtain the additional types and limits of insurance, at its sole cost and expense.
6. All insurance policies may be written with deductions and exceptions comparable for businesses of like character and size, if consistent herewith and approved by the City. A GRANTEE agrees to indemnify and save harmless the City, the Indemnitees and Additional Insureds from and against the payment of any deductible and from the payment of any premium on any insurance policy required to be furnished by this Agreement.
7. GRANTEE shall require that each and every one of its contractors and their subcontractors carry, in full force and effect, workers' compensation, comprehensive general liability, pollution liability and automobile liability insurance coverages of the type which a GRANTEE is required to obtain under the terms of this Section with appropriate limits of insurance.
8. Certificates of Insurance and endorsements reflecting coverage shall be forwarded to:

Risk Manager
City of Arlington
Post Office Box 231
Arlington, Texas 76004-0231

Section 19 Performance and Payment Bonds

- A. Within thirty (30) days after the award or renewal of a franchise, GRANTEE shall file with the City Secretary and Risk Manager a performance and payment bond each in the amount of Five Hundred Thousand Dollars (\$500,000.00) in favor of the City. The corporate surety on each bond will be authorized to do business in Texas and acceptable to the City Attorney. Bonds shall be maintained throughout any construction and any reconstruction period and until such time as determined by the City Council.
- B. In the event GRANTEE fails to comply with any law, ordinance or regulation governing a franchise, or fails to well and truly observe, fulfill and perform GRANTEE's proposal for Telecommunications Services, there shall be recoverable, jointly and severally, from the principal and surety of the bond, any damages or loss suffered by the City as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of GRANTEE, plus a reasonable allowance for attorney fees, including the City's legal staff, and costs, up to the full amount of the bond. This section shall be an additional remedy for any and all violations outlined regarding the letter of credit.
- C. The City may, upon completion of construction or reconstruction of the network as approved by the City Council, waive or reduce the requirement of GRANTEE to maintain bonds. However, the City may require a performance and payment bond to be posted by GRANTEE for any construction subsequent to the completion of the initial service areas, in a reasonable amount and upon such terms as determined by the City Council.
- D. The bond shall contain the following endorsement: "It is hereby understood and agreed that this bond may not be cancelled by the surety nor the intention not to renew be stated by the surety until thirty (30) days after receipt by the City Attorney, by registered mail, a written notice of such intent to cancel or not to renew."

Section 20 Letter of Credit

- A. Within thirty (30) days after the award or renewal of a franchise, a GRANTEE shall deposit with the City's Director of Finance an irrevocable letter of credit in a form satisfactory to the City's Director of Finance and the City Attorney. The amount of the letter of credit shall be one hundred thousand dollars (\$100,000.00) issued by a federally insured commercial lending institution with a credit rating of BAA or BBB+ or higher. The federally insured commercial institution on which the letter of credit is to be drawn shall be acceptable to the City. The letter of credit shall be used:

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1. To insure a GRANTEE's compliance with the terms and conditions of this ordinance; and
 2. To insure a GRANTEE's payment of any liabilities arising out of the construction, operation or maintenance of GRANTEE's telecommunications system, including the cost of removal or abandonment of any property of GRANTEE.
- B. The letter of credit shall contain the following endorsement: "At least sixty (60) days' prior written notice shall be given to the City by the financial institution or a GRANTEE of any such intention to cancel, replace, fail or renew, or materially alter this letter of credit. Such notice shall be given by certified mail to the City's Director of Finance and City Attorney."
- C. The letter of credit may be drawn upon by the City after providing GRANTEE thirty (30) days advance written notice of the amounts due and owing and GRANTEE's failure to pay such amounts by presentation of a draft at sight on the lending institution, accompanied by a written certificate signed by the City Manager certifying that a GRANTEE has failed to comply with this ordinance, its franchise or any other order, permit or direction of the City relating to this ordinance or a franchise stating the specific reasons therefor, and stating the basis for the amount being drawn. Examples of a basis for drawing upon the letter of credit include, but are not limited to, the following:
1. Failure of GRANTEE to pay to the City any franchise fees or taxes or other payment after ten (10) working days' written notice of delinquency;
 2. Failure of GRANTEE to pay to the City, within ten (10) working days after written notice, any amounts due and owing to the City by reason of the indemnity provisions of this ordinance;
 3. Failure of GRANTEE to pay to the City any liquidated damages due and owing to the City pursuant to this ordinance; and
 4. Failure by GRANTEE to pay to the City within thirty (30) working days any amounts due to the City costs in completing this ordinance.
- D. GRANTEE shall structure the letter of credit in such a manner so that if City draws upon the letter of credit and reduces the amount of available credit to a sum below seventy-five thousand dollars (\$75,000.00), the GRANTEE shall replenish the letter of credit to a minimum of seventy-five thousand dollars (\$75,000.00), within five (5) calendar days. The intent of this subsection is to ensure that the credit available to the City shall at no time fall below seventy-five thousand dollars (\$75,000.00). GRANTEE further agrees

that the letter of credit will be replenished to one hundred thousand dollars (\$100,000.00) within sixty (60) days from the date the City draws against the letter of credit.

- E. The letter of credit shall become the property of the City in the event that a franchise is cancelled by reason of default or partial default of GRANTEE. The letter of credit shall be retained by the City and returned to GRANTEE at the expiration of a franchise provided there is no outstanding default, unpaid franchise fees, ad valorem taxes or debts of any kind to the City on the part of GRANTEE or GRANTEE's creditors.
- F. The rights reserved to the City with respect to the letter of credit are in addition to all other rights of the City, whether reserved by this ordinance, a franchise or otherwise authorized by law, and no action, proceeding or right with respect to the letter of credit shall affect any other right the City has or may have.

Section 21 Liquidated Damages

- A. A GRANTEE understands and agrees that failure to comply with any time or performance requirements as written in this ordinance will result in damage to the GRANTOR, and that it is and will be impracticable to determine the actual amount of such damage whether in the event of delay or nonperformance; therefore, the parties hereby agree to the liquidated damages specified below. It is expressly understood and agreed that the following liquidated damage amounts are not to be considered a penalty, but shall be deemed, taken and treated as reasonable liquidated damages. It is also expressly understood and agreed that City's remedies in the event of GRANTEE default, breach or any noncompliance with this ordinance are not limited to the items stated in this section. The following amounts may be chargeable to the letter of credit for the following concerns:
 - 1. Failure to provide, upon written request, data, documents, reports or information, a GRANTEE shall pay Fifty Dollars (\$50.00) per day for each day, or part thereof, that each violation occurs or continues;
 - 2. Failure to provide bonds, insurance or a letter of credit, a GRANTEE shall pay Two Hundred Dollars (\$200.00) per day for each day, or part thereof, that the noncompliance continues.
 - 3. Failure to provide in a continuing manner the types of services set forth in this ordinance, unless the City Council specifically approves a delay or change or the GRANTEE has obtained modification of its obligation, a GRANTEE shall pay Two Hundred Dollars (\$200.00)

per day for each day, or part thereof, that the noncompliance continues.

- B. If the City Manager, following thirty (30) days' written notice to GRANTEE to cure any problem that might result in liquidated damages, concludes that a GRANTEE is in fact liable for liquidated damages pursuant to this section, he shall issue to the GRANTEE by registered or certified mail a Notice of Intention to Assess Liquidated Damages. The Notice of Intention to Assess shall set forth the basis of the assessment and shall inform the GRANTEE that liquidated damages will be assessed from the date of the Notice of Intention to Assess unless the assessment notice is appealed for hearing before the Council and the Council rules (1) that the violation has been corrected, or (2) that an extension of time or other relief should be granted. If GRANTEE desires a hearing before the Council then GRANTEE shall send a written Notice of Appeal by registered or certified mail to the City Manager within ten (10) days of the date of the Notice of Intention to Assess Liquidated Damages. The hearing on the GRANTEE's appeal shall be held within thirty (30) days of the date of the Notice of Intention to Assess Liquidated Damages. After the hearing, if the Council sustains in whole or in part the City Manager's assessment of liquidated damages, the City Manager may at any time thereafter draw upon the letter of credit. Unless the Council indicates to the contrary, the liquidated damages shall be assessed beginning on the date of the Notice of Intention to Assess and continuing thereafter until such time as the violation ceases, as determined by the City Manager in his sole discretion.

ARTICLE III
CUSTOMER RATES

Section 22 Customer Fees, Rates or Charges

- A. A GRANTEE shall furnish reasonably adequate service to Customers at reasonable rates and charges as may be prescribed from time to time by appropriate federal, state and local authorities.
- B. A GRANTEE shall not give unreasonable preference or advantage as to rates or services to anyone within a service classification; nor shall GRANTEE discriminate against anyone in the furnishing of service under a franchise, or the charges therefor, on account of race, color, religion, age, sex, disability or national origin.
- C. City reserves the right and power to regulate a GRANTEE's fees, rates or other charges if and when cities are granted such authority by law.
 - 1. The City will follow FCC and PUC Rate Regulations, if applicable, in regulation of the rates, charges or fees of a GRANTEE operating in City, notwithstanding any different or inconsistent provisions in this ordinance.
 - 2. In connection with such regulation, the City will ensure a reasonable opportunity for consideration of the views of interested parties.
 - 3. The City Manager or his designee is authorized to execute on behalf of the City and file with the FCC or PUC as necessary such certification forms or other instruments as are now or may hereafter be required by FCC or PUC Rate Regulations in order to enable the City to regulate fees, rates or charges.
 - 4. GRANTEE shall pay City's reasonable rate case expenses.

Section 23 Books and Records

- A. A GRANTEE shall, within thirty (30) days following the effective date of this ordinance, furnish and keep current with the City Secretary a list of its shareholders holding ten (10) percent or more of the outstanding stock or equivalent ownership interest as well as a roster of its principals or officers and directors and their addresses.
- B. A GRANTEE shall maintain an office in the City for so long as it continues to operate a system or any portion thereof and shall designate such office as the place where all notices, directions, orders, and requests may be served or delivered under this ordinance. The City Manager shall be notified of the location of such office or any change thereof.
- C. A GRANTEE shall keep a complete and accurate set of books of accounts and records of its business and operations in accordance with generally accepted accounting principles, and in accordance with this ordinance. All books and records shall be made available at a GRANTEE's office in the City for a period of at least three (3) years.
- D. The City Manager or his designee (City's independent certified public accounting firm, City Auditor, Director of Finance, etc.) shall have reasonable access to all books of accounts and records of GRANTEE for the purpose of ascertaining the accuracy of any and all reports required under this ordinance and shall be given reasonable access to all other records of a GRANTEE relevant to the enforcement of this ordinance.
- E. Any false entry in the books of account or records of a GRANTEE or false statement in the reports to the City Manager as to a material fact, knowingly made by a GRANTEE shall constitute the breach of a material provision of this ordinance.

Section 24 Fiscal Reports

- A. A GRANTEE shall file with the City's Director of Finance, within thirty (30) days after the end of each of the GRANTEE's fiscal quarters, a financial statement reporting gross revenues earned during the current fiscal quarter and gross revenues earned for the fiscal

year to date by a GRANTEE and GRANTEE's parent company or companies. A GRANTEE shall also file an annual audited financial statement prepared by an independent certified public accountant or accounting firm. In addition, the independent certified public accountant or accounting firm shall submit a certified statement that a GRANTEE's total gross revenues as herein defined were fairly stated and that the franchise fees were calculated in accordance with this ordinance. In the event that additional franchise fees are due to the City, the GRANTEE will submit a check for payment of these fees on or before the date the audited financial statements are due to be submitted to the City's Director of Finance.

- B. In addition to the audited financial statements, GRANTEE shall also provide a schedule of its properties and equipment devoted to telecommunications operations, by category including its investment in such properties and equipment, and the original cost less accumulated depreciation of the properties and equipment. The audited financial statements and the report on property and equipment shall be submitted along with any other reasonable information the City may request with respect to a GRANTEE's properties and expenses related to its telecommunications operations within the City. A GRANTEE shall also file an updated map as required by Section 25 and a report with the City Manager relating to its telecommunications operations that includes the following information specific to the City: number of cable miles, number of cable linear feet, number of cable lineal feet specifically delineating each separate sheath containing several individual fiber optic parts as described in the Compensation Section of this ordinance, number of customers for each revenue source attributable to the GRANTEE's operation within the City. This report shall be certified as being correct by a responsible officer of the company. All proprietary information submitted pursuant to this section shall be treated as confidential to the extent permitted by law.

ARTICLE IV

SYSTEM OPERATIONS

Section 25 Franchise Routes and Extensions

- A. GRANTEE shall furnish to the City prior to making the first payment under Section 11.B.1., a written description and map of suitable scale showing the Backbone and Network other than Backbone, all streets and public buildings and indicating the initial Rights-of-Way along which GRANTEE's network is proposed to be constructed. Upon approval by the City Manager such Network will be GRANTEE's authorized routes.
- B. GRANTEE may extend and make Telecommunication Services available to additional authorized routes after compliance with the construction section of this ordinance and any other relevant sections and after furnishing the City with an updated written description and map as required in Section 25.A. and obtaining the approval required therein.

Section 26 Reserved

Section 27 Operating Procedures

- A. GRANTEE shall construct, operate and maintain its system subject to the supervision of the City and in full compliance with the rules and regulations, including applicable amendments of the FCC, PUC and all other applicable federal, state or city laws and regulations, including the latest editions of the National Electrical Safety Code and the National Electric Code as adopted by the National Fire Protection Association. The Network and all its parts shall be subject to inspection by the City.
- B. The system shall not endanger or interfere with the safety of persons or property in a Franchise area or other areas where GRANTEE may have equipment located.

Section 28 Performance

- A. GRANTEE shall continue, through the term of any franchise, to maintain state of the art technical, operational and maintenance standards. Should the City Council find by resolution, that a GRANTEE has failed to maintain these standards and quality of Telecommunications Service, and should it, by resolution, specifically enumerate reasonable improvements to be made, GRANTEE shall make such improvements. Failure to make such improvements within thirty (30) days of adoption of such resolution will constitute a breach of condition for which the remedies of this ordinance are applicable.
- B. City shall have the right to employ consultants if necessary or desirable to assist in the administration of this or any other section of this ordinance and, by acceptance of a Franchise, GRANTEE agrees to pay half of all reasonably incurred costs associated therewith, in no case will GRANTEE's cost under this section exceed Seven Thousand Five Hundred Dollars (\$7,500.00) in any consecutive three (3) year period.

Section 29 Customer Protection

- A. Customers or potential Customers situated on GRANTEE's authorized routes and willing to pay GRANTEE's reasonable rates shall not be denied service, access, or otherwise discriminated against regarding the availability of service or rates, terms or conditions of Telecommunications Services on the basis of race, color, creed, religion, ancestry, national origin, sex, disability or age. GRANTEE shall comply at all times with all applicable federal, state and local laws and regulations relating to nondiscrimination. GRANTEE shall not deny or discriminate against any group of actual or potential customers in City on access to or the rates, terms and conditions of Telecommunications Services because of the income level of the local area in which such group may be located.
- B. GRANTEE shall use reasonable efforts to inform all persons in advance of the date and approximate time its employees or agents shall enter onto such person's property for the purpose of equipment installation, and where practical, for service or maintenance of the network. Each such representative and other employees entering upon private property shall be required to wear an employee identification card issued by GRANTEE and bearing a picture of said representative. Each GRANTEE representative entering customer's homes or places of business shall be bonded.

- C. GRANTEE shall provide all prospective Customers with written information concerning the Telecommunications Services provided and rates charged GRANTEE prior to the consummation of any agreement for service. GRANTEE shall also annually provide all Customers and shall provide all prospective Customers with information respecting GRANTEE's billing and collection procedures, procedures for changes in or termination of services, and refund policies. In addition, each Customer shall be informed of applicable privacy requirements as set forth in this Agreement or otherwise provided for in federal or state law or regulation.
- D. Neither GRANTEE nor its agents shall tap or monitor, or arrange for the tapping or monitoring, or permit any other person to tap or monitor, any cable, line, signal, input device, or Customer facility for any purpose, without the written authorization of the affected Customer. Such authorization shall be revokable at any time by the Customer without penalty by delivering a written notice of revocation to GRANTEE; provided, however, that GRANTEE may conduct systemwide or individually addressed "sweeps" solely for the purpose of verifying system integrity, checking for illegal taps or billing.
- E. GRANTEE shall report to the affected parties, City and other appropriate authorities, any instances of monitoring or tapping of the network, or any part thereof, of which it has knowledge, whether or not such activity has been authorized by GRANTEE. GRANTEE shall not record or retain any information transmitted between a customer and any third party. GRANTEE shall destroy all Customer information of a personally-identifiable nature after a reasonable period of time except as authorized not to do so by the affected customer.
- F. GRANTEE shall maintain in City at least one office to serve the purpose of receiving and resolving customer complaints regarding Telecommunications Services, equipment malfunctions, billing and collection disputes, and similar matters. GRANTEE shall have a local telephone number as a special repair service telephone number for use by Customers twenty-four (24) hours per day, seven (7) days per week. The local office of the GRANTEE shall be open to receive inquiries or complaints in person or by telephone during normal business hours Monday through Friday excluding legal

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holidays observed by the City. GRANTEE shall provide the means to accept service complaint calls twenty-four (24) hours a day, seven (7) days a week.

- G. Annually, and as Customers are connected or reconnected to the network, GRANTEE shall, by means such as a card or brochure, furnish information to Customers concerning the procedures for making inquiries or complaints, including the address and local telephone number of GRANTEE's office to which such inquiries or complaints are to be addressed.
- H. GRANTEE shall keep a service complaint log which will indicate the nature of each complaint, the date and time it was received, the disposition of said complaint and the time and date thereof. The service complaint log shall be made available upon request for periodic inspection by City. Records of service and non-service related complaints shall be maintained by GRANTEE for a period of at least three (3) years.

ARTICLE V

MISCELLANEOUS PROVISIONS

Section 30 Notice

Any notice or communication required in the administration of this ordinance shall be sent as follows:

City Manager
City of Arlington
P. O. Box 231
Arlington, Texas 76004-0231

Notice to GRANTEE will be as indicated on the **Acceptance of Franchise** section of this ordinance as well as the acceptance instrument required by that section.

Section 31 Management of Network

GRANTEE shall personally manage the network as required by the terms and conditions of a Franchise. It shall not without the prior consent of the City Council obtained pursuant to Section 33, directly or indirectly contract for, subcontract or assign in whole or in part, the management of the Network, or the provision of Telecommunications Services (collectively "subcontract") except where the following conditions are satisfied: (1) the subcontracting is to persons that control, are controlled by, or are under common control of GRANTEE at the time a franchise is awarded in accordance with Section 33, and (2) GRANTEE provides the City Manager with sixty (60) days advance written notice of such subcontracting.

Section 32 Termination

- A. The City Council shall have the option to declare a franchise terminated at any time for:
1. Failure of a Company to comply with any material term, condition or provision of this agreement;
 2. Any false statement or misrepresentation as to a material fact in a Company's application for a Franchise; or

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3. Company's loss of or failure to obtain all necessary Federal and State licenses, permits and other permissions required in the provision of Telecommunications Services.
- B. If a Company continues to violate or fails to comply with the terms and provisions of this ordinance for a period of thirty (30) days after a Company shall have been notified in writing by the City to cure such specific alleged violation or failure to comply, then the City may pursue the procedures set forth below to declare that the Company has terminated all rights and privileges consented to in this ordinance
 - C. A termination shall be declared only by a written decision of the City Council after an appropriate public proceeding before the City Council, which shall accord a Company due process and full opportunity to be heard and to respond to any notice of grounds to terminate. All notice requirements shall be met by providing the Company at least fifteen (15) days' prior written notice of any public hearing concerning the proposed termination of a Franchise. Such notice shall state the grounds for termination alleged by City.
 - D. The City Council, after full public hearing and upon finding the existence of grounds to terminate, may either declare any Franchise terminated or excuse such grounds upon a showing by the Company of mitigating circumstances or good cause for the existence of such grounds.
 - E. Neither a Company's acceptance of a Franchise, Company's appearance before the City Council at any public hearing concerning proposed termination of this agreement nor any action taken by the City Council as a result of any such public hearing, including a declaration of termination or a finding of grounds to terminate, shall be construed to waive or otherwise affect a Company's right to seek a judicial determination of the rights and responsibilities of the parties under this agreement.
 - F. A Company shall not be excused from complying with any of the terms and conditions of this agreement by the previous failure of the City to insist upon or to seek compliance with such terms or conditions.

Section 33 Transfer of Franchise

- A. A franchise granted under this ordinance shall be a privilege to be held in personal trust by GRANTEE. It shall not be assigned, transferred, sold or disposed of, in whole or in part, by voluntary sale, merger, consolidation or otherwise or by forced or involuntary sale, without the prior consent of the Council expressed by ordinance, and then only on such conditions as may therein be prescribed by the Council. There shall be no change in, transfer of or acquisition of control of the GRANTEE, including no change for which City Council consent is required under Section 31 of this ordinance, without the prior consent of the Council expressed by ordinance, and then only on such conditions as may therein be prescribed by the Council. For the purposes of this ordinance, any such change for which Council consent is required under the preceding three (3) sentences is collectively referred to as a "Transfer". GRANTEE shall send advance notice of any proposed Transfer to the City Manager by certified letter. The Council shall not withhold its prior consent to any transfer under this Section unreasonably, provided, however, among other things (1) the proposed assignee, transferee or other named entity (collectively "Transferee") agrees to comply with all provisions of this ordinance and such additional conditions as the Council may prescribe, (2) the Transferee is able to provide assurances reasonably satisfactory to the Council of its qualifications, character, the effect of the Transfer and such other matters as the Council deems relevant.
- B. For the purpose of determining whether it shall consent to any transfer, the City Council may request from the GRANTEE and proposed Transferee (and the GRANTEE and Transferee shall provide) information and documents reasonably related to the matters set forth in Section 33.A. and such further reasonable information and documents as the City may request. In the event that the City Council denies giving its consent and such transfer has been affected, the City Council may cancel a franchise unless the transfer is reversed and the GRANTEE is restored to its status prior to the change, or to a status acceptable to the City Council. In any event, if the City Council does not take action within one hundred twenty (120) days of certified letter notice to the City Manager as set out at Section 33.A., then the transfer will be deemed approved unless the

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information requested under Section 33.B. was in any way materially inaccurate and/or incomplete.

- C. The City is hereby empowered to take legal or equitable action to set aside, annul, revoke or cancel a Franchise or the transfer of a Franchise, if such transfer is not made according to the procedures set forth in this ordinance, or is not in the best interest of the City or the public.
- D. Any Transfer shall be made by a bill of sale or other appropriate document, an executed copy of which shall be filed in the office of the City Manager, within thirty (30) days after any such sale, transfer or assignment.
- E. For the purposes of this ordinance "... change in, transfer of or acquisition of control of the GRANTEE..." shall mean any change in the identity of the individuals or group which directly or indirectly directs, or has the power to direct, the management or policies of the GRANTEE, whether through the ownership of voting securities or other equity interest, by contract or otherwise. Without limiting the generality of the foregoing, such a change shall be deemed to have occurred when there is (1) a change in the effective shareholder voting control of the GRANTEE, its parent or controlling entities, in whatever manner effectuated; (2) an agreement of the holders of voting stock of the GRANTEE which vests or assigns policy or decision making in any person or entity other than the GRANTEE; or (3) a merger or consolidation of the GRANTEE or its parent or controlling entities, such as by contributing all or a portion of their assets to a joint venture or otherwise. However, such a change shall not be deemed to have occurred upon the departure or arrival of management personnel or other employees of GRANTEE. A rebuttable presumption that a transfer of control has occurred shall arise upon (a) the acquisition or accumulation by any person or group of persons of ten percent (10%) of the voting shares of GRANTEE (or its parent or controlling entities) if as of the date of the award of a franchise to GRANTEE such person or group of persons does not already own ten percent (10%) of the voting shares of GRANTEE (or its parent or controlling entities) or (b) if more than ten percent (10%) of the capacity in GRANTEE's lit fibers is leased to a provider of telecommunications type or cable type services. Every change, transfer, or

acquisition of control of the GRANTEE shall make a Franchise subject to cancellation unless and until the City shall have consented thereto, which consent will not be unreasonably withheld.

- F. The consent of the Council to any sale, transfer, lease, trust, mortgage or other instrument of hypothecation shall not constitute a waiver or release of any of the rights of the City under this ordinance or any Franchise.
- G. Nothing herein shall require approval for GRANTEE's assigning a franchise to or selling its stock to wholly owned subsidiaries or to affiliates under the same ultimate control and ownership as existed prior to the assignment.
- H. GRANTEE shall pay and/or reimburse the City for any costs incurred by the City of Arlington due to any proposed transfer including whether such transfer is approved, approved with conditions or denied.

Section 34 Foreclosure

Upon the foreclosure or other judicial sale of all or a substantial part of a GRANTEE's system or upon the termination of any lease covering all or a substantial part of a GRANTEE's system, GRANTEE shall notify the City Manager of such fact, and such notification shall be treated as a notification that a change in control of a GRANTEE has taken place, and the provisions of this ordinance, governing the consent of the City to such change in control of a GRANTEE shall apply.

Section 35 City's Rights Upon Expiration

Upon the expiration of a Franchise, the City shall have the right, at its election, to:

- A. Renew or extend a Franchise, in accordance with applicable law;
- B. Invite additional proposals and award a Franchise to another entity or person;
- C. Terminate a Franchise without further action; or,

D. Take such further action as the City deems appropriate.

Until such time as the City exercises its rights under this section the Company's rights and responsibilities within the City shall be controlled by the terms of a Franchise.

Section 36 Controlling Laws

This ordinance and a Franchise granted in accordance with this ordinance are subject to the applicable provisions of the Constitution, the laws of the United States and of the State of Texas, the Charter of the City of Arlington, and the Arlington City Code. All obligations of the parties hereunder are performable in Tarrant County, Texas. In the event that any legal proceeding is brought to enforce the terms of a Franchise, the same shall be brought in Tarrant County, Texas.

Section 37 Cumulative

That this ordinance shall be cumulative of all provisions of the Code of the City of Arlington, as amended, except in those instances where the provisions of this ordinance are in direct conflict with the provisions of such Code, in which instances the provisions of this ordinance shall supersede the conflicting provisions of such Code as they apply to a GRANTEE.

Section 38 Severability

That it is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses and phrases of this ordinance are severable, and, if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared void, ineffective or unconstitutional by the valid judgment or final decree of a court of competent jurisdiction, such voidness, ineffectiveness or unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance since the same would have been enacted by the City Council without the incorporation herein of any such void, ineffective or unconstitutional phrase, clause, sentence, paragraph or section.

Section 39 Effective Date

That this ordinance shall be in full force and effect from and after its passage.

Section 40 Acceptance of Franchise

As a condition subsequent to the effectiveness of a Franchise, GRANTEE accepts and agrees to the terms, conditions and provisions of this ordinance the same as if it were a contract between City and GRANTEE upon acceptance as set out below. A GRANTEE shall, within thirty (30) days after the passage of a Franchise, file in the office of the City Secretary a written instrument accepting this ordinance and all terms and conditions thereof, signed and acknowledged by its proper officers in a form acceptable to the City. This written instrument will also indicate a name, title and address of the official(s) of GRANTEE that will receive any notice in accordance with this ordinance. GRANTEE shall not commence construction, operation or activation of its Network until providing City with the required insurance, bonds, letter of credit and acceptance. (Amend Ord 94-144, 10/11/94)

Section 41 Nonapplicability

On or after August 15, 1999, the provisions of this Chapter do not apply to a telecommunications provider not currently franchised under this Chapter that is certificated by the Public Utility Commission of Texas. Providers currently holding a franchise under this Chapter will hold their franchise subject to the provisions of Chapter 283 of the Texas Local Government Code, as applicable. (Amend Ord 99-96, 8/10/99)

ORDINANCE NO. 98-67

AN ORDINANCE AMENDING ORDINANCE NO. 94-144 OF THE **"TELECOMMUNICATIONS"** CHAPTER OF THE CODE OF THE CITY OF ARLINGTON, TEXAS, 1987, CLARIFYING THE INTENDED SCOPE OF APPLICATION OF THE ORDINANCE; PROVIDING THIS ORDINANCE BE CUMULATIVE; PROVIDING FOR SEVERABILITY; PROVIDING FOR GOVERNMENTAL IMMUNITY; PROVIDING FOR INJUNCTIONS; PROVIDING FOR PUBLICATION AND BECOMING EFFECTIVE TEN DAYS AFTER PUBLICATION

WHEREAS, the City Council of the City of Arlington, Texas, approved and adopted Ordinance No. 94-144, the Telecommunications Chapter of the Code of the City of Arlington, Texas, 1987, on the 11th day of October, 1994; and

WHEREAS, at the time of the adoption of Ordinance No. 94-144, Southwestern Bell Telephone Company was the only local exchange carrier holding a franchise in the City of Arlington, Texas, to use the public rights-of-way and the only local exchange carrier certificated to provide such service by the Public Utility Commission of Texas; and

WHEREAS, since the adoption of Ordinance No. 94-144, there has been significant legislation deregulating certain aspects of the telecommunications industry, principally the Public Utility Regulatory Act of 1995 ("PURA 95") (codified in the Texas Utility Code §11 et seq. and effective September 1, 1995) and the Federal Telecommunications Act of 1996 ("Telecom 96") (codified in various sections of Title 47 of the United States Code and effective February 8, 1996); and

WHEREAS, since the adoption of Ordinance No. 94-144, the Public Utility Commission of Texas can certificate entities other than Southwestern Bell Telephone Company ("Southwestern Bell") to provide local exchange services in the City of Arlington, Texas, pursuant to PURA 95; and

WHEREAS, Telecom 96 further provides opportunities for other entities to compete with Southwestern Bell and each other to provide local exchange services within the City of Arlington, Texas; and

WHEREAS, the City of Arlington, Texas, did not intend that Ordinance No. 94-144 would ever apply to Southwestern Bell or to any other certificated telecommunications utility; and

WHEREAS, the City of Arlington, Texas, intended Ordinance No. 94-144 to apply to non-certificated competitive access providers and any other entity that uses the public rights-of-way along specific authorized routes that do not provide local exchange services, but do provide Telecommunications Services as defined herein; and

WHEREAS, at the time Ordinance No. 94-144 was adopted, Southwestern Bell, as the only local exchange carrier, already had authority to use the public rights-of-way pursuant to Arlington Ordinance No. 87-68 (adopted in 1987 and effective until 1997) and thus would not need further authority from the City to use the public rights-of-way; and

WHEREAS, Southwestern Bell has recently alleged that Ordinance No. 94-144 applies to Southwestern Bell; and

WHEREAS, Southwestern Bell has recently alleged that Ordinance No. 94-144 is prohibited by and pre-empted under various sections of the Communications Act of 1934, as amended by Telecom 96, and the Public Utility Regulatory Act of 1995 as these laws apply to them; and

WHEREAS, the City of Arlington, Texas, does not agree with the allegations made by Southwestern Bell, but does desire to clarify the intended scope of application of Ordinance No. 94-144 to entities using the public rights-of-way that are not certificated telecommunications utilities; NOW THEREFORE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ARLINGTON, TEXAS:

1.

That **Ordinance No. 94-144**, approved by final reading on **October 11, 1994**, adopting the **"Telecommunications"** Chapter of the Code of the City of Arlington, Texas, 1987, is hereby **amended in part** at **Section 1., Definitions**, to add the definition of "Certificated Telecommunications Utility" and amend the definition of "Telecommunications Services" or "Telecommunications Service" as follows:

"Certificated Telecommunications Utility" shall mean any person, partnership or other legal entity granted a certificate to provide local exchange services by the Public Utility Commission of Texas, including, but not limited to, a certificate of convenience and necessity, a certificate of authority, a service provider certificate of authority, or a successor certificate or other authorization.

"Telecommunications Services" or "Telecommunications Service" shall mean (1) services interconnecting interexchange carriers for the purpose of voice or data transmission; (2) services connecting interexchange carriers or competitive carriers to telephone companies providing local exchange services for the purpose of voice or data transmission; (3) services connecting interexchange carriers to any entity, other than another interexchange carrier, or telephone company providing local exchange services for the purpose of voice or data transmission; or (4) services providing private line point-to-point service for end users for voice, video and data transmission. Notwithstanding the above definitions, Telecommunications Services do not include (1) the provision of open video systems, enhance services related to open video, advanced video gateways, other related non-programming open video functions or similar types of services, gateways, platforms or functions; (2) the provision of video common carriage services; (3) "cable services", as that term may be defined from time to time under City ordinance, Texas law, the Communications Act of 1934, as amended, or applicable rulings of the courts or FCC; (4) leasing or subleasing poles, conduits or space on or in same to third parties, or overlashing wires or other facilities to the Fiber Optic Telecommunications Network; (5) switched local exchange service provided by a certificated telecommunications utility, or (6) personal communications service.

Further, **Section 2., Grant of Franchise and Term**, is hereby amended by the amendment of Subsection (A), so that hereafter said subsection shall be and read as follows:

- A. CITY may grant to a Company, its successors and assigns, subject to the reasonable and timely compliance by Company with the provisions contained herein, the nonexclusive right and privilege to have, acquire, construct, expand, reconstruct and maintain in, along, across, on, over, through, above and under the rights-of-way, a Fiber Optics Telecommunications Network to provide therewith Telecommunications Services to customers on or abutting such rights-of-way. This chapter does not apply to a Certificated Telecommunications Utility.

2.

This ordinance shall be and is hereby declared to be cumulative of all other ordinances of the City of Arlington, and this ordinance shall not operate to repeal or affect any of such other ordinances except insofar as the provisions thereof might be inconsistent or in conflict with the provisions of this ordinance, in which event such conflicting provisions, if any, in such other ordinance or ordinances are hereby repealed.

3.

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional, such holding shall not affect the validity of the remaining portions of this ordinance.

4.

All of the regulations provided in this ordinance are hereby declared to be governmental and for the health, safety and welfare of the general public. Any member of the City Council or any City official or employee charged with the enforcement of this ordinance, acting for the City of Arlington in the discharge of his/her duties, shall not thereby render himself/herself personally liable; and he/she is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his/her said duties.

5.

Any violation of this ordinance can be enjoined by a suit filed in the name of the City of Arlington in a court of competent jurisdiction, and this remedy shall be in addition to any penal provision in this ordinance or in the Code of the City of Arlington.

6.

The caption of this ordinance shall be published in a newspaper of general circulation in the City of Arlington, in compliance with the provisions of Article VII, Section 15, of the City Charter. Further, this ordinance may be published in pamphlet form and shall be admissible in such form in any court, as provided by law.

7.

This ordinance shall become effective ten (10) days after first publication as described above.

PRESENTED AND GIVEN FIRST READING on the 19th day of May, **1998**, at a regular meeting of the City Council of the City of Arlington, Texas; and GIVEN SECOND READING, passed and approved on the 26th day of May, **1998**, by a vote of 8 ayes and 0 nays at a regular meeting of the City Council of the City of **Arlington, Texas**.

ORDINANCE NO. 99-96

AN ORDINANCE AMENDING THE "UTILITIES" CHAPTER OF THE CODE OF THE CITY OF ARLINGTON, TEXAS, 1987, THROUGH THE REPEAL OF ORDINANCE NO. 98-49 AND **ARTICLE II**, ENTITLED TELEPHONE, AND ADOPTING A NEW **ARTICLE II**, ENTITLED CERTIFICATED TELECOMMUNICATIONS PROVIDERS, RELATIVE TO ESTABLISHING RULES AND REGULATIONS GOVERNING THE USE OF CITY PUBLIC RIGHTS-OF-WAY BY PROVIDERS OF TELECOMMUNICATIONS SERVICES, SETTING FEES FOR THE USE OF CITY PUBLIC RIGHTS-OF-WAY, PROVIDING FOR MUNICIPAL CONSENT PROCEDURES AND CONSTRUCTION OBLIGATIONS; PROVIDING FOR A FINE OF UP TO \$500 FOR EACH OFFENSE IN VIOLATION OF THE ORDINANCE; AMENDING THE "TELECOMMUNICATIONS" CHAPTER OF THE CODE OF ORDINANCES OF THE CITY OF ARLINGTON, TEXAS, 1987, THROUGH THE AMENDMENT OF **ARTICLE V**, TO ADD NEW **SECTION 41**, ENTITLED NONAPPLICABILITY; PROVIDING THIS ORDINANCE BE CUMULATIVE; PROVIDING FOR SEVERABILITY; PROVIDING FOR GOVERNMENTAL IMMUNITY; PROVIDING FOR INJUNCTIONS; PROVIDING FOR PUBLICATION AND BECOMING EFFECTIVE ON AUGUST 15, 1999

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ARLINGTON, TEXAS:

1.

That the "Utilities" Chapter of the Code of the City of Arlington, Texas, 1987, is hereby amended through the repeal of Ordinance No. 98-49 and Article II, Telephone, and by the adoption of a new **Article II**, entitled Certificated Telecommunications Providers, so that said article shall be and read as follows:

ARTICLE II

CERTIFICATED TELECOMMUNICATIONS PROVIDERS

Section 2.01 Findings and Purpose

The purpose of this Article is to:

- A. Assist in the management of the Public Rights-of-Way in order to minimize the congestion, inconvenience, visual impact and other adverse effects, and the costs to the citizens resulting from the placement of telecommunications facilities within the Public Rights-of-Way;
- B. Govern the Provider's use and occupancy of the Public Rights-of-Way;
- C. Compensate the City for the private, commercial use and occupancy of the Public Rights-of-Way by Telecommunications Providers in a non-discriminatory, competitively neutral manner;
- D. Assist the City in its efforts to protect the public health, safety and welfare;
- E. Facilitate competition among Telecommunications Service Providers and encourage the universal availability of advanced Telecommunications Services to all residents and businesses of the City;
- F. Conserve the limited physical capacity of the Public Rights-of-Way held in public trust by the City; and
- G. Comply with the provisions of Chapter 283.

This Article may be referred to as the "Certificated Telecommunications Providers" Ordinance.

Section 2.02 Granting Clause

Subject to applicable State and Federal law and to the restrictions set forth herein, the City may consent to the non-exclusive right and privilege to use the Public Rights-of-Way in the City by a Provider for the operation of Access Lines in a telecommunications system, consisting of both telecommunications Facilities and Transmission Media. The terms of this Ordinance shall apply throughout the City and to all operations of the Provider within the City Public Rights-of-Way, and in the Public Rights-of-Way in any newly annexed areas in accordance with Section 2.22 herein.

Section 2.03 Authority; Scope

- A. This Article applies to all Telecommunications Service Providers under Title 47, Chapter 5, Subchapter II of the United States Code (47 U.S.C. § 201 *et seq.*) ("Title 47") that place Transmission Media in, on or over Public Rights-of-Way, excluding services provided solely by means of a wireless transmission. No Municipal Consent granted under this Article authorizes the provision of any services not covered by Title 47. Cable service and open video systems as defined in Title VI of the Communications Act of 1934 [Title 47, Chapter 5, Subchapter V-A of the United States Code (47 U.S.C. § 521, *et seq.*)] and any other content service are expressly excluded.

- B. The right of a Person to apply for or to use City utility infrastructure, such as City owned utility poles and conduit ("City Utility infrastructure"), shall be governed by other provisions of the City Code. The granting of a Municipal Consent under this Article does not grant attachment rights or authorize the use of City utility infrastructure.

Section 2.04 Definitions

In this Article:

Access Line means a unit of measurement representing: (1) each switched transmission path of the Transmission Media within the Public Rights-of-Way extended to the end-user customer's network interface within the City that allows delivery of Telecommunications Service; (2) each separate transmission path of the Transmission Media within the City's Public Rights-of-Way that terminates at an end user customer's network interface of each loop provided as an unbundled network element to a Person pursuant to an Agreement under Section 252 of the Federal Telecommunications Act of 1996 (47 U.S.C. § 252); or (3) each termination point of a non-switched Transmission Media consisting of Transmission Media connecting specific locations identified by, and provided to, the end-user for the delivery of non-switched Telecommunications Service within the City.

Access Line Fee means the amount in Section 2.11 to be applied to each Access Line on a monthly basis for the calculation of the total amount to be paid to the City by

the Provider and/or any Person using the facilities of Provider for the creation of Telecommunications Service.

Affiliate means a Person who controls, is controlled by, or is under common control with a Provider. Affiliate does not include a Person who serves end user customers by means of a wireless transmission. There is a rebuttable presumption of control if a Provider owns 25% or more of the Affiliate's stock or assets.

Certificated Telecommunications Utility means any entity that has been granted or applied for a certificate under Chapter 54 of Tex. Utility Code or other successor authorizing certificate to provide local exchange telephone service.

Chapter 283 means Chapter 283 of Subtitle A of Title 9 of the Local Government Code of the State of Texas, as added by H.B. No. 1777 of the 1999 Regular Session of the 76th Legislature.

City means The City Of Arlington, Texas. As used throughout, the term City also includes the designated agent of the City.

City Manager means the City Manager of the City or the City Manager's designee.

Direction of the City means all ordinances, laws, rules, resolutions, and regulations of the City that are not inconsistent with this Ordinance and that are now in force or may hereafter be passed and adopted.

Facilities means any and all of the Provider's duct spaces, manholes, poles, conduits, underground and overhead passageways and other equipment, structures, plant and appurtenances and all associated Transmission Media.

Municipal Consent means the individual grant to use the Public Rights-of-Way issued by the City and executed by the individual Providers under this Article governing the Provider's use of the Public Rights-of-Way and the payment of compensation.

Person means a natural Person (an individual), corporation, company, association, partnership, firm, limited liability company, joint venture, joint stock company or association, and other such entity.

Provider means a Person, including any Certificated Telecommunications Utility, that delivers Telecommunications Service within the City to Person(s) by way of a Network, and that places Facilities in, on or over the Public Rights-of-Way. A Provider does not include Persons who are authorized by the City to occupy the Public Rights-of-Way in specifically approved routes within the City, unless they also have a Municipal Consent under this Article. To the extent allowed by law, Provider also means a Person that does not deliver Telecommunications Service within the City, but who uses, constructs or maintains Facilities or Transmission Media within the Public Rights-of-Way.

Public Rights-of-Way means all present and future public streets, highways, lanes, paths, alleys, sidewalks, boulevards, drives, tunnels, easements or similar property in the City limits in which the City holds a property interest or exercises rights of management or control.

PUC Determination Date means the date the Public Utility Commission of Texas makes the determination required under Section 283.055(b)(1) of the Local Government Code (as amended by H.B. No. 1777), which date will not be later than March 1, 2000.

Telecommunications Network or Network means all Facilities placed in the Public Rights-of-Way and used to provide Telecommunications Service to the public.

Telecommunications Service means the providing or offering to provide transmissions between or among points identified by the user, of information of the user's choosing, including voice, video or data, without change in content of the information as sent and received, if the transmissions are accomplished through a Telecommunications Network. Telecommunications Service include ancillary or adjunct switching services and signal conversions rendered as a function of underlying transmission services, but excludes long distance transmissions (inter-LATA [Local Access Transport Area] and intra-LATA toll transmissions). Telecommunications Service includes all communications services capable of being provided over a telephone system and certificated to telecommunications Providers under the Tex. Utility Code, Title 2, Public Utility Regulatory Act, as amended, and Title II of the Communications Act of 1934, as amended, expressly excluding cable services or open video systems as defined in Title VI of the Communications Act of 1934, as amended. Also excluded are "wireless services" as defined by law.

Transmission Media means any and all of the Provider's cables, fibers, wires or other physical devices used to transmit and/or receive communication signals, whether analog, digital or of other characteristic, and whether for voice, data or other purposes.

Section 2.05 Municipal Consent Required

- A. Prior to placing, reconstructing, or altering Facilities in, on or over the Public Rights-of-Way, a Provider must obtain a Municipal Consent from the City.
- B. The use of Public Rights-of-Way for the delivery of any service not covered by this Article is subject to all other applicable City requirements.
- C. Any Provider with a current, unexpired consent, franchise, agreement or other authorization from the City ("Grant") to use the Public Rights-of-Way that is in effect at the time this Article takes effect shall continue to operate under and comply with that Grant until the Grant expires or until it is terminated by mutual agreement of the City and the Provider and a Municipal Consent under this Ordinance is granted and in effect.

Section 2.06 Application For Municipal Consent

- A. A Person must submit an application to the City Manager to initiate the process to obtain a Municipal Consent.
- B. The application must be on a form prescribed by the City Manager, and it must include the following:
 - 1. The identity of the applicant, including all Affiliates of the applicant that may have physical control of the Network, to the extent known at the time of the application,
 - 2. A general description of the services to be provided initially,
 - 3. With respect to post-application construction a route map of the applicant's proposed Network, if any, and

4. A description of the effect on the rights-of-way, of any post-application construction to the extent known, but not including routine maintenance and construction for additions to existing Networks, except as may be required in Section 2.17, including:
 - a. The location and route required for applicant's proposed Telecommunications Network.
 - b. The location of all overhead and underground public utility, telecommunication, cable, water, sewer, drainage and other Facilities in the rights-of-way along the proposed route.
 - c. The specific trees, structures, improvements, Facilities and obstructions, if any, that the applicant proposes to temporarily or permanently remove or relocate.
5. While not a requirement for the issuance of a Municipal Consent, if applicable, the Applicant shall provide:
 - a. Evidence that the applicant holds or has applied for a Public Utility Commission of Texas Certificate and information to establish that the applicant will obtain all other governmental approvals and permits prior to construction.
 - b. Certification or other documentation to evidence the Public Utility Commission of Texas or any other required governmental approval showing compliance with E911 requirements of Chapters 771 and 772 of the Texas Health and Safety Code on Emergency Communication, and the Texas Public Utility Council Substantive Rules on interconnection, particularly Section 23.97(a), (d) and (e), as amended.
6. Such other and further information as may be reasonably requested by the City Manager as it relates to the use of the Public Rights-of-Way.

- C. Each applicant that shall submit a non-refundable application fee of \$850.00 with the application, with a credit in the amount of \$850.00 on its first quarterly payment due under Section 2.12.
- D. The City Manager shall review an application submitted under this Article and shall recommend to the City Council that it grant or deny the application. The City Manager shall make recommendation to the City Council as soon as practicable, but no later than the 90th day after a completed application has been filed. Upon mutual written agreement between the City and the Provider, action on an application may be postponed for one or more periods not exceeding 30 days each.
- E. Except for delay caused by the applicant, the City Council must take an initial action on the City Manager's recommendation within forty-five (45) days after receipt by the Council of the City Manager's recommendation or the City Manager's recommendation to grant an application shall be deemed approved. No City Council action is required to confirm a denial recommendation, except acknowledgment of receipt of the recommendation.

Section 2.07 Municipal Consent Ordinance

- A. If the City Manager finds that the application meets the requirements of this Article, the City Manager shall request the City Attorney or Designee to prepare a Municipal Consent ordinance for the City Council's consideration.
- B. A Municipal Consent ordinance submitted to the City Council must include the following provisions:
 - 1. a term of not more than five (5) years for the Municipal Consent;
 - 2. a requirement that the Provider substantially comply with this Article;
 - 3. a requirement that the Provider's Municipal Consent is subject to termination by the City Council, after notice and hearing, for the Provider's failure to comply with this Article or in accordance with Section 2.25;

4. a provision that incorporates the requirements of Section 2.14 [Transfer] of this Article;
 5. a provision that incorporates the requirements of Sections 2.17 [Construction Obligations], 2.18 [Conditions of Public Rights-of-Way Occupancy], and 2.19 [Insurance Requirements] of this Article, if applicable;
- C. Review and approval by the City does not constitute a guarantee of sufficiency of the design of the Telecommunications Network. The applicant retains full responsibility for the adequacy of the design of the Telecommunications Network.

Section 2.08 Petition for Reconsideration

A Person whose application for a Municipal Consent is denied, or whose application is not considered by the City Council within a reasonable time after the City Manager submits a recommendation under Section 2.07 or whose Municipal Consent is terminated may petition the City Council for reconsideration before seeking judicial remedies. A petition for reconsideration is considered denied if the City Council does not act within 60 days after the petition is filed with the City Secretary.

Section 2.09 Administration and Enforcement

- A. The City Manager shall administer this Article and enforce compliance with a Municipal Consent conveyed under this Article.
- B. A Provider shall report information related to the use of the Public Rights-of-Way that the City Manager requires in the form and manner prescribed by the City Manager.
- C. The City Manager shall report to the City Council upon the determination that a Provider has failed to comply with this Article.

Section 2.10 Applicability

- A. Sections 2.17 [Construction Obligations], 2.18 [Conditions of Public Rights-of-Way Occupancy] and 2.19

[Insurance Requirements] of this Article apply only to a Provider that constructs, operates, maintains, owns or controls Facilities in the Public Rights-of-Way.

- B. Section 2.20 [Indemnity] of this Article applies to a Provider that has a property interest in a Network.
- C. For all periods of time as to which the provisions of Chapter 283 validly apply to any matter also covered hereby, then to the extent of any conflict, the provisions of Chapter 283 apply and corresponding provisions hereof shall be disregarded.

Section 2.11 Compensation to City

A Provider shall compensate the City by payment of the fees as provided below:

- A. Access Line Fee Calculation. To compensate the City for the use of the rights-of-way, a Provider whose Telecommunications Network is used to serve customers in the City shall pay the City a monthly fee to be calculated as provided below for each Access Line owned or used by the Provider, as calculated as of month-end, that is activated for use by an end user customer of the Provider or of another Person as a Certificated Telecommunications Utility, by lease or otherwise, subject to Subsection (F) below or of any other Person;

1. Access Line Fee Calculation Amount:

- a. Following the effective date of the Municipal Consent, a Provider shall submit to the City Manager on a quarterly basis, a certified statement together with the Access Line Fee payment under Section 2.12, indicating the number of Access Lines used to provide Telecommunications Service at month end, for each month of the quarter and for each customer class identified herein. The statement shall be provided on a form prescribed by the City Manager.
- b. For each month of the quarter following the effective date of the Municipal Consent, a Provider shall pay an Access Line Fee which is based upon its number of Access Lines calculated as follows:

<u>Access Line Fee</u> <u>Calculation Amount</u>	<u>Monthly Amount Per</u> <u>Access Line From</u> <u>Effective Date</u> <u>through PUC</u> <u>Determination Date</u>
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TYPE (1) or (2):

Residential	\$2.35
Non-Residential	\$6.10

TYPE (3)

Private Line Termination Point(s)	\$6.10
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The City reserves the right to make reasonable adjustments to the Access Line Fee, with 180 days notice, but not to exceed ten percent (10%) in any one year, subject to the continuing effect of Texas Utilities Code, §§ 54.204 - 54.206

Amounts appearing above are used to calculate the total compensation due the City and are not to be construed as the setting of a charge for end-users.

(For purposes of this Section only, lines terminating at customers with "Lifeline," "Tel-Assistance," or other service that is required to be similarly discounted pursuant to state or federal law or regulation for the purpose of advancing universal service to the economically disadvantaged shall not be included in the lines upon which the fee is calculated, but Provider shall provide information on the number of such lines upon request by the City.)

2. Number of Access Lines. Subject to City's agreement not to disclose this information unless required by law, Provider will provide annually or as requested by the City, within a reasonable time after receipt of the City's written request, a report certifying as to the number of Access Lines being maintained or operated by Provider that are serving premises within the City, as of the date used in calculating the payment. The report shall be used solely for the purposes of verifying the

number of Provider's Access Lines serving premises within the City. Upon written request, Provider shall verify the information in the report and, upon reasonable advance notice, all non-customer specific records and other documents required for such verification shall be subject to inspection by the City expressly excluding any records, documents or other writings the disclosure of which is prohibited by state or federal law, including the Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq.*

- B. Minimum Annual Fee. Notwithstanding any other provision in this Ordinance, for all new installations of Facilities placed in, on or under the Public Rights-of-Way from the Effective Date of the Municipal Consent, and for each calendar year period thereafter, the Provider shall pay the City a minimum annual fee ("Minimum Fee") of \$250.00, in the event the Access Line Fee paid in the preceding twelve (12) months does not exceed \$250.00, with a credit against such Minimum Fee for any Access Line Fees paid to the City in the preceding twelve (12) months.

Each Municipal Consent shall provide that the Minimum Fee of (B) above may be adjusted once every three (3) years by the City, but such adjustment shall not exceed \$100 in any one three (3) year period.

- C. Confidential Records. If the Provider notifies the City by a conspicuous written notation of the confidential nature of any information (including, but not limited to the information in paragraph (B) of this section), reports, documents, or writings, the City will maintain the confidentiality of the information, reports, documents, and writings to the extent permitted by law. Upon receipt by the City of requests for the Provider's confidential information, reports, documents, or writings, the City shall notify the Provider of the request in writing by facsimile transmission. The City shall furnish the Provider with copies of all requests for Attorney General opinions pertaining to the Provider's confidential information, reports, documents or writings. The City shall request an Attorney General's Opinion before disclosing any confidential information, reports, documents or writings, and shall furnish the Provider with copies of Attorney General Opinion Requests as soon as practicable that it may pertain to the Provider's

Confidential Information, reports, documents or writings.

- D. No other fees. The payments due hereunder shall be in lieu of any construction, building or other permit, approval, inspection, or other similar fees or charges, including, but not limited to, all general business permit fees customarily assessed by the City for the use of the Public Rights-of-Way against Persons operating businesses similar to that of a Provider. Further, such Access Line Fee shall constitute full compensation to the City for all Provider's Facilities located within the Public Rights-of-Way, including interoffice-transport and other Transmission Media that do not terminate at an end-user customer's network interface device, even though those types of lines are not used in the calculation of the Public Rights-of-Way fee. The compensation paid herein is not in lieu of any generally applicable ad valorem taxes, sales taxes or other generally applicable taxes, fees, development impact fees or charges, or other statutory charges or expenses recoverable under the Texas Public Utility Regulatory Act, or successor statutes.
- E. Uncollectibles. Any other provision of this agreement notwithstanding, Provider shall not be obligated to pay the City for any Access Lines or private line termination points the revenues for which remain uncollectible. Upon request, Provider shall provide a written report on the number of access lines for which revenues are uncollected, to include number of lines and number excluded, and a general description of the collection efforts.
- F. Payments by or Use of the Network by Other Telecommunications Carriers and Providers.
1. Direct Payment-Facilities Provided to Other Telecommunications Service Providers: To the extent allowed by applicable state and federal law, any Telecommunications Service Providers who purchase Unbundled Network Elements or other Facilities or services for the purpose of rebundling those Facilities and/or Services to create Telecommunications Service for sale to Persons within the City ("Rebundler"), must pay to the City the Access Line Fee that is calculated as of month-end by applying the appropriate Access Line Fee, as specified in Section 2.11 above, to

each Access Line created by rebundling Telecommunications Service or Facilities. Direct payment further ensures that the Access Line Fee imposed herein can be applied on a non-discriminatory basis to all Telecommunications Service Providers that sell Telecommunications Service within the City. Other provisions of this Ordinance notwithstanding, the Provider shall not include in its monthly count of Access Lines any Facilities or services provided to other Telecommunications Service Providers for rebundling into Telecommunications Service, if the Telecommunications Service Provider who is rebundling those Facilities for resale has provided a signed statement to the Provider that the Telecommunications Service Provider is paying the Access Line Fees applicable to those rebundled services directly to the City. If Provider provides a copy of the signed statement to the City from the Rebundler which is acceptable to the City, then Provider is absolved of all responsibility for the Access Line Fees payable on the Services, Unbundled Network Facilities, and other Facilities rebundled for the creation of Telecommunications Service for sale within the City by each such Rebundler.

2. Indirect Payments - Public Rights-of-Way Fee Application to Use of Network by Others: With respect to any Person leasing, reselling, or otherwise using a Provider's Access Lines, if a Provider believes it does not have sufficient information to determine the appropriate rate to apply, then the higher Access Line Fee may be applied until such time as the Person using the Access Lines provides to the Provider sufficient written information to determine the correct Access Line Fee. If a Person provides sufficient written information for the application of the Access Line Fee, Provider may, at its discretion and not at the City's request, bill the Person on the basis of the information provided. Upon request, and to the extent allowed by law, Provider shall forward to the City a written report on a quarterly basis of the entities that have use of network elements for rebundling purposes. Provider shall provide to the City any information regarding the locations to which it is providing service or Facilities for use by another

Person for the provision of Telecommunications Service to end-user customers, so long as City first obtains written permission of such other Person for Provider to provide the information to the City. Any other provision of this Ordinance notwithstanding, however, a Provider shall not be liable for underpayment of Access Line Fees resulting from the Provider's reliance upon the written information provided by any Person who uses Provider's services or Facilities for the provision of Telecommunications Service to end-user customers.

Section 2.12 City Payment Due Dates

A. Access Line Fee:

A Provider shall remit the Access Line Fee on a quarterly basis together with the Certified Statement in the format required in Section 2.11(A)(1)(a). Payment shall be made on or before the 45th day following the close of each calendar quarter for which the payment is calculated and shall be paid by wire transfer to an account designated by the City Manager.

B. Minimum Fee Payment.

This fee per Section 2.11(B), if applicable, shall be due on January 31 of every year of the Consent Agreement.

Section 2.13 Audits

A. On 30 days notice to a Provider the City may audit a Provider for a period of five (5) years, or the term of the Municipal Consent, whichever is longer. The Provider shall furnish information to demonstrate its compliance with the Municipal Consent and/or other provisions of this Article.

B. A Provider shall keep complete and accurate books of accounts and records of business and operations that cumulatively reflect the monthly count of all Access Lines for a period of seven (7) years. The City Manager may require the keeping of additional records or accounts that are reasonably necessary for purposes of identifying, accounting for, and reporting the

number of Access Lines used to deliver telecommunication services or for calculation of the payments due hereunder. The City may examine the Provider's books and records referred to above, expressly excluding any records, documents or other writings the disclosure of which is prohibited by state or federal law, including the Electronic Communications Privacy Act, 18 U.S.C. §2701, *et seq.*, to the extent such records reasonably relate to providing information to verify compliance with this Article and the Municipal Consent.

- C. A Provider shall make available to the City or the City's designated agent (hereinafter "agent"), for the City or its agent to examine, audit, review and copy, in the City, on the City Manager's written request, its books and records referred to above, including papers, books, accounts, documents, maps, plans and other Provider records that pertain to Municipal Consent conditions and requirements obtained under this Article. A Provider shall fully cooperate in making records available and otherwise assist the City examiner. The City examiner shall not inspect or copy or otherwise demand production of customer specific information or any records, documents or other writings the disclosure of which is prohibited by state or federal law, including the Electronic Communications Privacy Act, 18 U.S.C. §2701, *et seq.* Provider will use its best efforts to retain records in such a manner that allows retrieval of all lawful information.
- D. The City Manager may, at any time, make inquiries pertaining to Providers' performance of the terms and conditions of a Municipal Consent conveyed under this Article. Providers shall respond to such inquiries on a timely basis.
- E. Upon written request by the City Manager, to the extent the documents are reasonably identified, Providers shall furnish to the City within 30 business days from the date of the written request copies of all public petitions, applications, written communications and reports submitted by Providers, to the FCC and/or to the PUC or their successor agencies, relating to any matters affecting the physical use of City Public Rights-of-Way.
- F. The provisions of this Section shall be continuing and shall survive the termination of a Municipal Consent

granted under this Article and shall extend beyond the term of the Municipal Consent granted to the Provider and the City shall have all the rights described in this Section for so long as Provider is providing any Telecommunications Service within the City, unless waived, in writing, by the City.

Section 2.14 Transfer

- A. No Municipal Consent nor any rights or privileges that a Provider has under a Municipal Consent, or the Facilities held by a Provider for use under such Municipal Consent which are in the Public Rights-of-Way, shall be sold, resold, assigned, transferred or conveyed by the Provider, either separately or collectively, to any other Person, without the prior written approval of the City by ordinance or resolution. The City's approval shall be based upon the transferee providing adequate information to the City that it has the ability to perform and comply with the obligations and requirements of the Municipal Consent. Such approval shall not be unreasonably withheld. Should a Provider sell, assign, transfer, convey or otherwise dispose of any of its rights or interests under its Municipal Consent, including such Provider's Telecommunications Network, or attempt to do so, without the City's prior consent, the City may revoke the Provider's Municipal Consent for default, in which event all rights and interest of the Provider under the Municipal Consent shall cease.
- B. Any transfer in violation of this Section shall be null and void and unenforceable. Any change of control of a Provider shall constitute a transfer under this Section. However, such a change in control shall not void the Municipal Consent as to the transferee, unless and until the City has given notice that such a change in control necessitates compliance with Section 2.14. If the Provider does not initiate compliance with Section 2.14 by a request for Municipal Consent within thirty (30) days after the above notice has been given by the City, the Municipal Consent shall be null and unenforceable as to the transferee.
- C. There shall be a rebuttable presumption of a change of control of a Provider upon a change of 15% or greater in the ownership of such Provider. Such a change in

control shall be deemed a transfer which requires consent of the City.

- D. A mortgage or other pledge of assets to a bank or lending institution in a bona fide lending transaction shall not be considered an assignment or transfer.
- E. Every Municipal Consent granted under this Section 2.14 shall specify that any transfer or other disposition of rights which has the effect of circumventing payment of required Access Line Fees or Minimum Fees and/or evasion of payment of such fees by failure to accurately count or report the number of Access Lines by a Provider is prohibited.
- F. Notwithstanding anything else in this Section 2.14, if the City has not approved or denied a request to transfer under this Section within 120 days of written notice of such request from the Provider to the City, it shall be deemed approved. Such time frame may be extended by mutual agreement of the parties.
- G. Notwithstanding any other provision in this Section 2.14, a Provider may transfer, without City approval, the Facilities in the Public Rights-of-Way under a Municipal Consent to another Provider who has a Municipal Consent under this Article. The Provider transferring the Facilities remains subject to all applicable obligations and provisions of the Municipal Consent unless the Provider to which the Facilities are transferred is also subject to the same, as applicable, obligations and provisions. The Provider transferring the Facilities must give written notice of the transfer to the City Manager.

Section 2.15 Notices to City

- A. A Provider shall notify the City Manager as is provided in the Consent Agreement.
- B. A Provider shall give written notice to the City not later than 15 days before a transfer or change in operations that may affect the applicability of Sections 2.18 [Conditions of Public Rights-of-Way Occupancy], 2.19 [Insurance Requirements], 2.20 [Indemnity], and 2.21 [Renewal of Municipal Consent], to the Provider.

Section 2.16 Circumvention of Fee Prohibited

A Person may not circumvent payment of Access Line Fees or evade payment of such fees by bartering, transfer of rights, or by any other means that result in undercounting a Provider's number of lines. Capacity or services may be bartered if the imputed lines are reported in accordance with Section 2.11.

Section 2.17 Construction Obligations

- A. A Provider is subject to the reasonable regulation of the City to manage its Public Rights-of-Way pursuant to the City's rights as a custodian of public property under state and federal laws. A Provider is subject to City ordinances and requirements and federal and state laws and regulations in connection with the construction, expansion, reconstruction, maintenance or repair of Facilities in the Public Rights-of-Way.
- B. At the City's request, a Provider shall furnish the City accurate and complete information relating to the construction, reconstruction, removal, maintenance, operation and repair of Facilities performed by the Provider in the Public Rights-of-Way. Such request may include up to three copies of such documents.
- C. The construction, expansion, reconstruction, excavation, use, maintenance and operation of a Provider's Facilities within the Public Rights-of-Way are subject to applicable City requirements.
 - 1. A Provider may be required to place certain Facilities within the Public Rights-of-Way underground according to applicable City requirements absent a compelling demonstration by the Provider that, in any specific instance, this requirement is not reasonable or feasible nor is it equally applicable to other similar users of the Public Rights-of-Way.
 - 2. A Provider shall perform operations, excavations and other construction in the Public Rights-of-Way in accordance with all applicable City requirements, including the obligation to use trenchless technology whenever commercially economical and practical and consistent with obligations on other similar users of the Public

Rights-of-Way. The City shall waive the requirement of trenchless technology if it determines that the field conditions warrant the waiver, based upon information obtained by the City as well as information provided to the City by the Provider. All excavations and other construction in the Public Rights-of-Way shall be conducted so as to minimize interference with the use of public and private property. A Provider shall follow all reasonable construction directions given by the City in order to minimize any such interference.

3. A Provider must obtain a permit, as reasonably required by applicable City codes, prior to any excavation, construction, installation, expansion, repair, removal, relocation or maintenance of the Provider's Facilities. Once a permit is issued, Provider shall give to the City a minimum of forty-eight (48) hours notice (which could be at the time of application for the issuance of the permit) prior to undertaking any of the above listed activities on its Network in, on or under the Public Rights-of-Way. The failure of the Provider to request and obtain a permit from the City prior to performing any of the above listed activities in, on or over any Public Right-of-Way, except in an emergency as provided for in Subsection (10) below, will subject the Provider to a stop-work order from the City and enforcement action pursuant to the City's Code of Ordinances. If the Provider fails to act upon any permit within 90 calendar days of issuance, the permit shall become invalid, and the Provider will be required to obtain another permit.
4. When a Provider completes construction, expansion, reconstruction, removal, excavation or other work ("Work"), the Provider shall promptly restore to the same condition as prior to the work the Public Rights-of-Way in accordance with applicable City requirements. A Provider shall replace and properly relay and repair the surface, base, underground infrastructure (i.e., gas, water, sewer, and the like), irrigation system and landscape treatment of any Public Rights-of-Way that may be excavated or damaged by reason of the erection, construction, maintenance, or repair of the Provider's Facilities within thirty (30)

calendar days after completion of the work in accordance with existing standards of the City in effect at the time of the work.

5. Upon failure of a Provider to perform any such repair or replacement work, and five (5) days after written notice has been given by the City to the Provider, the City may repair such portion of the Public Rights-of-Way as may have been disturbed by the Provider, its contractors or agents. Upon receipt of a invoice from the City, the Provider will reimburse the City for the costs so incurred within thirty (30) calendar days from the date of the City invoice.
6. Should the City reasonably determine, within two (2) years from the date of the completion of the repair work on streets that the surface, base, underground infrastructure, irrigation system or landscape treatment requires additional restoration work to meet existing standards of the City, a Provider shall perform such additional restoration work to the satisfaction of the City, subject to all City remedies as provided herein.
7. Notwithstanding the foregoing, if the City determines that the failure of a Provider to properly repair or restore the Public Rights-of-Way constitutes a safety hazard to the public, the City may undertake emergency repairs and restoration efforts. A Provider shall promptly reimburse the City for all costs incurred by the City within thirty (30) calendar days from the date of the City invoice.
8. A Provider shall furnish the Engineering Services Department or the department as designated by the City Manager, with construction plans and maps (and up to three copies) showing the location and proposed routing of new construction or reconstruction at least fifteen (15) days [subject to Subsection (D)], before beginning construction or reconstruction that involves an alteration to the surface or subsurface of the Public Rights-of-Way. A Provider may not begin construction until the location of new Facilities and proposed routing of the new construction or reconstruction and all required plans and drawings have been approved in writing by the City, which

approval will not be unreasonably withheld, taking due consideration of the surrounding area and alternative locations for the Facilities and routing.

9. If the City Manager declares an emergency with regard to the health and safety of the citizens and requests by written notice the removal or abatement of Facilities, a Provider shall remove or abate the Provider's Facilities by the deadline provided in the City Manager's request. The Provider and the City shall cooperate to the extent possible to assure continuity of service. If the Provider, after notice, fails or refuses to act, the City may remove or abate the facility, at the sole cost and expense of the Provider, without paying compensation to the Provider and without the City incurring liability for damages.
 10. Except in the case of customer service interruptions and imminent harm to property or Person ("Emergency Conditions"), a Provider may not excavate the pavement of a street or public rights-of-way without first complying with City requirements. The City Manager or designee shall be notified immediately regarding work performed under such Emergency Conditions, and the Provider shall comply with the requirements of City standards for the restoration of the Public Rights-of-Way.
 11. Within sixty (60) days of completion of each new permitted section of a Provider's Facilities, the Provider shall supply the City with a complete set of "as built" drawings for the segment in a format used in the ordinary course of the Provider's business and as reasonably prescribed by the City, and as allowed by law.
 12. The City may require reasonable bonding requirements of a Provider, as are required of other entities that place Facilities in the Public Rights-of-Way.
- D. In determining whether any requirement under this section is unreasonable or unfeasible, the City Manager or his/her designee shall consider, among other things, whether the requirement would subject the Provider or Providers to an unreasonable increase in risk of

service interruption, or to an unreasonable increase in liability for accidents, or to an unreasonable delay in construction or in availability of its services, or to any other unreasonable technical or economic burden.

Section 2.18 Conditions of Public Rights-Of-Way Occupancy

- A. In the exercise of governmental functions, the City has first priority over all other uses of the Public Rights-of-Way. The City reserves the right to lay sewer, gas, water, and other pipe lines or cables and conduits, and to do underground and overhead work, and attachments, restructuring or changes in aerial Facilities in, across, along, over or under a public street, alley or Public Rights-of-Way occupied by a Provider, and to change the curb, sidewalks or the grade of streets.
- B. The City shall assign the location in or over the Public Rights-of-Way among competing users of the Public Rights-of-Way with due consideration to the public health and safety considerations of each user type, and to the extent there is limited space available for additional users, may limit new users, as allowed under state or federal law.
- C. If, during the term of a Municipal Consent, the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or Public Rights-of-Way, the grant to an abutting landowner shall be subject to the rights of the Provider. If the City closes or abandons a Public Right-of-Way that contains a portion of a Provider's Facilities, the City shall close or abandon such Public Right-of-Way subject to the rights conveyed in the Municipal Consent.
- D. If the City gives written notice, a Provider shall, at its own expense, temporarily or permanently, remove, relocate, change or alter the position of Provider's Facilities that are in the Public Rights-of-Way within 120 days, except in circumstances that require additional time as reasonably determined by the City based upon information provided by the Provider. For projects expected to take longer than 120 days to remove, change or relocate, the City will confer with Provider before determining the alterations to be required and the timing thereof. The City shall give notice whenever the City has determined that removal,

relocation, change or alteration is reasonably necessary for the construction, operation, repair, maintenance or installation of a City or other governmental public improvement in the Public Rights-of-Way. This section shall not be construed to prevent a Provider's recovery of the cost of relocation or removal from private third parties who initiate the request for relocation or removal, nor shall it be required if improvements are solely for beautification purposes without prior joint deliberation and agreement with Provider.

If the Provider fails to relocate Facilities in the time allowed by the City in this Section, the Provider may be subject to liability to the City for such delay and as set forth in the City Codes or Ordinance, now or hereafter enacted.

Notwithstanding anything in this Subsection (D), the City Manager and a Provider may agree in writing to different time frames than those provided above if circumstances reasonably warrant such a change.

- E. During the term of its Municipal Consent, a Provider may trim trees in or over the Public Rights-of-Way for the safe and reliable operation, use and maintenance of its Network. All tree trimming shall be performed in accordance with standards promulgated by the City. Should the Provider, its contractor or agent, fail to remove such trimmings within twenty-four (24) hours, the City may remove the trimmings or have them removed, and upon receipt of a bill from the City, the Provider shall promptly reimburse the City for all costs incurred within thirty (30) working days.

- F. Providers shall temporarily remove, raise or lower its aerial Facilities to permit the moving of houses or other bulky structures, if the City gives written notice of no less than 48 hours. The expense of these temporary rearrangements shall be paid by the party or parties requesting and benefitting from the temporary rearrangements. Provider may require prepayment or prior posting of a bond from the party requesting temporary move.

Section 2.19 Insurance Requirements

- A. A Provider shall obtain and maintain insurance in the amounts reasonably prescribed by the City with an insurance company licensed to do business in the State of Texas acceptable to the City throughout the term of a Municipal Consent conveyed under this Article. A Provider shall furnish the City with proof of insurance at the time of filing the acceptance of a Municipal Consent. The City reserves the right to review the insurance requirements during the effective period of a Municipal Consent, and to reasonably adjust insurance coverage and limits when the City Manager determines that changes in statutory law, court decisions, or the claims history of the industry or the Provider require adjustment of the coverage. For purposes of this section, the City will accept certificates of self-insurance issued by the State of Texas or letters written by the Provider in those instances where the State does not issue such letters, which provide the same coverage as required herein. However, for the City to accept such letters the Provider must demonstrate by written information that it has adequate financial resources to be a self-insured entity as reasonably determined by the City, based on financial information requested by and furnished to the City. The City's current insurance requirements are described in Exhibit "A" attached hereto.
- B. Provider shall furnish, at no cost to the City, copies of certificates of insurance evidencing the coverage required by this Section to the City. The City may request the deletion, revision or modification of particular policy terms, conditions, limitations or exclusions, unless the policy provisions are established by a law or regulation binding the City, the Provider, or the underwriter. If the City requests a deletion, revision or modification, a Provider shall exercise reasonable efforts to pay for and to accomplish the change.
- C. An insurance certificate shall contain the following required provisions:
1. name the City of and its officers, employees, board members and elected representatives as additional insureds for all applicable coverage;

2. provide for 30 days notice to the City for cancellation, non-renewal, or material change;
 3. provide that notice of claims shall be provided to the City Manager by certified mail; and
 4. provide that the terms of the Municipal Consent which impose obligations on the Provider concerning liability, duty, and standard of care, including the indemnity section, are included in the policy and that the risks are insured within the policy terms and conditions.
- D. Provider shall file and maintain proof of insurance with the City Manager during the term of a Municipal Consent or an extension or renewal. An insurance certificate obtained in compliance with this section is subject to City approval. The City may require the certificate to be changed to reflect changing liability limits. A Provider shall immediately advise the City Attorney of actual or potential litigation that may develop may affect an existing carrier's obligation to defend and indemnify.
- E. An insurer has no right of recovery against the City. The required insurance policies shall protect the Provider and the City. The insurance shall be primary coverage for losses covered by the policies.
- F. The policy clause "Other Insurance" shall not apply to the City if the City is an insured under the policy.
- G. The Provider shall pay premiums and assessments. A company which issues an insurance policy has no recourse against the City for payment of a premium or assessment. Insurance policies obtained by a Provider must provide that the issuing company waives all right of recovery by way of subrogation against the City in connection with damage covered by the policy.

Section 2.20 Indemnity

- A. Each Municipal Consent granted under this Article shall contain provisions whereby the Provider shall promptly defend, indemnify and hold the City harmless from and against all damages, costs, losses or expenses:

1. for the repair, replacement, or restoration of City's property, equipment, materials, structures and Facilities which are damaged, destroyed or found to be defective as a result of the Provider's acts or omissions; and
 2. from and against any and all claims, demands, suits, causes of action, and judgments for:
 - a. damage to or loss of the property of any Person (including, but not limited to the Provider, its agents, officers, employees and subcontractors, City's agents, officers and employees, and third parties); and/or
 - b. death, bodily injury, illness, disease, loss of services, or loss of income or wages to any Person (including, but not limited to the agents, officers and employees of the Provider, Provider's subcontractors and City, and third parties), arising out of, incident to, concerning or resulting from the negligent or willful act or omissions of the Provider, its agents, employees, and/or subcontractors, in the performance of activities pursuant to such Municipal Consent.
- B. No Municipal Consent indemnity provision shall apply to any liability resulting from the negligence of the City, its officers, employees, agents, contractors, or subcontractors.
- C. The provisions of the required indemnity provision set forth in an individual Municipal Consent shall provide that:
1. It is solely for the benefit of the parties to the Municipal Consent and is not intended to create or grant any rights, contractual or otherwise, to any other Person or entity;
 2. To the extent permitted by law, any payments made to, or on behalf of the City under the provisions of this section are subject to the rights granted to Providers under Sections 54.204-54.206 of the Texas Utilities Code; and

3. Subject to the continued applicability of the provisions of Sections 54.204-54.206 of the Texas Utilities Code, as set forth in (2) above, the provisions of the indemnity shall survive the expiration of the Municipal Consent.

Section 2.21 Renewal of Municipal Consent

A Provider shall request a renewal of a Municipal Consent by making written application to the City Manager at least 90 days before the expiration of the consent.

Section 2.22 Annexation; Disannexation

Within thirty (30) days following the date of the passage of any action affecting the annexation of any property to or the disannexation of any property from the City's corporate boundaries, the City agrees to furnish Provider written notice of the action and an accurate map of the City's corporate boundaries showing, if available, street names and number details. For the purpose of compensating the City under this Ordinance, a Provider shall start including or excluding Access Lines within the affected area in the Provider's count of Access Lines on the effective date designated by the Comptroller of Public Accounts - Texas for the imposition of State local sales and use taxes; but in no case less than thirty (30) days from the date the Provider is notified by the City of the annexation or disannexation.

Section 2.23 Severability

The provisions of this ordinance are severable. However, in the event this Ordinance or any tariff that authorizes the Provider to recover the fee(s) provided for this Ordinance or any procedure provided in this Ordinance or any compensation due the City under this Ordinance becomes unlawful, or is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, illegal or otherwise inapplicable, in whole or in part, or is exchanged for another means of compensation under higher authority, the City shall adopt a new ordinance that is in compliance with the authority's decision or enactment. Unless explicitly prohibited, the new ordinance shall provide the City with a level of

compensation comparable to that set forth in this Ordinance as long as the compensation is recoverable by the Provider in a manner permitted by law for the unexpired portion of the term of this Ordinance.

Section 2.24 Governing Law

This Ordinance shall be construed in accordance with the City Code(s) in effect on the date of passage of this Ordinance to the extent that such Code(s) are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas, subject to the City's ongoing authority to adopt reasonable regulations to manage its Public Rights-of-Way, pursuant to Sections 2.17 and 2.18 or as otherwise provided by law. Municipal Consents entered into pursuant to this Ordinance are performable in Tarrant County, Texas.

Section 2.25 Termination

- A. The City shall reserve the right to terminate any Municipal Consent and any rights or privileges conveyed under this Article in the event of a material breach of the terms and conditions of the Municipal Consent or of this Article, subject to a thirty day written notice and the opportunity to cure the breach during that thirty (30) day period.
- B. Material breaches of a Municipal Consent specifically include, but are not limited to, continuing violations of Sections 2.11 [Compensation to City], 2.17 [Construction Obligations] and/or 2.18 [Conditions of Public Rights-of-Way Occupancy], and the furnishing of service of any kind that requires municipal authorization but that is not authorized by Section 2.03(A).
- C. A material breach shall not be deemed to have occurred if the violation occurs without the fault of a Provider or occurs as a result of circumstances beyond its control. Providers shall not be excused from performance of any of their obligations under this Article by economic hardship, nor misfeasance or malfeasance of their City Managers, officers or employees.

- D. A termination shall be declared only by a written decision by motion, resolution or ordinance of the City Council after an appropriate public proceeding before the City Council, which shall accord the Provider due process and full opportunity to be heard and to respond to any notice of grounds to terminate. All notice requirements shall be met by giving the Provider at least fifteen (15) days prior written notice of any public hearing concerning the proposed termination of its consent. Such notice shall state the grounds for termination alleged by City.

Section 2.26 Unauthorized Use of Public Rights-Of-Way

- A. Any Person seeking to place Facilities on, in or over the Public Rights-of-Way, City property, City structures, or Utility infrastructure shall first file an application for a Municipal Consent with the City and shall abide by the terms and provisions of this Ordinance pertaining to use of the Public Rights-of-Way and pay the fees specified herein.
- B. The City may institute all appropriate legal action to prohibit any Person from knowingly using the Public Rights-of-Way unless the City has consented to such use in accordance with the terms of this Article and with a Municipal Consent.
- C. Any Person using the Public Rights-of-Way without a Municipal Consent shall be liable for the same fees and charges as provided for herein.

2.

That the "**Telecommunications**" Chapter of the Code of the City of Arlington, Texas, 1987, is hereby amended by adding new **Section 41**, which shall read as follows:

Section 41 Nonapplicability

On or after August 15, 1999, the provisions of this Chapter do not apply to a telecommunications provider not currently franchised under this Chapter that is certificated by the Public Utility Commission of Texas. Providers currently holding a franchise under this Chapter will hold their franchise subject to the provisions of Chapter 283 of the Texas Local Government Code, as applicable.

3.

Any person, firm, corporation, agent or employee thereof who violates any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be fined an amount not to exceed Five Hundred and No/100 Dollars (\$500) for each offense. Each day that a violation is permitted to exist shall constitute a separate offense.

3.

This ordinance shall be and is hereby declared to be cumulative of all other ordinances of the City of Arlington, and this ordinance shall not operate to repeal or affect any of such other ordinances except insofar as the provisions thereof might be inconsistent or in conflict with the provisions of this ordinance, in which event such conflicting provisions, if any, in such other ordinance or ordinances are hereby repealed.

4.

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional, such holding shall not affect the validity of the remaining portions of this ordinance.

5.

All of the regulations provided in this ordinance are hereby declared to be governmental and for the health, safety and welfare of the general public. Any member of the City Council or any City official or employee charged with the enforcement of this ordinance, acting for the City of Arlington in the discharge of his/her duties, shall not thereby render himself/herself personally liable; and he/she is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his/her said duties.

6.

Any violation of this ordinance can be enjoined by a suit filed in the name of the City of Arlington in a court of competent jurisdiction, and this remedy shall be in addition to any penal provision in this ordinance or in the Code of the City of Arlington.

7.

The caption and penalty clause of this ordinance shall be published in a newspaper of general circulation in the City of Arlington, in compliance with the provisions of Article VII, Section 15, of the City Charter. Further, this ordinance may be published in pamphlet form and shall be admissible in such form in any court, as provided by law.

8.

This ordinance shall become effective on August 15, 1999.

PRESENTED AND GIVEN FIRST READING on the 3rd day of August, **1999**, at a regular meeting of the City Council of the City of Arlington, Texas; and GIVEN SECOND READING, passed and approved on the 10th day of August, **1999**, by a vote of 8 ayes and 0 nays at a regular meeting of the City Council of the City of **Arlington, Texas**.