

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Senator Karin Brownlee at 8:30 a.m. on March 15, 2001 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: April Holman, Legislative Research Department
Bob Nugent, Revisor of Statutes
Lea Gerard, Secretary

Conferees appearing before the committee:

Others attending: See attached list.

The Chair announced to committee members that the MARC model ordinance has been given to the committee secretary for their review (Attachment 1).

Jim Orr, City Attorney for the City of Westwood, submitted written testimony in opposition to **SB 306** (Attachment 2).

In response to a question from Senator Barone on March 12, 2001, Rob Hodges, Kansas Telecommunications Industry Association provided information regarding right-of-way and franchise requirements (Attachment 3).

In response to a question from Committee regarding the language in **SB 306** dealing with indemnity, documentation from the Kansas Corporation Commission was provided by Rob Hodges, Kansas Telecommunication Industry Association (Attachment 4).

The Committee proceeded to work the amended **SB 306** using a balloon amendment dated March 12, 2001 submitted by the industry (Attachment 5).

In response to Senator Steineger's question on clarification of Telecommunication facilities in the amended **SB 306**, the Chair requested Bob Nugent, Revisor of Statutes to write a definition for the term.

Senator Jordan moved, seconded by Senator Kerr that SB 306 provide both options, "access line fee or gross receipts" with a 5% cap. Motion carried.

Senator Emler requested a definition of access line fee and how are the access lines are counted today.

Senator Emler moved, seconded by Senator Kerr that the three balloon amendments on Page 3, starting with Line 10 through Line 21 be adopted. Motion carried.

Senator Emler moved, seconded by Senator Jenkins that SB 306 be amended on Page 3 to strike the language in subsection (a), Line 25 thru Line 30. Motion carried.

Senator Emler moved, seconded by Senator Jenkins that SB 306 be amended on Page 4 to insert the balloon amendment and to further clarify within the balloon amendment what party may be awarded attorney fees and to strike the language on Line 18 starting with "A city shall not" and continue thru Line 21. Motion carried.

Senator Jenkins moved, seconded by Senator Jordan to adopt a conceptual amendment that would apply the aforementioned concept to "gross receipts". Motion carried.

Senator Emler, moved, seconded by Senator Brungardt to amend Page 5, Line 12, subsection (d) to provide cross-reference to the open records act. Motion carried.

Attached is a follow-up list of questions regarding SB 306 by the Committee members (Attachment 6).

Meeting adjourned at 9:30 a.m.

Next meeting scheduled March 16, 2001 at 8:00 a.m.

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BILL NO. _____

ORDINANCE NO. _____

AN ORDINANCE ESTABLISHING REGULATIONS FOR THE USE OF THE RIGHTS-OF-WAY TO CONSTRUCT, OPERATE, AND/OR MAINTAIN COMMUNICATIONS SYSTEMS AND CABLE SYSTEMS, ESTABLISHING REQUIRED TERMS FOR GRANTING COMMUNICATIONS AND CABLE SERVICES CODE SYSTEM FRANCHISES, AND ESTABLISHING COMPENSATION FOR SUCH USE OF THE RIGHTS-OF-WAY

WHEREAS, Kansas law authorizes the City to franchise and regulate the use and occupancy of Rights-of-Way for placement of a Communications Systems and Cable Systems as hereinafter defined, and to require compensation and to adopt rules and regulations regarding such use and occupancy; and

WHEREAS, the City is authorized to and should establish standards for occupancy of the Rights-of-Way by Communications Facilities and Cable Facilities and other uses that are consistent with and recognize the Corporation Commission's duties and jurisdiction; and

WHEREAS, the City's standards included in this ordinance are designed to:

- A. Adequately reimburse the City for occupancy of the Rights-of-Way by Facilities;
- B. Fully protect the public and the City from any harm caused by private commercial use of Rights-of-Way, including, but not limited to, reducing the risk of loss of service or personal or property injury from errant excavation;
- C. Protect the regulatory authority of the City in a manner consistent with federal and state law; and
- D. Otherwise protect the public interests in and promote the development and coordinated use of an advanced telecommunications infrastructure; and
- E. Promote the entry of communications providers on a competitively neutral manner, maximize the available space for such providers by requiring coordination, collocation, and planned construction of infrastructure in the Rights-of-Way, and

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF _____ KANSAS:

CHAPTER 1. GENERAL PROVISIONS

- 1.1 **Declaration of Findings.** The City hereby declares as a legislative finding that the Rights-of-Way within [NAME OF CITY]:

- A. Are a unique and physically limited resource;
 - B. Are critical to the travel and transport of persons and property in the City; and
 - C. Are intended for public uses and must be managed and controlled consistent with that intent; and can be partially occupied by the Facilities of utilities and public service entities, to the enhancement of the health, welfare, and general economic well being of the City and its citizens; and require adoption of the specific additional regulations established by this Code to ensure coordination of users, maximize available space, reduce maintenance and costs to the public, and facilitate entry of a maximum number of providers of cable, communications, and other services in the public interest.
- 1.2 **Title.** This Ordinance may be referred to and cited as the "Communications and Cable Services Code" or herein as the "Code" of the City of _____.
- 1.3 **Applicability.** The requirements of this Code shall apply to the full extent of the terms herein and shall be limited in scope or application only to the extent as may be required by applicable federal or state law, including such changes in applicable law as may be hereinafter enacted. No provisions of this Code shall be disregarded pursuant to this subsection except on express application to and determination by the City to such effect based on the specific factual circumstances demonstrated. The provisions of this Code shall be deemed incorporated in each Franchise granted.
- 1.4 **Preservation of Police Power Authority.** Any rights granted pursuant to this Code and pursuant to any Franchise authorized hereunder are subject to the authority of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Providers shall be subject to and comply with all applicable Laws enacted by the City pursuant to its [**Home Rule or statutory**] powers, to the extent not in conflict with Kansas or federal law. Nothing in this Code shall be deemed to waive a right, if any, that any party may have to seek judicial or regulatory review as to the provisions herein or as to actions of the parties under applicable federal, state, or local law currently in effect or as may hereinafter be amended.
- 1.5 **Public Inspection Of Records.** Certain information required to be filed with the City pursuant to this Code is subject to inspection and copying by the public pursuant to the provisions of the Kansas Open Records Act, K.S.A. 45-215 et seq. Notwithstanding any ordinance or provision to the contrary, the City may disclose any proposed or existing Facilities locations of Provider as deemed in the public interest and as may be established by City Policy establishing requirements for notification and/or joint installation of facilities.

- 1.6 **Indemnification.** As a condition of use of the Rights-of-Way, Provider at its sole cost and expense, shall indemnify, protect, defend (with counsel acceptable to the City) and hold harmless the City, its elected officials, officers, employees, and agents, from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and expenses of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of the fact that the City approved a Franchise with Provider, the rights granted to Provider, or the activities performed, or failed to be performed, by Provider under the Franchise or use of the Rights-of-Way, or otherwise, except to the extent arising from or caused by the sole or gross negligence or willful misconduct of the City, its elected officials, officers, employees, agents or contractors. This indemnification shall survive the expiration or termination of any Franchise or use of the Rights-of-Way for a period of five (5) years after the effective date of expiration or termination.
- 1.7 **Compliance With Laws.** In performing activities and exercising its rights and obligations under any Franchise, the Provider shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction and use of public property.
- 1.8 **Enforcement; Attorneys' Fees.** The City shall be entitled to enforce this Code and any Franchise through all remedies lawfully available, and Provider shall pay City its costs of enforcement, including reasonable attorneys' fees in the event that Provider is determined judicially to have violated the terms of this Code or any Franchise.
- 1.9 **Relationship of the Parties.** Under no circumstances shall any Franchise authorized by this Code be construed to create any relationship of agency, partnership, joint venture, or employment between the parties.
- 1.10 **Defined Terms.** For purposes of this Code, the following terms, phrases, words, and their derivatives shall have the meanings set forth in this Section, unless the context clearly indicates that another meaning is intended. Words used in the present tense include the future tense, words in the single number include the plural number, and words in the plural number include the singular. The words "shall" and "will" are mandatory, and "may" is permissive. Words not defined shall be given their common and ordinary meaning.
 - A. **"Access Facilities"** means:
 1. Channel capacity designated for Public, Educational or Governmental Access use; and
 2. The facilities and equipment for the use of such channel capacity.

- B. **"Affiliate"** means each person, directly or indirectly, controlling, controlled by, or under common control with the Franchisee; provided that Affiliate shall in no event mean any limited partner or shareholder holding an interest of less than 15 percent of such Franchisee, or any creditor of such Franchisee solely by virtue of its status as a creditor and which is not otherwise an Affiliate by reason of owning a controlling interest in, being owned by, or being under common ownership, common management, or common control with, such Franchisee.
- C. **"Antenna"** means any device that transmits and/or receives radio waves for voice, data or video communications purposes including, but not limited to, television, AM/FM radio, microwave, cellular telephone and similar forms of communications. A combination of panels, boxes, or other antenna physically connected and designed in conjunction to receive signals at one location in the System shall be considered one (1) antenna.
- D. **"Basic Cable Service"** means any Cable Service tier that includes the lawful retransmission of local television broadcast signals and any Public, Educational, and Governmental Access programming required by this Ordinance to be carried on the basic tier. Basic Cable Service as defined herein shall be consistent with 47 U.S.C. § 543(b)(7) (1997).
- E. **"Cable Act"** means the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, (codified at 47 U.S.C. §§ 521-611 (1982 & Supp. V. 1987) as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, and the Telecommunications Act of 1996, Pub. L. No. 104-104 (1996) as it may, from time to time, be amended.
- F. **"Cable Franchise"** means the rights and obligations extended by the City to a Person to own, lease, construct, maintain, or operate a Cable System in the Rights-of-Way within the Franchise Area for the purpose of providing Cable Services. Any such authorization, in whatever form granted, shall not mean or include: (i) any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City, including the provision of Communications Services; (ii) any permit, agreement, or authorization required in connection with operations in the Rights-of-Way including, without limitation, permits and agreements for placing devices on or in poles, conduits, or other structures, whether owned by the City or a private entity, or for excavating or performing other work in or along the Rights-of-Way.
- G. **"Cable Franchise Fee"** means any tax, fee, or assessment of any kind imposed by the City or other governmental entity on a Cable Service Provider or its Cable Subscribers, or both, solely because of their status and activities as such, pursuant to Section ___ of this Code. The term

"Cable Franchise Fee" does not include: (i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and Cable Operators or their Cable Services but not including a tax, fee, or assessment that is unduly discriminatory against Cable Service providers or Cable Subscribers); (ii) Capital Costs that are required by a Cable Franchise to be incurred by a Grantee for public, educational or governmental ("PEG") Access facilities; (iii) requirements or charges incidental to the award or enforcement of a Cable Franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; (iv) any permit fee or other fee imposed under any valid right-of-way ordinance; or (v) any fee imposed under Title 17 of the United States Code.

H. **"Cable Internet Services"** means the offering of direct access by a cable license to the international computer network of both federal and non-federal interoperable packet switched data networks to customers for a fee. For purposes of this Code, Cable Internet Service shall mean the direct access to the Internet provided to customers over the Cable System and shall include the provision of incidental services or revenues that are required by law to be treated under the same regulation as such direct access service. If it is definitively determined under applicable law that Cable Internet Service is not a Cable Service, a Provider shall enter into a separate Communications Franchise with the City. All prior payments to the City attributable to such Cable Internet Service under a Cable Franchise shall be irrefutably deemed to be lawful compensation for the past use prospectively paid under any new Communications Franchise, irrespective of any rates or terms required for any future use under any new Communications Franchise.

I. **"Cable Services"** means:

1. The one-way transmission to subscribers of (i) video programming, or (ii) other programming service; and
2. Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

J. **"Cable System"** means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple Subscribers within the Franchise Area, but such term does not include:

1. A facility that serves only to retransmit the television signals of one or more television broadcast stations;

2. A facility that serves Subscribers without using any public Rights-of-Way; or
 3. A facility of a common carrier which is subject, in whole or in part, to the provisions of 47 U.S.C. §§ 201-226, except that such facility shall be considered a Cable System (other than for purposes of 47 U.S.C. § 541(c)) to the extent such facility is used in the transmission of video programming directly to Subscribers, unless the extent of such use is solely to provide interactive on-demand services;
 4. An Open Video System that complies with Section 653 of the Cable Act; or
 5. Any facility of any electric utility used solely for operating its electric utility system.
- K. "**Capital Costs**" means costs associated with the purchase of assets, products or other resources that will provide service for more than one year, but shall not have any meaning inconsistent with generally accepted accounting principles.
- L. "**Channel**" means a portion of the electromagnetic frequency spectrum which is used in a Cable System and which is capable of carrying one industry standard video signal, in either analog or digital form. At the time of the passage of this Ordinance, analog standard channel is defined as 6 MHz.
- M. "**City**" or "**Grantor**" means the City of [NAME OF CITY], Kansas.
- N. "**Code**" means this "Communications and Cable Services Code" and all provisions therein established by this Ordinance.
- O. "**Collocation**" means the shared use of Facilities, including, but not limited to, the placement of conduit owned by more than one Rights-of-Way user in the same trench or boring and the placement of equipment owned by more than one user in the same or connected conduit. Collocation does not include interconnection of Facilities or the sale or purchase of capacity (whether bundled or unbundled).
- P. "**Communications**" means the transmission via the Facilities, in whole or in part, between or among points specified by the user, of information of the user's choosing (e.g., data, video, voice), without change in the form or content of the information as sent and received, regardless of the statutory or regulatory scheme to which such transmissions may be subject.

- Q. "**Communications Franchise**" means a franchise for use of the Rights-of-Way for Communications Services as authorized herein and executed by the City and Franchisee.
- R. "**Communications Franchise Fee**" means the fee imposed by the City on Franchisee for use of the Rights-of-Way pursuant to a Communications Franchise pursuant to Section _____ of this Code.
- S. "**Communications Service**" means the transmission via Facilities, in whole or in part, of any writings, signs, signals, pictures, sounds or other forms of intelligence through wire, wireless or other means, including, but not limited to, any "telecommunications service," "enhanced service," "information service," or "Internet service," as such terms are now, or may in the future be, defined under federal law, and including all instrumentalities, facilities, conduit, apparatus ("Communications Facilities"), and services (among other things, the receipt, forwarding, and delivery of telecommunications) incidental to or designed to directly or indirectly facilitate or accept such transmission. This term does not include "cable television service," but these services shall be subject to separate cable franchising requirements and application.
- T. "**Complaint**" means any oral, written or electronic inquiry, allegation, or assertion made by a Person regarding Cable Service or Cable System operations.
- U. "**Converter**" means an electronic device that converts signals to a frequency not susceptible to interference within the television receiver of a Subscriber and, through the use of an appropriate Channel selector, permits a Cable Subscriber to view all authorized Cable Subscriber signals delivered at designated converter dial locations. Converters include all devices furnished to the Subscriber and owned by the Cable Provider.
- V. "**Direct Incremental Costs**" means the costs actually incurred by a Cable Provider in meeting an obligation under its Franchise which the Provider would not otherwise have incurred in order to either operate and conduct the business of its Cable System or meet another obligation of the Franchise.
- W. "**Drop**" means the cable or cables that connect the ground block on the Cable Subscriber's property to the nearest feasible point on the Cable System in order to receive Cable Service.
- X. "**Facilities**" means any portion of a System located in, along, over, upon, under, or through the Rights-of-Way.
- Y. "**Franchise**" means a Cable Franchise or a Communications Franchise as defined herein or any other agreement or license granted by the City

authorizing use of the Rights-of-Way for any Cable Service or Communication Service.

- Z. **"Franchise Area,"** unless otherwise specified in the applicable Franchise, means the entire geographic area within the City as it is now constituted or may in the future be constituted.
- AA. **"Franchisee"** means the party subject to a Communications Franchise, or its successor, assigns, or transferee.
- BB. **"Grantee"** means a Person who is granted a Cable Franchise and that Person's agents, employees, lawful successors, transferees, or assignees.
- CC. **"Gross Receipts"** means all revenues received directly or indirectly by a Franchisee or its Affiliates for Communications Services originating, terminating or otherwise rendered within the corporate limits of the City and all revenue derived from the use of the Communications Services Facilities. Except to the extent as may be prohibited by law, such "Gross Receipts" shall specifically include, but shall not be limited to, all revenue of the Franchisee derived from the following:
1. Recurring local exchange service revenues for business and residence which include basic telephone exchange service, Touch Tone, Custom Calling Services and measured local calls;
 2. Recurring local exchange service revenues for public, semi-public and private coin;
 3. Local directory assistance (411);
 4. Line status verification/busy interrupt;
 5. Local operator assistance;
 6. Information delivery service;
 7. Cellular and other wireless communication services revenue; provided that such revenues derive from a system having antennae or other parts of the mobile system physically located within the Right-of-Way;
 8. Nonrecurring local exchange service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate telephone bills;
 9. Revenue received by the Franchisee from Reseller Service Providers (except for revenues from Reseller Service Providers

that have a separate enforceable Franchise with the City providing for payment of Gross Receipts of that Reseller Service Provider);

10. Internet access charges or services and including all high-speed and traditional subscriber line charges or services (and including Cable Internet Service, unless such service revenues are validly included and collected as Gross Revenues in a Cable Franchise between Franchisee and the City);
11. Revenue from rent, physical use, collocation, or sale of the Facilities, network elements, or a portion thereof for any purpose;
12. Late charges or interest received on gross receipts;
13. Any portion of the Communications Franchise Fees collected by Franchisee from any person;
14. All other applicable revenues not listed herein.

"Gross Receipts" shall not include uncollectible debt, any federal, state or local taxes separately stated on a customer's bill. "Gross Receipts" shall not include revenues from Affiliates where the Affiliates have a separate enforceable Franchise with the City providing for payment of such Affiliate Gross Receipts or where the Affiliate does not utilize, transmit communications through, or connect to any part of the Facilities. In the event a Franchisee receives revenues for Communications Services or other activities within and without the City of which the specific portion attributed to operations in the City cannot be directly determined ("Unallocated Revenues"), "Gross Receipts" with respect to such revenues shall mean the portion thereof derived by multiplying such revenues by a fraction, the numerator of which is the Gross Receipts from the City and the denominator of which is the total revenues of Franchisee attributable from the area generating such Unallocated Revenues. All revenue from or relating to or connected with Communication Services deriving from any billing address within the City shall be presumed to be Gross Receipts of Franchisee, unless demonstrated in writing to the contrary as to each such revenue.

- DD. **"Gross Revenues"** means any revenue actually received by a Grantee, or by any other entity that is a Cable Operator on a Grantee's Cable System including the Grantee's Affiliates, from the operation of the Grantee's Cable System to provide Cable Services. By way of illustration and not limitation, this definition would include revenue derived from pay cable fees, installation and reconnection fees, leased channel access fees; Converter rentals; revenue from Cable Internet Service (unless it is determined by applicable law that it is not a Cable Service); revenue from home shopping to the extent conducted through a Cable Service; all Cable

Service lease payments from the Cable System; payments or other consideration received by the Grantee from programmers for carriage of programming on the Cable System and accounted for as revenue under generally accepted accounting principles ("GAAP"); advertising revenues; revenues from data transmissions to the extent these transmissions are considered Cable Services under federal law; payments or other consideration received by the Grantee for the use of the Cable System to provide Cable Service and accounted for as revenue under GAAP. Gross Revenues shall include revenue received by any entity other than the Grantee where necessary to prevent evasion or avoidance of the obligations under this Code or a Franchise to pay the applicable Cable Franchise Fees. Revenues which are not directly attributable to specific Cable Subscribers, including, but not limited to, leased access fees, advertising revenues, and home shopping commissions, shall be allocated among the franchising jurisdictions served by the Grantee's Cable System on a per Subscriber or other equitable basis measured in a consistent manner from period to period. Gross Revenues shall not include (i) to the extent consistent with GAAP, bad debt; provided, however, that all or part of any such bad debt that is written off but subsequently collected shall be included in Gross Revenues in the period collected; (ii) amounts collected from Cable Subscribers for public, educational and governmental access, provided, however, this exclusion does not limit a Grantee's ability to pass through franchise related costs to the extent allowed by applicable law; (iii) any taxes on Cable Services furnished by Grantee which are imposed directly upon any Subscriber or user by the State, City or other governmental unit and which are collected by Grantee on behalf of said governmental unit; or (iv) Cable Franchise Fees collected from Cable Subscribers.

- EE. **"Institutional Network" or "I-Net"** means a communication network which is constructed or operated by Grantee and which is generally available only to Cable Subscribers who are not residential Subscribers. The I-Net shall consist of capacity, fibers or both, from both within the primary cable network and/or separately constructed networks that may be dedicated to governmental, educational and other publicly funded users for two-way, broadband communications. The I-Net includes all equipment and maintenance of equipment required to make the capacity available, including, but not limited to, fiber and coaxial cable, cable modems, switching, routing, transmitting and receiving necessary for the use of the network as set out in the individual Cable Franchise.
- FF. **"Institutional Network Services"** means the provision of an I-Net by a Cable System operator to governmental, educational and other non-profit, publicly funded users, as determined by the City, pursuant to the terms of its Franchise for non-commercial applications including, but not limited to, two-way dedicated voice, video, data and telephony channels connecting and interconnecting user facilities.

- GG. **"Linear Foot"** means the length in feet of cable, wire, fiber, conduit or other linear Facilities. Facilities that are physically connected, wrapped, or lashed as a single cable, conduit or bundle of cables or conduit shall be considered a single facility for purposes of calculating each Linear Foot, provided that each conduit or bundle of conduit up to and including 4" in diameter shall constitute a separate Facility for calculating Linear Feet. Conduit having fiber optic or other cable or wire installed within it shall not be considered separate facilities but shall be considered part of the single "conduit" or bundle for purposes of calculating Linear Feet.
- HH. **"Normal Business Hours"** means those hours during which most similar businesses in the community are open to serve customers. In all cases, Normal Business Hours must include some evening hours, at least one night per week, and some weekend hours.
- II. **"Normal Operating Conditions"** means those Cable Services or conditions that are within the control of a Cable System Franchise Grantee. Those conditions, which are ordinarily within the control of Grantee, include, but are not limited to, special promotions; pay-per-view events; rate increases; regular peak or seasonal demand periods; and maintenance or upgrade of the Cable System. Those conditions that are not within the control of Grantee include, but are not limited to, natural disasters; civil disturbances; power outages; telephone network outages; vandalism, public works projects for which no advanced notice is given, and severe or unusual weather conditions.
- JJ. **"Open Video Services"** means any video programming Services provided to any person by a Franchisee certified by the FCC to operate an Open Video System pursuant to Section 47 U.S.C. 573, as may be amended, regardless of the Facilities used.
- KK. **"Person"** means any corporation, partnership, proprietorship, individual, organization, governmental entity or any natural person.
- LL. **"Provider"** means a Franchisee or Grantee or any Person required to have a Communications Franchise or Cable Franchise.
- MM. **"Public Building"** means any building owned or for the greater part occupied by the City or other governmental unit.
- NN. **"Renewal"** means a new Communications Franchise or Cable Franchise granted to an existing Provider.
- OO. **"Reports"** means any and all non-trade secret documents and information required to be completed and/or kept or filed by a Grantee or Franchisee on order of the Federal Communications Commission, State or City. In accordance with applicable law, the City shall maintain such information

as confidential to the extent that the Provider identifies specific information as such.

- PP. **"Reseller Service Provider"** means a Communications Service Provider providing service within the City that does not have ownership, possessory interest, or control of Facilities in the Rights-of-Way, but instead uses the Rights-of-Way by interconnecting with or using the network elements of another Communications Service Provider utilizing the Rights-of-Way, and/or by leasing excess capacity from a facility-based Communications Service Provider.
- QQ. **"Rights-of-Way"** means the surface and space on, above and below every municipal street, alley, road, highway, lane or City right-of-way dedicated or commonly used now or hereafter for utility purposes and facilities thereon, including, but not limited to, overhead lighting facilities. This term shall not include any county, state, or federal rights-of-way or any real property owned or controlled by any Person or Agency other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such Person or Agency. "Rights-of-Way" shall not include public property owned or leased by the City and not intended for right-of-way use, including, but not limited to, City Hall property or public works facilities.
- RR. **"ROW Ordinance"** means the "[INSERT ROW MANAGEMENT ORDINANCE FOR] [NAME OF CITY], Kansas," adopted as Ordinance No. _____ that regulates the excavation, construction and use of the Rights-of-Way by all persons.
- SS. **"Service Interruption"** means the loss of picture or sound on one or more Channels on the Cable System.
- TT. **"Standard Installation"** means any Service installation that can be completed using a Drop of one hundred twenty-five (125) feet or less.
- UU. **"Subscriber"** means any Person, who or which lawfully elects to subscribe for any purpose to Cable Service provided by a Grantee by means of, or in connection with, the Cable System, and whose premises or facilities are physically wired and lawfully activated to receive Cable Service from Grantee's Cable System, including Persons who receive Cable Service without charge according to the terms of the Code or Franchise.
- VV. **"System"** means the cables, wires, lines, towers, wave guides, optic fiber, antennae, and any associated converters, equipment, or other facilities designed and constructed for the purpose of producing, receiving, amplifying or distributing communications to or from locations within the City.

- WW. "**Telecommunications Act**" means the Telecommunications Act of 1996 codified at Title 47 of the Unites States Code.
- XX. "**Trained Representative**" means employees of a Grantee who have the authority and capability while speaking with a Cable Subscriber to, among other things, answer billing questions, adjust bills, and schedule service and installation calls.
- YY. "**Wired Access Point Antenna**" means any antenna located on the Rights-of-Way connected directly to the wire, cable, or fiber optic communications Facilities within the City or any Antenna having its highest point positioned in the Rights-of-Way at a height in excess of 40 feet.

CHAPTER 2. COMMUNICATIONS SERVICES

- 2.1 **Unlawful to Operate Without a Franchise.** It shall be unlawful for any Person to construct, operate or maintain Communications Facilities or to provide Communications Services by use of Facilities in the Rights-of-Way in the City without a valid, unexpired Communications Franchise from the City, unless otherwise specifically authorized under applicable federal or state law, or otherwise provided by Ordinance. Unless otherwise provided hereinafter by City ordinance, a Reseller Service Provider shall not be required to obtain a Franchise.
- 2.2 **Franchises Nonexclusive.** The authority granted by the City in any Franchise shall be for nonexclusive use of the Rights-of-Way. The Grantor specifically reserves the right to grant, at any time, such additional Franchises or other rights to use the Rights-of-Way for any purpose and to any other person, including itself, as it deems appropriate, subject to all applicable law.
- 2.3 **Nature of Rights Granted by any Franchise.** Franchises shall not convey title, equitable or legal, in the Rights-of-Way, and shall give only the right to occupy Rights-of-Way, for the purposes and for the period stated in this Code and as may be further limited by the Franchise. No Franchise may excuse Franchisee from obtaining appropriate access or attachment agreements before locating its Facilities on another person's Facilities. All Franchises shall be deemed to incorporate and be limited by the provisions of this Code and shall create rights for the sole and exclusive use of Franchisee.
- 2.4 **Application and Application Fee Required.** Any person seeking to use the Rights-of-Way for any Communications Service, or seeking renewal of an existing Franchise, shall submit a completed application on such form as approved by the City. Such application shall be accompanied by a non-refundable application fee in an amount as may be hereinafter established by the City, to compensate the City and defray in whole or part the City's costs in review, negotiation and administration of any application filed under this Code. On request of the City, the applicant shall provide such additional information

that is deemed necessary or appropriate to the City in reviewing the application and proposed use of the Rights-of-Way. Franchisee shall be responsible for payment of any reasonable costs incurred by City in processing these applications or in adapting or executing the Franchise for use by Franchisee to the extent such costs exceed the application fees paid. The City may provide for the waiver of these application fees and/or of Communications Franchise Fees for use of the Rights-of-Way by other governmental entities where such waiver is deemed by the City to be lawful and in the public interest. The information provided by Franchisee shall be certified as true and correct and Franchisee shall be responsible to certify to the City any material changes to the information provided in such completed Application during the term of any Franchise.

2.5 Standards and Procedures for Approval or Renewal of Franchises.

Franchises shall be granted pursuant to all applicable procedures and requirements as set forth in K.S.A. 12-2001, et. seq. The City shall authorize Franchises or renewals to any eligible Franchisee for the right and privilege to construct, operate, and maintain Facilities in, through and along the City's Rights-of-Way for the purposes of supplying Communications Services on a nonexclusive basis within the City, subject, however, to the standards, terms and conditions herein set forth within this Code, which shall be deemed incorporated therein, and any special conditions as may be provided for in the Franchise. All Franchisees shall be required to obtain and maintain any necessary and lawful permit, license certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the FCC or the Kansas Corporation Commission. In reviewing an Application, the City may consider prior conduct of the Franchisee in performance of its obligations or compliance with the City's ordinances in the past, or the existence of any outstanding violations or deficiencies. The City may deny or condition any Franchise where the proposed use would interfere with the public use of the Rights-of-Way or otherwise conflict with the legitimate public interests of the City or as otherwise provided by law. The City may establish standard Franchises setting forth the minimum requirements for all Franchisees. Applications for Franchises may be approved, denied, or approved with conditions consistent with applicable requirements of the Telecommunications Act or other applicable requirements as may be necessary to fulfill the requirements and objectives of this Code.

2.6 Cable Service and Open Video Systems (OVS); Separate Franchise Required.

A Communications Franchise shall not provide Franchisee the right to provide cable service as a cable operator (as defined by 47 U.S.C. § 522 (5)) within the City. Upon Franchisee's request for a franchise to provide cable service as a cable operator (as defined by 47 U.S.C. § 522(5)) within the City, the City shall timely negotiate such Cable Television Services Franchise in good faith with Franchisee. A Communications Franchise shall also not permit Franchisee to operate an Open Video System, except where otherwise expressly provided in the Franchise or by separate Franchise, and Franchisee remits the maximum fees permitted by 47 U.S.C. § 573(c)(2)(B) and where Franchisee otherwise complies

with FCC regulations promulgated pursuant to 47 U.S.C. § 573. Absent such applicable Franchise from the City, Franchisee shall be prohibited from offering OVS service and any such service shall be considered a breach of the Franchise. Unless otherwise specified, any such new Franchise or amendment to this Franchise shall obligate Franchisee to pay a Communications Franchise Fee of five percent (5%) on all gross revenues directly or indirectly attributable to the provision of OVS service within the City. The City may, at its option, negotiate with Franchisee to exchange all or a part of the Communications Franchise Fees for capacity or Facilities used for City or other public purposes. Any such exchange shall be negotiated based on the Franchisee's cost of providing capacity or Facilities to the City, and shall be credited towards the calculation of applicable Communications Franchise Fees.

- 2.7 **Use of Rights-of-Way; Police Powers; Franchisee's Use Subordinate.** The Franchisee shall construct and maintain its Facilities in accordance with all applicable federal, state and local laws, including all permit requirements, and fee payments, and all other City codes and ordinances in effect as of the date of this Franchise or hereinafter adopted to the extent not in contravention of state or federal law. The grant of a Franchise does not in any way impact the continuing authority of the City through the proper exercise of its Home Rule or statutory powers to adopt and enforce ordinances necessary to provide for the health, safety and welfare of the public. The City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of facilities on any particular segment of Rights-of-Way. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon the Franchisee. The use of the Rights-of-Way authorized by any Franchise shall in all matters be subordinate to the City's use and rights therein.
- 2.8 **Term.** A Franchise shall be effective for a term of five (5) years from its effective date, unless the City reasonably determines that a shorter term is warranted under the circumstances.
- 2.9 **Communications Franchise Fees.** Franchisee shall pay to the City as monthly compensation for the use of the Rights-of-Way a Communications Franchise Fee equal to _____ percent of monthly Gross Receipts, but in no event shall the monthly Communications Franchise Fee be less than the sum of:
- A. \$_____ for the first mile of linear Facilities, or part thereof, plus \$_____ per Linear Foot thereafter up to a monthly charge under this subsection of \$_____, and
 - B. \$_____ for each Antenna in the Rights-of-Way, but not less than \$1000 (applicable only when Antennas are to be located in the Right-of-Way).

Provided, however, no such minimum charge shall be imposed during the first _____ months after the use of the Rights-of-Way have been authorized by the City.

- 2.10 **Bundled Services.** To the extent Franchisee markets "bundled" services, including combinations of services that may be subject to a Communications Franchise and also a Cable Franchise, Franchisee shall fairly reflect to the City an appropriate and reasonable division of services among the various services offered based on the actual value of each separate service. Whether or not Franchisee separates services on a Subscriber's bill, it will provide to the City the amounts upon which it will pay the Communications Franchise Fee and any applicable taxes or fees based on the provision of Communications Service, and the amounts upon which it will pay the Fee. Should Franchisee engage in billing practices that, in the determination of the City, do not fairly reflect an appropriate split of Communications Services and Cable Services the City will notify Franchisee in writing of its determination. The parties will meet and discuss in good faith whether the billing practices result in an unfair payment of fees to the City. If the parties do not agree on an appropriate method of determining which charges are subject to the Communications Franchise Fees and which are subject to the Cable Franchise Fee, the parties may subject the dispute to arbitration, or may resort to other methods of dispute resolution, including litigation. Fees or taxes which are not paid on the appropriate division of bundled services receipts, when ultimately paid, will be subject to all interest and penalties provided by the applicable Franchise. If Franchisee holds a Cable Franchise, any fee that could be lawfully attributed to Gross Receipts or alternatively "Gross Revenues" under this Code shall be deemed to be subject to the higher fee.
- 2.11 **Timing of Payment of Communications Franchise Fees.** Unless otherwise agreed to in writing, all Communications Franchise Fees shall be due and payable on a monthly basis within 60 calendar days of the close of each month for which the payment applies (the "due date").
- 2.12 **Interest on Late Payments and Under Payments.** If any Communications Franchise Fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the rate of one and one-half percent per month, unless such other maximum rate is established by Law.
- 2.13 **Fee Statement.** Each Communications Franchise Fee payment shall be accompanied by a statement showing the manner in which the Communications Franchise Fee was calculated. If any Fee Statement is determined to understate the Fee owed, then such additional amount owed shall be made with a corrected statement, including interest on said amount as provided herein. Within 90 calendar days following the end of the calendar year, each Franchisee shall submit a statement, certified as true, setting forth its Gross Revenues, the amount of linear foot and antennae within the Facilities, and describing what revenues or receipts (including each type of services) were included and excluded in the fee

calculations for the calendar year, and describing any adjustments made in determining the Communications Franchise Fee.

- 2.14 **No Accord and Satisfaction.** No acceptance by the City of any Communications Franchise Fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Communications Franchise Fee payment be construed as a release of any claim of the City.
- 2.15 **Maintain Records.** Franchisee shall at all times maintain complete and accurate books of account and records of the business, ownership, and operations of the Franchisee with respect to the System in a manner that allows the City to determine whether the Franchisee has properly calculated its Communications Franchise Fee in compliance with this Ordinance. Should the City reasonably determine that the records are not being maintained in such manner, the Franchisee shall correct the manner in which the books and/or records are maintained so that the Franchisee comes into compliance with this section. All financial books and records which are maintained in accordance with FCC regulations and the regulations of any governmental entity that regulates utilities in Kansas, and generally accepted accounting principles shall be deemed to be acceptable under this section. Such books and records shall be maintained for a period of at least three years. The failure to provide information or maintain records as required herein shall be grounds for forfeiture or revocation of a Franchise.
- 2.16 **Right of Inspection.** The City or its designated representatives shall have the right to inspect, examine or audit, during normal business hours and upon reasonable notice, all documents, records or other information that pertains to the System and/or Franchisee's Communications Franchise Fee obligations under the Franchise. In addition to access to the records of Franchisee for audits, upon request, Franchisee shall provide reasonable access to records necessary to verify compliance with the terms of the Franchise. If any audit or review by the City results in a determination by the City that Franchisee has underpaid any amount due by more than five (5%) percent of the total due, Franchisee shall, in addition to other amounts due, shall also pay any audit costs incurred by the City in determining or identifying such underpayment.
- 2.17 **Description of Service.** Franchisee shall on an annual basis provide the City with a description of new local communications services offered within the City during the prior six-month period. The first annual report shall also provide a listing of each separate type of service or bundled service offered during the initial annual period. Any individual or bundled service or item for which the provider has a separate charge shall be considered a separate service under this paragraph.
- 2.18 **Payment of Taxes; Communications Franchise Fee Not a Tax.** The Communications Franchise Fees required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City, except that Franchisee shall be

entitled to a credit in payment of Communications Franchise Fees in the amount of any [insert description of specific tax] Tax due and paid pursuant to Chapter _____ of the City Code, as may be amended. The Communications Franchise Fee is compensation for use of the Rights-of-Way and shall in no way be deemed a tax of any kind. Franchisee shall be fully responsible for the payment of all applicable taxes.

- 2.19 **Duty to Notify City of Resellers.** Within 30 days of the Franchisee carrying any Communications of any Reseller Service Provider through Franchisee's Facilities, Franchisee shall notify the City of the name and address of such Reseller Service Provider, the reseller rates or tariffs to be paid to Franchisee relating to such Reseller, and provide to City any written commitment, if any, as to the payment of Communications Franchise Fees for the revenues attributable to such Reseller Service Provider.
- 2.20 **Duty of Reseller to Provide Notice of Operation Within City; Facilities to be Subject to Franchise.** Prior to providing service within the City or transmitting communications through Facilities in the City, a Reseller Service Provider shall provide written notice to the City of the intent to do so, and shall include (1) the certification of the applicable regulatory approval necessary to undertake such service or communications (2) the name of the Provider(s) owning the Facilities within the City through which the Communications shall be transmitted. It shall be unlawful for any Provider or Reseller Service Provider not having its own Franchise authorizing such communications to transmit communications for commercial purposes through any Facility owned by a Provider that does not have a valid franchise with the City authorizing the use of such Facilities.
- 2.21 **Sale or Lease of Facilities.** Except as otherwise may be provided by Law or Franchise, Franchisee shall not lease, sell, or otherwise transfer possession or control of the Facilities, or any portion thereof, for any purpose to any person that has not obtained a duly issued Franchise, or other grant by the City to use the Rights-of-Way and which includes the authority to use or maintain such leased or transferred Facilities. Franchisee shall provide the City at least 30 days' prior notice of such intended sale, lease or transfer of possession or control.
- 2.22 **Assignment of Franchise.** The Franchisee shall not sell, transfer, lease, assign, sublet or dispose of, in whole or in part, either by forced or voluntary sale, or by ordinary sale, consolidation, or otherwise, a Franchise or any of the rights or privileges granted by a Franchise, without the prior written consent of the City; provided that such transfer may occur without written consent of the City to a wholly owned parent or subsidiary, or between wholly owned subsidiaries, upon thirty days prior notice to the City. Such consent shall not be unreasonably withheld. The City reserves the right to be reimbursed for its reasonable costs relating to a transfer of ownership. Franchisee shall not change its name under which it does business with the public without providing at least 30 days prior notice to the City.

- 2.23 **Forfeiture of Franchise and Privilege.** In case of failure on the part of the Franchisee, its successors and assigns, to comply with any of the provisions of this Code or a Franchise, or if the Franchisee, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of this Code or the terms of a Franchise, the Franchisee, its successors and assigns, shall forfeit all rights and privileges permitted by this Code and any Franchise, and all rights hereunder shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings: Before the City declares the forfeiture or revocation of a Franchise, it shall first serve a written notice upon the Company, setting forth in detail the neglect or failure complained of, and the Company shall have thirty (30) days thereafter, or such other reasonable period established by the City Council, in which to cure the default by complying with the conditions of a Franchise and fully remedying any default or violation. If at the end of such thirty (30) day period the City determines that the conditions have not been complied with the City shall take action by an affirmative vote of the City Council present at the meeting and voting, to terminate the Franchise; setting out the grounds upon which said Franchise is to be forfeited or revoked. Nothing herein shall prevent the City from invoking any other remedy or from declaring immediate forfeiture where the default is incapable of being cured by Franchisee, including where such defaults or violations have repeatedly occurred.

CHAPTER 3. CABLE SERVICES

3.1 Cable Franchise Requirements.

- A. **General Findings Regarding Cable Services.** The City finds that Cable Service has become an integral part of its citizens' lives, and that evolving Cable Systems have the potential to play an even more dramatic role in the future, providing great benefits and advanced capabilities to Residents of the City. At the same time, the rapidly emerging role of Cable Systems as an integrated broadband communications platform necessitates a finding that the local government has a legitimate and vital role to play in regulating Cable Services in a manner that ensures high quality customer service while at the same time fostering competition to the extent permitted under law. The Council further finds that the public convenience, safety, and general welfare can best be served by establishing regulatory powers that are vested in the City.
- B. **Unlawful to Operate Without a Franchise.** It shall be unlawful for any Person to construct, operate or maintain a Cable System or to provide Cable Service or other competing multichannel video services in the City without a Franchise, unless otherwise specifically authorized under applicable federal or State law. Consistent with Chapter 5 any such Person shall be subject to a fine of \$500 per day. The payment of such fine notwithstanding, all such violators shall be subject to all other applicable provisions of this Code to the fullest extent allowed by law,

including, but not limited to, the payment of a Cable Franchise Fee. This section shall not apply to a Grantee who has properly asserted its intent and is diligently pursuing renewal of the Franchise pursuant to 47 USC § 546.

C. **Franchise Not Exclusive.**

1. Any Franchise granted pursuant to this Ordinance shall be nonexclusive. The Grantor specifically reserves the right to grant, at any time, such additional Franchises for a Cable Television System or any component thereof, to any other Person including itself, as it deems appropriate, subject to this Code and applicable federal and state law.
2. The terms and conditions of any Cable Franchises granted or renewed pursuant to this Ordinance shall be, when taken as a whole, no less burdensome or more beneficial than any other Cable Franchises granted or renewed pursuant to this Ordinance, when taking into consideration the context in which the earlier terms were adopted. Provided, however, that nothing herein shall be construed as requiring the use of identical terms or conditions, or limit the enforceability of conditions that are freely negotiated.

D. **Franchise Territory.**

Every Cable Franchise shall apply to the entire territorial area of the City, as it exists now or may later be configured.

E. **Federal, State, and City Jurisdiction.**

1. This Chapter and Code shall be construed in a manner consistent with all applicable federal and state laws.
2. In the event that the federal or state government discontinues preemption in any area of cable communications over which it currently exercises jurisdiction in such manner as to expand rather than limit municipal regulatory authority, City may, if it so elects, adopt rules and regulations in these areas to the extent permitted by law and the reasonable exercise of the City's police powers.
3. The provisions of this Chapter and Code shall apply to all Cable Franchises granted or renewed after or simultaneously with the effective date of this Ordinance. This Chapter and Code shall also apply to all existing Franchises, to the extent not inconsistent with the terms of any such Franchise or applicable law, and to the extent that it does not impose additional material burdens on such Grantee. A Cable Franchise (including all of Grantee's particular rights, powers, protections, privileges, immunities and obligations

associated therewith as the same exist on the date hereof) shall constitute a legally binding contract between the City and Grantee, and as such, cannot be amended, modified or changed by the Grantor without the consent of Grantee in any manner whatsoever, whether by ordinance, rule, regulation or otherwise, to impose on Grantee more stringent or burdensome requirements or conditions. In the event of any conflict between the terms and conditions of a Franchise and the provisions of this Chapter or Code, and other generally applicable regulatory ordinances of the City, the specific terms of the Franchise shall control; provided, however, that nothing herein contained shall preclude the City from the proper exercise of its police powers.

4. In the event of a change in state or federal law which by its terms would require the City to amend this Chapter or Code, the parties shall modify the existing Franchise in a mutually agreed upon manner.

F. **Initial Franchise Applications.** Any Person desiring an initial Franchise for a Cable System shall file an application with the City. A nonrefundable Application Fee as may be hereinafter established by the City shall accompany the application, which shall not be considered or credited against the collection of applicable Cable Franchise Fees.

G. **Consideration of Initial Applications.**

1. Upon receipt of any application for an initial Franchise, the City Administrator shall prepare a report and make his or her recommendations respecting such application to the City Council.
2. A public hearing shall be held prior to any initial Franchise grant, at a time and date approved by the Council. Within thirty (30) days after the close of the hearing, the Council shall make a decision based upon the evidence received at the hearing as to whether or not the Franchise(s) should be granted, and, if granted, subject to what conditions.

H. **Franchise Renewal.** Franchise Renewals shall be in accordance with applicable law including, but not necessarily limited to, the Cable Communications Policy Act of 1984, as amended. The City and a Grantee, by mutual consent, may enter into Renewal negotiations at any time during the term of the Franchise.

I. **Grant of Additional Franchise and Competing Service.** Since competing or overlapping Cable Franchises may have an adverse impact on the public Rights-of-Way, on the quality and availability of services to the public and may adversely affect an existing Provider's ability to

continue to provide the Services it is presently providing under a Franchise, the City may issue a Franchise in an area where another Grantee is operating only following a public hearing to consider the potential impact which the grant of an additional Franchise may have on the community. In considering whether to grant one or more additional Franchises, the City shall specifically consider, and address in a written report, the following issues:

1. The positive and/or negative impact of an additional Franchise on the community.
2. The ability and willingness of the specific applicant in question to provide Cable Services to the entire Franchise Area which is served by the existing Cable Provider. The purpose of this subsection is to ensure that any competition which may occur among Grantees will be on terms, which when taken as a whole, do not give a competitive advantage to one Grantee over another.
3. The amount of time it will take the applicant to complete construction of the proposed Cable System and activate Cable Service in the entire Franchise Area; and, whether the applicant can complete construction and activation of its Cable System in a timely manner.
4. The financial capabilities of the applicant and its guaranteed commitment to make the necessary investment to erect, maintain, and operate the proposed Cable System for the duration of the Franchise term. In order to ensure that any prospective Grantee does have the requisite current financial capabilities, the City may request equity and debt financing commitment letters, current financial statements, bonds, letters of credit, or other documentation to demonstrate to the City's satisfaction that the requisite funds to construct and operate the proposed Cable System are available.
5. The quality and technical reliability of the proposed Cable System, based upon the applicant's plan of construction and the method of distribution of signals, and the applicant's technical qualifications to construct and operate such Cable System.
6. The experience of the applicant in the erection, maintenance, and operation of a Cable System.
7. The capacity of the Rights-of-Way to accommodate one or more additional Cable Systems and the potential disruption of those Rights-of-Way and private property that may occur if one or more additional Franchises are granted.

8. The disruption of existing Cable Service and the potential that the proposed Franchise would adversely affect the residents of the City.
9. The likelihood and ability of the applicant to continue to provide competing Cable Service to Subscribers within the entire Franchise Area for the duration of the Franchise.
10. Such other information as the City may deem appropriate to be considered prior to granting any competing or overlapping Franchise.

J. **Permits for Non-Franchised Entities.**

1. The City may issue a license to a Person other than the Grantee to permit that Person to traverse any portion of a Grantee's Franchise Area within the City in order to provide Cable Service outside, but not within the City. Such license or easement, absent a grant of a Franchise in accordance with this Chapter, shall not authorize nor permit said Person to provide Cable Service of any type to any home or place of business within the City. Such license shall be granted pursuant to the requirements of Chapter 2 of this Code.

3.2 **Design, Services and Capabilities.**

- A. **Cable System Design.** Every Grantee shall offer Cable Service that meets the current and future cable-related needs of the City. Such Cable Service shall, at a minimum, be comparable to Cable Services offered by that Grantee or its Affiliates operating any headend serving the City and surrounding municipalities in _____ County. The Franchise shall incorporate a description of the Grantee's Cable System including the general design and capabilities of the Cable System to identify for the City how the Cable System will meet the current and future Cable needs of the City.
- B. **The Cable System.** Every Cable System shall pass by every single-family dwelling unit and multiple-family dwelling unit within the Franchise Area in accordance with line extension policies set forth in this Ordinance. Service shall be provided to Subscribers in accordance with the schedules and line extension policies specified in this Ordinance unless otherwise specified in the Franchise.
- C. **Drops To Public Buildings.**
 1. Every Grantee shall provide installation of at least one (1) Cable Drop, and one (1) outlet, provide monthly Basic Cable Service, without charge, to Public Buildings specified by the City in the applicable Franchise, where the drop does not exceed two hundred

(200) feet. All accredited K-12 schools shall also receive one (1) Cable Drop and one (1) outlet and Basic Cable Service at no charge, subject to the above 200-foot limit. The location of such Cable Drops and outlets shall be determined in cooperation with the management of the Public Building to which the connection is to be made. Following the City's designation of additional Public Building(s) to receive Cable Service, a Grantee shall complete construction of the Drop and outlet within ninety (90) days if the City requests construction, weather permitting and subject to payment of the Direct Incremental Costs of installation in excess of two hundred (200) feet. Drops and outlets that are in addition to the one free Drop and outlet required by this section shall be provided by a Grantee at the cost of Grantee's time and material. Alternatively, at an institution's request, the institution may add outlets at its own expense, as long as such installation meets the Grantee's standards, which shall be made readily available to any public entity upon request. Additional outlets and Services to Public Buildings are subject to the applicable commercial rate.

2. All such Cable Service outlets shall not be utilized for commercial purposes. The City shall take reasonable precautions to prevent any use of a Grantee's Cable System in any inappropriate manner or that may result in loss or damage to the Cable System. Users of such outlets shall hold the Grantee harmless from any and all liability or claims arising out of their use of such outlets, other than for those claims arising out of improper installation or faulty equipment.
3. In instances where the Drop line from the feeder cable to the Public Building, school or library exceeds 200 feet, the Grantee may charge for its Direct Incremental Costs that are incurred in exceeding this length.

D. **School and Library Cable Modems.** Unless otherwise specified in the applicable Franchise, upon activation and commercial offering of two-way cable modem service within the Franchise Area, every Grantee shall provide upon written request a courtesy cable modem and Cable Internet Service without charge to every State accredited K-12 school and library in the Franchise Area.

E. **Use Of Grantee's Facilities.** Subject to any applicable state or federal regulations, the City shall have the right to install and maintain, free of charge, upon the poles and within the underground pipes and conduits of a Grantee, any wires and fixtures desired by the City for public purposes. Provided, however, that (a) such use by Grantor does not unreasonably interfere with the current or future use by Grantee; (b) such use by Grantor is restricted to non-commercial public purposes; and (c) Grantor takes

reasonable precautions to prevent any use of Grantee's facilities in any manner that results in an inappropriate use thereof, or any loss or damage to the Cable System. For the purposes of this subsection, "public purposes" includes, but is not limited to, the use of the structures and installations for Grantor fire, police, traffic, utility, and/or signal systems, but not for Cable System purposes in competition with the Grantee. The Grantee shall not deduct the value of such use of its Facilities from its Cable Franchise Fee and/or other fees payable to Grantor.

- F. **Upgrade of System.** Every Grantee shall upgrade its Cable System (herein referred to as the "System Upgrade"), if required, as set forth in its respective Franchise.
- G. **Emergency Alert Capability.** Every Grantee shall at all times provide the system capabilities to comply with the FCC's Emergency Alert System rules and regulations. Provided, that at a minimum these capabilities will remain in place even if the FCC at some future dates eliminates the current regulations.
- H. **Periodic Review.** The Franchise shall include provisions to provide for a "periodic review" between the City and a Grantee to evaluate changes in law, technology, or service, and reasonable procedures for mutually agreed upon modifications to the Franchise to incorporate changes identified as desirable or necessary as a result of any such periodic review.
- I. **Closed Captioning and Descriptive Audio Service.** Every Grantee will make audio descriptive service and closed captioning capabilities available to the extent required by state and federal law.
- J. **Standby Power.** Within twelve (12) months of activation of the System, the Grantee shall provide standby power generating capacity capable of providing at least twelve (12) hours of emergency supply at the Cable System Headend. For nodes, two hours with emergency power supply. Every Grantee shall maintain standby power System supplies throughout the major trunk cable networks capable of providing emergency power within the standard limits of commercially available power supply units.
- K. **Status Monitoring.** Every Grantee shall provide an automatic status monitoring System, or a functional equivalent, when the Cable System has been activated for interactive service provided that such status monitoring is technically and economically feasible.
- L. **HDTV/ATV Conversion.** Conversion to High Definition Television/Advanced Television (HDTV/ATV) formats shall occur in accordance with applicable law.

3.3 **Institutional Network, And Public Educational And Governmental Access Or "PEG Access"**

A. **Institutional Network, Access Channels.**

1. Every Grantee shall, to the extent required in its Franchise and subject to applicable law, provide or fund on an equal basis with other Cable Providers whose Franchises are granted or renewed after the adoption of this Code an Institutional Network, that provides two-way broadband voice, video and data capabilities for use by governmental, educational and other publicly-funded or non-profit local community service organizations identified by the City.
2. Every Grantee shall also provide a channel or channels, bandwidth capacity, service, and funding, for separate Public, Educational and Government Access Channels, as specified in their Franchise. All such PEG Access Channels shall be available to all Subscribers as part of their Basic Cable Service. Given the on-going changes in the state of technology as of the Effective Date of this Code, absent the express written consent of the City, Grantee shall transmit PEG Access Channels in the format or technology utilized to transmit all of the Channels on the Basic Cable Service tier. Oversight and administration of the PEG Access Channels shall be set forth in the Franchise.

- B. **Proof of Performance Testing.** To ensure high quality service on the Institutional Network and Access Channels, proof of performance testing throughout the System and on all Channels will be made available to the City to the extent required in a Franchise. Every Grantee will monitor Access Channels throughout the Cable System to determine the level of technical quality of Access Channels is in conformance with FCC Rules and to ensure that the level of technical quality on such Access Channels is the same as on other Channels within the Cable System. In the event that a Complaint is made by a programmer of any Access Channels, the Grantee shall immediately investigate the Complaint and determine whether the Grantee is in compliance with the technical standards set forth in section 3.4.2 of this Chapter.

3.4 **Technical Standards and Customer Service Practices.**

A. **General Technical Standards and Customer Service Practices.**

1. This Chapter incorporates Cable Service technical standards and establishes customer service practices that every Grantee must satisfy.
2. Every Grantee shall maintain such equipment and keep such records as required to comply with all customer service and technical standards required by these regulations and other

applicable laws. The Grantee shall at all times assist and cooperate with Grantor in explaining, interpreting and understanding such records or reports.

B. **Test and Compliance Procedure.** Tests for a Cable System shall be performed periodically in a manner so as to conform with FCC specifications. The tests may be witnessed by representatives of the City and written test reports shall be made available to the City upon request. If any test locations fail to meet the performance standards, the Grantee shall be required to indicate what corrective measures have been taken and shall have the site retested.

C. **Cable System Office Hours and Telephone Availability.**

1. Every Grantee shall maintain a conveniently located customer service center, which shall include a place where Subscribers may pay their bills, pick up and return converter boxes and comparable items and receive information on the Grantee and its services. Such service center shall be open at least during Normal Business Hours. Grantee shall also maintain a publicly listed toll-free or local telephone line that is available to Subscribers twenty-four (24) hours a day, seven (7) days a week.
2. Every Grantee shall have Trained Company Representatives available to respond to Subscriber telephone inquiries during Normal Business Hours.
3. After Normal Business Hours, the telephone access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after Normal Business Hours must be responded to by a Trained Representative on the next business day.
4. Under Normal Operating Conditions, telephone answer time by a Trained Customer Service representative or automated response unit, including wait time, shall not exceed thirty (30) seconds when the connection is made. If a call must be transferred, transfer time shall not exceed thirty (30) seconds. Under Normal Operating Conditions, these standards shall be met no less than ninety percent (90%) of the time, measured on a quarterly basis.
5. Under Normal Operating Conditions, a Grantee shall establish an inbound telephone system upon which Subscribers shall not receive a busy signal more than three percent (3%) of the time.
6. A Grantee will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering

standards above unless an historical record of complaints indicates a clear failure to comply.

D. **Service Calls and Installations.** Under Normal Operating Conditions, each of the following standards must be met no less than ninety-five percent (95%) of the time as measured on a quarterly basis:

1. Standard Installations will be performed within seven (7) business days after an order has been placed. "Standard Installations" are those that are located up to 125 feet from the existing distribution system.
2. The appointment window alternatives for installations, Service calls, and other installation activities, will be either a specific time or, within a maximum four (4) hour time block during Normal Business Hours. The Grantee may schedule Service calls and other installation activities outside of Normal Business Hours for the express convenience of a Subscriber, if so requested.
3. A Grantee may not cancel an appointment with a Subscriber after the close of business on the business day prior to the scheduled appointment.
4. If a Grantee's representative is running late for an appointment with a Subscriber and will not be able to keep the appointment as scheduled, the Subscriber must be contacted. The appointment must be rescheduled, as necessary, at a time which is convenient for the Subscriber.

E. **Repairs and Interruptions.**

1. Under Normal Operating Conditions and excluding conditions beyond the control of a Grantee, every Grantee will begin working on Service Interruptions and outages within a reasonable time frame but in no event later than twenty-four (24) hours after the Service Interruption or outage becomes known. The Grantee must begin actions to correct other service problems on the business day following notification of such service problems.
2. The term "Service Interruption" means the loss of picture or sound on one or more cable channels, or Cable Internet Service connectivity.
3. Work on requests for service, excluding conditions beyond the control of a Grantee, must begin by the next business day after notification of the problem and shall exercise all due diligence to complete the work in the shortest period of time possible.

4. Outside repairs to cable plant, which cannot be made by the initial service technician dispatched, shall under Normal Operating Conditions be re-scheduled within twenty-four (24) hours of the originally scheduled service call. The Subscriber does not need to be home for outside plant and line repairs.
5. A Grantee may interrupt service only for good cause and for the shortest time reasonably possible, including interruption for System Upgrade, maintenance and repair. Subject to the reasonable safety precautions for the benefit of the Grantee's employees and agents, routine maintenance shall occur at times that affect the fewest number of Subscribers, generally between 12:00 A.M. and 6:00 A.M. To the extent that specific neighborhoods will be affected by a planned outage, such as during an upgrade, the Grantee shall provide advance notice through telephone calls, door hangers and/or other reasonable means.
6. A Grantee shall provide a credit equivalent to a pro rata of the monthly cable rate for each Service Interruption exceeding four (4) hours in any twenty-four (24) hour period, unless it is demonstrated that the Subscriber caused the outage, or the outage was planned as part of an upgrade or other work that occurred between the hours of 12:00 A.M. and 6:00 A.M., of which the City and the Subscriber received appropriate prior notification. A Subscriber is entitled to a full refund for any Cable System or disruption to a pay per view event. These credits and refunds shall be made available upon request by Subscriber describing the time, date and nature of the disruption experienced.
7. Technicians capable of performing service related emergency repairs and maintenance must be available twenty-four (24) hours a day, including weekends and holidays.
8. No charge shall be made to a Subscriber for any service call relating to Grantee owned and Grantee maintained equipment after the initial installation of Cable Service unless the problem giving rise to the service request can be demonstrated by Grantee to have been:
 - (i) Caused by the negligence or malicious destruction of cable equipment by the Subscriber; or
 - (ii) A problem established as having been non-Cable System or Cable Service in origin.

A Grantee may also assess a service charge for repeat service calls to the same address in instances where the problem was not caused by the Grantee.

9. Cable Drop lines, cable trunk lines, or any other type of outside wiring that comprise part of a Grantee's Cable System that are located underground, shall be placed in such locations pursuant to City Code, and the surrounding ground shall be restored as close as is practical to its condition immediately prior to such underground construction activity within a reasonable period of time after connection to the Cable System. Except for a Grantee's maintenance facilities, no Cable Drop line, cable trunk line, or any other type of outside wiring shall be permitted to lay upon the ground for an unreasonable period of time within the City, except for the express purpose of being immediately connected to the Cable System of Grantee. The requirements of this subsection shall apply to all installation, reinstallation, service or repair commenced by a Grantee within the City during Normal Operating Conditions.

F. Disconnections and Downgrades.

1. If any Subscriber fails to pay a properly due monthly Subscriber fee, or any other properly due fee or charge, the Grantee may disconnect the Subscriber's outlet; provided, however, that such disconnection shall not be effected until after the later of: (i) thirty (30) days after the due date of said delinquent fee or charge; or (ii) fifteen (15) days after delivery to Subscriber of written notice of the intent to disconnect. If a Subscriber pays before expiration of the later of (i) or (ii), the Grantee shall not disconnect. Provided, however, that this section does not apply to Subscribers disconnected as a result of insufficient funds.
2. No Subscriber may be disconnected without prior written notice.
3. No Subscriber may be disconnected for non-payment if payment of outstanding balances is made before the scheduled date for disconnection, up to and including the last business day before the scheduled disconnection.
4. No Subscriber may be disconnected due to a Grantee's failure to timely or correctly post payments.
5. No Subscriber may be disconnected outside of Normal Business Hours or on Sundays or holidays.
6. Absent extenuating circumstances, a Grantee is not required to reconnect a Subscriber with an undisputed outstanding balance.

7. A Grantee is permitted to refuse orders for premium or "pay per view" services from Subscribers with a record of non-payment .
8. A Grantee may disconnect Subscriber premises that are responsible for signal leakage in excess of applicable federal limits. A Grantee may effectuate such disconnection without advance notice, provided that a Grantee shall immediately notify the Subscriber with door tags and/or telephone calls or other reasonable means. If the source of the signal leakage is remedied, and the Subscriber was not the cause of such leakage the Grantee shall reconnect the Subscriber at no charge. If the Subscriber was the cause of the signal leakage the Grantee may charge a reasonable reconnection fee. For purposes of this Section, use of FCC-approved navigation devices does not in and of itself constitute Subscriber caused signal leakage.
9. Subscribers may request disconnection or a downgrade of cable service at any time. A Grantee may not impose any charge for service delivered after the requested date of disconnection. As provided under federal law, subscribers may request a downgrade at no charge if made within thirty (30) days of a rate increase.
10. Nothing in this Chapter or Code shall limit the right of a Grantee to deny Cable Service to any household or individual which has a negative credit or Cable Service history with the Grantee, which may include non-payment of bills, theft or damage to the Grantee's equipment, outstanding balances, or threats or assaults on employees of the Grantee in the course of their employment. In the event Cable Service is denied, the Grantee will give notice to the Subscriber of the right to contact the appropriate authority, as designated by the City.

G. Communications Between Grantee and Subscribers.

1. **Notifications to Subscribers:**
 - (i) Every Grantee shall provide written information to Subscribers on each of the following topics at the time of installation, at least annually to all Subscribers, and at any time upon request of a Subscriber:
 - (a) Product and Services offered;
 - (b) Prices and options for programming Services and conditions of subscription to programming and other Services and facilities.
 - (c) Installation and service maintenance policies;

- (d) Instructions on how to use Services;
 - (e) Channel positions of programming offered on a System; and
 - (f) Billing and Complaint procedures, including the name, address and telephone number of the City.
- (ii) Subscribers will be given thirty (30) days advance notice of any changes in rates, programming Services, or Channel positions, if the change is within the control of the Grantee. All such notice shall be provided in writing by any reasonable means. In addition, the Grantee shall notify Subscribers thirty (30) days in advance of any significant changes in other information required by this section. Notwithstanding the foregoing or any provision of this Franchise to the contrary, a Grantee shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, Cable Franchise Fee, or any other fee, tax assessment, or change of any kind imposed by any government entity on the transaction between the Grantee and the Subscriber.

2. **Billing.**

- (i) Bills must be clear, concise, and understandable. Bills must be fully itemized, including, but not limited to, Basic and premium Service charges and equipment charges.
- (ii) Bills must clearly delineate all activity during the billing period, including optional charges, rebates, and credits.
- (iii) In case of a billing dispute, a Grantee must respond to a written Complaint from a Subscriber within twenty-one (21) calendar days.
- (iv) Credits for Service shall be issued no later than the Subscriber's next billing cycle after determination that the credit is warranted.

3. **Late Charges.** A Grantee may impose a monthly fee for any delinquent balance owed by a Subscriber, subject to the following:

- (i) At least ten (10) days before the date the fee is imposed, the Subscriber shall be given written notice, on the face of the bill or by separate notice of:

- (a) The date after which the fee will be imposed if the balance is not paid; and
 - (b) The amount of the fee that will be imposed; and
 - (ii) The Fee for the delinquent payment shall not exceed five percent (5%) of the amount of the delinquent balance per month or five dollars (\$5) per month, whichever is greater.
- 4. **Refunds.** Refund checks will be issued promptly, but no later than either:
 - (i) The Subscriber's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or
 - (ii) The return of equipment supplied by the Grantee if Cable Services are terminated.
- H. **Complaint Log.** Subject to the privacy provisions of 47 U.S.C. § 521 et seq., every Grantee shall prepare and maintain written records of all Complaints made to them and the resolution of such Complaints, including the date of such resolution. Such written records shall be on file at the office of Grantee. A Grantee shall make available to Grantor a written summary of such Complaints and their resolution upon request.
- I. **Parental Control.** Every Grantee shall make available to any Subscriber upon request a "lockout" device for blocking both video and audio portions of any channel(s) of programming entering the Subscriber's premises. Such device shall be provided at a reasonable charge, except to the extent that federal law specifically provides otherwise. A Grantee may, however, require a reasonable security deposit for the use of such a device.
- J. **Service Area.**
 - 1. A Grantee may not discriminate in the build-out of its Cable System to a particular area of the City or provision of cable Service to individual or groups of residents on the basis of race, creed, religion or economic condition. A Grantee shall serve all areas of the City with populations of at least twenty-five (25) dwelling units per cable mile, including areas annexed subsequent to the grant of the Franchise.
 - 2. **Mandatory Extension Rule.** Every Grantee shall extend the System and make Service available at regular installation and regular monthly charges upon request to any contiguous area not designated for initial Service in the plan when potential Subscribers can be served by extension of the System past occupied dwelling units equivalent to twenty-five (25) units or

more per street mile. Such extension shall be at the Grantee's cost. Where aerial extension is allowed by regulation but underground installation is requested by benefited Subscribers, the cost of undergrounding that exceeds estimated aerial extension cost may be charged to benefited Subscribers.

3. **Newly Annexed Areas.** In such cases where mandatory extension of the Cable System is required for areas newly annexed after the effective date of the Franchise, but the technical capabilities of the then-existing Cable System are such that the minimum technical performance standards required by this Franchise or the FCC cannot be met, then the Grantee shall be required to make such extension only if the Grantee can earn a fair return (as measured by the Grantee's weighted average cost of capital) on the incremental investment required combined with the overall investment base of the Cable System within the boundaries of the Franchise Area.
4. **Special Agreements.** Nothing herein shall be construed to prevent a Grantee from serving areas not covered under this section upon agreement with developers, property owners or residents.

- K. **Customer Service Reporting Requirements.** The City may require upon reasonable request that a Grantee periodically prepare and furnish to City semi-annual reports and any other reasonable information relevant to the Grantee's compliance with the customer Service requirements of this Chapter measured on a quarterly basis.

3.5 **Operation and Maintenance.**

- A. **Open Books and Records.** Every Grantee shall cooperate with the City with respect to City's administration of this Chapter and Code and any applicable Franchise granted pursuant to it. Subject to the privacy provisions of the Cable Act, City shall have the right to inspect, upon three (3) business days notice, during Normal Business Hours, all books, records, maps, plans, financial statements, service complaint logs, performance test results, and other existing like materials of a Grantee that relate to the operation of the Grantee's Cable System and that are reasonably necessary to Grantor's enforcement or administration of this Code or the Grantee's Franchise. A Grantee shall not be required to maintain any books or records for franchise compliance purposes longer than three (3) years, except that financial records necessary to demonstrate compliance with the required Cable Franchise Fee payments shall be kept for six (6) years. Upon request, the City will treat designated information disclosed by a Grantee as confidential to the extent permissible under state and federal law. All such review of a Grantee's books and records shall be performed by an independent party if the City itself enters into the business as a competitor.

B. **Communications with Regulatory Agencies.** Copies of all petitions, applications, communications, and reports submitted by a Grantee to the FCC, Securities and Exchange Commission, or any other federal or state regulatory commission or agency having jurisdiction in respect to any matters directly affecting the Cable System operations shall be made available contemporaneously to the City upon request. Copies of responses from the above regulatory agencies to a Grantee likewise shall be made available promptly to the City upon request. If the City is specifically named in any such pleading or response, the City shall automatically be furnished a copy.

C. **Annual Reports.**

1. Upon request, a Grantee shall make available to City, within ninety (90) days of the end of each of the applicable Grantee's fiscal years during the term of this Franchise, the following:
 - (i) A revenue statement certified by a representative of the Grantee showing the Gross Revenues of the Grantee for the preceding fiscal year;
 - (ii) A current list of names and addresses of each officer and director and other management personnel of the Grantee;
 - (iii) A copy of all documents that relate directly to the Grantee's Cable System that were filed with any federal, State, or local agencies during the preceding fiscal year and that were not previously filed with the City;
 - (iv) A statement of the Grantee's current billing practices and charges;
 - (v) A copy, if any, of the Grantee's current Subscriber Service contract; and
 - (vi) A copy of Annual Reports to stockholders, if any, for operating company and parent company.

All of the above information shall not be required annually unless there is a change after the first filing.

2. City and its agents and representatives shall have authority to arrange for and conduct an audit during Normal Business Hours of the books and records of Grantee that are reasonably necessary for the enforcement of a Franchise. A Grantee shall first be given thirty (30) days notice of the audit, the description of and purpose for the audit, and a description, to the best of City's ability, of the books, records, and documents that City wants to review. The

costs and expense of such audit shall be borne by the Grantee if the audit reveals a discrepancy of two percent or more from the information related to the City.

3. Any review or audit of a Grantee's books and records shall be performed by an independent party if the City itself enters into the business as a competitor to provide Cable Services.

D. **Index of Reports.**

1. Every Grantee shall compile and maintain an Index of Reports, that shall list all reports, documents, and filings, that it has prepared with respect to the Cable System over the course of the past two years as a result of the requirements of the FCC or this Chapter or Code or Franchise, including technical Cable System testing, and proof of performance reports and customer service compliance measurements, and shall provide a copy of such Index of Reports to the City annually, and upon written request.
2. A Grantee shall make a copy of any reports or documents listed in the Index of Reports available to the City upon request.

- E. **Additional Reports and Assistance.** Upon request of the City, a Grantee shall add additional reports to the Index, which are reasonably necessary to the City's proper enforcement of this Chapter, Code or Franchise. The City shall require such reports only through passage of a formal resolution of the City. In addition, upon request, a Grantee shall cooperate and assist the City in interpreting and understanding any report required under this Chapter, Code or its Franchise, including through the provision of explanatory graphs and/or charts.

F. **Service Contract and Subscriber Information.**

1. A Grantee shall have authority to promulgate such rules, regulations, terms, and conditions governing the conduct of its business as shall be reasonably necessary to enable the Grantee to exercise its rights and perform its obligations under this Chapter and its Franchise and to assure uninterrupted Cable Service to all of its Subscribers; provided such rules, regulations, terms, and conditions shall not be in conflict with the provisions of this Code, federal, state and/or local law, or any applicable rules and regulations.
2. Upon request, a Grantee shall submit to City any Subscriber contract form that it utilizes. If no written contract exists, a Grantee shall file with the City a document completely and concisely stating the terms of the residential Subscriber contract offered, specifically including the length of the Subscriber

contract. The length and terms of any Subscriber contract shall be available for public inspection during Normal Business Hours.

3.6 **Financial Provisions, Remedies, Procedures and Due Process.**

A. **Annual Cable Franchise Fee.**

1. As compensation for grant of a Franchise and in consideration of permission to use the Rights-of-Way of the City for the construction, operation, maintenance and reconstruction of a Cable System, and to defray the costs of Franchise obligations, every Grantee shall pay to the City on an annual basis throughout the term of its Franchise, a sum totaling ____ percent (__%) of the Grantee's Gross Revenues.
2. To the extent a Cable Franchisee markets "bundled" services, including combinations of services that may be subject to a Communications Franchise and also a Cable Franchise, Franchisee shall fairly reflect to the City an appropriate and reasonable division of services among the various services offered based on the actual value of each separate service. Whether or not a Grantee separates services on a Subscriber's bill, it will provide to the City the amounts upon which it will pay the Communications Franchise Fee and any other applicable taxes or fees based on the provision of Communications Service, and the amounts upon which it will pay the Cable Service Cable Franchise Fee. Should a Grantee engage in billing practices that, in the determination of the City, do not fairly reflect an appropriate split of Communications Services and Cable Television Services the City will notify the Grantee in writing of its determination. The parties will meet and discuss in good faith whether the billing practices result in an unfair payment of fees to the City. If the parties do not agree on an appropriate method of determining which charges are subject to Communications Franchise Fees and which are subject to the Cable Franchise Fee, the parties may subject the dispute to arbitration, or may resort to other methods of dispute resolution, including litigation. Fees or taxes which are not paid on the appropriate division of bundled services receipts, when ultimately paid, will be subject to all interest and penalties provided by the applicable Franchise. If Franchisee holds a Communications Franchise, any fee that could be lawfully attributed to Gross Revenue or alternatively "Gross Receipts" under this Code shall be deemed to be subject to the higher fee.
3. Payments due City under this section shall be computed quarterly, for the preceding quarter, as of March 31, June 30, September 30, and December 31. Each quarterly payment shall be due and

payable no later than forty five (45) days after the dates listed in the previous sentence. Each payment shall be accompanied by a brief report by the Grantee showing the basis for the computation and a "Cable Franchise Fee Worksheet," listing all of the sources of revenues attributable to the operation of the Grantee's System.

4. Should any additional monies be due to the City as a result of information contained in the annual financial report of a Grantee or by audit as permitted by this Chapter, the Grantee shall pay such additional monies to the City within sixty (60) days after receipt of notice of same from the City.
 5. In the event that any of the quarterly Cable Franchise Fee payments are not timely made, a Grantee shall also pay the City interest thereon at the then-current prime rate. Said interest to be applied commencing with the forty-fifth (45th) day after the end of the quarter and continuing until all such overdue sums (including interest) are paid.
 6. No acceptance of any payment shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the City may have for further sums payable under the provisions of this Chapter, Code or applicable Franchise. All amounts paid shall be subject to audit and re-computation by the City or its designee, at any time upon reasonable notice and specification of the documents requested to be reviewed. City's right to audit, and the Grantee's obligations to retain records related to the Cable Franchise Fee audit, shall expire six (6) years from the date on which each Cable Franchise Fee payment by the Grantee is due.
- B. **Security Fund.** Each Grantee may be required to maintain a security fund with the City to ensure compliance with this Chapter, Code and applicable Franchise, in an amount and in a manner as set forth in the Grantee's Franchise.
- C. **Bonds, Indemnification, and Insurance.** Each Grantee shall maintain bonds and insurance with the City in amounts and in a manner as set forth in the Grantee's Franchise. Each Grantee also shall be required to indemnify the City in a manner as set forth in Chapter 1 and in the Grantee's Franchise.
- D. **Remedies and Enforcement Procedure.**
1. Whenever the City has reason to believe that a Grantee has violated any provision of this Code or its Franchise, including the customer service and telephone availability requirements, the City

shall first notify the Grantee in writing of the violation and demand correction within a reasonable time, which shall not be less than thirty (30) days. If the Grantee fails to demonstrate to the reasonable satisfaction of the City that no violation exists, or if the Grantee fails to correct the violation within the time prescribed, or if the Grantee is unable to correct the violation and fails to commence corrective action within the time prescribed and to diligently remedy such violation thereafter, the Grantee shall then be given written notice of not less than thirty (30) days of a public hearing to be held before the City Council. Said notice shall indicate with reasonable specificity the violation alleged to have occurred. This procedure shall apply to all alleged Code or Franchise violations, including those in which grounds for revocation are considered.

2. At the public hearing, the City Council shall hear and consider all relevant evidence and thereafter render findings and a decision based upon the evidence.
3. In the event the City finds that the Grantee has corrected the violation or promptly commenced correction of such violation after notice thereof from the City and is diligently proceeding to fully remedy the violation, or that no violation has occurred, the proceedings shall terminate and no penalty or other sanction shall be imposed.
4. In the event the City finds that a violation exists and that the Grantee has not corrected the same in a satisfactory manner or did not promptly commence and diligently proceed to correct the violation, the City may impose penalties and/or liquidated damages from the Security Fund, as follows:
 - (i) For System construction schedule violations, including, but not limited to provisions relating to initial construction schedules and system upgrade construction schedule, \$500 per day of non-compliance;
 - (ii) For all other violations, \$250 per day per violation.

The City shall provide the Grantee with written notice of its decision together with a written finding of fact explaining the basis for such a decision.

5. If the City elects to assess penalties or liquidated damages, then such election shall constitute the City's exclusive remedy for a period of sixty (60) days. Thereafter, if the Grantee remains in

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non-compliance, the City may pursue any other available remedy, including Franchise revocation.

6. In the event that a Franchise is cancelled or terminated by reason of the default of the Grantee, the security fund deposited pursuant to the Franchise shall remain in effect and available to the City until all pending claims or penalties are resolved or settled, after which point any remaining amounts in the security fund shall revert to the possession of the Grantee.
7. The rights reserved to the City with respect to the security fund are in addition to all other rights of City, whether reserved by this Code, applicable Franchise, or authorized by law, and no action, proceeding, or exercise of a right with respect to such security fund shall affect any other right City may have.
8. The foregoing provisions shall not be deemed to preclude the City from obtaining any other available remedies for repeated violations, of the same general type, whether remedied or not.

E. **Grounds for Revocation.** In addition to any rights in this Code or applicable Franchise, the City reserves the right to utilize the above described enforcement procedure to revoke a Franchise, and all rights and privileges pertaining thereto, in the event that any of the following occur, and the City and a Grantee are not able to mutually agree upon a cure or alternate remedy:

1. The Grantee substantially violates any material provision of this Code or its Franchise;
2. The Grantee practices an act of fraud or deceit upon the City; or
3. The Grantee becomes insolvent or is adjudged bankrupt.

F. **Right of Appeal.**

1. Upon the imposition of a penalty or revocation decision, a Grantee shall have a period of one hundred and twenty (120) days subsequent to the date of the formal adoption of the decision by the City Council within which to file an appeal with a court of competent jurisdiction.
2. During any such appeal period, the Franchise shall remain in full force and effect.

3.7 **Foreclosure, Receivership and Abandonment.**

- A. **Foreclosure.** Upon the foreclosure or other judicial sale of all or a part of the Cable System, or upon the termination of any lease covering all or part of the Cable System, a Grantee shall notify the City of such fact and such notification shall be treated as a notification that a change in control of the Grantee has taken place, and the provisions of this Code governing the consent to transfer or change in ownership shall apply without regard to how such transfer or change in ownership occurred.

- B. **Receivership.** The City shall have the right to cancel a Franchise one hundred twenty (120) days after the appointment of a receiver or trustee to take over and conduct the business of a Grantee, whether in receivership, reorganization, bankruptcy, or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless:
 - 1. Within one hundred twenty (120) days after its election or appointment, the receiver or trustee has fully complied with all the provisions of the Franchise and remedied all defaults thereunder; and
 - 2. Such receiver or trustee, within said one hundred twenty (120) days, has executed an agreement, duly approved by a court having jurisdiction, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Code and applicable Franchise.

3.8 **Purchase Of System.**

- A. If a renewal or extension of a Franchise is denied without further right of appeal, or a Franchise is lawfully terminated, with all rights of appeal exhausted, the City may acquire ownership of the Cable System or effect a transfer of ownership of the Cable System to another Person, any such acquisition or transfer shall in accordance with and to the extent permitted by 47 U.S.C. § 547 as follows:
 - 1. Upon revocation of a Franchise, such valuation shall not include any sum attributable to the value of the Franchise itself and plant and property shall be valued according to its book value at the time of revocation, or the Cable System's initial cost less depreciation and salvage whichever of the two is lower.
 - 2. At the expiration of a Franchise, such valuation shall be at fair market value, exclusive of the value attributed to the Franchise itself.

3.9 **Sale Or Transfer Of Franchise.**

- A. A Grantee shall not sell, transfer, lease, assign, sublet, or dispose of, in whole or in part, an interest in or control of a Franchise or Cable System without the prior consent of the City, which consent shall not be unreasonably denied or delayed and may be denied only upon a good faith finding by the City that the proposed transferee lacks the legal, technical, or financial qualifications to consummate the transaction and operate the Cable System so as to perform its obligations under the Franchise. This section shall not apply to sales of property or equipment in the normal course of business. Consent from the City shall not be required for a transfer in trust, mortgage, or other instrument of hypothecation, in whole or in part, to secure an indebtedness, or for a pro forma transfer to a corporation, partnership, or other entity controlling, controlled by, or under common control with a Grantee.
- B. The following events shall be deemed to be a sale, assignment, or other transfer of an interest in or control of a Franchise or Cable System requiring compliance with this section: (i) the sale, assignment, or other transfer of all or a majority of a Grantee's assets in the City; (ii) the sale, assignment, or other transfer of capital stock or partnership, membership, or other equity interests in a Grantee by one or more of its existing shareholders, partners, members, or other equity owners so as to create a new controlling interest in Grantee; (iii) the issuance of additional capital stock or partnership membership or other equity interest by a Grantee so as to create a new controlling interest in a Grantee; and (iv) a Grantee's agreement to transfer management or operation of the Grantee or the System to an unaffiliated entity so as to create a new controlling interest in the Grantee. The term "controlling interest" as used herein means majority equity ownership of a Grantee.
- C. A transfer solely for security purposes such as the grant of a mortgage or security interest, including the pledge or grant of a mortgage or security interest to lenders of a Grantee's assets, including, but not limited to, the Franchise, such as in a transaction commonly known as an "initial public offering" shall not be deemed to be a sale, assignment or other transfer of an interest in or control of a Franchise or Cable System and thus shall not require compliance with this section.
- D. In the case of any sale or transfer of ownership of an interest in or control of a Franchise or Cable System, the City shall have one hundred twenty (120) days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with FCC Regulations and the requirements of this Code. If the City fails to render a final decision on the request within one hundred twenty (120) days after receipt by the City of all required information, such request shall be deemed granted unless the requesting party and the City agree to an extension of the one hundred twenty (120) day period.

- E. The City reserves any legal right it has under applicable law to require a Grantee to pay all costs and expenses incurred by the City in connection with the sale, assignment, or transfer of a Franchise, including, but not limited to, the City's costs of reviewing the qualifications of any proposed transferees. Such reimbursement shall not be considered a Cable Franchise Fee.

3.10 **Rights Of Individuals Protected.**

- A. **Discriminatory Practices Prohibited.** A Grantee shall not deny Cable Service, deny access, or otherwise discriminate against Subscribers, programmers, or general citizens on the basis of income level, race, color, religion, national origin, sex, or age. Every Grantee shall strictly adhere to the equal employment opportunity requirements of state and federal law. Every Grantee shall comply at all times with all other applicable federal, State, and local laws, and all executive and administrative orders relating to non-discrimination.
- B. **Subscriber Privacy.** Every Grantee shall at all times comply with the federal subscriber privacy requirements codified at 47 U.S.C. § 551.

3.11 **Miscellaneous Provisions.**

- A. **Rate Regulation.** The City reserves the right to regulate rates for Basic Cable Service and any other services offered over a Cable System, to the extent permitted by federal or state law. A Grantee shall be subject to the rate regulation provisions provided for herein, and those of the Federal Communications Commission (FCC) at 47 C.F.R., Part 76.900, Subpart N. The City shall follow the rules relating to cable rate regulation promulgated by the FCC at 47 C.F.R., Part 76.900, Subpart N.
- B. **Rights Reserved to Grantor.** Upon either final non-appealable determination of non-renewal or revocation of a Franchise, Grantor shall have discretion to permit a Grantee by mutual consent to continue to operate the Cable System for an extended period of time agreed upon by the parties. Any such operation of the System by a Grantee shall be in accordance with the terms and conditions of this Ordinance or Franchise, and shall provide the regular Subscriber service and any and all of the services that may be provided at that time.

CHAPTER 4. RIGHTS-OF-WAY MANAGEMENT AND FACILITIES REQUIREMENTS

- 4.1 **Rights-of-Way Ordinance.** A Provider shall be subject to and comply with the additional or supplementary terms and conditions of the "ROW Ordinance," as may be amended from time to time, which is incorporated herein by reference and such provisions and the provisions of this Code shall be deemed a condition of any Franchise. **[insert ROW ordinance provisions in this Chapter at option of**

City]. The provisions of this Chapter 4 shall apply as provided herein to Providers, and to the full extent permitted by law, additionally to all construction activities in public utility easements.

4.2 **Permit Requirements.** At least thirty (30) days before the beginning of any installation, removal or relocation of its Facilities, the Provider shall submit detailed plans of the proposed action to the City Engineer. The City Engineer shall, within thirty (30) days of receipt of such plans, either approve the plans or inform the Provider of the reasons for disapproval. The Provider shall designate a responsible contact person with whom representatives of the City Engineer can communicate with on all matters relating to facilities installation and maintenance.

- A. Prior to any excavation within the Rights-of-Way, the Provider shall obtain a permit, pay all applicable fees, and perform such work in accordance with applicable provisions of the City ROW Ordinance, and any subsequent ordinances or regulations that may be adopted by the City regarding excavation work.
- B. The Provider shall post a bond with the City in accordance with the City's ordinances in an amount determined by the City Engineer, to guarantee the timeliness and quality of any construction, repair and restoration work, including damage to public or private property, and to guarantee the removal of its facilities from the City's Rights-of-Way should such removal be required upon the expiration of a Franchise.
- C. Prior to the commencement of any construction or alteration of its facilities located in the Rights-of-Way, the Provider shall furnish to the City Engineer a subsurface utility engineering study on the proposed route of construction, expansion or alteration, which shall consist of the following tasks:
 - 1. All available plans, plats and other location data indicating the existence and approximate location of all facilities along the proposed construction route;
 - 2. Completion of a visual survey and written record of the location and dimensions of any above-ground features of any underground facilities along the proposed construction route, including, but not limited to, manholes, valve boxes, utility boxes, post and visible street cut repairs;
 - 3. Plot and incorporate the data obtained from completion of task A and B above, on to the Provider's proposed system route maps, plan sheets and computer aided drafting and design (CADD) files; and

4. Provide all such data collected into a CADD file (or other format as may be identified by the City Engineer) compatible with that used by the City Engineer and deliver a copy to the City Engineer.
- 4.3 **Mapping of Facilities.** Each Provider shall maintain and file with the City updated maps, in such form as may be required by the City Engineer, providing the location and sufficient detail of all existing and new Facilities in the Rights-of-Way, and such other related information as required by the City Engineer. Such maps shall be updated and kept current with the City.
- 4.4 **No interference.** Provider shall construct and maintain its Facilities so as not to interfere with other users of the Rights-of-Way. Except as may otherwise be provided, the Provider shall, prior to commencement of work, execute a City-approved resident-notification plan to notify residents affected by the proposed work. All construction and maintenance by Provider or its subcontractors shall be performed in accordance with industry standards.
- 4.5 **Advertising, Signs or Extraneous Markings.** Provider shall not place or cause to be placed any sort of signs, advertisements or other extraneous markings, whether relating to Provider or any other person or entity on the public right-of-way, except such necessary minimal markings as approved by the City as are reasonably necessary to identify the facilities for service, repair, maintenance or emergency purposes, or as may be otherwise required to be affixed by applicable law or regulation.
- 4.6 **Tree Protection.** Unless otherwise approved in writing by the City, in the attachment, installation, removal, reattachment, reinstallation, relocation or replacement or otherwise of the Facilities, Provider shall neither remove, cut, nor damage any trees, or their roots, in and along the streets, alleys and public places of the City. Tree trimming and pruning may be permitted to occur only after prior written notice to the City of the extent of trimming and pruning to be performed and the prior written approval thereof by the City. The type and extent of trimming and pruning shall be in accordance with the requirements of the City.
- 4.7 **Exclusion of Certain Locations/Facilities.** Prior to its installation of any Facilities in the Rights-of-Way and after it provides the City with its proposed plans for the Facilities, the City may in its discretion designate certain locations or facilities in the Rights-of-Way to be excluded from use by Provider for its Facilities, including, but not limited to, ornamental or similar specially-designed street lights, or other facilities or locations which, in the reasonable judgment of the City Engineer do not have electrical service adequate or appropriate for the Provider's Facilities or cannot safely bear the weight or wind loading thereof, or any other facility or location that in the reasonable judgment of the City Engineer is incompatible with the proposed Facilities or would be rendered unsafe or unstable by the installation. The City Engineer may further exclude certain other facilities that have been designated or planned for other use or are not otherwise available for use by Provider due to engineering, technological, proprietary, legal,

or other limitations or restrictions as may be reasonably determined by the City. In the event such exclusions conflict with the reasonable requirements of the Provider, the City will cooperate in good faith with Provider to attempt to find suitable alternatives, if available, provided that the City shall not be required to incur financial cost nor require the City to acquire new locations for Provider.

- 4.8 **Location, Type and Design of Facilities Subject to Approval.** The design, location, and nature of all Facilities shall be subject to the review and approval of the City Engineer. Such review shall be based on nondiscriminatory bases in application of City policy and approvals shall not be unreasonably withheld. **[Option 1: Except as provided herein, all Facilities constructed after the date of a Franchise shall be placed underground, and in conduit, where capable. Antenna or other Facilities may be located aboveground only if approved by the City Engineer for good cause and including as may be specifically authorized in an Exhibit attached hereto. Unless extraordinary circumstances exist, good cause shall not include authorization for aboveground facilities requiring new poles or major modification to existing aboveground structures. Option 2: Except as provided herein, all Facilities constructed after the date of a Franchise shall be placed underground, and in conduit, where capable, unless existing aboveground structures requiring no major modification are available. Major modifications of aboveground structures to accommodate Facilities or Antenna, or erection of new poles, will be allowed only if approved by the City Engineer for good cause or as may be specifically authorized in an Exhibit attached hereto.]** Aboveground pedestals, vaults, antennae or other Facilities, may be installed only if approved by the City where alternative underground facilities are not feasible or where underground requirements are otherwise waived pursuant to the provisions of this subsection. Existing conduit shall be used where feasible and available. Where reasonable and appropriate and where adequate public rights-of-way exists, the Provider shall place aboveground Facilities underground in conjunction with City capital improvement projects and/or at specific locations requested by the City provided that such placement is practical, efficient, and economically feasible. Unless specifically authorized herein or otherwise by the City, wired access point antennae/towers located on the Rights-of-Way or other City owned or controlled property shall not be authorized by a Franchise, but shall require a separate Lease or Franchise with the City. City height limitations, applicable zoning restrictions, and general city policy with regard to all users of the Rights-of-Way shall also be applicable to all Facilities. The City Engineer may establish such regulations or policies as may be deemed necessary or appropriate to effect this provision.
- 4.9 **Notification, Joint Installation and Collocation Requirements.** Provider shall, prior to any excavation or installation within the Rights-of-Way, provide sufficient notification and joint installation opportunity on a shared-cost basis to potential users of the Rights-of-Way as may be provided for by separate City policy. Such notification and adopted policies shall be designed to maximize collocation of providers to minimize the disturbance to the Rights-of-Way and maximize its useable capacity. Provider shall not install new conduit or other

Facilities in the Rights-of-Way where existing conduit is available to Provider that would reasonably avoid the need for new excavation or overhead installations. Provider shall identify by mapping, as required by the City Engineer, the location and specifications of all conduit available or dedicated for collocation.

- 4.10 **Use of Facilities by others; required terms.** If any Provider chooses to make its Facilities physically available for use by any other Provider it shall do so only under terms that are fair and reasonable, competitively neutral and nondiscriminatory, and which do not prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service under the circumstances. Provider shall further comply with the facilities attachment requirements of federal law codified at § 47 U.S.C. 224.
- 4.11 **Additional Facilities Requirements; Planned Infrastructure.** When Provider installs any new conduit, the Provider shall simultaneously install sufficient additional conduit or other related facilities ("Excess Conduit") as may be determined by the City Engineer and in order to reasonably meet the needs of existing and future users of the Rights-of-Way. The criteria for when such conduit will be required, the amount of conduit to be required, management and ownership of the excess conduit and financing of the excess conduit and related matters shall be established by a separate city policy. Such policy shall be publicly available and each Franchise shall be deemed subject to such applicable policies adopted or as may be amended. The Excess Conduit shall be designed and installed in accordance with City specifications. The City may reserve for its own purposes a portion of any Excess Conduit dedicated to the City, but shall make available any portion not so reserved to any and all subsequent Providers (or others as determined by the City) on a non-discriminatory basis for fair and reasonable compensation that shall be paid in addition to the Franchise Fees. When sections of Provider's conduit is installed simultaneously with another Provider, the cost of such sections of Excess Conduit shall also be cost shared among each Provider as may be established by policy. The requirements herein shall be administered and applied on a competitively neutral and nondiscriminatory basis to maximize the available space in the Rights-of-Way and designed to minimize the total number of excavations and cost of total communications infrastructure installation. No Linear Foot charge shall apply to any Excess Conduit installed by Provider and dedicated to the City.
- 4.12 **Removal of Facilities.** Upon expiration of a Franchise, whether by lapse of time, by agreement between the Provider and the City, or by forfeiture thereof, the Provider shall remove, at its sole cost, from public property any and all of its Facilities that are the subject of a Franchise within a reasonable time after such expiration, not to exceed 90 days, and, it shall be the duty of Provider immediately upon such removal to restore the right-of-way from which the Facilities are removed to as good condition as the same were before the removal was effected and as required by the City. Notwithstanding the foregoing, upon

request of Provider, the City may allow underground Facilities to be left in place when it is not practical or desirable to require removal.

- 4.13 **Relocation of Facilities.** Whenever the City shall in its exercise of the public interest request of the Provider the relocation or reinstallation of any of its Facilities, Provider shall forthwith remove, relocate, or reinstall any such property as may be reasonably necessary to meet the request and the cost of such relocation, removal, or reinstallation of the Facilities shall be the exclusive obligation of said Provider. Provider shall upon request of any other person requesting relocation of Facilities and holding a validly issued building or moving permit of the City, and within forty-eight (48) hours prior to the date upon which said person intends to exercise its rights under said permit, Provider shall thereupon temporarily raise, lower, or relocate its wires or other Facilities as may be required for the person to exercise the rights under the permit, and Provider may require such permit holder to make payment in advance for any expenses incurred by said Provider pursuant to said person's request.
- 4.14 **No Cause of Action Against the City.** The Provider shall have no remedy or recourse whatsoever against the City for any loss, cost, expense, or damage arising from any of the provisions or requirements of a Franchise, or because of the enforcement thereof by said City, or for the failure of said City to have the authority to grant, all, or any part, of the herein granted; provided that said Provider expressly acknowledges that it accepted the rights herein granted in reliance upon its independent and personal investigation and understanding of the power of authority of said City to enter into the Franchise authorized herein with Provider; provided further that the Provider acknowledges by its acceptance of said Franchise that it has not been induced to enter into a Franchise upon any understanding, or promise, whether given verbally or in writing by or on behalf of said City, or by any other person concerning any term or condition of a Franchise not expressed therein; provided further that the Provider acknowledges by the acceptance of any Franchise that it has carefully read the provisions, terms, and conditions hereof and is willing to, and does accept, all of the risk attendant to said provisions, terms, and conditions.
- 4.15 **Provider Responsible for Costs.** The Provider shall be responsible for all reasonable costs borne by the City that are directly associated with its installation, maintenance, repair, operation, use, and replacement of its Facilities within the Rights-of-Way, that are not otherwise accounted for as part of the Permit fee established pursuant to the ROW Ordinance. All such costs shall be itemized and the City's books and records related to these costs shall be made available upon request to the Provider. Provider shall be responsible for its own costs incurred removing or relocating its Facilities when required by the City due to City requirements relating to maintenance and use of the Rights-of-Way for City purposes.
- 4.16 **Insurance and Bonds.** During the term of any Franchise, the Provider shall obtain and maintain at the Provider's sole expense, all insurance and bonds

required by the ROW Ordinance or applicable Franchise. Nothing contained in this Code shall limit the Provider's liability to the City to the limits of insurance certified or carried.

CHAPTER 5. MISCELLANEOUS

- 5.1 **Administration of Franchise.** The City shall be responsible for the continued administration of this Code and any Franchises granted hereunder. The City may delegate this authority from time to time in any manner consistent with applicable law, provided, however, that the City shall not delegate enforcement authority.
- 5.2 **Appeals.** Unless otherwise provided herein or by and generally applicable Administrative Appeal process, a Provider may appeal any decision of the City pursuant to this Code to the governing body of City within fifteen (15) days of such decision where, upon written request of the Provider specifying this provision and including the details of the alleged claim, an evidentiary hearing shall be held on such appeal.
- 5.3 **Non-Enforcement by the City.** A Provider shall not be relieved of its obligation to comply with any of the provisions of this Code or its applicable Franchise by reason of any failure of the City to enforce prompt compliance.
- 5.4 **Penalties.** Any Person violating any provision of this Code shall be subject to a fine of \$500 per day per violation. The payment of such fine notwithstanding, all such violators shall be subject to all other applicable provisions of this Code to the fullest extent allowed by law, including, but not limited to, the payment of a Communications Franchise Fee or Cable Franchise Fee.
- 5.5 **Publication of Notices.** All public notices or ordinances required to be published by law shall be published in the official newspaper of the City. A Grantee shall be responsible for all costs of publication that may be required with respect to its Franchise or any amendments thereto.
- 5.6 **Severability.** If any material Section of this Code or of any Franchise granted pursuant to it is held by a governmental authority of competent jurisdiction, to be invalid or unlawful as conflicting with applicable laws now or hereafter in effect, or is held by a court or competent governmental authority to be modified in any way in order to conform to the requirements of any such applicable laws, such provision shall be considered a separate, distinct, and independent part of the Code, Franchise, and, to the extent possible, such holding shall not affect the validity and enforceability of all other provisions therein.

ORDINANCE NO. _____

AN ORDINANCE GRANTING TO _____, A FRANCHISE AUTHORIZING THE RIGHT TO CONSTRUCT, OPERATE, AND MAINTAIN A COMMUNICATIONS SYSTEM USING THE RIGHTS-OF-WAY IN THE CITY OF, [NAME OF CITY], KANSAS

WHEREAS, _____ (“Franchisee”) has requested a Communications Franchise from the City to authorize the use of the City Rights-of-Way for the Franchisee to construct, install, maintain, and operate its communications fiber optic cable and related facilities for communications or related capabilities; and

WHEREAS, Kansas statutes and the Home Rule Amendment to the Kansas Constitution authorize the City to grant a franchise for the use and occupancy of Rights-of-Way for placement of a System as hereinafter defined, and to adopt rules and regulations regarding such use and occupancy; and

WHEREAS, the City is authorized to and has established standards in its Cable and Communications Code for franchising occupancy of the Rights-of-Way by communications facilities and other uses that are consistent with and recognize the Kansas Corporation Commission’s duties and jurisdiction; and

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF [NAME OF CITY], KANSAS:

SECTION 1. GENERAL

- 1.1 **Preservation of Police Power Authority.** Any rights granted to Franchisee pursuant to this Franchise are subject to the authority of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public.
- 1.2 **Defined Terms.** For purposes of this Franchise, the terms, phrases, words, and their derivatives shall have the meanings as set forth in the Communication and Cable Code of the City, Chapter _____ (the “Code” or “Cable and Communications Code”).
- 1.3 **Franchise Subject to Provisions of Cable and Communications Code.** This Franchise fully incorporates the provisions of the Cable and Communications Code as if fully set forth herein, and Franchisee agrees as a part of this Franchise to abide by the provisions of such Code, and to be subject to the enforcement by the City as provided therein and in this Franchise as a material term herein. This Franchise may establish supplementary obligations on Franchisee, but nothing in this Franchise shall be deemed to waive any obligation or requirement applicable to Franchisee authorized or established by the Code.

SECTION 2. GRANT OF AUTHORITY TO USE THE RIGHTS-OF-WAY

- 2.1 **Franchises Non-Exclusive.** This Franchise shall grant nonexclusive privileges to use the Rights-of-Way. The City specifically reserves the right to grant, at any time, such additional Franchises or other rights to use the Rights-of-Way for any purpose and to any other person, including itself, as it deems appropriate, subject to applicable federal and state law.
- 2.2 **Nature of Rights Granted by this Franchise.** This Franchise shall not convey title, equitable or legal, in the Rights-of-Way, and gives only the right to occupy Rights-of-

Way, for the purposes and for the period stated in this Franchise and subject to the requirements herein. This Franchise does not excuse Franchisee from obtaining appropriate access or attachment agreements before locating its Facilities on another person's Facilities located within the Rights-of-Way.

- 2.2 **Grant.** Franchisee is hereby granted the right and privilege to construct, operate, and maintain facilities in, through and along the City's right-of-way and utility easements for the purposes of supplying Communications Services on a nonexclusive basis within the City, subject, however, to the terms and conditions herein set forth within this Franchise and the Code, and all such special conditions as may be set forth in Exhibit A. As a condition of this grant, Franchisee is required to obtain and is responsible for any necessary permit, license certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City the FCC or the Kansas Corporation Commission, subject to Franchisee's right to challenge in good faith such requirements.

This Franchise does not provide Franchisee the right to provide cable service or operate an Open Video System.

- 2.3 **Use of Rights-of-Way; Police Powers; Franchisee's Use Subordinate.** The Franchisee shall construct and maintain its Facilities in accordance with all applicable federal, state and local laws, including all permit requirements, and fee payments, and all other City codes and ordinances in effect as of the date of this Franchise or hereinafter adopted to the extent not in contravention of state or federal law. The City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of facilities on any particular segment of Rights-of-Way. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon the Franchisee. The use of the Rights-of-Way authorized by this Franchise shall in all matters be subordinate to the City's use and rights therein and Franchisee shall be limited to such uses as have been expressly granted to Franchisee by the City.

- 2.4 **No interference.** Franchisee shall construct and maintain its Facilities so as not to interfere with other users of the Rights-of-Way. Except as may otherwise be provided, the Provider shall, prior to commencement of work, execute a City-approved resident-notification plan to notify residents affected by the proposed work. All construction and maintenance by Franchisee or its subcontractors shall be performed in accordance with industry standards.

- 2.5 **Notification, Joint Installation and Collocation Requirements.** Franchisee shall, prior to any excavation or installation within the Rights-of-Way, provide sufficient notification and joint installation opportunity on a shared-cost basis to potential users of the Rights-of-Way as may be required by the City. Franchisee shall further make its installed facilities available to other Franchisees on a nondiscriminatory competitively neutral basis consistent with the requirements of federal law codified at § 47 U.S.C. 224.

- 2.6 **Additional Facilities Requirements; Planned Infrastructure.** When Franchisee installs any new conduit, the Franchisee shall simultaneously install sufficient additional conduit or other related facilities ("Excess Conduit") as may be determined by the City Engineer in accordance with the Code. When sections of Franchisee's conduit is installed simultaneously with another Franchisee, the cost of such sections of Excess Conduit shall also be cost shared among each Franchisee as may be established by the

City. In no event shall any Franchisee that chooses to allow collocation in its Facilities do so in a manner that is competitively discriminatory or creates an obstacle to entry under the terms made available.

- 2.7 **Franchisee Responsible for Costs.** The Franchisee shall be responsible for all reasonable costs borne by the City that are directly associated with its installation, maintenance, repair, operation, use, and replacement of its Facilities within the Rights-of-Way, that are not otherwise accounted for as part of the Permit fee established pursuant to the Code. All such costs shall be itemized and the City's books and records related to these costs shall be made available upon request to the Franchisee. Franchisee shall be responsible for its own costs incurred removing or relocating its Facilities when required by the City due to City requirements relating to maintenance and use of the Rights-of-Way for City purposes.

SECTION 3. TERM

This Franchise shall be effective for a term of five (5) years from the effective date herein of this Franchise, subject to termination or forfeiture as provided herein.

SECTION 4. COMPENSATION

- 4.1 **Compensation.** Franchisee agrees to pay the Communications Franchise Fees and such other compensation in the amount and under such additional regulations and provisions as are set forth in the Code. Franchisee acknowledges that it has reviewed the Code and agrees that such compensation is fair and reasonable compensation to the City for use of the Rights-of-Way.
- 4.2 **Taxes; Communications Franchise Fee Not a Tax.** The Communications Franchise Fees or other compensation required herein and by the Code shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City, except as may be provided for in the Code. Franchisee acknowledges that the Communications Franchise Fee is compensation for use of the Rights-of-Way and shall in no way be deemed a tax of any kind.

SECTION 5. TRANSFER OF FRANCHISE OR FACILITIES

- 5.1 **Transfer of Franchise.** Franchisee shall not sell, transfer, lease, assign, sublet or dispose of, in whole or in part, either by forced or voluntary sale, or by ordinary sale, consolidation, or otherwise, this Franchise or any of the rights or privileges granted by this Franchise, without the prior written consent of the City; provided that such transfer may occur without written consent of the City to a wholly owned parent or subsidiary, or between wholly owned subsidiaries, upon thirty days prior notice to the City. Such consent shall not be unreasonably withheld. The City reserves the right to be reimbursed for its reasonable costs relating to a transfer of ownership. Franchisee shall not change its name under which it does business with the public without providing at least 30 days prior notice to the City.
- 5.2 **Sale or Lease of Facilities.** Except as otherwise may be provided by law, Franchisee shall not lease, sell, or otherwise transfer possession or control of the Facilities, or any portion thereof, for any purpose to any person that has not obtained a duly issued Franchise, or other grant by the City to use the Rights-of-Way and which includes the authority to use or maintain such leased or transferred Facilities.

SECTION 6. FORFEITURE OF FRANCHISE AND PRIVILEGE.

In case of failure on the part of the Franchisee, its successors and assigns, to comply with any of the provisions of this Franchise, including the provisions of the Code, or if the Franchisee, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of the terms of this Franchise, including the provisions of the Code, the Franchisee, its successors and assigns, shall forfeit all rights and privileges permitted herein, and all rights hereunder shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings: Before the City proceeds to forfeit this Franchise, it shall first serve a written notice upon the Company, setting forth in detail the neglect or failure complained of, and the Company shall have thirty (30) days thereafter in which to cure the default by complying with the conditions of this Franchise. If at the end of such thirty (30) day period the City determines that the conditions have not been complied with the City shall take action by an affirmative vote of the City Council present at the meeting and voting, to terminate the Franchise; setting out the grounds upon which said Franchise is to be canceled or terminated. Nothing herein shall prevent the City from taking any other action or remedy as may be set forth in the Code or as may otherwise exist at law.

SECTION 7. GENERAL CONDITIONS

- 7.1 **Compliance With Laws.** In performing activities and exercising its rights and obligations under this Franchise, the Franchisee shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction and use of public property.
- 7.2 **Enforcement; Attorneys' Fees.** The City shall be entitled to enforce this Franchise through all remedies lawfully available, and Franchisee shall pay City its costs of enforcement, including reasonable attorneys' fees in the event that Franchisee is determined judicially to have violated the terms of this Franchise.
- 7.3 **Relationship of the Parties.** Under no circumstances shall this Franchise be construed as one of agency, partnership, joint venture, or employment between the parties.
- 7.4 **Relocation or Removal of Facilities.** Franchisee shall at its own cost relocate or remove its Facilities as required by the City under such conditions as may be set forth in the Code.
- 7.5 **No Cause of Action Against the City.** Franchisee shall have no remedy or recourse whatsoever against the City for any loss, cost, expense, or damage arising from any of the provisions or requirements of this Franchise, or because of the enforcement thereof by said City, or for the failure of said City to have the authority to grant, all, or any part, of the herein granted; provided that said Franchisee expressly acknowledges that it accepted the rights herein granted in reliance upon its independent and personal investigation and understanding of the power of authority of said City to enter into the Franchise herein with Franchisee; provided further that the Franchisee acknowledges by its acceptance of said Franchise that it has not been induced to enter into this Franchise upon any understanding, or promise, whether given verbally or in writing by or on behalf of said City, or by any other person concerning any term or condition of this Franchise not expressed herein; provided further that the Franchisee acknowledges by the acceptance of this Franchise that it has carefully read the provisions, terms, and conditions hereof and

all incorporated provisions and is willing to, and does accept, all of the risk attendant to said provisions, terms, and conditions.

SECTION 8. INDEMNIFICATION

Franchisee at its sole cost and expense, hereby agrees to indemnify, protect, defend (with counsel acceptable to the City) and hold harmless the City, its elected officials, officers, employees, and agents, from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and expenses of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of the fact that the City entered into this Franchise with Franchisee, the rights granted to Franchisee, or the activities performed, or failed to be performed, by Franchisee under this Franchise, or otherwise, except to the extent arising from or caused by the sole or gross negligence or willful misconduct of the City, its elected officials, officers, employees, agents or contractors. This indemnification shall survive the expiration or termination of this Franchise for a period of five (5) years after the effective date of expiration or termination.

SECTION 9. MISCELLANEOUS

- 9.1 This Franchise, together with all Exhibits, shall constitute the entire Franchise and no negotiations or discussions prior to execution shall be of any effect.
- 9.2 The invalidity in whole or in part of any provision shall not affect the validity of any other provision.
- 9.3 The right and remedies of the Parties shall be cumulative and in addition to any other rights and remedies provided by law or equity. A waiver of a breach of any provision thereof shall not constitute a waiver of any other breach. The laws of the State of Kansas shall govern this Franchise.
- 9.4 This Franchise shall create no third-party beneficiary rights.
- 9.5 Notices shall be in writing, mailed certified with return receipt requested, effective upon receipt and sent to:

Franchisee:

The City:

City of [NAME OF CITY], Kansas

Attn: _____

or to replacement addresses that may be later designed in writing.

SECTION 10. EFFECTIVE AND ACCEPTANCE.

- 10.1 This is a franchise ordinance finally passed after being read in full at three regular meetings of the Governing Body. Immediately after the final passage, the franchise ordinance shall be published in _____ **[INSERT NEWSPAPER]**, an official City newspaper, once each week for two consecutive weeks. It shall take effect and be in force sixty-one days after the date of its final

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passage unless pending its final passage or within sixty days of its final passage a petition signed by a number of the voters of the City equal to 20% of the number of voters who voted from the council member receiving the highest number of votes at the last preceding City election shall be presented to the Governing Body of the City asking that the franchise ordinance be submitted for adoption to popular vote, in which case the franchise ordinance shall become effective only if and when approved by a majority of the electors voting thereon.

10.2 Franchisee shall have sixty (60) days after the final passage and approval of this ordinance to file with the City Clerk of the City its acceptance in writing of the provisions, terms and conditions of this ordinance, which acceptance shall be duly acknowledged before some officer authorized by law to administer oaths; and when so accepted, the ordinance and acceptance shall constitute a contract between the City and Franchisee subject to the provisions of the laws of the State of Kansas. Franchisee's acceptance shall be deemed to acknowledge that this Franchise is a lawful contract between the City and Franchisee and that Franchisee agrees to the terms hereof voluntarily and with full authority to execute this Franchise.

PASSED by the Governing Body of the City of [NAME OF CITY] this ____ day of _____, 2000.

APPROVED by the Mayor this ____ day of _____, 2000.

_____, Mayor

ATTEST:

_____, City Clerk

APPROVED AS TO FORM:

_____, City Attorney

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EXHIBIT A
SPECIAL CONDITIONS

The following special conditions shall be a condition of this Franchise and shall supercede any provision in this Franchise to the contrary:

JOINT INSTALLATION AND EXCESS CONDUIT POLICY

In order to minimize entry into the city's rights-of-way and to minimize disruption to city facilities, the facilities others using the rights-of-way, and to the citizens of the city, the city has adopted the following policy related to notification of right-of-way use, joint construction of underground facilities and installation of excess conduit.

1.01 Joint Installation Notification.

- A. Prior to constructing any new or additional underground conduit or above ground boxes or pedestals within the Rights-of-Way, a Franchisee shall certify in writing to the City Engineer that it has made appropriate inquiry to all existing utilities and other entities possessing a right to occupy the Rights-of-Way as to the availability of existing or planned conduit or box or pedestal locations that the Franchisee could reasonably utilize to meet its needs, and that no such conduit or box or pedestal locations are available or planned within the next six months.
- B. All existing utilities, and entities granted a Franchise, with usable conduit within the Rights-of-Way shall make such conduit available to other Franchisees consistent with the federal requirements of § 47 U.S.C. 224. All existing utilities, and entities granted a Franchise, with box and pedestal locations shall, when feasible, accommodate collocation of facilities of other Franchisees. Each Franchisee shall provide mapping of all existing facilities and excess conduit except as may be waived by the city engineer as unnecessary or unduly burdensome. All new facilities shall require sufficient mapping in hard copy and electronic format.
- C. Once the city engineer has made the determination that no such conduit or box or pedestal locations are available and has reviewed the plans and provided preliminary approval of the location of the facilities the city will notify by registered mail all companies on file with the city prior to being authorized to proceed with installation of new conduit or boxes and pedestals (or overhead facilities if otherwise permitted).
- D. The Franchisee (Licensee) may request that the name of their company not be revealed in the notification to other firms. However, the Franchisee (Licensee) shall supply the city all information and assistance that the city deems necessary in order to comply with the following Notification requirements and understands that its identity will be know once participants in the joint construction have been identified by the City:
 1. The City shall provide written notification of the proposed construction activity and locations (whether by trenching, boring, overhead installation, or otherwise) to all existing and potential users of the Rights-of-Way as designated on a provider list

approved by the City. The notice shall invite all firms to join with the Franchisee (Licensee) in placing their own conduit and laterals and boxes and pedestals in the noticed locations on a cost-shared basis. The written notification shall contain sufficient mapping and information as would be reasonably necessary for potential users to assess the viability of joint installation. The notice shall include a statement that the notification is pursuant to this policy, and shall include a copy of this policy. Such notices shall disclose where the Licensee (Franchisee) intends to construct conduit and contain a clear map of the proposed route or locations, including all proposed lateral or connecting conduit to specific locations.

2. All companies notified shall have twenty-one (21) days from the receipt of such notification to indicate in writing to the City as to whether they desire to jointly undertake the construction of such conduit or otherwise co-locate their Facilities at such time. Any company electing to jointly construct or co-locate its Facilities with that of Franchisee (Licensee) shall share in the pro-rata costs of such construction or joint installation of Facilities. All interested companies shall enter into a participant agreement and shall designate a lead company, normally the Licensee (Franchisee). The city shall be given a copy of the participant agreement and will work with the lead company in making all construction and location determinations, in granting permits, in making inspections, and in all other matters with regard to the construction of the joint underground facility. All city policies, requirements, construction standards, and ordinances will apply to the project. The lead company shall be responsible for maintenance and management of the joint facility. All such issues and requirements shall be covered in the participant agreement.
- E. A company that is invited to participate in a joint construction project and decides not to participate may not enter the right-of-way for the purpose of the construction of new facilities for a period of _____ years from the date of receipt of notification. This prohibition does not apply to the repair of existing facilities or situations determined by the city engineer to be in the nature of an emergency, or where good cause is determined by the City engineer justifying a failure by the company to respond and warranting new disturbance contrary to timeframe established by this provision.
- F. The City Engineer may limit the number of conduit that may be installed by each provider to ensure that no one provider unreasonably consumes a disproportionate amount of the available rights-of-way. Unless space consideration otherwise dictate, each location shall be presumed to be capable of permitting each provider to install up to two 4" conduit, or their equivalent.

1.02 Excess Conduit Requirements.

- A. **Policy Objectives.** The City has determined that the influx of users of the Rights-of-Way requires affirmative action by the City to coordinate the users of the Rights-of-Way and to ensure that there are sufficient underground facilities for future and existing communications users. By requiring initial installers of facilities to install additional conduit for use by other providers and the city, the City desires to promote competition by available infrastructure, maximize the useable space in the Rights-of-Way, lower cost to the industry as a whole, reduce excavations, and most importantly maximize safety by reducing the potential for excavation accidents.
- B. When a Franchisee installs any new conduit, the Franchisee shall at the request of the City Engineer install sufficient additional conduit or other related facilities ("Excess Conduit") to meet the City's planned infrastructure needs for the City and the expected needs of other users of the rights-of-way. Such additional Excess Conduit shall be required as provided for on a designated conduit plan, if any, and additionally as determined based on the following criteria:
1. [INSERT APPROPRIATE POLICY CRITERIA:] (1) All construction of underground conduit will require the construct of additional conduit; (2) All construction of underground conduit in streets designated as arterials (collectors, major thoroughfares) will require the construction of additional conduit; (3) All construction of underground conduit in streets designated by the city as "high use utility corridors" will require the construct of additional conduit; (4) All construction of underground conduit in streets that have been determined by the city engineer to be likely locations for further telecommunication facilities, as determined by an independent review or industry study, will require the construction of additional conduit; (5) All construction of underground conduit in city streets will require the construction of additional conduit if the licensee (franchisee) does not comply with the city's facility notification and joint construction policy]
 2. Excess Conduit shall not be required for uses that are not technically compatible or in locations or circumstances where the policy objectives stated in this Policy would not be served.
- C. The city will normally require no more than one four inch conduit as Excess Conduit unless the city engineer determines by an independent review or industry study that more than one four inch conduit is required to accommodate projected future rights-of-way use.

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- D. The additional conduit will be constructed and managed by licensee (franchisee) or if this is a joint construction project by the lead company. [Option 1. The additional conduit will be owned by the city and leased or sold to companies wanting to locate underground facilities in the rights-of-way. The sale or lease of additional conduit will be in an amount that is no less than the prorata share of construction and carrying costs experienced by the licensee (franchisee), or group of licensees (franchisees) in the case of joint construction projects, in the construction of the conduit.] [Option 2. The additional conduit will be owned by the licensee (franchisee), or in the case of joint construction the lead company, and will be sold or leased to a licensee or franchisee wanting to locate facilities in the right-of-way. The owner of the additional conduit will make the excess conduit available to other providers for an amount equivalent to the prorata share of construction and carrying costs experienced by the licensee (franchisee), or group of licensees (franchisees) in the case of joint construction projects, in the construction of the conduit. The city reserves the right to review each situation and refer potential users of the additional conduit to the owner. The owner of the conduit is obligated to maintain the additional conduit in good and serviceable condition and will notify the city of any inquiry regarding its possible use.]
- E. The cost of the additional conduit will be born by the licensee, or in the case of a joint construction project, by all participants in the project on a prorata basis. [Option 1. The licensee, or in the case of a joint construction projects all participants, shall recoup their prorata share of costs and financing through the sale of additional conduit.] [Option 2. The marginal cost of constructing and financing the additional conduit shall be reimbursed by the city through a credit on right-of-way use fees, franchise fees or utility taxes to the licensee, or in the case of a joint construction project all participants. All proceeds from the sale or lease of additional conduit shall be paid to the city, less any agreed upon administrative or maintenance costs.]
- F. All of the terms and requirements for installation and maintenance shall be set out in advance of construction and agreed to by all parties. The City Engineer may adopt approved agreements, require mediation, or may adopt other procedures or regulations to effect this Policy and to otherwise ensure the timely coordination of parties as to the joint installation and or excess conduit.

1.03 Box and Pedestal Construction

- A. **Policy Objectives.** The city has determined that the influx of users of the Rights-of-Way requires affirmative action by the City to coordinate the users of the Rights-of-Way and to ensure that there are sufficient

acceptable box and pedestal locations for future and existing communications users. By requiring initial installers of facilities to accommodate the use by other providers, the City desires to promote competition by by facilitating interconnections and minimize the disruption to the rights-of-way and visual blight to the community.

- B. When a Franchisee installs any new boxes or pedestals, the Franchisee shall provide to the city engineer the locations and descriptions of all such proposed facilities and at the request of the City Engineer shall install sufficient additional capacity or other related facilities to meet the expected needs of other users of the rights-of-way.

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES**Section 3.93.001 SCOPE OF ORDINANCE**

WHEREAS, K.S.A. 12-2001, and the Home Rule Amendment to the Kansas Constitution authorize the City to grant franchises and licenses for the use and occupancy of Right-of-Way for placement of Communications Systems as hereinafter defined, and to adopt rules and regulations regarding such use and occupancy; and

WHEREAS, The City only intends to require a franchise from those entities that actually own or control communications Facilities located within the Right-of-Way and not entities that purely operate as Resellers, provided, however, that communications carriers should not be allowed to evade application of franchise fee requirements through the use of affiliates or subsidiaries who utilize the underlying Facilities to provide Communications Service; and

WHEREAS, The City intends to establish a structure by this ordinance and other ordinances of the City by which providers of Communications Service using the Right-of-Way register with the City and, as appropriate, either apply for a license for private use of the Right-of-Way or apply for a franchise under the provisions of this ordinance; and

WHEREAS, the Kansas Corporation Commission (hereinafter referred to as the "KCC") has been charged with the duty to ensure that basic local Telecommunications Services are available to all consumers in the state, to encourage competition, to ensure that monopoly Services are subject to effective price, rate, Service regulation, encourage development of new technologies, prevent anti-competitive behavior and eliminate unnecessary regulatory constraint; and

WHEREAS, the City is authorized to and should establish standards for occupancy of the Right-of-Way by communications facilities and other uses that are consistent with and recognize the Kansas Corporation Commission's duties and jurisdiction; and

WHEREAS, the City's standards included in this ordinance are designed to:

- A. Adequately compensate the City for occupancy of the Right-of-Way by all Communications Services;
- B. Fully protect the public and the City from any harm caused by private commercial use of Right-of-Way, including but not limited to reducing the risk of loss of service or personal or property injury from errant excavation;

Protect the regulatory authority of the City in a manner consistent with federal and state Law; and

Otherwise protect the public interests in and promote the development and coordinated use of an advanced telecommunications infrastructure; and

Promote the entry and occupancy of right of way by communications providers on a competitively neutral manner, maximize the available space for such providers by requiring coordination, colocation, and planned construction of infrastructure in the Right-of-Way.

Minimize unnecessary local regulation of Communications Service providers.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:

SECTION 1. SCOPE OF ORDINANCE

This Ordinance shall apply to any public or private entity who seeks to construct, install, or operate a Communications System or Facilities, as such terms are defined herein, within the Right-of-Way, unless such entity already has an existing valid Franchise from the City to construct, install, or maintain a Communications System in the Right-of-Way prior to the effective date of this Ordinance or is otherwise exempt from this requirement by operation of applicable state Law. Provided, however, that all of the provisions related to construction or permitting specifications adopted pursuant to the City's police powers, to the extent that they do not conflict with the material terms of an existing Franchise, shall be fully applicable to all such Franchisees. This Ordinance shall apply to City owned or controlled Communications Systems except to the extent such lines or facilities are utilized on an internal, non-commercial basis by the City or any of its Departments. This Ordinance shall not apply to the provision of Cable Service. (Ord. No. 44-845)

(44-845, Created, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES**Section 3.93.002 FINDINGS, AUTHORITY, DEFINITIONS**

SECTION 2. FINDINGS, AUTHORITY AND DEFINITIONS

2.1 Declaration of Findings. The City hereby declares as a legislative finding that the Right-of-Way within the City of Wichita:

Is a unique and physically limited resource;

Is critical to the travel and transport of persons and property in the City;

Is intended for public uses and must be managed and controlled consistent with that intent; and can be partially occupied by the Facilities of utilities and public service entities, to the enhancement of the health, welfare, and general economic well being of the City and its citizens; and

Requires adoption of specific additional regulations to ensure minimal inconvenience to the public, coordinate users, maximize available space, reduce maintenance and costs to the public, and facilitate entry of a maximum number of providers of cable, telecommunications, and other services in the public interest.

2.2 Adopted Pursuant to Home Rule Powers. The City adopts this Ordinance and any Franchises granted hereunder pursuant to K.S.A. 12-2001, its Home Rule powers, and other applicable law. Any rights contained within a Franchise or License granted pursuant to this Ordinance are subject to the Home Rule powers of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Every Franchisee or Licensee shall comply with all applicable Laws enacted by the City pursuant to its Home Rule powers to the extent consistent with federal law.

2.3 Defined Terms. For purposes of this Ordinance, the following terms, phrases, words, and their derivatives shall have the meanings set forth in this Section, unless the context clearly indicates that another meaning is intended. Words used in the present tense include the future tense, words in the single number include the plural number, and words in the plural number include the singular. The words "shall" and "will" are mandatory, and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

"Access Lines" means the following billed lines and trunks, whether provided on a retail or wholesale basis: residential lines; DSL and or ISDN lines (channels); PBX trunks; Centrex or Centrex-like stations; simulated exchange access lines provided by a central office based switching arrangement where all stations served by such simulated exchange access lines are used by a single customer of the provider of such arrangement; where stations are served by simulated exchange access lines provided by a central office based switching arrangement and the stations served are not used by a single customer of the provider of such arrangement, each station shall constitute an access line; and pay phone lines unless prohibited by applicable law. "Access line" shall include wireless telecommunications services subject to 47 C.F.R. Part 24. "Access line" shall not include the following: wireless telecommunications services subject to 47 C.F.R. Part 22; unbundled loop facilities; and special access services.

"Affiliate" means each person, directly or indirectly, controlling, controlled by, or under

common control with a Franchisee; provided that Affiliate shall in no event mean any limited partner, member, or shareholder holding an interest of less than 15 percent of such Franchisee.

"Antenna" means any device that transmits and/or receives radio waves for voice, data or video communications purposes including, but not limited to, television, AM/FM radio, microwave, cellular telephone and similar forms of communications. A combination of panels, boxes, or other antenna physically connected and designed in conjunction to receive signals at one location in the System shall be considered one (1) antenna.

"Cable Services" means:

1. The one-way transmission to subscribers of (i) video programming, or (ii) other programming service; and
2. Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

"City" means the City of Wichita, Kansas.

"Colocation" means the shared use of Facilities, such as poles, ducts or conduit, including but not limited to the placement of conduit owned by more than one Right-of-Way user in the same trench or boring and the placement of equipment owned by more than one user in the same conduit. Colocation does not include interconnection of Facilities or the sale or purchase of capacity (whether bundled or unbundled).

"Communications Service" or "Service" means the transmission of writing, signs, signals, pictures, sounds or other forms of intelligence through cables, wires or lines, including, but not limited to, any "telecommunications service," "enhanced service," "information service," interconnection, including interconnect of cellular or PCS or other mobile services, "Open Video Service," or "Internet service," as such terms are now, or may in the future be, defined under federal law, and including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of telecommunications) incidental to such transmission. This term does not include "Cable Services," but these services shall be subject to separate cable franchising requirements and application.

"Communications System" or "System" means the cables, wires, lines, optic fiber, and any associated converters, equipment, or other facilities designed, constructed or occupied by a Franchisee or others for the purpose of producing, receiving, amplifying or distributing communications service to or from locations within the City.

"Facilities" means any portion of a System located in, along, over, upon, under, or through the Right-of-Way.

"Franchise" or "Agreement" means the individual Franchises that are governed by this Ordinance and agreed to and executed by Franchisee.

"Franchisee" means any entity who currently has a franchise granted by the City of Wichita, or who is granted a Franchise pursuant to this Ordinance and that entity's agents, employees, lawful successors, assignees, or transferees.

"Franchise Fee" means the fee imposed by the City on a Franchisee pursuant to Section 4 of this Ordinance.

"Gross Receipts" means all revenues received directly or indirectly by a Franchisee or its Affiliates for Communications Services that either originate or terminate within the corporate limits of the City of Wichita, and all revenue derived from the use of Facilities. This term shall be interpreted as expansively as legally permissible and shall incorporate any and all new services, technologies or sources of revenue that may develop over the course of the term of the Franchise. For illustration purposes only, such Gross Receipts shall specifically include, but shall not be limited to, all revenue of a Franchisee derived from the following:

1. Recurring local exchange service revenues from businesses and residences which include basic telephone exchange service, Touch Tone, Custom Calling Services and measured local calls;
2. Recurring local exchange service revenues from public, semi-public and private coin telephone use;
3. Local directory assistance (411);
4. Line status verification/busy interrupt;
5. Local operator assistance;
6. Information delivery service;
7. Cellular, PCS or other mobile revenue attributable to Franchisee's use of Right-of-Way (such as interconnect fees, or cell sites connections);
8. Non-recurring local exchange service revenue, which shall include customer service charges for installation of lines and reconnection of service.
9. Revenue received by the Franchisee from Reseller Service Providers, unless the reseller has a franchise with City and directly pays a franchise fee or occupation tax on such revenues to the City;
10. Internet/data access charges or services, including all high-speed and traditional subscriber line charges or services (such as, without limitation, T1, T3, OC3, frame relay, DSL, ISDN, cable modem, special access, or point to point);
11. Revenue from rent, lease, physical use, or colocation of the Facilities or a portion thereof for any purpose;
12. Late charges, penalties or interest received from customers;
13. Sale of accounts receivable; and
14. All other applicable revenues not listed herein.

"Gross Receipts" shall not include revenues from Cable Services subject to a Cable Services Franchise, from the provision of interexchange services or uncollected debt, and any federal, state or local taxes or franchise fees separately stated on a customer's bill. Provided, that a Franchisee shall include uncollected debt in Gross Receipts at the time it is actually collected.

"License" means the individual grant of the right to use the Right-of-Way for a

Communications System solely for private use of the Licensee and not for resale or lease to others.

"Licensee" means any entity granted a License pursuant to this Ordinance and not otherwise required by the Ordinance or State Law to have a Franchise.

"Linear Foot" – means the length in feet of cable, wire, fiber, or other linear Facilities physically connected, wrapped, or lashed as a single cable or bundle of cables, or with respect to underground Facilities, means the length of a conduit or an array of conduits contemporaneously installed during the same construction project by a single provider. Where applicable, a separate Franchise shall be required for each separate entity who owns or controls Facilities within an array of conduits.

"Open Video Services" means any video programming Services provided to any person by a Franchisee certified by the FCC to operate an Open Video System pursuant to Section 47 U.S.C. 573, as may be amended, regardless of the Facilities used.

R. **"Pass Through Service"** means the Facilities for a Communication System that merely pass through the City from one point to another point and from which no Gross Receipts are directly attributable from subscribers or other carriers within the City.

"Public Project" means any project planned or undertaken by the City or any governmental entity for construction, reconstruction, maintenance, or repair of public facilities or improvements, or any other purpose of a public nature.

"Public Project for Private Development" means a Public Project, or that portion thereof, arising solely from a request or requirement of a third party (non-City or governmental) primarily for the benefit and use of a third party.

"Reseller Service Provider" means a person or business providing Service within the City that does not own or control its own facilities in the Right-of-Way, but instead uses the Right-of-Way by interconnecting with or using the network elements of another service provider utilizing the Right-of-Way, and/or by leasing excess capacity from a facility-based service provider.

"Right-of-Way" means the surface and space on, above and below every municipal street, alley, road, highway, lane or City right-of-way dedicated or commonly used now or hereafter for utility purposes, including but not limited to overhead lighting facilities, and including utility easements wherein the City now or hereafter acquires the right and authority to locate or permit the location of utilities consistent with communications facilities. This term shall not include any county, state, or federal right-of-way or any property owned or controlled by any person or agency other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such Person or Agency. Right-of-Way shall not include property owned or held by City and not typically considered Right-of-Way such as City parks and City buildings.

"Wired Access Point Antenna" means any Antenna located in the Right-of-Way connected directly to wire, cable, or fiber optic communications Facilities within the City or any Antenna having its highest point positioned in the Right-of-Way at a height that is otherwise subject to

separate zoning and wireless siting ordinances. (**Ord. No. 44-845**)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES

Section 3.93.003 GRANT OF FRANCHISES AND AUTHORITY TO USE RIGHT-OF-WAY

SECTION 3. GRANT OF FRANCHISES AND AUTHORITY TO USE THE RIGHT-OF-WAY

3.1 Registration. All providers of Communications Services that intend to place Facilities in the Right-of-Way shall register with the City Engineer. Such providers shall be required to obtain a franchise, license, or other permit to use the Right-of-Way in the manner provided this Ordinance, a Right-of-Way management ordinance, or other provisions of the Code of the City of Wichita. Such registration shall be in such form as may reasonably be required by the City Engineer. After the receipt of a completed registration, the City shall determine the type of application required of the provider.

3.2 Non-Exclusive. Franchises and Licenses granted pursuant to this Ordinance shall be nonexclusive. The City specifically reserves the right to grant, at any time, Franchises or other rights to use the Right-of-Way for any purpose and to any other person, including itself, as it deems appropriate, subject to applicable federal and State law.

3.3 Grant. Any Franchise granted pursuant to the terms of this Ordinance shall convey the right, privilege and authority to construct, operate, and maintain Facilities in, through and along the City's Right-of-Way for the purposes of supplying Communications Services on a nonexclusive basis within the City, subject, however, to the terms and conditions herein set forth and within an individual Franchise. As a condition of any such grant, a Franchisee is required to obtain and is responsible for any necessary permit, license certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the FCC or the KCC, subject to the Franchisee's right to challenge in good faith such requirements as established by the FCC, KCC or other City ordinance.

No Franchise granted pursuant to this Ordinance shall provide authority to provide Cable Service as a cable operator (as defined by 47 U.S.C. § 522(5)) within the City. Upon a Franchisee's request for a franchise to provide Cable Service as a cable operator (as defined by 47 U.S.C. § 522(5)) within the City, the City agrees to timely negotiate such franchise in good faith with the Franchisee. Neither does this Ordinance authorize the grant of a Franchise to operate an Open Video System without payment of fees permitted by 47 U.S.C. § 573(c)(2)(B) and without complying with FCC regulations promulgated pursuant to 47 U.S.C. § 573, and first obtaining a separate or amended Franchise.

3.4 Grant of a License. Licenses granted pursuant to the terms of this Ordinance and any Right-of-Way management ordinance shall be solely for private use of the Licensee and not for the resale or lease of Communications Services or System to others. Such License shall be granted only for specific routes or locations described in the License and for such term as described in the license.

All references in this Ordinance to the grant of a "Franchise" and the rights and obligations of a "Franchisee" shall likewise apply to the grant of a "License" and the rights and obligations of a "Licensee" without the necessity of stating "Franchise or License" except where the context clearly indicates application only to a Franchise.

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3.5 Nature of Grant of Franchise. Franchises granted under authority of this Ordinance shall not convey title, equitable or legal, in the Right-of-Way, and gives only the right to occupy Right-of-Way, for the purposes and for the period stated in the individual Franchises. A Franchise does not excuse the Franchisee from obtaining appropriate access or pole attachment agreements before locating its Facilities on another person's Facilities.

3.6 Acceptance. No Franchise or License granted under this Ordinance shall be effective until the Franchisee or Licensee shall have executed a written agreement setting forth the particular terms and provisions under which the rights to occupy and use the Right-of-Way will be granted. Such agreement may incorporate by reference provisions of this Ordinance, a Right-of-Way management ordinance, or other Code provisions or City regulations. acceptance of a Franchise in the manner provided by State Law may constitute the writing required by this subsection.

3.7 Term.

The specific length of the term of the Franchises granted hereunder shall be set out in the individual Franchise. The term of the Franchise notwithstanding, upon written request of either the City or a Franchisee, the Franchise may be reviewed at any time after four (4) years from the effective date of the Franchise and either the City or the Franchisee may propose amendments to any provision of the Franchise by giving thirty days written notice to the other of the amendment(s) desired. The City and Franchisee shall negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s).

Upon written request of either the City or the Franchisee, the City and the Franchisee shall negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s) at any time upon any of the following events:

1. Change in federal, state, or local law, regulation, or order which materially affects any rights or obligations of either the City or a Franchisee, including but not limited to the scope of the grant to the Franchisee or the compensation to be received by the City.
2. Change in the structure or operation of the communications industry or the Service provided through the System which materially affects any rights or obligations of either the City or a Franchisee, including but not limited to the scope of the grant to the Franchisee or the compensation to be received by the City.
3. Any other material and unintended change or shift in the economic benefit the City or the Franchisee relied upon and anticipated upon entering into the Franchise.

C. The compensation provision of the individual Franchise shall be reopened and renegotiated in good faith if communication consumers within the City have access to alternative providers of Communications Services who use the Right-of-Way and do not pay a Franchise fee or other payment substantially equivalent to what is required under this Ordinance and the Franchise, which results in the application of compensation requirements that are discriminatory and not competitively neutral with respect to the Franchisee. The use of Right-of-Way provisions of a Franchise shall be reopened and renegotiated if consumers within the City have access to alternative providers of Communications Services through Systems who use the Right-of-Way and do not have requirements on the use of Right-of-Way substantially equivalent to the requirements of this Ordinance or a Franchise, which results in a material and unfair disadvantage to the Franchisee. Upon any such event, the City shall have up to one hundred eighty (180) days after written request of the Franchisee in which to restore competitive neutrality, provided that any adjustment in compensation resulting from renegotiations under this Subsection (C) shall be effective no later than ninety (90) days after receipt of such written request.

D. Failure of the City and Franchisee to agree upon mutually satisfactory amendments or successfully renegotiate the materially affected provisions of the Franchise under subsection (B) or (C) shall give rise to dispute resolution as follows: At the expiration of one hundred eighty (180) days from the date of the written request (or sooner if requested by both the City and the Franchisee) the City and the Franchisee shall each select a representative who shall jointly select a third representative. The three representatives shall hear the positions of the City and Franchisee and shall determine the matters in disagreement by majority vote. Such decision shall be presented to City and the Franchisee as the renegotiated language under subsection (B) or (C). Rejection of the dispute resolution by either the City or the Franchisee shall give rise to a right to terminate the Franchise, or at the option of the parties, the Franchise shall remain in effect according to its then existing terms.

E. The Franchise shall remain in effect according to its terms pending completion of any review or renegotiation provided by this section.

3.8 Amendment and Renewal. Any amendment of a Franchise shall be subject to the procedures of the Franchise Act, K.S.A. 12-2001, et seq. No Franchise or License shall be extended in term or renewed until any ongoing violations or defaults in the performance of the Franchise or License agreement or the requirements of this Ordinance have been cured, or a plan detailing the corrective action to be taken by the Franchisee or Licensee has been approved by the City.

3.9 Use of Right-of-Way; Police Powers; Franchisees' Use Subordinate. Facilities shall be placed with adequate clearance from existing public or private utilities in the Right Way or a Public Project so as not to impact or be impacted by such public or private utilities or improvements or public project. Every Franchisee shall construct and maintain its Facilities in accordance with all applicable federal, state and local laws, including all permit requirements, fee payments, and all other City codes and ordinances in effect as of the date of this Ordinance or hereinafter adopted to the extent not in contravention of state or federal law. The grant of a Franchise pursuant to this Ordinance does not in any way impact the continuing authority of the City through the proper exercise of its Home Rule powers to adopt and enforce ordinances necessary to provide for the health, safety and welfare of the public.

In granting a Franchise the City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of Facilities on any particular segment of Right-of-Way. The burden and responsibility for making all such determinations advance of construction or installation shall be entirely upon the Franchisee. The use of the Right-of-Way authorized by a Franchise granted pursuant to this Ordinance shall in all matters be subordinate to the City's use and rights therein, except to the extent that the use of the Right-of-Way is for the provision of commercial Communications Services. A Franchisee shall coordinate the placement of its Facilities in a manner that minimizes adverse impact on public and private improvements, as reasonably determined by the City Engineer.

3.10 No Interference. Every Franchisee shall construct and maintain its Facilities so as not to interfere with other users of the Right-of-Way. Except as may otherwise be provided, a Franchisee shall notify all residents affected by the proposed work prior to commencement of such work. Notice shall include, where reasonably possible, ten (10) days in advance of construction, a letter, and/or door hanger describing the work to be done, time of beginning and completing the work, the name of the company, and a phone number to contact the company seven (7) days a week, twentyfour (24) hours a day. All construction and maintenance by a Franchisee or its subcontractors shall be performed in accordance with industry standards. All Facilities determined by the City Engineer to be in interference shall be moved by the Franchisee at the Franchisee's own expense.

3.11 Exclusion of Certain Locations/Facilities Prior to a Franchisee's installation of any Facilities in the Right-of-Way and after it provides the City with its proposed plans for the

Facilities, the City may in its reasonable discretion designate certain locations or facilities in the Right-of-Way to be excluded from use by a Franchisee for its Facilities, including but not limited to ornamental or similar specially-designed streets lights, or other facilities or which, in the reasonable judgment of the City Engineer do not have electrical service adequate or appropriate for the Franchisee's Facilities or cannot safely bear the weight or wind loading thereof, or any other facility or location that in the reasonable judgment of the City Engineer is incompatible with the proposed Facilities or would be rendered unsafe or unstable by the installation, provided that all Franchisees are treated in a similar manner.

The City Engineer may further exclude certain other Facilities that have been designated or planned for other use or are not otherwise available for use by a Franchisee due to engineering, technological, proprietary, legal, or other limitations or restrictions as may be reasonably determined by the City. The City shall provide a written explanation for any denial for a particular location and shall work with a Franchisee to identify other suitable routes.

3.12 Location, Type and Design of Facilities Subject to Approval

- A. The design, location, and nature of all Facilities shall be subject to the reasonable review and approval of the City Engineer in a non-discriminatory manner. This is a means to properly manage and control all Right-of-Way usage in the City, and to protect the public health, safety, and welfare. The review and approval is to ensure efficient coordination relating to Right-of-Way use relating to public and private utilities and to evaluate the configuration and size of Facilities that may be located in the Right-of-Way or other public or private property.

 - A. Except as provided herein, all Facilities constructed by a Franchisee shall be placed underground unless otherwise agreed to by the City.
1. Whenever any one or more existing Facilities for electrical, cable, or Communications Services are located underground in the Right-of-Way, all new or replacement Facilities shall be placed underground.
 2. Where there are obstructions in the Right-of-Way such as trees, shrubs, utilities, commercial signs, man-made structures, or other like obstructions which make the cost of underground construction unreasonable, a Franchisee may request waiver of this requirement, in which event the City will not unreasonably withhold its consent.
 3. When a Franchisee is allowed to place Facilities above ground under this section, Franchisee may attach its Facilities to an existing utility pole pursuant to a properly executed agreement with the pole owner, provided, however, that any necessary replacement of the pole in order to accommodate the attachment shall be subject to the proper exercise of the City's police powers, and in no instance shall a Franchisee erect a new pole within an existing aerial pole line absent the City's prior authorization.
 4. Above-ground pedestals, vaults, or other above-ground Facilities, may be installed only approved by the City where alternative underground facilities are not feasible or where underground requirements are otherwise waived pursuant to this Section, and shall generally be located behind the sidewalk where feasible and shall be screened from public view. Facilities in rear lot easements shall be exempt from the screening requirements except when they are within fifty feet of a street or highway.
 5. The underground requirements of this subsection (B) shall not apply to the maintenance and repair of existing Facilities, as determined by the City Engineer.

- A. Except as may otherwise be provided by other applicable ordinances of the City, where reasonable and appropriate and where adequate public Right-of-Way exist, a Franchisee shall place above-ground Facilities underground in conjunction with City capital improvement projects and/or at specific locations requested by the City provided that such placement is practical, efficient, and economically feasible.
- A. Wired Access Point Antenna located on the Right-of-Way, other City owned, or controlled property shall not be authorized by this Ordinance, but shall require a separate Lease or Use agreement with the City. Wireless facilities shall be subject to the Wireless Ordinance of the City.
- A. All Facilities, whether on Right-of-Way or public or private property, shall also be subject to size and height limitations or other applicable zoning restrictions in accordance with any generally applicable Ordinance adopted by the City.

3.13 Co-location and Additional Facilities Requirements; Planned Infrastructure.

- A. Prior to trenching and/or constructing any new or additional underground conduit within the Right-of-Way, a Franchisee shall certify in writing to the City Engineer that it has made appropriate inquiry to all existing utilities and other entities possessing a right to occupy the Right-of-Way as to the availability of existing or planned trenching and/or conduit that the Franchisee could reasonably utilize to meet its needs, and that no such conduit is available or planned at a reasonable cost by any other entity on the time schedule reasonably needed by Franchisee. Entities contacted for purposes of this section shall respond to the contacting party within fifteen (15) working days following such request.
- B. All entities subject to this Ordinance shall make space in its trench and/or conduit within the Right-of-Way available to other Franchisees consistent with the federal requirements of 47 U.S.C. § 224.
- C. Upon a determination that no such trenching and/or conduit is available, a Franchisee may trench and/or install new conduit pursuant to the following requirements:
 - 1. The Franchisee shall provide written notification of the proposed construction activity to all other existing utilities and Franchise holders, who shall have fifteen (15) days from the receipt of such notification to indicate in writing to the City and the Franchisee as to whether they desire to jointly undertake the construction of such trenching and/or conduit or otherwise co-locate their Facilities or a System at such time. Any utility or Franchise holder electing to jointly construct or co-locate its Facilities or a System with that of Franchisee shall share in the pro-rata costs of such construction or co-location of Facilities and/or System reasonably incurred by Franchisee and shall participate in the project on the same time schedule as reasonably established by both the Franchisee and the City acting through the Utility Location and Coordination Council established by Sections 2.12.1093, et seq., of the Code of the City.
 - 2. When a Franchisee installs any new trench and/or conduit, the Franchisee shall, at the request of the City Engineer to enable colocation by City or other entities, install sufficient additional space and/or conduit or other related facilities to meet the City's planned infrastructure needs and needs of other entities planning development of facilities in the area. Such excess conduit shall at the option of the Franchisee either (1) be owned by the City, or (2) be owned by a Franchisee. If ownership of the conduit is transferred to the City, the City shall reimburse the Franchisee in the

amount of the incremental cost of the labor and material of installing the excess conduit simultaneous with the Franchisee's conduit. Such reimbursements are subject to review and approval by the City. If the Franchisee retains ownership of the excess conduit, the Franchisee shall be obligated to make such conduit and/or trench space available to any other user of the Rights of Way on a nondiscriminatory basis at not more than the prorata cost of that portion of the Excess Conduit determined by the total labor and material cost of all Facilities at that location. Such requirements shall be administered and applied on a competitively neutral and nondiscriminatory basis to maximize the available space in the Rights of Way and to minimize the total number of excavations and cost of total communications infrastructure installation.

3.14 Right-of-Way Management Code. The City reserves its rights to adopt a rightofway management and construction standards ordinance of general applicability pursuant to its public health, safety and welfare authority which shall apply to any Franchise granted pursuant to this Ordinance except where inconsistent with a material term of any such Franchise.

3.15 Underground Facility Locating Service. A Franchisee shall cooperate with and participate fully in a reputable underground facility locating service and shall participate in Kansas One Call to insure that damage and/or interference with other underground facilities occupants is minimized.

3.16 Conditions Relating to Private Property. If (1) a Franchisee should in the course of the construction and/or reconstruction of the System elect to place underground Facilities in the public utility easement on private property where there was, at the time of Franchisee's election, space available for the installation of such plant within the Right-of-Way, and (2) a Franchisee should fail, neglect or refuse to take preconstruction photography (or videography) of the condition of any private property upon which underground construction is to occur, a Franchisee shall have the burden of proof as to the condition of the private property prior to the initiation of such construction in any subsequent complaint resolution, arbitration or judicial procedure between a Franchisee and the private property owner. If a Franchisee enters private property for the purposes of construction where there is no dedicated public easement, Franchisee shall first secure the private property owner's written consent.

3.17 Permit Requirements. This Ordinance and individual Franchises establish the general rules and scope of authority for a Franchisee to construct and maintain its Communications System within the Right-of-Way. The Franchisee is still required to obtain individual permitting approval from the City Engineer prior to engaging in actual construction of its specific Facilities within the Right-of-Way. At least fifteen (15) days before the of any installation, removal or relocation of its Facilities, a Franchisee shall submit detailed plans of the proposed action to the City Engineer. The City Engineer shall, within fifteen (15) days of receipt of such plans, either approve the plans or inform the Franchisee of the reasons for disapproval. The Franchisee shall designate a responsible contact person with whom representatives of the City Engineer can communicate with on all matters relating to facilities installation and maintenance.

Prior to any excavation within the Right-of-Way, a Franchisee shall obtain a permit, pay all applicable fees, and perform such work in accordance with applicable provisions of the City ROW Management Code, and any ordinances or regulations that may be adopted by the City regarding excavation work.

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Every Franchisee shall post a bond with the City in accordance with the City's ordinances in an amount determined by the City Engineer, to guarantee the timeliness and quality of any construction, repair and restoration work, including damage to public or private property, and to guarantee the removal of its Facilities from the City's Right-of-Way should such removal be required upon the expiration of its Franchise. Such bond amount shall not exceed the estimated costs of the specific construction activity, and within six months of satisfactory completion of the construction project the bond amount shall be reduced to an amount of no more than one tenth of the initial face amount of the bond. The City Attorney in the reasonable exercise of its discretion may waive the bond requirements upon a sufficient demonstration of self-insurance.

Prior to the commencement of any construction or alteration of its Facilities located in the Right-of-Way, a Franchisee shall, if requested by the City Engineer, furnish to the City Engineer a subsurface utility engineering study based on available records maintained by existing utility companies, on the proposed route of construction, expansion or alteration, which must be approved by the City Engineer. The study must consist of the following tasks:

All available plans, plats and other location data indicating the existence and approximate location of all facilities along the proposed construction route;

Completion of a visual survey and written record of the location and dimensions of any above ground features of any underground facilities along the proposed construction route, including but not limited to manholes, valve boxes, utility boxes, post and visible street cut repairs;

Plot and incorporate the data obtained from completion of task 1. and 2. above, on to the Franchisee's proposed system route maps, plan sheets and computer aided drafting and design (CADD) files; and

Provide all such data collected into a CADD file (or other format as may be identified by the City Engineer) compatible with that used by the City Engineer and deliver a copy to the City Engineer.

3.18 Franchisees Subject to Wireless Ordinances. Any Franchise notwithstanding, all Franchisees operating wireless communications systems within the City are subject to all of the applicable Ordinances and zoning requirements of the City related to such activities.

3.19 As Built Drawings. Every Franchisee shall keep and maintain accurate records and as-built drawings, in both paper and electronic format, of all Facilities (except customer service lines) constructed, reconstructed, or relocated in the Right-of-Way of arterial streets (as designated by City of Wichita Code §11.96.100) after the date hereof. Such Facilities shall be horizontally and vertically located at least every 100 feet and at any other alignment change. All points of Facilities shall be horizontally located from street centerline, or section or quarter section lines or corners. Vertical locations on all points of Facilities shall consist of elevations in either City datum or United States Geological Survey datum. The Franchisee shall cooperate promptly and fully with the City and take all reasonable measures necessary to provide accurate and complete information regarding the nature and horizontal and vertical location of its Facilities located within Right-of-Way when requested by the City or its authorized agents for a Public Project. Such location and identification shall be at the sole expense of the Franchisee without expense to

the City, its employees, agents, or authorized contractors.

3.20 Agent. Every Franchisee shall designate and maintain an agent, familiar with the Facilities, who is responsible for timely satisfaction of the information needs of the City and other users of the Right-of-Way.

3.21 Franchisees Responsible for Costs. The Franchisee shall be responsible for all costs borne by the City that are directly associated with a Franchisee's installation, maintenance, repair, operation, use, and replacement of its Facilities within the Right-of-Way, that are not otherwise accounted for as part of the Permit fee established pursuant to the Right-of-Way Ordinance. All such costs shall be itemized and the City's books and records related to these costs shall be made available upon request to the Franchisee. Franchisee shall be responsible for its own costs incurred removing or relocation its facilities when required by the City due to City requirements relating to maintain and use of the Right-of-Way for City purposes. (ORD. NO. 44-845)

(44-845, CREATED, 01/23/2001)

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Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES**Section 3.93.004 FRANCHISE AND LICENSE FEES**

4.1 Application Fees. No Franchise shall be issued without submission of an application and payment of a non-refundable application fee to the City of five thousand dollars (\$5,000). Every Franchisee shall also be responsible for payment of any reasonable costs incurred by City in processing these applications or in adapting or executing a Franchise for use by the Franchisee to the extent such costs exceed the application fees paid.

4.2 Franchise Fees. Every Franchisee (but not Licensee) shall pay to the City as compensation for the use of the Right-of-Way pursuant to any Franchise granted under this Ordinance the following Franchise Fees to the City:

Interim Period. From the date of this Ordinance to June 30, 2002, Franchisees providing Communications Services either originating or terminating within the City shall pay the sum of One Dollar and Eighty-One Cents (\$1.81) per month for each Access Line served by the Franchisee within the City limits ("Access Line Charge"), or at the option of a Franchisee, five (5) percent of Gross Receipts, provided that in no event during this "interim period" shall Franchisee's total monthly payment be less than the amount due pursuant to an Access Line Charge.

Effective July 1, 2002. Effective July 1, 2002 and thereafter, all Franchisees providing Communications Services either originating or terminating within the City shall pay five (5) percent of Gross Receipts.

Pass Through Services. Every Franchisee that provides Pass Through Services within the City who does not otherwise pay a Gross Receipts fee, shall pay an annual fee of Two Dollars and Fifty Cents (\$2.50) per linear foot of Right-of-Way occupied by the Franchisee's Facilities. Beginning in 2003, the annual fee shall be adjusted in an amount equal to the change in the Consumer Price Index for all Urban Consumers (CPI-U) for preceding year; this annual rate and the adjustment thereof shall be maintained by the City Treasurer.

4.3 License Fees. Every Licensee shall pay to the City the costs for the use of the Right-of-Way pursuant to any License granted under this Ordinance or a Right-of-Way management ordinance the following License Fees to the City:

Application fee. Prior to the grant of a License, an applicant for a License shall submit an application and make payment of a non-refundable application fee based upon a charge of Fifty Cents (\$.50) per linear foot of Right-of-Way to be occupied by the Facilities, up to a maximum of \$5,000. Every Licensee shall also be responsible for payment of any reasonable costs incurred by City in processing these applications or in adapting or executing an agreement for use by the Licensee to the extent such costs exceed the application fees paid.

License fee. A Licensee shall pay to the City an annual fee based upon Two Dollars and Fifty Cents (\$2.50) per linear foot of Right-of-Way occupied by the Licensee's Facilities. Such annual fee may be adjusted to One Dollar and Twenty-five Cents (\$1.25) per linear foot for that portion of the Right-of-Way for which

Licensee would otherwise qualify for a Minor Street Permit under the City Code. Beginning in 2003, the annual fee shall be adjusted in an amount equal to the change in the Consumer Price Index for all Urban Consumers (CPI-U) for the preceding year; this annual rate and the adjustment thereof shall be maintained by the City Treasurer.

4.4 Timing of Payment of Fees. Unless otherwise agreed to as part of the Franchise, all Franchise Fees shall be due and payable on a monthly basis within thirty (30) calendar days of the last day of each preceding month, except that annual Franchise and License Fees shall be due and payable for each calendar year in a lump sum on or before July 1 of that calendar year. The annual fee shall be pro rated on a monthly basis from the effective date for the initial year of the Franchise or License.

4.5 Interest on Late Payments and Under Payments. If any Franchise Fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the applicable statutory interest rate.

4.6 Fee Statement. Each Franchise Fee payment shall be accompanied by a statement showing the manner in which the Franchise Fee was calculated. If any Fee Statement is determined to understate the Fee owed, then such additional amount owed shall be made with a corrected statement, including interest on said amount as provided herein. Within ninety (90) calendar days following the end of the calendar year, each person that paid a Franchise Fee shall submit a statement, certified as true, setting forth its Gross Receipts, and describing what revenues or receipts were included and excluded in the fee calculations for the calendar year, and describing any adjustments made in determining the Franchise Fee, or if applicable shall submit an accounting of the amount of linear feet of Right-of-Way occupied by the Franchisee's Facilities.

4.7 No Accord and Satisfaction. No acceptance by the City of any Franchise Fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Franchise Fee payment be construed as a release of any claim of the City.

4.8 Maintain Records. Every Franchisee shall at all times maintain complete and accurate books of account and records of the business, ownership, and operations of the Franchisee with respect to the System in a manner that allows the City to determine whether the Franchisee has properly calculated its Franchise Fee in compliance with this Ordinance. Should the City reasonably determine that the records are not being maintained in such manner, the Franchisee shall correct the manner in which the books and/or records are maintained so that the Franchisee comes into compliance with this section for a period of five (5) years. All financial books and records which are maintained in accordance with FCC regulations and the regulations of any governmental entity that regulates utilities in Kansas, and generally accepted accounting principles shall be deemed to be acceptable under this section.

4.9 Right of Inspection. The City or its designated representatives shall have the right to inspect, examine or audit, during normal business hours and upon reasonable notice, all documents, records or other information that pertains to a Franchisee's System and/or Franchise Fee obligations under this Ordinance and applicable Franchise. In addition to access to the records of the Franchisee for

audits, upon request, a Franchisee shall provide reasonable access to records necessary to verify compliance with the terms of this Ordinance and any Franchise.

4.10 Payment of Taxes; Franchise Fee Not a Tax. The Franchise Fees required herein as part of any Franchise shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City, except that Franchisee shall be entitled to a credit in payment of Franchise Fees in the amount of any Telecommunications Service Occupation Tax due pursuant to Chapter 3.01 of the City Code, as may be amended. The Franchise Fee is compensation for use of the Right-of-Way and shall in no way be deemed a tax of any kind.

4.11 Duty to Notify City of Resellers. Within thirty (30) days of a Franchisee carrying any Communications Services of any Reseller Service Provider through the Franchisee's Facilities, the Franchisee shall notify the City of the name and address of such Reseller Service Provider and provide to City a written commitment as to the payment of franchise fees for the revenues attributable to such Reseller Service Provider.

4.12 Sale or Lease of Conduit Except as otherwise may be provided by law, a Franchisee shall not lease, sell or authorize the use of any conduit within the City's Right-of-Way to a nonaffiliated third person for the installation of that person's Communications System for any purpose if that person has not obtained a duly issued Franchise, or other grant by the City to use the Right-of-Way and which includes the authority use or maintain such System.

4.13 Bundled Services. Gross receipts from bundled services shall be deemed attributable to services subject to the Franchise Fee. The burden will be on the Franchisee to prove in a manner reasonably acceptable to the City that any receipt or charge is not intended to be included within Gross Receipts. For the purpose of calculating Gross Receipts, discounts shall be applied equally to all services; the same percentage of discount shall be applied to each service included in the bundled bill. (ORD. NO. 44-845)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES

Section 3.93.005 OPEN VIDEO SERVICE

If a Franchisee, granted a Franchise pursuant to this Ordinance, intends to offer in the City Open Video Services, it shall comply with all applicable federal, state and local laws, including rules of the Federal Communications Commission applicable to such service. The City may in its discretion modify the terms of a Franchise or otherwise require a Franchisee to obtain a separate franchise to implement such requirements as the City may be authorized to make applicable to a Franchisee. This may include a payment of a franchise fee to City of five (5) percent of the Open Video System gross revenues, and conditions related to public, educational, and governmental access channels and funding. (ORD. NO. 44-845)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES

Section 3.93.006 TRANSFER OF OWNERSHIP

6.1 No Franchisee shall sell, transfer, lease, assign, sublet, or dispose of in whole or in part, either by forced or involuntary sale, or by ordinary sale, consolidation, or otherwise, a Franchise granted hereunder or any of the rights or privileges granted by such Franchise, without the prior written consent of the City. Such consent shall not be unreasonably withheld, delayed or denied. The City reserves the right to be reimbursed for its reasonable costs relating to a transfer of ownership.

6.2 Any assignment or transfer shall not require consent of the City when the Franchise is assigned, sold or transferred between wholly-owned subsidiaries of a parent corporation, provided that the Franchisee provides advance written notice to the City. In all such instances, the new Franchisee shall be responsible for all Franchise requirements and obligations.

6.3 Notwithstanding Section 6.1 above, the City acknowledges and agrees that a Franchisee may assign or collaterally assign, in whole or in part, its rights, interests and obligations hereunder without limitation to any of its affiliates, any party providing financing to a Franchisee, and any successors and assigns of the foregoing without the consent of the City. A Franchisee will provide the City with notice of any such assignment. The City agrees that the holder of any security interest shall not be prevented or impeded by the City from enforcing such security interest and shall not terminate the Franchise without the prior written consent of the assignee. The City shall execute all consents to assignment and/or acknowledgements of any security interest as are required by a Franchisee to give effect to the foregoing. Such acknowledgements may contain an agreement to allow the holder of such security interest to cure defaults by the Franchisee under this Ordinance or a Franchise granted pursuant to it and consent to allow the assignment to the successors-in-interest of the holder of such security interest. (ORD. NO. 44-845)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES**Section 3.93.007 GENERAL CONDITIONS**

7.1 Compliance With Laws. A Franchise granted pursuant to terms of this Ordinance shall include a provision which acknowledges that the City and the Franchisee shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction and use of public property.

7.2 Enforcement; Attorneys' Fees. The City shall be entitled to enforce this Ordinance, and, any Franchises granted pursuant to it, through all remedies lawfully available, and a Franchisee shall pay City reasonable attorneys' fees in the event that the Franchisee is determined judicially to have violated the terms of this Ordinance or a Franchise.

7.3 Advertising, Signs or Extraneous Markings. No Franchisee shall place or cause to be placed any sort of signs, advertisements or other extraneous markings, whether relating to a Franchisee or any other person or entity on the public right-of-way, except such necessary minimal markings as approved by the City as are reasonably necessary to identify the Facilities for service, repair, maintenance or emergency purposes, or as may be otherwise required to be affixed by applicable law or regulation.

7.4 Tree Protection. In the attachment, installation, removal, reattachment, reinstallation, relocation or replacement or otherwise of the Facilities, Franchisees shall comply with the tree pruning ordinance of City.

7.5 Forfeiture of Privilege. In case of failure on the part of a Franchisee, its successors and assigns, to comply with any of the material provisions of this Ordinance or Franchise granted hereunder, or if a Franchisee, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of the material terms of this Ordinance or a Franchise, the Franchisee, its successors and assigns, shall forfeit all rights and privileges permitted herein, and all rights under the Franchise shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings: Before the City proceeds to forfeit a Franchise, it shall first serve a written notice upon the Franchisee, setting forth in detail the neglect or failure complained of, and the Franchisee shall have thirty (30) days thereafter in which to cure the default by complying with the conditions of this Ordinance or the Franchise. If at the end of such thirty (30) day period the City determines that the conditions have not been complied with the City shall take action by an affirmative vote of the City Council present at the meeting and voting, to terminate the Franchise; setting out the grounds upon which said Franchise is to be canceled or terminated. A Franchisee may, upon thirty (30) days notice to City, appeal to District Court.

7.6 Removal of Facilities. Upon expiration of a Franchise, whether by lapse of time, by agreement between a Franchisee and the City, or by forfeiture thereof, a Franchisee shall remove, at its sole cost, from public property any and all of its Facilities that are the subject of its Franchise within a reasonable time after such expiration, not to exceed one hundred eighty (180) days, and, it shall be the duty of the Franchisee immediately upon such removal to restore the right-of-way from which the Facilities are removed to as good a condition as the same were before the removal was effected and as otherwise required by the City. Notwithstanding the foregoing, upon request of a Franchisee, the City may allow underground Facilities to be left in place when it is not practical or desirable to require

removal.

7.7 Relocation of Facilities.

A. Every Franchisee shall promptly locate, remove, relocate, or adjust any Facilities located in Right-of-Way if reasonably necessary and requested by the City for a Public Project. Such location removal, relocation, or adjustment for a particular Public Project shall be performed by the Franchisee once without expense to the City, its employees, agents, or authorized contractors and shall be specifically subject to rules and regulations of the City pertaining to such; provided, that if the Franchisee demonstrates to the satisfaction of the City that the Facility was originally established in a private easement that thereafter became part of the Right-of-Way, the removal, relocation, or adjustment shall be without expense to the Franchisee. If additional location, removal, relocation, or adjustment is the result of the inaccurate or mistaken information of the Franchisee, the Franchisee shall be responsible for costs associated with such without expense to the City.

B. The Franchisee shall not be responsible for the expenses of relocation to accommodate any new Public Project for Private Development. The expenses attributable to such a project shall be the responsibility of the third party upon the request and appropriate documentation of the Franchisee. Before such expenses may be billed to the third party, the Franchisee shall be required to coordinate with the third party and the City on the design and construction to ensure that the work required is necessary and done in a cost effective manner. Upon the request of the Franchisee or the third party, the allocation of expenses attributable to the project shall be made in the reasonable determination of the City. Eligible third parties may request to have the City specially assess those expenses billed by the Franchisee under this section. The City will use its best efforts, but is not required, to continue to provide a location in the Right-of-Way for the Franchisee's Facilities as part of a Public Project, provided that the Franchisee has cooperated promptly and fully with the City in the design of its Facilities as part of the Public Project.

C. Every Franchisee shall temporarily remove or raise or lower its wires or other Facilities upon request of any other person requesting relocation of Facilities and holding a validly issued building or moving permit of the City. The expense of such temporary removal, raising or lowering shall be paid by the party or parties requesting the same, and the Franchisee may request such payment in advance. A Franchisee shall be given not less than fifteen days written notice from the permit holder detailing the time and location of the moving operations, and not less than twenty-four (24) hours advance notice from the permit holder advising of the actual operation. The City shall not be liable for any such expense or notice requirement for the moving of houses or structures by the City or its contractors.

7.8 Non-discrimination. All Franchises and Licenses shall provide that a Franchisee or Licensee will not, on the grounds of race, color, sex, religion, national origin, ancestry, disability, or age discriminate or permit discrimination against any person in the use of City facilities or in activities under the Franchise or License. (ORD. NO. 44845)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES

Section 3.93.008 CONFIDENTIAL INFORMATION

By entering into a Franchise, the Franchisee acknowledges and agrees that the Franchise and certain information required to be filed with the City pursuant to this Ordinance and such Franchise are subject to inspection and copying by the public pursuant to the provisions of the Kansas Open Records Act, K.S.A. 45-215 et seq. To the extent allowed by Kansas law, if requested by a Franchisee, the City shall preserve a Franchisee's information obtained in the course of a Franchisee's use of the Right-of-Way hereunder as confidential, and with the same degree of care in protecting its own confidential or proprietary information, however, in no event less than reasonable care. It is understood and agreed by a Franchisee that the City has the right to disclose information obtained pursuant to this Ordinance to governmental agencies having requisite governmental or judicial authority over the terms of the Franchise, provided that the City has given the Franchisee prior written notice of impending disclosure and the Franchisee has a reasonable opportunity to seek confidential status or protective order or other such appropriate remedy. The obligations under this Section 8 shall survive termination of said Franchise. (ORD. NO. 44-845)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES**Section 3.93.009 LIABILITY AND INDEMNIFICATION**

9.1 It shall be the responsibility of every Franchisee to take adequate measures to protect and defend its facilities in the Right-of-Way from harm or damage. If the Franchisee fails to accurately or timely locate Facilities when requested, it has no claim for cost or damages against the City and its authorized contractors unless such party is responsible for the harm or damage by its negligence or intentional conduct. The Franchisee shall be responsible to the City and its agents, representatives and authorized contractors for all damages including, but not limited to, delay damages, repair costs, down time, construction delays, penalties or other expenses of any kind arising out of the failure of the Franchisee to perform any of its obligations under this Ordinance or Franchise except to the extent the damaged party is responsible for the harm or damage by its negligence or intentional conduct. Provided, however, the City and its authorized contractors shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near a Franchisee's System.

9.2 Every Franchisee shall hold and save and defend the City its officers, employees, agents, and authorized contractors, harmless from and against all claims, damages, expense, liability, and costs including attorney fees, to the extent occasioned in any manner by the grant of a Franchise to a Franchisee or its enforcement by City and Franchisee's occupancy including construction, operation, maintenance, and use of the Right-of-Way, except to the extent otherwise specified in 9.1 above. In the event a claim shall be made or an action shall be instituted against the City arising from any of the causes enumerated in this section, then upon notice by the City to the Franchisee, the Franchisee shall assume liability for the defense of such actions at the cost of the Franchisee, subject to the option of the City to appear and defend, at its own cost, any such case. (ORD. NO. 44845)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES**Section 3.93.010 INSURANCE**

10.1 During the term of any Franchise, unless specified otherwise, every Franchisee shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers that are licensed to do business in the state of Kansas. Should the Franchisee elect to use the services of an affiliated captive insurance company for this purpose, that company shall possess a certificate of authority from the Kansas Insurance Commissioner. The Franchisee shall provide not less than the following insurance:

Workers' compensation as provided for under any worker's compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law.

Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with a limit of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage liability. The City shall be included as an additional insured with respect to liability arising from the Franchisee's operations under this ordinance or the Franchise.

10.2 Certificate of Insurance. A Franchisee shall, as a material condition of its Franchise, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a certificate of insurance, satisfactory in form and content to the City, evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the City thirty (30) days prior written notice. The Franchisee shall make available to the City on request the policy declarations page and a certified copy of the policy in effect, so that limitations and exclusions can be evaluated for appropriateness of overall coverage.

10.3 Nothing contained in this Ordinance or an individual Franchise shall limit a Franchisee's liability to the City to the limits of insurance certified or carried. (ORD. NO. 44 845)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES

Section 3.93.011 UNLAWFUL TO OPERATE WITHOUT A FRANCHISE

It shall be unlawful for any person to construct, operate or maintain a Communications System or to provide Communications Services in the City utilizing City Right-of-Way without a valid, unexpired Franchise or License, unless otherwise specifically authorized under applicable federal or State law. Any person who violates any provisions of this Ordinance shall be guilty of a misdemeanor and shall be subject to a fine of Two Thousand Five Hundred Dollars (\$2,500) per day. The payment of such fine notwithstanding, all such violators shall be subject to all other applicable provisions of this Ordinance to the fullest extent allowed by law, including but not limited to the payment of a Franchise Fee. (ORD. NO. 44-845)

(44-845, CREATED, 01/23/2001)

Chapter 3.93 TELECOMMUNICATIONS/OPEN VIDEO SYSTEM FRANCHISES

Section 3.93.012 INVALIDITY AND REMEDIES

12.1 The invalidity in whole or in part of any provision of this Ordinance shall not affect the validity of any other provision.

12.2 The right and remedies of the parties under a Franchise shall be cumulative and in addition to any other rights and remedies provided by law or equity. A waiver of a breach of any provision thereof shall not constitute a waiver of any other breach. The laws of the State of Kansas shall govern this Ordinance and any Franchises granted hereunder. (ORD. NO. 44-845)

(44-845, CREATED, 01/23/2001)

CITY OF OVERLAND PARK, KANSAS
COMMUNICATIONS AND CABLE CODE

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ORDINANCE NO. _____

AN ORDINANCE ESTABLISHING REGULATIONS FOR THE USE OF THE RIGHTS-OF-WAY TO CONSTRUCT, OPERATE, AND/OR MAINTAIN COMMUNICATIONS SYSTEMS AND CABLE SYSTEMS, ESTABLISHING REQUIRED TERMS FOR GRANTING COMMUNICATIONS AND CABLE SERVICES FRANCHISES, AND ESTABLISHING COMPENSATION FOR SUCH USE OF THE RIGHTS-OF-WAY

WHEREAS, Kansas law authorizes the City to franchise and regulate the use and occupancy of Rights-of-Way for placement of Communications Systems and Cable Systems as hereinafter defined, and to require compensation and to adopt rules and regulations regarding such use and occupancy; and

WHEREAS, the City is authorized to and should establish standards for occupancy of the Rights-of-Way by Communications Facilities and Cable Facilities and other uses that are consistent with and recognize the Kansas Corporation Commission's duties and jurisdiction; and

WHEREAS, the City's standards included in this ordinance are designed to:

- A. Adequately reimburse the City for occupancy of the Rights-of-Way by Facilities;
- B. Fully protect the public and the City from any harm caused by private commercial use of Rights-of-Way, including, but not limited to, reducing the risk of loss of service or personal or property injury from errant excavation;
- C. Protect the regulatory authority of the City in a manner consistent with federal and state law; and
- D. Otherwise protect the public interests in and promote the development and coordinated use of an advanced telecommunications infrastructure; and
- E. Promote the entry of communications ~~providers~~ Franchisees on a competitively neutral manner, maximize the available space for such ~~providers by requiring Franchisees by implementing regulations for the~~ reasonable management of the Rights-of-Way including relating to the coordination, collocation, and planned construction of infrastructure in the Rights-of-Way, and

NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF OVERLAND PARK, KANSAS:

CHAPTER 1. GENERAL PROVISIONS

- 1.1 **Declaration of Findings.** The City hereby declares as a legislative finding that the Rights-of-Way within the City limits:
- A. Are a unique and physically limited resource;
 - B. Are critical to the travel and transport of persons and property in the City; and
 - C. Are intended for public uses and must be managed and controlled consistent with that intent; and can be partially occupied by the Facilities of utilities and public service entities, to the enhancement of the health, welfare, and general economic well being of the City and its citizens; and require adoption of the specific additional regulations established by this Code to ensure coordination of users, maximize available space, reduce maintenance and costs to the public, and facilitate entry of a maximum number of providers of cable, communications, and other services in the public interest.
- 1.2 **Title.** This Ordinance may be referred to and cited as the "Communications and Cable Services Code" or herein as the "Code" of the City of Overland Park, Kansas.
- 1.3 **Applicability.** The requirements of this Code shall apply to the full extent of the terms herein and shall be limited in scope or application only to the extent as may be required by applicable federal or state law, including such changes in applicable law as may be hereinafter enacted. No provisions of this Code shall be disregarded pursuant to this subsection except on express application to and determination by the City to such effect based on the specific factual circumstances demonstrated. The provisions of this Code shall be deemed incorporated in each Franchise granted. Nothing in this Code shall be interpreted to unilaterally deprive any Person of any rights or obligations imposed by any binding and existing valid franchise or contract during the term thereof, and shall impose obligations on any such Person additional to those included in such franchise or contract only to the extent permitted by law; provided that the failure of the City to enforce any provision herein or the failure of any Person to comply with any provision herein shall not be a waiver of the City's right to enforce such provisions nor shall it in any way constitute evidence or agreement by the City that such Person has a valid existing franchise. The provisions of this Code shall apply irrespective of whether a Provider-Franchisee is determined to be operating pursuant to a valid franchise or Agreement.

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- 1.4 **Preservation of Police Power Authority.** Any rights granted pursuant to this Code and pursuant to any Franchise authorized hereunder are subject to the authority of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. ~~Providers~~ Franchisees shall be subject to and comply with all applicable Laws enacted by the City pursuant to its home rule powers, to the extent not in conflict with Kansas or federal law. Nothing in this Code shall be deemed to waive a right, if any, that any party may have to seek judicial or regulatory review as to the provisions herein or as to actions of the parties under applicable federal, state, or local law currently in effect or as may hereinafter be amended.
- 1.5 **Public Inspection ~~Of~~ Records.** Certain information required to be filed with the City pursuant to this Code is subject to inspection and copying by the public pursuant to the provisions of the Kansas Open Records Act, K.S.A. 45-215 et seq. Notwithstanding any ordinance or provision to the contrary, the City may disclose any proposed or existing Facilities locations of ~~Providers~~ Franchisees as deemed in the public interest and as may be established by City Policy establishing requirements for notification and/or joint installation of facilities.
- 1.6 **Indemnification.** As a condition of use of the Rights-of-Way, ~~Providers~~ Franchisees at their sole cost and expense, shall indemnify, protect, defend (with legal counsel representing the City that is acceptable to the City) and hold harmless the City, its elected officials, officers, employees, and agents, from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and expenses of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of the fact that the City approved a Franchise with ~~Provider~~ Franchisee, the rights granted to ~~Provider~~ Franchisee, or the activities performed, or failed to be performed, by ~~Provider~~ Franchisee under the Franchise or use of the Rights-of-Way, or otherwise, except to the extent arising from or caused by the sole or gross negligence or willful misconduct of the City, its elected officials, officers, employees, agents or contractors. This indemnification shall survive the expiration or termination of any Franchise or use of the Rights-of-Way for a period of ~~five (5)~~ two (2) years after the effective date of expiration or termination.
- 1.7 **No Cause of Action Against the City.** The ~~Provider~~ Franchisee shall have no ~~remedy or recourse~~ cause of action whatsoever against the City for ~~any loss, cost, expense, or damage~~ damages of any kind arising from any of the provisions or requirements of a Franchise, or because of the enforcement thereof by said City, or for the failure of said City to have the authority to grant, all, or any part, of the herein granted; provided that said ~~Provider~~ Franchisee expressly acknowledges that it accepted the rights herein granted in reliance upon its independent and personal investigation and understanding of the power of authority of said City to

enter into the Franchise authorized herein with ~~Provider~~ Franchisee; provided further that the ~~Provider~~ Franchisee acknowledges by its acceptance of said Franchise that it has not been induced to enter into a Franchise upon any understanding, or promise, whether given verbally or in writing by or on behalf of said City, or by any other person concerning any term or condition of a Franchise not expressed therein; provided further that the ~~Provider~~ Franchisee acknowledges by the acceptance of any Franchise that it has carefully read the provisions, terms, and conditions hereof and is willing to, and does accept, all of the risk attendant to said provisions, terms, and conditions.

- 1.8 **Compliance With Laws.** In performing activities and exercising its rights and obligations under any Franchise, ~~Providers~~ Franchisees shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction and use of public property.
- 1.9 **Enforcement; Attorneys' Fees.** The City shall be entitled to enforce this Code and any Franchise through all remedies lawfully available, and ~~Provider~~ Franchisee shall pay City its costs of enforcement, including reasonable attorneys' fees in the event that ~~Provider~~ Franchisee is determined judicially to have violated the terms of this Code or any Franchise.
- 1.10 **Relationship of the Parties.** Under no circumstances shall any Franchise authorized by this Code be construed to create any relationship of agency, partnership, joint venture, or employment between the parties.
- 1.11 **Defined Terms.** For purposes of this Code, the following terms, phrases, words, and their derivatives shall have the meanings set forth in this Section, unless the context clearly indicates that another meaning is intended. Words used in the present tense include the future tense, words in the single number include the plural number, and words in the plural number include the singular. The words "shall" and "will" are mandatory, and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

A. **"Access Facilities"** means:

1. Channel capacity designated for Public, Educational or Governmental Access use; and
2. The facilities and equipment for the use of such channel capacity.

B. **"Affiliate"** means each person, directly or indirectly, controlling, controlled by, or under common control with the Franchisee; provided that Affiliate shall in no event mean any limited partner or shareholder holding an interest of less than 15 percent of such Franchisee, or any creditor of such Franchisee solely by virtue of its status as a creditor and which is not

otherwise an Affiliate by reason of owning a controlling interest in, being owned by, or being under common ownership, common management, or common control with, such Franchisee.

- C. **"Antenna"** means any device that transmits and/or receives radio waves for voice, data or video communications purposes including, but not limited to, television, AM/FM radio, microwave, cellular telephone and similar forms of communications. A combination of panels, boxes, or other antenna physically connected and designed in conjunction to receive signals at one location in the System shall be considered one (1) antenna.
- D. **"Basic Cable Service"** means any Cable Service tier that includes the lawful retransmission of local television broadcast signals and any Public, Educational, and Governmental Access programming required by this Ordinance to be carried on the basic tier. Basic Cable Service as defined herein shall be consistent with 47 U.S.C. § 543(b)(7) (1997).
- E. **"Cable Act"** means the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, (codified at 47 U.S.C. §§ 521-611 (1982 & Supp. V. 1987) as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, and the Telecommunications Act of 1996, Pub. L. No. 104-104 (1996) as it may, from time to time, be amended.
- F. **"Cable Franchise"** ~~means the rights and obligations extended by the City to a Person to own, lease, construct, maintain, or operate a Cable System in the Rights-of-Way within the Franchise Area for the purpose of providing Cable Services. Any such authorization, in whatever form granted, shall not mean or include: (i) any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City, including the provision of Communications Services; (ii) any permit, agreement, or authorization required in connection with operations in the Rights-of-Way including, without limitation, permits and agreements for placing devices on or in poles, conduits, or other structures, whether owned by the City or a private entity, or for excavating or performing other work in or along the Rights-of-Way.~~ an initial Cable Franchise authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to Section 626), issued by the City, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a Cable System.
- G. "Cable Franchisee" means a Person who is granted a Cable Franchise and that Person's agents, employees, lawful successors, transferees, or

assignees, or any other Person who constructs, operates or maintains Cable Facilities or provides Cable Services by use of the Rights-of-Way, other than Reseller Service Providers.

GH. "**Cable Franchise Fee**" means any tax, fee, or assessment of any kind imposed by the City or other governmental entity on a Cable Service Provider-Franchisee or its Cable Subscribers, or both, solely because of their status and activities as such, pursuant to Chapter Three of this Code. The term "Cable Franchise Fee" does not include: (i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and Cable Operators or their Cable Services but not including a tax, fee, or assessment that is unduly discriminatory against Cable Service providers-Franchisees or Cable Subscribers); (ii) Capital Costs that are required by a Cable Franchise to be incurred by a Grantee-Cable Franchisee for public, educational or governmental ("PEG") Access facilities; (iii) requirements or charges incidental to the award or enforcement of a Cable Franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; ~~(iv) any permit fee or other fee imposed under any valid right-of-way ordinance;~~ or (iv) any fee imposed under Title 17 of the United States Code.

HI. "**Cable Services**" means:

1. The one-way transmission to subscribers of (i) video programming, or (ii) other programming service; and
2. Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

IJ. "**Cable Internet Services**" means the offering of direct access by a cable license to the international computer network of both federal and non-federal interoperable packet switched data networks to customers for a fee. For purposes of this Code, Cable Internet Service shall mean the direct access to the Internet provided to customers over the Cable System and shall include the provision of incidental services ~~or~~ and such other revenues that are required by applicable law to be treated under the same regulation as such direct access service, but not including revenue from independent services such as Internet web design or Internet web hosting or the sale of modems for Cable Internet Services. Except as may be otherwise required by applicable law or a binding provision of a Franchise issued by the City prior to the effective date of this Code, a Provider Franchisee receiving revenue from Cable Internet Service shall include such revenue in the calculation of Gross Receipts from Communications Services and shall be required to have a Communications Franchise with

the City governing the use of the Rights-of-Way for such purposes. Except as may lawfully be required by the City or otherwise dictated by applicable law, all Franchises granted hereinafter shall authorize use of the Rights-of-Way for Cable Internet Service only pursuant to a Communications Franchise. All prior payments to the City attributable to such Cable Internet Service under a Cable Franchise shall be irrefutably deemed to be lawful compensation for the past use prospectively paid under any new Communications Franchise, irrespective of any additional rates or terms required for any future use under any new Communications Franchise.

JK. "**Cable System**" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple Subscribers within the Franchise Area, but such term does not include:

1. A facility that serves only to retransmit the television signals of one or more television broadcast stations;
2. A facility that serves Subscribers without using any public Rights-of-Way; or
3. A facility of a common carrier which is subject, in whole or in part, to the provisions of 47 U.S.C. §§ 201-226, except that such facility shall be considered a Cable System (other than for purposes of 47 U.S.C. § 541(c)) to the extent such facility is used in the transmission of video programming directly to Subscribers, unless the extent of such use is solely to provide interactive on-demand services;
4. An Open Video System that complies with Section 653 of the Cable Act; or
5. Any facility of any electric utility used solely for operating its electric utility system.

KL. "**Capital Costs**" means costs associated with the purchase of assets, products or other resources that will provide service for more than one year, but shall not have any meaning inconsistent with generally accepted accounting principles.

LM. "**Channel**" means a portion of the electromagnetic frequency spectrum which is used in a Cable System and which is capable of carrying ~~one industry standard video signal, in either analog or digital form. At the time~~

~~of the passage of this Ordinance, analog standard channel is defined as 6 MHz. a television channel as defined by the FCC.~~

- MN.** "**City**" or "**Grantor**" means the City of Overland Park, Kansas.
- NO.** "**Code**" means this "Communications and Cable Services Code" and all provisions therein established by this Ordinance.
- OP.** "**Collocation**" means the shared use of Facilities, including, but not limited to, the placement of conduit owned by more than one Rights-of-Way user in the same trench or boring and the placement of equipment owned by more than one user in the same or connected conduit. Collocation does not include interconnection of Facilities or the sale or purchase of capacity (whether bundled or unbundled).
- PQ.** "**Communications**" means the transmission via the Facilities, in whole or in part, between or among points specified by the user, of information of the user's choosing (e.g., data, video, voice), without change in the form or content of the information as sent and received, regardless of the statutory or regulatory scheme to which such transmissions may be subject.
- QR.** "**Communications Franchise**" means a franchise for use of the Rights-of-Way for Communications Services as authorized herein and executed by the City and ~~Franchisee.~~ Communications Franchisee.
- S.** "Communications Franchisee" means a Person granted a Communications Franchise and that Person's agents, employees, lawful successors, transferees, or assignees, or any other Person who constructs, operates or maintains Communications Facilities or provides Communications Services by use of Facilities in the Rights-of-Way, other than Reseller Service Providers.
- T.** "**Communications Franchise Fee**" means the fee imposed by the City on Communications Franchisee for use of the Rights-of-Way pursuant to a Communications Franchise pursuant to Chapter Two of this Code.
- SU.** "**Communications Service**" means the transmission via Facilities, in whole or in part, of any writings, signs, signals, pictures, sounds or other forms of intelligence through wire, wireless or other means, including, but not limited to, any "telecommunications service," "enhanced service," "information service," or "Internet serviceAccess Service" and "Cable Internet Service," as such terms are now, or may in the future be, defined under federal law, and including all instrumentalities, facilities, conduit, apparatus ("Communications Facilities"), and services (among other things, the receipt, forwarding, and delivery of telecommunications) incidental to or designed to directly or indirectly facilitate or accept such

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transmission. This term does not include "cable television service," but these services shall be subject to separate cable franchising requirements and application.

- TV. "**Complaint**" means any oral, written or electronic inquiry, allegation, or assertion made by a Person regarding Cable Service or Cable System operations.
- UW. "**Converter**" means an electronic device that converts signals to a frequency not susceptible to interference within the television receiver of a Subscriber and, through the use of an appropriate Channel selector, permits a Cable Subscriber to view all authorized Cable Subscriber signals delivered at designated converter dial locations. Converters include all devices furnished to the Subscriber and owned by the Cable Provider Franchisee.
- VX. "**Direct Incremental Costs**" means the costs actually incurred by a Cable Provider Franchisee in meeting an obligation under its Franchise which the Provider Franchisee would not otherwise have incurred in order to either operate and conduct the business of its Cable System or meet another obligation of the Franchise.
- WY. "**Drop**" means the cable or cables that connect the ground block on the Cable Subscriber's property to the nearest feasible point on the Cable System in order to receive Cable Service.
- XZ. "**Facilities**" means any portion of a System located in, along, over, upon, under, or through the Rights-of-Way.
- YAA. "**Franchise**" means a Cable Franchise or a Communications Franchise as defined herein or any other agreement or license granted by the City authorizing use of the Rights-of-Way for any Cable Service or Communication Service.
- BB. "**Franchisee**" means a Communications Franchisee or a Cable Franchisee or any Person required to have a Communications Franchise or Cable Service Franchise.
- ZCC. "**Franchise Area**" unless otherwise specified in the applicable Franchise, means the entire geographic area within the City as it is now constituted or may in the future be constituted.
- AA. "**Franchisee**" means the party subject to a Cable Franchise or a Communications Franchise, or its successor, assigns, or transferee.

BB. "Grantee" means a Person who is granted a Cable Franchise and that Person's agents, employees, lawful successors, transferees, or assignees.

CC-DD. "**Gross Receipts**" means all revenues received directly or indirectly by a Communications Franchisee or its Affiliates for Communications Services originating, terminating or otherwise rendered wholly within the City and all revenue derived from the use of the Facilities. Except to the extent as may be prohibited by law, such "Gross Receipts" shall specifically include, but shall not be limited to, all revenue of the Communications Franchisee derived from the following:

1. Recurring local exchange service revenues for business and residence which include basic telephone exchange service, Touch Tone, Custom Calling Services and measured local calls;
2. Recurring local exchange service revenues for public, semi-public and private coin;
3. Local directory assistance (411);
4. Line status verification/busy interrupt;
5. Local operator assistance;
6. Information delivery service;
7. Cellular and other wireless communication services revenue; provided that such revenues derive from a system having antennae or other parts of the mobile system are physically located within the Rights-of-Way and the City is legally authorized to collect such fee;
8. Nonrecurring local exchange service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate telephone bills;
9. Revenue received by the Communications Franchisee from Reseller Service Providers (except for revenues from Reseller Service Providers that have a separate enforceable Franchise with the City providing for payment of Gross Receipts of that Reseller Service Provider);
10. ~~Internet access charges or services and including all high-speed and traditional subscriber line charges or services~~ Revenue from Internet Access Service (and including Cable Internet Service, unless such service revenues are validly required to be included

and are collected as Gross Revenues in a Cable Franchise between Franchisee and the City);

11. Revenue from rent, physical use, collocation, or sale of the Facilities, network elements, or a portion thereof for any purpose;
12. Late charges or interest received on gross receipts;
13. All other applicable revenues not listed herein.

"Gross Receipts" shall not include uncollectable debt, any federal, state or local taxes separately stated on a customer's bill, and Franchise Fees.

"Gross Receipts" shall not include revenues from Affiliates where the Affiliates have a separate enforceable Franchise with the City providing for payment of such Affiliate Gross Receipts or where the Affiliate does not utilize, transmit communications through, or connect to any part of the Facilities. In the event a Communications Franchisee receives revenues for Communications Services or other activities within and without the City of which the specific portion attributed to operations in the City cannot be directly determined ("Unallocated Revenues"), "Gross Receipts" with respect to such revenues shall mean the portion thereof derived by multiplying such revenues by a fraction, the numerator of which is the Gross Receipts from the City and the denominator of which is the total revenues of Communications Franchisee attributable from the area generating such Unallocated Revenues. All revenue from or relating to or connected with Communication Services deriving from any billing address within the City limits shall be presumed to be Gross Receipts of Communications Franchisee, unless demonstrated in writing to the contrary as to each such revenue.

~~DDEE.~~ **"Gross Revenues"** means any revenue actually received by a ~~Grantee~~ Cable Franchisee, or by any other entity that is a Cable Operator on a ~~Grantee's Cable Franchisee's~~ Cable System including the ~~Grantee's Cable Franchisee's~~ Affiliates, from the operation of the ~~Grantee's Cable Franchisee's~~ Cable System to provide Cable Services. By way of illustration and not limitation, this definition would include to the extent permitted by law revenue derived from pay cable fees, installation and reconnection fees, leased channel access fees; Converter rentals; revenue from Cable Internet Service (if it is not required to be included in the Gross Receipts of a separate binding Communications Franchise with the City as prescribed in this Code); revenue from home shopping to the extent conducted through a Cable Service; all Cable Service lease payments from the Cable System; ~~payments or other consideration received by the Grantee from programmers for carriage of programming on the Cable System and;~~ payments or other consideration received by the

Cable Franchisee from programmers; except as provided herein, that is accounted for as revenue under generally accepted accounting principles ("GAAP"); advertising revenues; revenues from data transmissions to the extent these transmissions are considered Cable Services under federal law; payments or other consideration received by the Grantee Cable Franchisee for the use of the Cable System to provide Cable Service and accounted for as revenue under GAAP. ~~Gross Revenues shall include revenue received by any entity other than the Grantee where necessary to prevent evasion or avoidance of the obligations under this Code or a Franchise to pay the applicable Cable Franchise Fees.~~ Revenues which are not directly attributable to specific Cable Subscribers, including, but not limited to, leased access fees, advertising revenues, and home shopping commissions, shall be allocated among the franchising jurisdictions served by the Grantee's Cable Franchisee's Cable System on a per Subscriber or other equitable basis measured in a consistent manner from period to period. Gross Revenues shall not include (i) to the extent consistent with GAAP, bad debt; provided, however, that all or part of any such bad debt that is written off but subsequently collected shall be included in Gross Revenues in the period collected; (ii) amounts collected from Cable Subscribers for public, educational and governmental access, provided, however, this exclusion does not limit a Grantee's Cable Franchisee's ability to pass through franchise related costs to the extent allowed by applicable law; ~~or~~ (iii) any taxes on Cable Services furnished by Grantee Cable Franchisee which are imposed directly upon any Subscriber or user by the State, City, or other governmental unit and which are collected by Grantee Cable Franchisee on behalf of said governmental unit; (iv) Franchise Fees collected from Subscribers, or (v) payments or other consideration received by the Cable Franchisee from programmers for carriage of programming on the Cable System to the extent that such Cable Franchisee's books and records indicate that all such payments are utilized for advertising of public interest community events.

~~EE~~ FF. "**Institutional Network" or "I-Net"** means a communication network which is constructed or operated by Grantee Cable Franchisee and which is generally available only to Cable Subscribers who are not residential Subscribers. ~~The I-Net shall~~ As may be required in the applicable Cable Franchise, the I-Net may consist of capacity, fibers or both, from both within the primary cable network and/or separately constructed networks that may be dedicated to governmental, educational and other publicly funded users for two-way, broadband communications. The I-Net includes all equipment and maintenance of equipment required to make the capacity available, including, but not limited to, fiber and coaxial cable, cable modems, switching, routing, transmitting and receiving necessary for the use of the network as set out in the individual Cable Franchise.

- FFGG. "**Institutional Network Services**" means the provision of an I-Net by a Cable System operator to governmental, educational and other ~~other non-profit, publicly funded users, as determined by the City,~~ Institutional Users pursuant to the terms of its Franchise for non-commercial applications including, but not limited to, two-way dedicated voice, video, data and telephony channels connecting and interconnecting user facilities.
- HH. "Institutional Users" means governmental, educational, and other non-profit publicly funded users delineated in Exhibit A, as may be amended from time to time with the consent of the Cable Franchisee.
- II. "Internet Access Service" means the offering of direct access to the international computer network of both federal and non-federal interoperable packet switched data networks to customers for a fee. For purposes of this Code, Internet Access Service shall mean include the direct access to the Internet or Internet connections, including but not limited to all high-speed and Dedicated Subscriber Line ("DSL") communications connections to the Internet or otherwise and shall include the provision of incidental services and related services, but not including revenue from independent services such as Internet web design or Internet web hosting and the sale of Internet Service modems. Except where otherwise stated, the term "Internet Access Service" shall include Cable Internet Service.
- GGJJ. "**Linear Foot**" means the length in feet of cable, wire, fiber, conduit or other linear Communications Facilities. Facilities that are physically connected, wrapped, or lashed as a single cable, conduit or bundle of cables or conduit shall be considered a single facility for purposes of calculating each Linear Foot, provided that each conduit or bundle of conduit up to and including 4" in exterior diameter shall constitute a separate Facility for calculating Linear Feet. Conduit having fiber optic or other cable or wire installed within it shall not be considered separate facilities but shall be considered part of the single "conduit" or bundle for purposes of calculating Linear Feet. Each ~~Provider~~ Franchisee shall be subject to a separate Linear Foot charge for Facilities used by Provider Franchisee and subject to this code.
- HHKK. "**Normal Business Hours**" means those hours during which most similar businesses in the community are open to serve customers. In all cases, Normal Business Hours must include some evening hours, at least one night per week, and some weekend hours.
- ILL. "**Normal Operating Conditions**" means those Cable Services or conditions that are within the control of a Cable System Franchise Grantee Cable Franchisee. Those conditions which are ordinarily within the control

of ~~Grantee Cable Franchisee~~ include, but are not limited to, special promotions; pay-per-view events; rate increases; regular peak or seasonal demand periods; and maintenance or upgrade of the Cable System. Those conditions that are not within the control of ~~Grantee Cable Franchisee~~ include, but are not limited to, natural disasters; civil disturbances; power outages; telephone network outages; vandalism, public works projects for which no advanced notice is given, and severe or unusual weather conditions.

~~JJ-MM.~~ **"Open Video Services"** means any video programming Services provided to any person by a Franchisee certified by the FCC to operate an Open Video System pursuant to Section 47 U.S.C. 573, as may be amended, regardless of the Facilities used.

~~KK-NN.~~ **"Person"** means any corporation, partnership, proprietorship, individual, organization, governmental entity or any natural person.

~~LL.~~ "Provider" means a Franchisee or Grantee or any Person required to have a Communications Franchise or Cable Service Franchise.

~~MM-OO.~~ **"Public Building"** means any building owned or for the greater part occupied by the City or other governmental unit.

~~NN-PP.~~ **"Renewal"** means a new Communications Franchise or Cable Franchise granted to an existing ~~Provider- Franchisee.~~

~~OO-QQ.~~ **"Reports"** means any and all non-trade secret documents and information required to be completed and/or kept or filed by a ~~Grantee or Cable Franchisee or Communications Franchisee~~ on order of the Federal Communications Commission, State or City. In accordance with applicable law, the City shall maintain such information as confidential to the extent that the ~~Provider-Franchisee~~ identifies specific information as such.

~~PP-RR.~~ **"Reseller Service Provider"** means a Communications or Cable Service Provider providing service within the City that does not have ownership, possessory interest, or control of Facilities in the Rights-of-Way, but instead uses the Rights-of-Way by interconnecting with or using the network elements of another ~~Provider-a Franchisee~~ utilizing the Rights-of-Way, and/or by leasing excess capacity from a facility-based Communications or Cable ~~Service Provider-Franchisee.~~

~~QQ-SS.~~ **"Rights-of-Way"** means the surface and space on, above and below every municipal street, alley, road, highway, lane or City right-of-way dedicated or commonly used now or hereafter for utility purposes and facilities thereon, including, but not limited to, overhead lighting facilities.

This term shall not include any county, state, or federal rights-of-way except where controlled or maintained by the City, or as otherwise provided by applicable Laws or pursuant to an agreement between the City and any such Person or Agency. "Rights-of-Way" shall not include public property owned or leased by the City and not intended for right-of-way use, including, but not limited to, municipal office building property or public works facilities.

~~RR-TT~~. **"ROW Ordinance"** means "An Ordinance for Managing the Use and Occupancy of Public Right-of-Way for the City of Overland Park, Kansas," adopted as Ordinance No. RW-2184 that regulates the excavation, construction and use of the Rights-of-Way by all persons, or as amended or supplemented hereinafter.

~~SS-UU~~. **"Service Interruption"** means the loss of picture or sound on one or more Channels on the Cable System.

~~TT-VV~~. **"Standard Installation"** means any Service installation that can be completed using a Drop of one hundred twenty-five (125) feet or less.

~~UU-WW~~. **"Subscriber"** means any Person, who or which lawfully elects to subscribe for any purpose to Cable Service provided by a ~~Grantee Cable Franchisee~~ by means of, or in connection with, the Cable System, and whose premises or facilities are physically wired and lawfully activated to receive Cable Service from ~~Grantee's Cable Franchisee's~~ Cable System, including Persons who receive Cable Service without charge according to the terms of the Code or Franchise.

~~VV-XX~~. **"System"** means the cables, wires, lines, towers, wave guides, optic fiber, antennae, and any associated converters, equipment, or other facilities designed and constructed for the purpose of producing, receiving, amplifying or distributing communications to or from locations within the City.

~~YY~~. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

~~WWZZ~~. **"Telecommunications Act"** means the Telecommunications Act of 1996 codified at Title 47 of the United States Code.

~~AAA~~. "Telecommunications Service" means the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used.

~~XXBBB.~~ **"Trained Representative"** means employees of a Grantee-Cable Franchisee who have the authority and capability while speaking with a Cable Subscriber to, among other things, answer billing questions, adjust bills, and schedule service and installation calls.

CHAPTER 2. COMMUNICATIONS SERVICES

- 2.1 **Unlawful to Operate Without a Franchise.** It shall be unlawful for any Person to construct, operate or maintain Communications Facilities or to provide Communications Services by use of Facilities in the Rights-of-Way in the City without a valid, unexpired Communications Franchise from the City, unless otherwise specifically authorized under applicable federal or state law, or otherwise provided by Ordinance. Unless otherwise provided hereinafter by City ordinance, a Reseller Service Provider shall not be required to obtain a Franchise. Unless otherwise specified in the applicable Communications Franchise, a Communications Franchisee is authorized to provide the full range of Communications Services (not including Cable Service) contemplated under this Code, provided, however, that nothing herein prevents a Communications Franchisee from entering into a Franchise to solely provide Telecommunications Services as defined under federal law or such other more limited service as may be included within "Communications Services" as defined herein.
- 2.2 **Franchises Nonexclusive.** The authority granted by the City in any Franchise shall be for nonexclusive use of the Rights-of-Way. The Grantor specifically reserves the right to grant, at any time, such additional Franchises or other rights to use the Rights-of-Way for any purpose and to any other person, including itself, as it deems appropriate, subject to all applicable law.
- 2.3 **Nature of Rights Granted by any Franchise.** Franchises shall not convey title, equitable or legal, in the Rights-of-Way, and shall give only the right to occupy Rights-of-Way, for the purposes and for the period stated in this Code and as may be further limited by the Franchise. No Franchise shall grant the right to use Facilities owned or controlled by the City or a third-party, without the consent of such party, nor shall a Franchise excuse Franchisee from obtaining appropriate access or attachment agreements before locating its Facilities on the Facilities owned or controlled by the City or a third-party. All Franchises shall be deemed to incorporate and be limited by the provisions of this Code and shall create rights for the sole and exclusive use of Franchisee.
- 2.4 **Application and Application Fee Required.** Any person seeking to use the Rights-of-Way for any Communications Service, or seeking renewal of an existing Franchise, shall submit a completed application on such form as approved by the City. Such application shall be accompanied by a non-refundable application fee in an amount as may be hereinafter established by the City, to compensate the City and defray in whole or part the City's reasonable costs in

review, negotiation and administration of any application filed under this Code. On request of the City, the applicant shall provide such additional information that is deemed necessary or appropriate to the City in reviewing the application and proposed use of the Rights-of-Way. Communications Franchisee shall be responsible for payment of any reasonable costs incurred by City in processing these applications or in adapting or executing the Franchise for use by Communications Franchisee to the extent such costs exceed the application fees paid. The City may provide for the waiver of these application fees and/or of Communications Franchise Fees for use of the Rights-of-Way by other governmental entities for governmental noncommercial purposes where such waiver is deemed by the City to be lawful and in the public interest. The information provided by Communications Franchisee shall be certified as true and correct and Communications Franchisee shall be responsible to certify to the City any material changes to the information provided in such completed Application during the term of any Franchise.

2.5 Standards and Procedures for Approval or Renewal of Franchises.

Franchises shall be granted pursuant to all applicable procedures and requirements as set forth in K.S.A. 12-2001, et. seq. The City shall authorize Franchises or renewals to any eligible Communications Franchisee for the right and privilege to construct, operate, and maintain Facilities in, through and along the City's Rights-of-Way for the purposes of supplying Communications Services on a nonexclusive basis within the City, subject, however, to the standards, terms and conditions herein set forth within this Code, which shall be deemed incorporated therein, and any special conditions as may be provided for in the Franchise. All Franchisees shall be required to obtain and maintain any necessary and lawful permit, license certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the FCC or the Kansas Corporation Commission. In reviewing an Application, the City may consider prior conduct of the Franchisee in performance of its obligations or compliance with the City's ordinances in the past, or the existence of any outstanding violations or deficiencies. The To the extent not inconsistent with applicable law, the City may deny or condition any Franchise where the proposed use would interfere with the public use of the Rights-of-Way or otherwise conflict with the legitimate public interests of the City or as otherwise provided by law. The City may establish standard Franchises setting forth the minimum requirements for all Franchisees. Applications for Franchises may be approved, denied, or approved with conditions consistent with applicable requirements of the Telecommunications Act or other applicable requirements as may be necessary to fulfill the requirements and objectives of this Code. Franchises shall be granted by the City on a non-discriminatory and competitively neutral basis to the extent required by the Telecommunications Act.

2.6 Cable Service and Open Video Systems (OVS); Separate Franchise

Required. A Communications Franchise shall not provide Communications

Franchisee the right to provide cable service as a cable operator (as defined by 47 U.S.C. § 522 (5)) within the City. Upon Communications Franchisee's request for a franchise to provide cable service as a cable operator (as defined by 47 U.S.C. § 522(5)) within the City, the City shall timely negotiate such Cable Television Services Franchise in good faith with Communications -Franchisee. A Communications Franchise shall also not permit Communications Franchisee to operate an Open Video System, except where otherwise expressly provided in the Franchise or by separate Franchise, and Communications Franchisee remits the maximum fees permitted by 47 U.S.C. § 573(c)(2)(B) and where Communications Franchisee otherwise complies with FCC regulations promulgated pursuant to 47 U.S.C. § 573. Absent such applicable Franchise from the City, Franchisee shall be prohibited from offering OVS service-or services not authorized by the Franchise and any such service-services shall be considered a material breach of the Franchise. Unless otherwise specified, any such new Franchise or amendment to ~~this a~~ Franchise shall obligate Franchisee to pay a Communications Franchise Fee of five percent (5%) on all gross revenues directly or indirectly attributable to the provision of OVS service within the City. The City may, at its option, negotiate with Franchisee to exchange all or a part of the Communications Franchise Fees for capacity or Facilities used for City or other public purposes. Any such exchange shall be negotiated based on the Franchisee's cost of providing capacity or Facilities to the City, and shall be credited towards the calculation of applicable Communications Franchise Fees.

- 2.7 **Use of Rights-of-Way; Police Powers; Franchisee's Use Subordinate.** The Franchisee shall construct and maintain ~~its Franchisee's~~ Facilities in accordance with all applicable federal, state and local laws, including all permit requirements, and fee payments, and all other City codes and ordinances in effect as of the date of this Franchise or hereinafter adopted to the extent not in contravention of state or federal law. The grant of a Franchise does not in any way impact the continuing authority of the City through the proper exercise of its Home Rule or statutory powers to adopt and enforce ordinances necessary to provide for the health, safety and welfare of the public. The City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of facilities on any particular segment of Rights-of-Way. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon the Franchisee. The use of the Rights-of-Way authorized by any Franchise shall in all matters be subordinate to the City's use and rights therein. Nothing herein shall be construed to allow the City to take ownership of Franchisee's facilities in violation of any right to due process or compensation as may exist in federal or state law.
- 2.8 **Term.** A Franchise shall be effective for a term of ~~five (5)~~ _____ years from its effective date, unless the City reasonably determines that a ~~shorter~~ different term is warranted under the circumstances consistent with applicable law.

2.9 **Communications Franchise Fees.** Unless otherwise approved by the Governing Body, the Communications Franchisee shall pay to the City as monthly compensation for the use of the Rights-of-Way a Communications Franchise Fee equal to three percent of monthly Gross Receipts, with a minimum monthly Communications Franchise Fee to be not less than the sum of:

- A. \$ _____ \$1000 per month for the first mile of linear Facilities, or part thereof, plus \$ _____ \$.16 per month per Linear Foot thereafter up to a monthly charge under this subsection of \$ _____ \$7500, and
- B. \$ 15 per month for each Antenna in the Rights-of-Way, or such other amounts as established by the Governing Body annually, but not less than \$1000 per month.

Provided, however, no such minimum charge shall be imposed during the first _____ months after the use of the Rights-of-Way have been authorized by the City, unless another term is warranted under the circumstances and consistent with applicable law.

2.10 **Bundled Services.** To the extent Communications Franchisee markets "bundled" services, including combinations of services that may be subject to a Communications Franchise and also a Cable Franchise, Communications Franchisee shall fairly reflect to the City an appropriate and reasonable division of services among the various services offered ~~based on the actual value of each separate service. Whether or not.~~ Revenues from the sale of such bundled services shall be apportioned for purposes of the Communications Franchisee in such manner that an amount equal to the Communications Franchisee's usual and customary charge for Communications Service alone shall be included in "Gross Receipts;" provided, however, if a Communications Franchisee discounts the cost or otherwise receives reduced revenue from the sale of such bundled service, the amount attributable to "Gross Receipts" shall be reduced on a pro rata basis equal to the percentage difference between the costs for the bundled and unbundled service components. Whether or not Communications Franchisee separates services on a Subscriber's bill, it will provide to the City the amounts upon which it will pay the Communications Franchise Fee and any applicable taxes or fees based on the provision of Communications Service, and the amounts upon which it will pay the Fee. ~~Should Franchisee engage in billing practices that, in the determination of the City, do not fairly reflect an appropriate split of Communications Services and Cable Services the City will notify Franchisee in writing of its determination. The parties will meet and discuss in good faith whether the billing practices result in an unfair payment of fees to the City. If the parties do not agree on an appropriate method of determining which charges are subject to the Communications Franchise Fees and which are subject to the Cable Franchise Fee, the parties may subject the dispute to arbitration, or may resort to other methods of dispute resolution, including litigation. Fees or taxes which are~~

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~~not paid on the appropriate division of bundled services receipts, when ultimately paid, will be subject to all interest and penalties provided by the applicable Franchise. If Franchisee holds a Cable Franchise, any fee that could be lawfully attributed to Gross Receipts or alternatively "Gross Revenues" under this Code shall be deemed to be subject to the higher fee.~~

- 2.11 **Timing of Payment of Communications Franchise Fees.** Unless otherwise agreed to in writing, all Communications Franchise Fees shall be due and payable on a monthly basis within 60 calendar days of the close of each month for which the payment applies (the "due date").
- 2.12 **Interest on Late Payments and Under Payments.** If any Communications Franchise Fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the rate of one and one-half percent per month, unless such other maximum rate is established by Law.
- 2.13 **Fee Statement.** Each Communications Franchise Fee payment shall be accompanied by a statement showing the manner in which the Communications Franchise Fee was calculated. If any Fee Statement is determined to understate the Fee owed, then such additional amount owed shall be made with a corrected statement, including interest on said amount as provided herein. Within 90 calendar days following the end of the calendar year, each Franchisee shall submit a statement, certified as true, setting forth its Gross Receipts, Linear Feet, and number of Antennae for each month of the preceding calendar year, and describing what revenues or receipts (including each type of services) were included and excluded in the fee calculations for the calendar year, and describing any adjustments made in determining the Communications Franchise Fee.
- 2.14 **No Accord and Satisfaction.** ~~No~~ For a period of five (5) years after receipt of a payment, no acceptance by the City of any Communications Franchise Fee shall be construed as an accord that the amount paid is in fact the correct amount,² nor shall acceptance of any Communications Franchise Fee payment be construed as a release of any claim of the City.
- 2.15 **Maintain Records.** Franchisee shall at all times maintain complete and accurate books of account and records of the business, ownership, and operations of the Franchisee with respect to the System in a manner that allows the City to determine whether the Franchisee has properly calculated its Communications Franchise Fee in compliance with this Ordinance. Should the City reasonably determine that the records are not being maintained in such manner, the Franchisee shall and City shall mutually agree on a method to correct the manner in which the books and/or records are maintained so that the Franchisee comes into compliance with this section. All financial books and records which are maintained in accordance with FCC regulations and the regulations of any

governmental entity that regulates utilities in Kansas, and generally accepted accounting principles shall be deemed to be acceptable under this section. Such books and records shall be maintained for a period of at least three years. ~~The failure to provide information or maintain records~~ The maintenance of such records and the provision of such information as required herein shall be grounds for forfeiture or revocation of a material term of this Franchise.

- 2.16 **Right of Inspection.** The City or its designated representatives shall have the right to inspect, examine or audit, during normal business hours and upon reasonable notice, (ordinarily not less than two business days), all documents, records or other information that pertains to the System and/or Franchisee's Communications Franchise Fee obligations under the Franchise. In addition to access to the records of Franchisee for audits, upon request at least two (2) business' days notice, Franchisee shall provide reasonable access to records necessary to verify compliance with the terms of the Franchise. If any audit or review by the City results in a determination by the City that Franchisee has underpaid any amount due by more than five (5%) percent of the total due, Franchisee shall, in addition to other amounts due, shall also pay any audit costs incurred by the City in determining or identifying such underpayment.
- 2.17 **Description of Service.** Communications Franchisee shall on an annual basis provide the City with a description of new local communications services offered within the City during the prior six-month period. The first annual report shall also provide a listing of each separate type of service or bundled service offered during the initial annual period. Any individual or bundled service or item for which the ~~provider~~ Communications Franchisee has a separate charge shall be considered a separate service under this paragraph.
- 2.18 **Payment of Taxes; ~~Communications Franchise Fee Not a Tax.~~** The Communications Franchise Fees required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City, ~~except that Franchisee shall be entitled to a credit in payment of Communications Franchise Fees in the amount of any~~ [insert description of specific tax] ~~_____ Tax due and paid pursuant to Chapter _____ of the City Code, as may be amended.~~ The Communications Franchise Fee is compensation for use of the Rights-of-Way ~~and shall in no way be deemed a tax of any kind.~~ Communications Franchisee shall be fully responsible for the payment of all applicable taxes.
- 2.19 **Duty to Notify City of Resellers.** Within 30 days of the Franchisee carrying any Communications of any Reseller Service Provider through Franchisee's Facilities, Franchisee shall notify the City of the name and address of such Reseller Service Provider, the reseller rates or tariffs to be paid to Franchisee relating to such Reseller, and provide to the City ~~any written commitment, if any, as to the payment of Communications~~ a statement as to whether the Reseller Service

Provider will be obtaining a separate Franchise with the City to directly pay Franchise Fees for the revenues attributable to such Reseller Service Provider.

- 2.20 **Duty of Reseller to Provide Notice of Operation Within City; Facilities to be Subject to Franchise.** Prior to providing service within the City or transmitting communications through Facilities in the City, a Reseller Service Provider shall provide written notice to the City of the intent to do so, and shall include (1) the certification of the applicable regulatory approval necessary to undertake such service or communications (2) the name of the Provider(s) owning the Facilities within the City through which the Communications shall be transmitted. It shall be unlawful for any Provider-Franchisee or Reseller Service Provider not having its own Franchise authorizing such communications to transmit communications for commercial purposes through any Facility owned by a Provider-Franchisee that does not have a valid franchise with the City authorizing the use of such Facilities.
- 2.21 **Sale or Lease of Facilities.** Except as otherwise may be provided by Law or Franchise, Communications Franchisee shall not lease, sell, or otherwise transfer possession or control of the Facilities, or any portion thereof, for any purpose to any person that has not obtained a duly issued Franchise, or other grant by the City to use the Rights-of-Way and which includes the authority to use or maintain such leased or transferred Facilities; provided, however, this subsection shall not be construed to apply to Franchisee offering or providing its capacity or spectrum on the System to a Reseller Service Provider. Franchisee shall provide the City at least 30 days' prior notice of such intended sale, lease or transfer of possession or control.
- 2.22 **Assignment of Franchise.** The Communications Franchisee shall not sell, transfer, lease, assign, sublet or dispose of, in whole or in part, either by forced or voluntary sale, or by ordinary sale, consolidation, or otherwise, a Franchise or any of the rights or privileges granted by a Franchise, without the prior written consent of the City; provided that such transfer may occur without written consent of the City to a wholly owned parent or subsidiary, or between wholly owned subsidiaries, upon thirty days prior notice to the City. Such consent shall not be unreasonably withheld. Communications Franchisee may also pledge or grant a security interest to any lender(s) (not affiliated with Franchisee) of Franchisee's assets, including but not limited to the Franchise, or an interest in Franchisee's Affiliate companies, in a transaction commonly known as an "initial public offering" without the prior approval of the City. The City reserves the right to be reimbursed for its reasonable costs relating to a transfer of ownership. Franchisee shall not change its name under which it does business with the public without providing at least 30 days prior notice to the City.
- 2.23 **Forfeiture of Franchise and Privilege.** In case of failure on the part of the Communications Franchisee, its successors and assigns, to comply with any of the

material provisions of this Code or a Franchise, or if the Franchisee, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of this Code or the terms of a Franchise, the Franchisee, its successors and assigns, shall forfeit all rights and privileges permitted by this Code and any Franchise, and all rights hereunder shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings: Before the City declares the forfeiture or revocation of a Franchise, it shall first serve a written notice upon the Company, setting forth in detail the neglect or failure complained of, and the Company shall have thirty (30) days thereafter, or such other reasonable period established by the City Commission, in which to cure the default by complying with the conditions of a Franchise and fully remedying any default or violation. If at the end of such thirty (30) day period the City determines that the conditions have not been complied with the City shall conduct a public hearing affording Franchisee due process. If after a hearing the City determines that the Franchisee is in violation of the Franchise, the City shall take action by an affirmative vote of the City Commission-Council present at the meeting and voting, to terminate the Franchise ; and setting out the grounds upon which said Franchise is to be forfeited or revoked in a written notice to Franchisee together with written findings of fact. Nothing herein shall prevent the City from taking- invoking any other action or remedy as may be set forth in the Code or as may otherwise exist at law or from declaring immediate forfeiture upon notification where the default is incapable of being cured by Franchisee, including where such defaults or violations have repeatedly occurred after notification of such violations, nor shall this Section preclude Franchisee from seeking any right it may have to judicial review of a final decision under this Section. -Nothing herein shall prevent the City from invoking any other remedy or from declaring immediate forfeiture where the default is incapable of being cured by Franchisee, including where such defaults or violations have repeatedly occurred.

CHAPTER 3. CABLE SERVICES

3.1 Cable Franchise Requirements.

~~A. General Findings Regarding Cable Services. The City finds that Cable Service has become an integral part of its citizens' lives, and that evolving Cable Systems have the potential to play an even more dramatic role in the future, providing great benefits and advanced capabilities to Residents of the City. At the same time, the rapidly emerging role of Cable Systems as an integrated broadband communications platform necessitates a finding that the local government has a legitimate and vital role to play in regulating Cable Services in a manner that ensures high quality customer service while at the same time fostering competition to the extent permitted under law. The Council further finds that the public~~

~~convenience, safety, and general welfare can best be served by establishing regulatory powers that are vested in the City.~~

BA. Unlawful to Operate Without a Franchise. It shall be unlawful for any Person to construct, operate or maintain a Cable System or to provide Cable Service or other competing multichannel video services in the City without a Franchise, unless otherwise specifically authorized under applicable federal or State law. Consistent with Chapter 5 any such Person shall be subject to a fine of \$500 per day. The payment of such fine notwithstanding, all such violators shall be subject to all other applicable provisions of this Code to the fullest extent allowed by law, including, but not limited to, the payment of a Cable Franchise Fee. This section shall not apply to a ~~Grantee~~ Cable Franchisee who has properly asserted its intent and is diligently pursuing renewal of the Franchise pursuant to 47 USC § 546.

B. Nature of Rights Granted by any Cable Franchise. Cable Franchises shall not convey title, equitable or legal, in the Rights-of-Way, and shall give only the right to occupy Rights-of-Way, for the purposes of providing Cable Services and as may be further limited by the Cable Franchise. No Franchise shall grant the right to use Facilities owned or controlled by the City or a third-party, without the consent of such party, nor shall a Franchise excuse Cable Franchisee from obtaining appropriate access or attachment agreements before locating its Facilities on the Facilities owned or controlled by the City or a third-party. All Franchises shall be deemed to incorporate and be limited by the provisions of this Code and shall create rights for the sole and exclusive use of Franchisee. Any Franchise or other authorization for Cable Services, in whatever form granted, shall not grant or include: (i) any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City, including the provision of Communications Services; (ii) any permit, agreement, or authorization required in connection with operations in the Rights-of-Way including, without limitation, permits and agreements for placing devices on or in poles, conduits, or other structures, whether owned by the City or a private entity, or for excavating or performing other work in or along the Rights-of-Way.

C. Franchise Not Exclusive.

1. Any Cable Franchise granted pursuant to this Ordinance shall be nonexclusive. The Grantor specifically reserves the right to grant, at any time, such additional Franchises for a Cable Television System or any component thereof, to any other Person including

itself, as it deems appropriate, subject to this Code and applicable federal and state law.

2. The terms and conditions of any Cable Franchises granted or renewed pursuant to this Ordinance shall be, when taken as a whole, no less burdensome or more beneficial than any other Cable Franchises granted or renewed pursuant to this Ordinance, when taking into consideration the context in which the earlier terms were adopted. Provided, however, that nothing herein shall be construed as requiring the use of identical terms or conditions, or limit the enforceability of conditions that are freely negotiated.
3. Further provided, nothing in this subsection shall create any remedy other than that which is provided in subsection C.4 below, nor shall it be deemed to create any cause of action or claim of breach for any party.
4. Before granting an additional Cable Franchise, the City shall give written notice to every existing ~~Grantee-Cable Franchisee~~ of any other proposal to service all or part of such existing ~~Grantee's Cable Franchisee's~~ Franchise area, identifying the applicant for such additional franchise and specifying the date, time, and place at which the City shall consider and/or determine whether such additional Cable Franchise should be granted. In the event that an existing ~~Grantee-Cable Franchisee~~ believes that the City has entered into an additional Cable Franchise with terms or provisions that are, taken as a whole, more favorable or less burdensome than the terms set forth in this Franchise, taking into consideration the context in which the different provisions were adopted, the City shall, upon request by such existing ~~Grantee Cable Franchisee~~, enter into good faith negotiations with the ~~existing Grantee to consider modification of the Grantee's existing Cable Franchisee to modify the Cable Franchisee's~~ Franchise.

D. Franchise Territory.

Every Cable Franchise shall apply to the entire territorial area of the City, as it exists now or may later be configured.

E. Federal, State, and City Jurisdiction.

1. This Chapter and Code shall be construed in a manner consistent with all applicable federal and state laws.
2. In the event that the federal or state government discontinues preemption in any area of cable communications over which it

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currently exercises jurisdiction in such manner as to expand rather than limit municipal regulatory authority, City may, if it so elects, adopt rules and regulations in these areas to the extent permitted by law and the reasonable exercise of the City's police powers.

3. The provisions of this Chapter and Code shall apply to all Cable Franchises granted or renewed after or simultaneously with the effective date of this Ordinance. This Chapter and Code shall also apply to all existing Cable Franchises, to the extent not inconsistent with the terms of any such Franchise ~~or applicable law, and to the extent that it does not impose additional material burdens on such Grantee.~~ A Cable Franchise (including all of ~~Grantee's~~ Cable Franchisee's particular rights, powers, protections, privileges, immunities and obligations associated therewith as the same exist on the date hereof) shall constitute a legally binding contract between the City and Grantee Cable Franchisee, and as such, cannot be amended, modified or changed by the Grantor without the consent of ~~Grantee Cable Franchisee~~ Grantee Cable Franchisee in any manner whatsoever, whether by ordinance, rule, regulation or otherwise, to impose on ~~Grantee Cable Franchisee~~ Grantee Cable Franchisee more stringent or burdensome requirements or conditions. In the event of any conflict between the terms and conditions of a Cable Franchise and the provisions of this Chapter or Code, and other generally applicable regulatory ordinances of the City, the specific terms of the Franchise shall control; provided, however, that nothing herein contained shall preclude the City from the proper exercise of its police powers.
4. In the event of a change in state or federal law which by its terms would require the City to amend this Chapter or Code, the parties shall modify the existing Cable Franchise in a mutually agreed upon manner.

F. **Initial Franchise Applications.** Any Person desiring an initial Franchise for a Cable System shall file an application with the City. A nonrefundable Application Fee as may be hereinafter established by the City shall accompany the application, which shall not be considered or credited against the collection of applicable Cable Franchise Fees.

G. **Consideration of Initial Applications.**

1. Upon receipt of any application for an initial Franchise, the City Administrator shall prepare a report and make his or her recommendations respecting such application to the City Council.
2. A public hearing shall be held prior to any initial Franchise grant, at a time and date approved by the Council. Within thirty (30) days

after the close of the hearing, the Council shall make a decision based upon the evidence received at the hearing as to whether or not the Franchise(s) should be granted, and, if granted, subject to what conditions.

H. **Franchise Renewal.** Cable Franchise Renewals shall be in accordance with applicable law including, but not necessarily limited to, the Cable Communications Policy Act of 1984, as amended. The City and a Grantee Cable Franchisee, by mutual consent, may enter into Renewal negotiations at any time during the term of the Franchise.

I. **Grant of Additional Franchise and Competing Service.** Since competing or overlapping Cable Franchises may have an adverse impact on the public Rights-of-Way, on the quality and availability of services to the public and may adversely affect an existing Cable Provider's Franchisee's ability to continue to provide the Services it is presently providing under a Franchise, the City may issue a Franchise in an area where another Grantee-Cable Franchisee is operating only following a public hearing to consider the potential impact which the grant of an additional Franchise may have on the community. In considering whether to grant one or more additional Franchises, the City shall specifically consider, and address in a written report, the following issues:

1. The positive and/or negative impact of an additional Cable Franchise on the community.
2. The ability and willingness of the specific applicant in question to provide Cable Services to the entire Franchise Area which is served by the existing Cable Provider-Franchisee. The purpose of this subsection is to ensure that any competition which may occur among Grantees-Cable Franchisees will be on terms which when taken as a whole do not give a competitive advantage to one Grantee-Cable Franchisee over another.
3. The amount of time it will take the applicant to complete construction of the proposed Cable System and activate Cable Service in the entire Franchise Area; and, whether the applicant can complete construction and activation of its Cable System in a timely manner.
4. The financial capabilities of the applicant and its guaranteed commitment to make the necessary investment to erect, maintain, and operate the proposed Cable System for the duration of the Franchise term. In order to ensure that any prospective Grantee Cable Franchisee does have the requisite current financial capabilities, the City may request equity and debt financing

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commitment letters, current financial statements, bonds, letters of credit, or other documentation to demonstrate to the City's satisfaction that the requisite funds to construct and operate the proposed Cable System are available.

5. The quality and technical reliability of the proposed Cable System, based upon the applicant's plan of construction and the method of distribution of signals, and the applicant's technical qualifications to construct and operate such Cable System.
6. The experience of the applicant in the erection, maintenance, and operation of a Cable System.
7. The capacity of the Rights-of-Way to accommodate one or more additional Cable Systems and the potential disruption of those Rights-of-Way and private property that may occur if one or more additional Franchises are granted.
8. ~~The disruption of existing Cable Service and the potential that the proposed Franchise would adversely affect the residents of the City. The disruption on the availability of Cable Service within the City..~~
9. ~~The likelihood and ability of the applicant to continue to provide competing Cable Service to Subscribers within the entire Franchise Area for the duration of the Franchise.~~
109. Such other information as the City may deem appropriate to be considered prior to granting any competing or overlapping Franchise.

J. **Permits for Non-Franchised Entities.**

1. The City may issue a license to a Person other than the ~~Grantee Cable Franchisee~~ to permit that Person to traverse any portion of a ~~Grantee's Cable Franchisee's Cable Franchise Area~~ within the City in order to provide Cable Service outside, but not within the City. Such license or easement, absent a grant of a Cable Franchise in accordance with this Chapter, shall not authorize nor permit said Person to provide Cable Service of any type to any home or place of business within the City. ~~Such license shall be granted pursuant to the requirements of Section 2 of this Code.~~

3.2 **Design, Services and Capabilities.**

- A. **Cable System Design.** Every ~~Grantee-Cable Franchisee~~ shall offer Cable Service that meets the current and future cable-related needs of the City. Such Cable Service shall, at a minimum, be comparable to Cable Services offered by that ~~Grantee-Cable Franchisee~~ or its Affiliates operating any headend serving the City and surrounding municipalities in Johnson County. The Cable Franchise shall incorporate a description of the ~~Grantee's-Cable Franchisee's~~ Cable System including the general design and capabilities of the Cable System to identify for the City how the Cable System will meet the current and future Cable needs of the City.
- B. **The Cable System.** Every Cable System shall pass by every single-family dwelling unit and multiple-family dwelling unit within the Franchise Area in accordance with line extension policies set forth in this Ordinance. Service shall be provided to Subscribers in accordance with the schedules and line extension policies specified in this Ordinance unless otherwise specified in the Franchise.
- C. **Drops To Public Buildings.**
1. Every ~~Grantee-Cable Franchisee~~ shall provide installation of at least one (1) Cable Drop, and one (1) outlet, provide monthly Basic Cable Service, without charge, to Public Buildings specified by the City in the applicable Franchise, where the drop does not exceed two hundred (200) feet. All accredited K-12 schools, and public libraries shall also receive one (1) Cable Drop and one (1) outlet and Basic Cable Service at no charge, subject to the above 200 foot limit. The location of such Cable Drops and outlets shall be determined in cooperation with the management of the Public Building to which the connection is to be made. Following the City's designation of additional Public Building(s) to receive Cable Service, a ~~Grantee-Cable Franchisee~~ shall complete construction of the Drop and outlet within one hundred and eighty (180) days if the City requests construction, weather permitting and subject to payment of the Direct Incremental Costs of installation in excess of two hundred (200) feet. Drops and outlets that are in addition to the one free Drop and outlet required by this ~~section-Section~~ shall be provided by a ~~Grantee-Cable Franchisee~~ at the cost of ~~Grantee's Cable Franchisee's~~ Direct Incremental Cost . Alternatively, at an institution's request, the institution may add outlets at its own expense, as long as such installation meets the ~~Grantee's-Cable Franchisee's~~ standards, which shall be made readily available to any public entity upon request. Additional outlets and Services to Public Buildings are subject to the applicable commercial rate.

2. All such Cable Service outlets shall not be utilized for commercial purposes. The City shall take reasonable precautions to prevent any use of a ~~Grantee's~~ Cable Franchisee's Cable System in any inappropriate manner or that may result in loss or damage to the Cable System. Users of such outlets shall hold the ~~Grantee~~ Cable Franchisee harmless from any and all liability or claims arising out of their use of such outlets, other than for those claims arising out of improper installation or faulty equipment.
3. In instances where the Drop line from the feeder cable to the Public Building, school or library exceeds 200 feet, the ~~Grantee~~ Cable Franchisee may charge for its Direct Incremental Costs that are incurred in exceeding this length. A ~~Grantee~~ Cable Franchisee may require advance payment of this cost.

D. **School and Library Cable Modems.** Unless otherwise specified in the applicable Franchise, upon activation and commercial offering of two-way cable modem service within the Franchise Area, every ~~Grantee~~ Cable Franchisee shall provide upon written request a courtesy cable modem and Cable Internet Service without charge to every State accredited K-12 public and higher education school and library in the Franchise Area, which may constitute an element of an individual Franchise I-Net requirement.

E. **Use Of ~~Grantee's~~ Facilities. Subject of Cable Franchisee's Facilities.** Unless otherwise specified in the applicable Cable Franchise, and subject to any applicable state or federal regulations, the City shall have the right to install and maintain, free of charge, upon the poles and within the underground pipes and conduits of a ~~Grantee~~ Cable Franchisee, any wires and fixtures desired by the City for public purposes. Provided, however, that (a) such use by Grantor does not unreasonably interfere with the current or future use by ~~Grantee~~ Cable Franchisee; (b) such use by Grantor is restricted to non-commercial public purposes; and (c) Grantor takes reasonable precautions to prevent any use of ~~Grantee's~~ Cable Franchisee's facilities in any manner that results in an inappropriate use thereof, or any loss or damage to the Cable System. For the purposes of this subsection, "public purposes" includes, but is not limited to, the use of the structures and installations for Grantor fire, police, traffic, utility, and/or signal systems, but not for Cable System purposes in competition with the ~~Grantee~~. ~~The ~~Grantee~~ Cable Franchisee. The Cable Franchisee shall not deduct the value of such use of its Facilities from its Cable Franchise Fee and/or other fees payable to Grantor.~~

- F. **Upgrade of System.** Every Grantee-Cable Franchisee shall upgrade its Cable System (herein referred to as the "System Upgrade"), if required, as set forth in its respective Franchise.
- G. **Emergency Alert Capability.** Every Grantee-Cable Franchisee shall at all times provide the System capabilities to comply with the FCC's Emergency Alert System rules and regulations. Provided, that at a minimum these capabilities will remain in place even if the FCC at some future date eliminates the current regulations.
- H. **Periodic Review.** The Cable Franchise shall include provisions to provide for a "periodic review" between the City and a Grantee-Cable Franchisee to evaluate changes in law, technology, or service, and reasonable procedures for mutually agreed upon modifications to the Cable Franchise to incorporate changes identified as desirable or necessary as a result of any such periodic review.
- I. **Closed Captioning and Descriptive Audio Service.** Every Grantee-Cable Franchisee will make audio descriptive service and closed captioning capabilities available to the extent required by state and federal law.
- J. **Standby Power.** Within twelve (12) months of activation of the System, the Grantee-Cable Franchisee shall provide standby power generating capacity capable of providing at least twelve (12) hours of emergency supply at the Cable System Headend. For nodes, two hours with emergency power supply. Every Grantee-Cable Franchisee shall maintain standby power System supplies throughout the major trunk cable networks capable of providing emergency power within the standard limits of commercially available power supply units.
- K. **Status Monitoring.** Every Grantee-Cable Franchisee shall provide an automatic status monitoring System, or a functional equivalent, when the Cable System has been activated for interactive service provided that such status monitoring is technically and economically feasible.
- L. **HDTV/ATV Conversion.** Conversion to High Definition Television/Advanced Television (HDTV/ATV) formats shall occur in accordance with applicable law.

3.3 **Institutional Network, And Public Educational And Governmental Access Or "PEG Access"**

- A. **Institutional Network, PEG Facilities and Other Public Interest Services.**

1. Every ~~Grantee-Cable Franchisee~~ shall, to the extent required in its Franchise and subject to applicable law, provide or fund on a similar basis with other Cable ~~Providers-Franchisees~~ whose Franchises are granted or renewed after the adoption of this Code an Institutional Network, ~~that provides two-way broadband voice, video and data capabilities or PEG Access Facilities or other public interest services, or some combination of the same,~~ for use by governmental, educational and other publicly-funded or non-profit local community service organizations identified by the City. Such ~~Institutional Network-public interest~~ requirements shall at a minimum satisfy the community need for such facilities and/or services as determined by the Governing Body for the period of the applicable Franchise.
2. Every ~~Grantee-Cable Franchisee~~ shall also provide a channel or channels, bandwidth capacity, service, and funding, for separate Public, Educational and Government Access Channels, as specified in their Franchise. All such PEG Access Channels shall be available to all Subscribers as part of their Basic Cable Service. Given the on-going changes in the state of technology as of the Effective Date of this Code, absent the express written consent of the City, ~~Grantee-Cable Franchisee~~ shall transmit PEG Access Channels in the format or technology utilized to transmit all of the Channels on the Basic Cable Service tier. Oversight and administration of the PEG Access Channels shall be set forth in the Franchise.

B. **Proof of Performance Testing.** To ensure high quality service on the ~~Institutional Network and~~ Access Channels, proof of performance testing throughout the System and on all Channels will be made available to the City to the extent required in a Franchise. Every ~~Grantee-Cable Franchisee~~ will monitor Access Channels throughout the Cable System to determine the level of technical quality of Access Channels is in conformance with FCC Rules and to ensure that the level of technical quality on such Access Channels is the same as on other Channels within the Cable System. ~~In the event that a Complaint is made by a programmer of any Access Channels, the Grantee shall immediately investigate the Complaint and determine whether the Grantee is in compliance with the technical standards set forth in section 3.4.2 of this Chapter.~~

3.4 **Technical Standards and Customer Service Practices.**

A. **General Technical Standards and Customer Service Practices.**

1. This Chapter incorporates Cable Service technical standards and establishes customer service practices that every Grantee-Cable Franchisee must satisfy.
2. Every Grantee-Cable Franchisee shall maintain such equipment and keep such records as required to comply with all customer service and technical standards required by these regulations and other applicable laws. The Grantee-Cable Franchisee shall at all times assist and cooperate with Grantor in explaining, interpreting and understanding such records or reports.

B. **Test and Compliance Procedure.** Tests for a Cable System shall be performed periodically in a manner so as to conform with FCC specifications. The tests may be witnessed by representatives of the City and written test reports shall be made available to the City upon request. If any test locations fail to meet the performance standards, the Grantee-Cable Franchisee shall be required to indicate what corrective measures have been taken and shall have the site retested.

C. **Cable System Office Hours and Telephone Availability.**

1. Every Grantee-Cable Franchisee shall maintain a conveniently located customer service center, which shall include a place where Subscribers may pay their bills, pick up and return converter boxes and comparable items and receive information on the Grantee-Cable Franchisee and its services. Such service center shall be open at least during Normal Business Hours. ~~Grantee-Cable Franchisee~~ shall also maintain a publicly listed toll-free or local telephone line that is available to Subscribers twenty-four (24) hours a day, seven (7) days a week.
2. Every Grantee-Cable Franchisee shall have Trained Company Representatives available to respond to Subscriber telephone inquiries during Normal Business Hours.
3. After Normal Business Hours, the telephone access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after Normal Business Hours must be responded to by a Trained Representative on the next business day.
4. Under Normal Operating Conditions, telephone answer time by a Trained Customer Service representative or automated response unit, including wait time, shall not exceed thirty (30) seconds when the connection is made. If a call must be transferred, transfer time shall not exceed thirty (30) seconds. Under Normal Operating

Conditions, these standards shall be met no less than ninety percent (90%) of the time, measured on a quarterly basis.

5. Under Normal Operating Conditions, a ~~Grantee-Cable Franchisee~~ shall establish an inbound telephone system upon which Subscribers shall not receive a busy signal more than three percent (3%) of the time.
6. A ~~Grantee-Cable Franchisee~~ will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless an historical record of complaints indicates a clear failure to comply.

D. **Service Calls and Installations.** Under Normal Operating Conditions, each of the following standards must be met no less than ninety-five percent (95%) of the time as measured on a quarterly basis:

1. Standard Installations will be performed within seven (7) business days after an order has been placed. "Standard Installations" are those that are located up to 125 feet from the existing distribution system.
2. The appointment window alternatives for installations, service calls, and other installation activities, will be either a specific time or, within a maximum four (4) hour time block during Normal Business Hours. The ~~Grantee-Cable Franchisee~~ may schedule service calls and other installation activities outside of Normal Business Hours for the express convenience of a Subscriber, if so requested.
3. A ~~Grantee-Cable Franchisee~~ may not cancel an appointment with a Subscriber after the close of business on the business day prior to the scheduled appointment.
4. If a ~~Grantee's-Cable Franchisee's~~ representative is running late for an appointment with a Subscriber and will not be able to keep the appointment as scheduled, the Subscriber must be contacted. The appointment must be rescheduled, as necessary, at a time which is convenient for the Subscriber.

E. **Repairs and Interruptions.**

1. Under Normal Operating Conditions and excluding conditions beyond the control of a ~~Grantee,~~ ~~every Grantee-Cable Franchisee,~~ **every Cable Franchisee** will begin working on Service Interruptions and outages within a reasonable time frame but in no

event later than twenty-four (24) hours after the Service Interruption or outage becomes known. The ~~Grantee Cable Franchisee~~ must begin actions to correct other service problems on the business day following notification of such service problems.

2. The term "Service Interruption" means the loss of picture or sound on one or more cable channels, ~~or Cable Internet Service connectivity.~~
3. Work on requests for service, excluding conditions beyond the control of a ~~Grantee Cable Franchisee~~, must begin by the next business day after notification of the problem.
4. Outside repairs to cable plant which cannot be made by the initial service technician dispatched, shall under Normal Operating Conditions be re-scheduled within twenty-four (24) hours of the originally scheduled service call. The Subscriber does not need to be home for outside plant and line repairs.
5. A ~~Grantee Cable Franchisee~~ may interrupt service only for good cause and for the shortest time reasonably possible, including interruption for System Upgrade, maintenance and repair. Subject to the reasonable safety precautions for the benefit of the ~~Grantee's Cable Franchisee's~~ employees and agents, routine maintenance shall occur at times that affect the fewest number of Subscribers, generally between 12:00 A.M. and 6:00 A.M. To the extent that specific neighborhoods will be affected by a planned outage, such as during an upgrade, the ~~Grantee Cable Franchisee~~ shall provide advance notice through telephone calls, door hangers and/or other reasonable means.
6. Upon Subscriber request a ~~Grantee Cable Franchisee~~ shall provide a credit equivalent to a pro rata of the monthly cable rate for each Service Interruption exceeding four (4) hours in any twenty-four (24) hour period, unless it is demonstrated that the Subscriber caused the outage, or the outage was planned as part of an upgrade or other work that occurred between the hours of 12:00 A.M. and 6:00 A.M., of which the City and the Subscriber received appropriate prior notification. A Subscriber is entitled to a full refund for any Cable System or disruption to a pay per view event. These credits and refunds shall be made available upon request by Subscriber describing the time, date and nature of the disruption experienced.

7. Technicians capable of performing service related emergency repairs and maintenance must be available twenty-four (24) hours a day, including weekends and holidays.
8. No charge shall be made to a Subscriber for any service call relating to Grantee-Cable Franchisee owned and Grantee-Cable Franchisee maintained equipment after the initial installation of Cable Service unless the problem giving rise to the service request can be demonstrated by Grantee-Cable Franchisee to have been:
 - (i) Caused by the negligence or malicious destruction of cable equipment by the Subscriber; or
 - (ii) A problem established as having been non-Cable System or Cable Service in origin.

A Grantee-Cable Franchisee may also assess a service charge for repeat service calls to the same address in instances where the problem was not caused by the Grantee-Cable Franchisee.

9. Cable Drop lines, cable trunk lines, or any other type of outside wiring that comprise part of a Grantee's-Cable Franchisee's Cable System that are located underground, shall be placed in such locations pursuant to City Code, and the surrounding ground shall be restored as close as is practical to its condition immediately prior to such underground construction activity within a reasonable period of time after connection to the Cable System. Except for a Grantee's-Cable Franchisee's maintenance facilities, no Cable Drop line, cable trunk line, or any other type of outside wiring shall be permitted to lay upon the ground for an unreasonable period of time within the City, except for the express purpose of being immediately connected to the Cable System of Grantee-Cable Franchisee. The requirements of this subsection shall apply to all installation, reinstallation, service or repair commenced by a Grantee-Cable Franchisee within the City during Normal Operating Conditions.

F. **Disconnections and Downgrades.**

1. If any Subscriber fails to pay a properly due monthly Subscriber fee, or any other properly due fee or charge, the Grantee-Cable Franchisee may disconnect the Subscriber's outlet; provided, however, that such disconnection shall not be effected until after the later of: (i) thirty (30) days after the due date of said delinquent fee or charge; or (ii) fifteen (15) days after delivery to Subscriber of written notice of the intent to disconnect. If a

Subscriber pays before expiration of the later of (i) or (ii), the ~~Grantee-Cable Franchisee~~ shall not disconnect. Provided, however, that this ~~section~~ Section does not apply to Subscribers disconnected as a result of insufficient funds.

2. ~~No~~ Absent extenuating circumstances, no Subscriber may be disconnected without prior written notice, the above notification of intent to disconnect in 3.3.F.1 shall satisfy this notice requirement. Provided, however, that no such prior notification requirement shall apply to disconnections for theft of service, or other violations of law.
3. No Subscriber may be disconnected for non-payment if payment of outstanding balances is made before the scheduled date for disconnection, up to and including the last business day before the scheduled disconnection.
4. No Subscriber may be disconnected due to a ~~Grantee's-Cable Franchisee's~~ failure to timely or correctly post payments.
5. No Subscriber may be disconnected outside of Normal Business Hours or on Sundays or holidays.
6. Absent extenuating circumstances, a ~~Grantee-Cable Franchisee~~ is not required to reconnect a Subscriber with an undisputed outstanding balance.
7. A ~~Grantee-Cable Franchisee~~ is permitted to refuse orders for premium or "pay per view" services from Subscribers with a record of non-payment .
8. A ~~Grantee-Cable Franchisee~~ may disconnect Subscriber premises that are responsible for signal leakage in excess of applicable federal limits. A ~~Grantee-Cable Franchisee~~ may effectuate such disconnection without advance notice, provided that a ~~Grantee Cable Franchisee~~ shall immediately notify the Subscriber with door tags and/or telephone calls or other reasonable means. If the source of the signal leakage is remedied, and the Subscriber was not the cause of such leakage the ~~Grantee-Cable Franchisee~~ shall reconnect the Subscriber at no charge. If the Subscriber was the cause of the signal leakage the ~~Grantee-Cable Franchisee~~ may charge a reasonable reconnection fee. For purposes of this Section, use of FCC-approved navigation devices does not in and of itself constitute Subscriber caused signal leakage.

9. Subscribers may request disconnection or a downgrade of cable service at any time. A ~~Grantee-Cable Franchisee~~ may not impose any charge for service delivered after the requested date of disconnection. As provided under federal law, subscribers may request a downgrade at no charge if made within thirty (30) days of a rate increase.
10. Nothing in this Chapter or Code shall limit the right of a ~~Grantee Cable Franchisee~~ to deny Cable Service to any household or individual which has a negative credit or Cable Service history with the ~~Grantee-Cable Franchisee~~, which may include non-payment of bills, theft or damage to the ~~Grantee's-Cable Franchisee's~~ equipment, outstanding balances, or threats or assaults on employees of the ~~Grantee-Cable Franchisee~~ in the course of their employment. In the event Cable Service is denied, the ~~Grantee-Cable Franchisee~~ will give notice to the Subscriber of the right to contact the appropriate authority, as designated by the City.

G. **Communications Between ~~Grantee-Cable Franchisee~~ and Subscribers.**

1. **Notifications to Subscribers:**

- (i) Every ~~Grantee-Cable Franchisee~~ shall provide written information to Subscribers on each of the following topics at the time of installation, at least annually to all Subscribers, and at any time upon request of a Subscriber:
 - (a) Product and Services offered;
 - (b) Prices and options for programming Services and conditions of subscription to programming and other Services and facilities.
 - (c) Installation and service maintenance policies;
 - (d) Instructions on how to use Services;
 - (e) Channel positions of programming offered on a System; and
 - (f) Billing and Complaint procedures, including the name, address and telephone number of the City.
- (ii) Subscribers will be given thirty (30) days advance notice of any changes in rates, programming Services, or Channel positions, if the change is within the control of the ~~Grantee~~

Cable Franchisee. All such notice shall be provided in writing by any reasonable means. In addition, the ~~Grantee~~ Cable Franchisee shall notify Subscribers thirty (30) days in advance of any significant changes in other information required by this ~~section~~ Section. Notwithstanding the foregoing or any provision of this ~~Franchise Code~~ to the contrary, a ~~Grantee~~ Cable Franchisee shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, Cable Franchise Fee, or any other fee, tax assessment, or change of any kind imposed by any government entity on the transaction between the ~~Grantee~~ Cable Franchisee and the Subscriber.

2. **Billing.**

- (i) Bills must be clear, concise, and understandable. Bills must be fully itemized, including, but not limited to, Basic and premium Service charges and equipment charges.
- (ii) Bills must clearly delineate all activity during the billing period, including optional charges, rebates, and credits.
- (iii) In case of a billing dispute, a ~~Grantee~~ Cable Franchisee must respond to a written Complaint from a Subscriber within thirty (30) calendar days.
- (iv) Credits for Service shall be issued no later than the Subscriber's next billing cycle after determination that the credit is warranted.

3. **Late Charges.** A ~~Grantee~~ Cable Franchisee may impose a monthly fee for any delinquent balance owed by a Subscriber, subject to the following:

- (i) At least ten (10) days before the date the fee is imposed, the Subscriber shall be given written notice, on the face of the bill or by separate notice of:
 - (a) The date after which the fee will be imposed if the balance is not paid; and
 - (b) The amount of the fee that will be imposed; and
- (ii) The Fee for the delinquent payment shall not exceed five percent (5%) of the amount of the delinquent balance per month or five dollars (\$5) per month, whichever is greater.

4. **Refunds.** Refund checks will be issued promptly, but no later than either:

- (i) The Subscriber's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or
- (ii) The return of equipment supplied by the ~~Grantee-Cable Franchisee~~ if Cable Services are terminated.

H. **Complaint Log.** Subject to the privacy provisions of 47 U.S.C. § 521 et seq., every ~~Grantee-Cable Franchisee~~ shall prepare and maintain written records of all Complaints made to them and the resolution of such Complaints, including the date of such resolution. Such written records shall be on file at the office of ~~Grantee-Cable Franchisee~~. A Cable Franchisee shall make available to Grantor a written summary of such Complaints and their resolution upon request.

I. **Parental Control.** Every ~~Grantee-Cable Franchisee~~ shall make available to any Subscriber upon request a "lockout" device for blocking both video and audio portions of any channel(s) of programming entering the Subscriber's premises. Such device shall be provided at a reasonable charge, except to the extent that federal law specifically provides otherwise. A Cable Franchisee may, however, require a reasonable security deposit for the use of such a device.

J. **Service Area.**

1. A ~~Grantee-Cable Franchisee~~ may not discriminate in the build-out of its Cable System to a particular area of the City or provision of cable Service to individual or groups of residents on the basis of race, creed, religion or economic condition. A Cable Franchisee shall serve all areas of the City with populations of at least ten (10) dwelling units per one quarter (1/4) aerial cable mile, including areas annexed subsequent to the grant of the Franchise, unless otherwise provided by Franchise ordinance. Such line extension requirements may be modified in a Franchise such as where a franchise is granted to a prior existing Cable operator located in area annexed subsequent to the adoption of this Code, or such other circumstances that are sufficiently unique as determined by the Governing Body as not to create an unfair competitive advantage.

2. **Newly Annexed Areas.** In such cases where mandatory extension of the Cable System is required for areas newly annexed after the effective date of the Franchise, but the technical capabilities of the then-existing Cable System are such that the minimum technical

performance standards required by this Franchise Code or the FCC cannot be met, then the Grantee-Cable Franchisee shall be required to make such extension only if the Grantee-Cable Franchisee can earn a fair return (as measured by the Grantee's-Cable Franchisee's weighted average cost of capital) on the incremental investment required combined with the overall investment base of the Cable System within the boundaries of the Franchise Area.

3. **Special Agreements.** Nothing herein shall be construed to prevent a Grantee-Cable Franchisee from serving areas not covered under this section upon agreement with developers, property owners or residents.

K. **Customer Service Reporting Requirements.** The City may require upon reasonable request that a Grantee-Cable Franchisee periodically prepare and furnish to City semi-annual reports and any other reasonable information relevant to the Grantee's-Cable Franchisee's compliance with the customer Service requirements of this Chapter measured on a quarterly basis.

3.5 **Operation and Maintenance.**

A. **Open Books and Records.** Every Grantee-Cable Franchisee shall cooperate with the City with respect to City's administration of this Chapter and Code and any applicable Franchise granted pursuant to it. Subject to the privacy provisions of the Cable Act, City shall have the right to inspect, upon three (3) business days notice, during Normal Business Hours, all books, records, maps, plans, certified financial statements, service complaint logs, performance test results, and other existing like materials of a Grantee-Cable Franchisee that relate to the operation of the Grantee's-Cable Franchisee's Cable System and that are reasonably necessary to Grantor's enforcement or administration of this Code or the Grantee's-Cable Franchisee's Franchise. A Grantee-Cable Franchisee shall not be required to maintain any books or records for franchise compliance purposes longer than three (3) years, except that financial records necessary to demonstrate compliance with the required Cable Franchise Fee payments shall be kept for six (6) years. Upon request, the City will treat designated information disclosed by a Grantee-Cable Franchisee as confidential to the extent permissible under state and federal law. All such review of a Grantee's-Cable Franchisee's books and records shall be performed by an independent party if the City itself enters into the business as a competitor.

B. **Communications with Regulatory Agencies.** Copies of all non-confidential petitions, applications, communications, and reports

submitted by a Grantee-Cable Franchisee to the FCC, Securities and Exchange Commission, or any other federal or state regulatory commission or having jurisdiction in respect to any matters directly affecting agency which directly relate to the operation of the Cable System operations in the City shall be made available contemporaneously to the City upon request. Copies of responses from the above regulatory agencies to a Grantee-Cable Franchisee likewise shall be made available promptly to the City upon request. If the City is specifically named in any such pleading or response, the City shall automatically be furnished a copy.

C. **Annual Reports.**

1. Upon request, a Grantee-Cable Franchisee shall make available to City, within ninety (90) days of the end of each of the applicable Grantee's-Cable Franchisee's fiscal years during the term of this Franchise, the following:
 - (i) A revenue statement certified by a representative of the Grantee-Cable Franchisee showing the Gross Revenues of the Grantee-Cable Franchisee for the preceding fiscal year;
 - (ii) A current list of names and addresses of each officer and director and other management personnel of the Grantee Cable Franchisee;
 - (iii) A copy of all documents that relate directly to the Grantee's Cable Franchisee's Cable System that were filed with any federal, State, or local agencies during the preceding fiscal year and that were not previously filed with City;
 - (iv) A statement of the Grantee's-Cable Franchisee's current billing practices and charges;
 - (v) A copy, if any, of the Grantee's-Cable Franchisee's current Subscriber Service contract; and
 - (vi) A copy of Annual Reports to stockholders, if any, for operating company and parent company.
 - (vii) An index of all technical and operational reports that Franchisee is required to develop and maintain with respect to its Cable System pursuant to this Code, individual Cable Franchise and the FCC.

Other than subsection (vii), aAll of the above information shall not be required annually unless there is a change after the first filing.

2. City and its agents and representatives shall have authority to arrange for and conduct an audit during Normal Business Hours of the books and records of Grantee-Cable Franchisee that are reasonably necessary for the enforcement of a Franchise. A Grantee-Cable Franchisee shall first be given thirty (30) days notice of the audit, the description of and purpose for the audit, and a description, to the best of City's ability, of the books, records, and documents that City wants to review. The costs and expense of such audit shall be borne by the Grantee-Cable Franchisee if the audit reveals a discrepancy of ~~two~~ five percent (5%) or more from the information related to the City.
3. Any review or audit of a Grantee's-Cable Franchisee's books and records shall be performed by an independent party if the City itself enters into the business as a competitor to provide Cable Services.

D. Index of Reports.

1. ~~Every Grantee shall compile and maintain an Index of Reports, that shall list all reports, documents, and filings, that it has prepared with respect to the Cable System over the course of the past two years as a result of the requirements of the FCC or this Chapter or Code or Franchise, including technical Cable System testing, and proof of performance reports and customer service compliance measurements, and shall provide a copy of such Index of Reports to the City annually, and upon written request.~~
2. ~~A Grantee shall make a copy of any reports or documents listed in the Index of Reports available to the City upon request.~~

~~E. Additional Reports and Assistance. Upon request of the City, a Grantee shall add additional reports to the Index which are reasonably necessary to the City's proper enforcement of this Chapter, Code or Franchise. The City shall require such reports only through passage of a formal resolution of the City. In addition, upon request, a Grantee shall cooperate and assist the City in interpreting and understanding any report required under this Chapter, Code or its Franchise, including through the provision of explanatory graphs and/or charts.~~

F. Service Contract and Subscriber Information.

1. A Grantee-Cable Franchisee shall have authority to promulgate such rules, regulations, terms, and conditions governing the conduct of its business as shall be reasonably necessary to enable the Grantee-Cable Franchisee to exercise its rights and perform its obligations under this Chapter and its Cable Franchise and to

assure uninterrupted Cable Service to all of its Subscribers; provided such rules, regulations, terms, and conditions shall not be in conflict with the provisions of this Code, federal, state and/or local law, or any applicable rules and regulations.

2. Upon request, a ~~Grantee~~ Cable Franchisee shall submit to City any Subscriber contract form that it utilizes. If no written contract exists, a ~~Grantee~~ Cable Franchisee shall file with the City a document completely and concisely stating the terms of the residential Subscriber contract offered, specifically including the length of the Subscriber contract. The length and terms of any Subscriber contract shall be available for public inspection during Normal Business Hours.

3.6 Financial Provisions, Remedies, Procedures and Due Process.

A. Annual Cable Franchise Fee.

1. As compensation for grant of a Cable Franchise and in consideration of permission to use the Rights-of-Way of the City for the construction, operation, maintenance and reconstruction of a Cable System, and to defray the costs of Cable Franchise obligations, every ~~Grantee~~ Cable Franchisee shall pay to the City on an annual basis throughout the term of its Cable Franchise, a sum totaling five percent (5%) of the ~~Grantee's~~ Cable Franchisee's Gross Revenues.
2. Further, every ~~Grantee~~ Cable Franchisee shall market any "bundled" services to fairly reflect an appropriate and reasonable division of services among the various services offered. ~~Whether or not a Grantee Revenues from the sale of such bundled services shall be apportioned for purposes of the Cable Franchise in such manner that an amount equal to the Cable Franchisee's usual and customary charge for Cable Service alone shall be included in "Gross Revenues;" provided, however, if a Cable Franchisee discounts the cost or otherwise receives reduced revenue from the sale of such bundled service, the amount attributable to "Gross Revenues" shall be reduced on a pro rata basis equal to the percentage difference between the costs for the bundled and unbundled service components. Whether or not a Cable Franchisee separates services on a Subscriber's bill, it will provide to the City the amounts upon which it will pay the Communications Franchise Fee and any other applicable taxes or fees based on the provision of Communications Service, and the amounts upon which it will pay the Cable Service Cable Franchise Fee. Should a Grantee~~

~~engage in billing practices that, in the determination of the City, do not fairly reflect an appropriate split of Communications Services and Cable Television Services the City will notify the Grantee in writing of its determination. The parties will meet and discuss in good faith whether the billing practices result in an unfair payment of fees to the City. If the parties do not agree on an appropriate method of determining which charges are subject to Communications Franchise Fees and which are subject to the Cable Franchise Fee, the parties may subject the dispute to arbitration, or may resort to other methods of dispute resolution, including litigation. Taxes or fees which are not paid on the appropriate division of the bundled bill, when ultimately paid, will be subject to all interest and penalties provided by the applicable portion of this Code.~~

3. Payments due City under this section shall be computed quarterly, for the preceding quarter, as of March 31, June 30, September 30, and December 31. Each quarterly payment shall be due and payable no later than forty five (45) days after the dates listed in the previous sentence. Each payment shall be accompanied by a brief report by the ~~Grantee Cable Franchisee~~ showing the basis for the computation and a "Cable Franchise Fee Worksheet," listing all of the sources of revenues attributable to the operation of the ~~Grantee's Cable Franchisee's System~~.
4. Should any additional monies be due to the City as a result of information contained in the annual financial report of a ~~Grantee Cable Franchisee~~ or by audit as permitted by this Chapter, the ~~Grantee Cable Franchisee~~ shall pay such additional monies to the City within sixty (60) days after receipt of notice of same from the City.
5. In the event that any of the quarterly Cable Franchise Fee payments are not timely made, a ~~Grantee Cable Franchisee~~ shall also pay the City interest thereon at the then-current prime rate. Said interest to be applied commencing with the forty-fifth (45th) day after the end of the quarter and continuing until all such overdue sums (including interest) are paid.
6. No acceptance of any payment shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the City may have for further sums payable under the provisions of this Chapter, Code or applicable Franchise. All amounts paid shall be subject to audit and re-computation by the City or its designee,

at any time upon reasonable notice and specification of the documents requested to be reviewed. City's right to audit, and the ~~Grantee's Cable Franchisee's~~ obligations to retain records related to the Cable Franchise Fee audit, shall expire five (5) years from the date on which each Cable Franchise Fee payment by the ~~Grantee Cable Franchisee~~ is due.

- B. **Security Fund.** Each ~~Grantee Cable Franchisee~~ may be required to maintain a security fund with the City to ensure compliance with this Chapter, Code and applicable Franchise, in an amount and in a manner as set forth in the ~~Grantee's Cable Franchisee's~~ Franchise.
- C. **Bonds, Indemnification, and Insurance.** Each ~~Grantee Cable Franchisee~~ shall maintain bonds and insurance with the City in amounts and in a manner as set forth in the ~~Grantee's Cable Franchisee's~~ Franchise. Each ~~Grantee Cable Franchisee~~ also shall be required to indemnify the City in a manner as set forth in Chapter 1 and in the ~~Grantee's Cable Franchisee's~~ Franchise.
- D. **Remedies and Enforcement Procedure.**
1. Whenever the City has reason to believe that a ~~Grantee Cable Franchisee~~ has violated any provision of this Code or its Franchise, including the customer service and telephone availability requirements, the City shall first notify the ~~Grantee Cable Franchisee~~ in writing of the violation and demand correction within a reasonable time, which shall not be less than thirty (30) days. If the ~~Grantee Cable Franchisee~~ fails to demonstrate to the reasonable satisfaction of the City that no violation exists, or if the ~~Grantee Cable Franchisee~~ fails to correct the violation within the time prescribed, or if the ~~Grantee Cable Franchisee~~ is unable to correct the violation and fails to commence corrective action within the time prescribed and to diligently remedy such violation thereafter, the ~~Grantee Cable Franchisee~~ shall then be given written notice of not less than thirty (30) days of a public hearing to be held before the City Council. Said notice shall indicate with reasonable specificity the violation alleged to have occurred. This procedure shall apply to all alleged Code or Cable Franchise violations, including those in which grounds for revocation are considered.
 2. At the public hearing, the City Council shall hear and consider all relevant evidence and thereafter render findings and a decision based upon the evidence.

3. In the event the City finds that the Grantee-Cable Franchisee has corrected the violation or promptly commenced correction of such violation after notice thereof from the City and is diligently proceeding to fully remedy the violation, or that no violation has occurred, the proceedings shall terminate and no penalty or other sanction shall be imposed.
4. In the event the City finds that a violation exists and that the Grantee-Cable Franchisee has not corrected the same in a satisfactory manner or did not promptly commence and diligently proceed to correct the violation, the City may impose penalties and/or liquidated damages from the Security Fund, as follows:
 - (i) For System construction schedule violations, including, but not limited to provisions relating to initial construction schedules and system upgrade construction schedule, \$500 per day of non-compliance;
 - (ii) For all other violations, \$250 per day per violation.

The City shall provide the Grantee-Cable Franchisee with written notice of its decision together with a written finding of fact explaining the basis for such a decision.

5. If the City elects to assess penalties or liquidated damages, then such election shall constitute the City's exclusive remedy for a period of sixty (60) days. Thereafter, if the Grantee-Cable Franchisee remains in non-compliance, the City may pursue any other available remedy, including Franchise revocation.
6. In the event that a Cable Franchise is cancelled or terminated by reason of the default of the Grantee-Cable Franchisee, the security fund deposited pursuant to the Cable Franchise shall remain in effect and available to the City until all pending claims or penalties are resolved or settled, after which point any remaining amounts in the security fund shall revert to the possession of the Grantee Cable Franchisee.
7. The rights reserved to the City with respect to the security fund are in addition to all other rights of City, whether reserved by this Code, applicable Cable Franchise, or authorized by law, and no action, proceeding, or exercise of a right with respect to such security fund shall affect any other right City may have.

8. The foregoing provisions shall not be deemed to preclude the City from obtaining any other available remedies for repeated violations, of the same general type, ~~whether remedied or not.~~

E. **Grounds for Revocation.** In addition to any rights in this Code or applicable Franchise, the City reserves the right to utilize the above described enforcement procedure to revoke a Franchise, and all rights and privileges pertaining thereto, in the event that any of the following occur, and the City and a ~~Grantee~~ Cable Franchisee are not able to mutually agree upon a cure or alternate remedy:

1. The ~~Grantee~~ Cable Franchisee substantially violates any material provision of this Code or its Franchise;
2. The ~~Grantee~~ Cable Franchisee practices an act of fraud or deceit upon the City; or
3. The ~~Grantee~~ Cable Franchisee becomes insolvent or is adjudged bankrupt.

F. **Right of Appeal.**

1. Upon the imposition of a penalty or revocation decision, a ~~Grantee~~ Cable Franchisee shall have a period of one hundred and twenty (120) days subsequent to the date of the formal adoption of the decision by the City Council within which to file an appeal with a court of competent jurisdiction.
2. During any such appeal period, the Cable Franchise shall remain in full force and effect.

3.7 **Foreclosure, Receivership and Abandonment.**

A. **Foreclosure.** Upon the foreclosure or other judicial sale of all or a part of the Cable System, or upon the termination of any lease covering all or part of the Cable System, a ~~Grantee~~ Cable Franchisee shall notify the City of such fact and such notification shall be treated as a notification that a change in control of the ~~Grantee~~ Cable Franchisee has taken place, and the provisions of this Code governing the consent to transfer or change in ownership shall apply without regard to how such transfer or change in ownership occurred.

B. **Receivership.** The City shall have the right to cancel a Cable Franchise one hundred twenty (120) days after the appointment of a receiver or trustee to take over and conduct the business of a ~~Grantee~~ Cable Franchisee, whether in receivership, reorganization, bankruptcy, or other

action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless:

1. Within one hundred twenty (120) days after its election or appointment, the receiver or trustee has fully complied with all the provisions of the Cable Franchise and remedied all defaults thereunder; and
2. Such receiver or trustee, within said one hundred twenty (120) days, has executed an agreement, duly approved by a court having jurisdiction, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Code and applicable Cable Franchise.

3.8 **Purchase Of of System.**

A. If a renewal or extension of a Cable Franchise is denied without further right of appeal, or a Cable Franchise is lawfully terminated, with all rights of appeal exhausted, the City may acquire ownership of the Cable System or effect a transfer of ownership of the Cable System to another Person, any such acquisition or transfer shall in accordance with and to the extent permitted by 47 U.S.C. § 547 as follows:

1. Upon revocation of a Cable Franchise, such valuation shall not include any sum attributable to the value of the Cable Franchise itself and plant and property shall be valued according to its book value at the time of revocation, or the Cable System's initial cost less depreciation and salvage whichever of the two is lower.
2. At the expiration of a Cable Franchise, such valuation shall be at fair market value, exclusive of the value attributed to the Cable Franchise itself.

3.9 **Sale Or or Transfer Of of Cable Franchise.**

A. A ~~Grantee~~ Cable Franchisee shall not sell, transfer, lease, assign, sublet, or dispose of, in whole or in part, an interest in or control of a Cable Franchise or Cable System without the prior consent of the City, which consent shall not be unreasonably denied or delayed and may be denied only upon a good faith finding by the City that the proposed transferee lacks the legal, technical, or financial qualifications to consummate the transaction and operate the Cable System so as to perform its obligations under the Cable Franchise. This ~~section~~ Section shall not apply to sales of property or equipment in the normal course of business. Consent from the City shall not be required for a transfer in trust, mortgage, or other

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instrument of hypothecation, in whole or in part, to secure an indebtedness, or for a pro forma transfer to a corporation, partnership, or other entity controlling, controlled by, or under common control with a Grantee-Cable Franchisee.

- B. The following events shall be deemed to be a sale, assignment, or other transfer of an interest in or control of a Cable Franchise or Cable System requiring compliance with this section: (i) the sale, assignment, or other transfer of all or a majority of a Grantee's-Cable Franchisee's assets in the City; (ii) the sale, assignment, or other transfer of capital stock or partnership, membership, or other equity interests in a Grantee-Cable Franchisee by one or more of its existing shareholders, partners, members, or other equity owners so as to create a new controlling interest in Grantee Cable Franchisee; (iii) the issuance of additional capital stock or partnership membership or other equity interest by a Grantee-Cable Franchisee so as to create a new controlling interest in a GranteeCable Franchisee; and (iv) a Grantee's-Cable Franchisee's agreement to transfer management or operation of the Grantee-Cable Franchisee or the System to an unaffiliated entity so as to create a new controlling interest in the Grantee-Cable Franchisee. The term "controlling interest" as used herein means majority equity ownership of a Grantee-Cable Franchisee.
- C. A transfer solely for security purposes such as the grant of a mortgage or security interest, including the pledge or grant of a mortgage or security interest to lenders of a Grantee's-Cable Franchisee's assets, including, but not limited to, the Cable Franchise, such as in a transaction commonly known as an "initial public offering" shall not be deemed to be a sale, assignment or other transfer of an interest in or control of a Cable Franchise or Cable System and thus shall not require compliance with this section.
- D. In the case of any sale or transfer of ownership of an interest in or control of a Cable Franchise or Cable System, the City shall have one hundred twenty (120) days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with FCC Regulations and the requirements of this Code. If the City fails to render a final decision on the request within one hundred twenty (120) days after receipt by the City of all required information, such request shall be deemed granted unless the requesting party and the City agree to an extension of the one hundred twenty (120) day period.
- E. The City reserves any legal right it has under applicable law to require a Grantee-Cable Franchisee to pay all costs and expenses incurred by the City in connection with the sale, assignment, or transfer of a Cable Franchise, including, but not limited to, the City's costs of reviewing the

qualifications of any proposed transferees. ~~Such reimbursement shall not be considered a Cable Franchise Fee.~~

3.10 **Rights Of Individuals Protected.**

- A. **Discriminatory Practices Prohibited.** A ~~Grantee Cable Franchisee~~ shall not deny Cable Service, deny access, or otherwise discriminate against Subscribers, programmers, or general citizens on the basis of income level, race, color, religion, national origin, sex, or age. Every ~~Grantee Cable Franchisee~~ shall strictly adhere to the equal employment opportunity requirements of state and federal law. Every ~~Grantee Cable Franchisee~~ shall comply at all times with all other applicable federal, State, and local laws, and all executive and administrative orders relating to non-discrimination.
- B. **Subscriber Privacy.** Every ~~Grantee Cable Franchisee~~ shall at all times comply with the federal subscriber privacy requirements codified at 47 U.S.C. § 551.

3.11 **Miscellaneous Provisions.**

- A. **Rate Regulation.** The City reserves the right to regulate rates for Basic Cable Service and any other services offered over a Cable System, to the extent permitted by federal or state law. A ~~Grantee Cable Franchisee~~ shall be subject to the rate regulation provisions provided for herein, and those of the Federal Communications Commission (FCC) at 47 C.F.R., Part 76.900, Subpart N. The City shall follow the rules relating to cable rate regulation promulgated by the FCC at 47 C.F.R., Part 76.900, Subpart N.
- B. **Rights Reserved to Grantor.** Upon either final non-appealable determination of non-renewal or revocation of a Cable Franchise, Grantor shall have discretion to permit a ~~Grantee Cable Franchisee~~ by mutual consent to continue to operate the Cable System for an extended period of time agreed upon by the parties. Any such operation of the System by a ~~Grantee Cable Franchisee~~ shall be in accordance with the terms and conditions of this ~~Ordinance or Code~~ and the Cable Franchise, and shall provide the regular Subscriber service and any and all of the services that may be provided at that time.

CHAPTER 4. RIGHTS-OF-WAY MANAGEMENT AND FACILITIES REQUIREMENTS

- 4.1 **Rights-of-Way Ordinance.** A ~~Provider Franchisee~~ shall be subject to and comply with the additional or supplementary terms and conditions of the "ROW Ordinance," as may be amended from time to time, which is incorporated herein by reference and such provisions and the provisions of this Code shall be deemed

a condition of any Franchise. The provisions of this Chapter 4 shall apply as provided herein to ~~Providers~~ Franchisees, and to the full extent permitted by law, additionally to all construction activities in public utility easements.

4.2 **Exclusion of Certain Locations/Facilities.** Prior to its installation of any Facilities in the Rights-of-Way and after it provides the City with its proposed plans for the Facilities, the City may in its discretion designate certain locations or facilities in the Rights-of-Way to be excluded from use by ~~Provider~~ Franchisee for its Facilities, including, but not limited to, ornamental or similar specially-designed street lights, or other facilities or locations which, in the reasonable judgment of the City Engineer do not have electrical service adequate or appropriate for the ~~Provider's~~ Franchisee's Facilities or cannot safely bear the weight or wind loading thereof, or any other facility or location that in the reasonable judgment of the City Engineer is incompatible with the proposed Facilities or would be rendered unsafe or unstable by the installation. The City Engineer may further exclude certain other facilities that have been designated or planned for other use or are not otherwise available for use by ~~Provider~~ Franchisee due to engineering, technological, proprietary, legal, or other limitations or restrictions as may be reasonably determined by the City Engineer. In the event such exclusions conflict with the reasonable requirements of the ~~Provider~~ Franchisee, the City will cooperate in good faith with ~~Provider~~ Franchisee to attempt to find suitable alternatives, if available, provided that the City shall not be required to incur financial cost nor require the City to acquire new locations for ~~Provider~~ Franchisee. All such determinations shall be in writing and appealable to the City Manager as provided in the ROW Ordinance.

4.3 **Location of Facilities Subject to Approval.** The location of all Facilities shall be subject to the reasonable review of the City Engineer. The location of pedestals, vaults, nodes or ground mounted Facilities, including backup power supplies, to the extent permitted pursuant to the City's ROW Ordinance, and other applicable permitting/zoning requirements shall be provided to the City Engineer for review at least fifteen days in advance of actual construction. The City shall work with the Franchisee to identify possible alternate locations for placement of such facilities. Where reasonable and appropriate and where adequate public Rights-of-Way exists, the Franchisee shall at its cost place above-ground Facilities underground in conjunction with City capital improvement projects and/or at specific locations requested by the City provided that such placement is practical, efficient, and technically and economically feasible. Unless specifically authorized herein or otherwise by the City, antennae or antennae structures having a height of forty (40) feet or greater located on the Rights-of-Way, or any antennae on other City owned or controlled property, shall not be authorized by a Franchise, but shall require a separate Lease or Use agreement with the City. Antennae shall be permitted pursuant to a Franchise only on existing structures requiring no substantial modification and subject to approval of the City Engineer, including as to location and design. City height limitations, applicable zoning

restrictions, and general city policies with regard to all users of the Rights-of-Way shall also be applicable to all Facilities. The City Engineer may establish such regulations or policies as may be deemed necessary or appropriate to effect this provision.

- 4.4 **Erection of Poles Prohibited.** Franchisee shall not erect, for any reason, any pole on or along any Rights-of-Way in an existing aerial utility system. Franchisee may obtain the lease of pole space and facilities from the existing utility pole owners. If additional poles in an existing aerial route are required, Franchisee may negotiate with the utility for the installation of the needed poles, provided, however, that Franchisee may not install its facilities on any such utility facility if the utility has not obtained all requisite authorizations from the City.

4.5 **Facilities Requirements; Planned Infrastructure.**

- A. Prior to constructing any new or additional conduit within the Rights-of-Way, Franchisee shall make a good faith effort to ascertain whether existing or planned conduit exists that the Franchisee could reasonably utilize to meet its needs. Provided, however, if during the term of this Franchise the City adopts a generally applicable ordinance requiring all users of the Rights-of-Way to provide mapping of reserve conduit that prior to constructing any new conduit Franchisee will be required to certify in writing to the City Engineer that it has made appropriate inquiry to all existing utilities and other entities possessing a right to occupy the Rights-of-Way as to the availability of existing or planned conduit that the Franchisee could reasonably utilize to meet its needs, and that no such conduit is available or planned within the near future at a reasonable cost.
- B. Upon a determination that no such conduit is available, Franchisee may install new conduit pursuant to the following requirements:
1. The Franchisee shall provide written notification of the proposed construction activity to all existing utilities, ~~Franchise holders~~ Franchisees, and other known service providers who shall have thirty (30) days from the receipt of such notification to indicate in writing to the City and the Franchisee as to whether they desire to jointly undertake the construction of such conduit or otherwise co-locate their facilities at such time. Any utility or Franchise holder electing to jointly construct or co-locate its facilities with that of Franchisee shall share in the pro-rata costs of such construction or co-location of facilities reasonably incurred by Franchisee and shall participate in the project on reasonably the same time schedule established by both the Franchisee and the City. The City Engineer will work with Franchisee in developing the process for these notification requirements.

- (i) When Franchisee installs any new conduit within a designated High Density Corridor, the Franchisee shall at the request of the City Engineer install sufficient additional conduit or other related facilities ("Excess Conduit") to meet the City's planned infrastructure needs for the City and other proposed users of the Rights-of-Way. Such Excess Conduit shall consist of one four-inch (4") duct, with four (4) pathways, or its equivalent in multiple smaller conduit, unless the City Engineer reasonably determines and demonstrates that there is a need for a greater or lesser amount of conduit at a particular location. The cost of the Excess Conduit may not be deducted from any Franchise Fees payable to the City, or otherwise be charged to the City. Upon completing installation and construction of any such Excess Conduit, Franchisee shall deliver to City a Certificate of Ownership for such excess conduit, free and clear of all claims, liens and encumbrances except for any security interest granted by Franchisee to its vendors or financial institutions for the construction of the System. The Excess Conduit shall be designed and installed in accordance with City specifications. The City may reserve a portion of such Excess Conduit for its own purposes, but shall make available any portion not so reserved to any and all subsequent franchisees (or others as determined by the City) for fair and reasonable compensation on a non-discriminatory basis which shall not be considered a Franchise Fee. Franchisee shall be entitled to recoupment of its documented costs of installation (based on the prorata costs of the conduit section utilized) from such specially allocated revenue paid to the City by another service provider for use or acquisition of the Excess Conduit. When sections of Franchisee's conduit is installed simultaneously with another franchisee, the cost of such sections of Excess Conduit shall also be cost-shared among each franchisee. For purposes of this Section, the term "High Density Corridor" means a specific section or portion of the Rights-of-Way reasonably identified by the City Engineer as having a projected need to accommodate the conduit requirements of multiple providers based upon proposed construction plans or other objective criteria, and shall initially be limited to those locations identified in Exhibit F appended hereto. Unless otherwise required for demonstrated good cause, such High Density Corridors shall be limited to arterial and collector streets. The City Engineer may establish additional procedures for effecting

these sections, including but not limited to procedures for providing notice to prospective users of such excess conduit, to determine the number of conduit required for any proposed location and administering the requirement of this section.

- (ii) The requirements herein shall be administered and applied on a competitively neutral and nondiscriminatory basis with the objective to maximize the available space in the Rights-of-Way and to minimize the total number of excavations and cost of total communications infrastructure installation. Franchisee may appeal any City Engineer designation of a High Density Corridor to the City Council.

- 4.6 **Use of Facilities by others; required terms.** If any ~~Provider-Franchisee~~ chooses to make its Facilities physically available for use by any other ~~Provider Franchisee~~ ~~Franchisee~~ it shall do so only under terms that are fair and reasonable, competitively neutral and nondiscriminatory, and which do not prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service under the circumstances. ~~Provider Franchisee~~ shall further comply with the facilities attachment requirements of federal law codified at § 47 U.S.C. 224.
- 4.7 **Removal and Relocation of Facilities.** Facilities shall be Removed or Relocated on request of the City at ~~Providers' Franchisees'~~ cost as may be more specifically provided in the ROW Ordinance.
- 4.8 **Provider Franchisee Responsible for Costs.** The ~~Provider-Franchisee~~ shall be responsible for all reasonable costs borne by the City that are directly associated with ~~Provider's Franchisee's~~ installation, maintenance, repair, operation, use, and replacement of its Facilities within the Rights-of-Way, that are not otherwise accounted for as part of the Permit fee established pursuant to the ROW Ordinance. All such costs shall be itemized and the City's books and records related to these costs shall be made available upon request to the ~~Provider.~~ ~~Provider Franchisee.~~ Franchisee shall be responsible for its own costs incurred removing or relocating its Facilities when required by the City due to City requirements relating to maintenance and use of the Rights-of-Way for City purposes.
- 4.9 **Insurance and Bonds.** During the term of any Franchise, the ~~Provider Franchisee~~ shall obtain and maintain at the ~~Provider's Franchisee's~~ sole expense, all insurance and bonds required by the ROW Ordinance or applicable Franchise. Nothing contained in this Code shall limit the ~~Provider's Franchisee's~~ liability to the City to the limits of insurance certified or carried.

CHAPTER 5. MISCELLANEOUS

- 5.1 **Administration of Franchise.** The City shall be responsible for the continued administration of this Code and any Franchises granted hereunder. The City may delegate this authority from time to time in any manner consistent with applicable law, provided, however, that the City shall not delegate enforcement authority.
- 5.2 **Appeals.** Unless otherwise provided herein or by and generally applicable Administrative Appeal process, a ~~Provider~~Franchisee may appeal any decision of the City pursuant to this Code to the governing body of City within ~~fifteen (15)~~ ten (10) days of such decision where, upon written request of the ~~Provider~~ Franchisee specifying this provision and including the details of the alleged claim, an evidentiary hearing shall be held on such appeal.
- 5.3 **Non-Enforcement by the City.** A ~~Provider~~Franchisee shall not be relieved of its obligation to comply with any of the provisions of this Code or its applicable Franchise by reason of any failure of the City to enforce prompt compliance.
- 5.4 **Penalties.** Any Person violating any provision of this Code shall be subject to a fine of \$500 per day per violation. The payment of such fine notwithstanding, all such violators shall be subject to all other applicable provisions of this Code to the fullest extent allowed by law, including, but not limited to, the payment of a Communications Franchise Fee or Cable Franchise Fee.
- 5.5 **Publication of Notices.** All public notices or ordinances required to be published by law shall be published in the official newspaper of the City. A ~~Grantee~~ Franchisee shall be responsible for all costs of publication that may be required with respect to its Franchise or any amendments thereto.
- 5.6 **Severability.** If any material Section of this Code or of any Franchise granted pursuant to it is held by a governmental authority of competent jurisdiction, to be invalid or unlawful as conflicting with applicable laws now or hereafter in effect, or is held by a court or competent governmental authority to be modified in any way in order to conform to the requirements of any such applicable laws, such provision shall be considered a separate, distinct, and independent part of the Code, Franchise, and, to the extent possible, such holding shall not affect the validity and enforceability of all other provisions therein.

February 15, 2001

The Hon. Karin Brownlee
Via fax: 785-368-7117

Dear Sen. Brownlee:

I want to take a moment of your time to share my personal feelings about SB 306. I am the city attorney for the City of Westwood, and have had considerable experience in dealing with franchises in recent years. I should emphasize that I am writing this as a concerned citizen, and not in any representative capacity, although please understand that my professional experience has been most informative. Preliminarily, this bill appears lacking in any understanding of construction safety law and municipal law, and contains many vague and even contradictory provisions. It seems to bear the hallmarks of a drafter rather ignorant of the subject matter of local government and property law. While the problems created by this bill for all parties are too numerous to detail here, suffice it to say it is a disaster that will erode our tradition of home rule, limit the police power of cities to promote health and safety, and create cost, danger and disruption for our citizens.

Cities have historically been responsible for setting safety and other regulations governing the rights of way. A primary function of cities is to provide safe and responsible use of these finite public resources, and to assure safe passage on our streets and sidewalks. The current law, K.S.A. 12-2001 *et seq.*, provides that private enterprises may use these rights-of-way, which are for the benefit of all of the public, for private gain. They must, however, adhere to certain municipal regulations and may have to compensate the citizenry (subject to certain legal limits) for this use.

SB 306 wholly disrupts that historical balance of interests in favor of untrammelled privilege by the telecommunications industry to do as it pleases with public property, and pay virtually nothing for it. Please note that many of the fees and charges eliminated by this bill are either approved by federal law, or traditionally apply equally to all citizens. For example, if a person wants to undertake a construction project, he or she has to pay for a building permit so that the costs of inspection and the like are not entirely borne by the taxpayers. This bill will shift all these costs to the taxpaying public, and will eliminate most meaningful compensation for the private use of the public rights of way.

I understand that SB 306 is being touted as a bill to ensure fairness and equal treatment between competing interests. That is utter nonsense. The federal telecommunications act already mandates that cities treat providers in an equal fashion, and prohibits any barriers to competition. I hope you share my revulsion toward unnecessary and redundant legislation. We do not need any more laws on the books since equity and competitive neutrality are already guaranteed by federal law. If multi-billion dollar corporations really had a legitimate complaint, they would already be beating down the doors of the federal courthouse.

The most sinister aspect of this legislation is that it gives lip service to, but ultimately eviscerates, the police power authority of local government to assure that safe construction practices are employed and to provide proper stewardship of public property. Currently, for example, Westwood, like its neighbors, has codes to make sure construction is done properly and traffic disruption is minimized. We want to be certain, for example, that when a street or sidewalk is torn up, it is properly repaired and does not cave in. We also have a heavily-built environment, and we have to keep track of "who is where" to make sure one provider does not tear up someone else's property, most frighteningly including high pressure gas mains.

This bill begins by narrowing the home rule powers of cities in Sec. 7, then says a city "may not impose regulations on telecommunications providers of local exchange service that are not authorized by this act." See Sec. 7(c). This seems to limit the health and safety police powers of cities. Where, for example, is the provision in this that says how to fill in a hole in the asphalt? Since safety codes are not specifically "authorized by this act" they are potentially eliminated. Cities have been enacting building codes for years, and this will arguably repeal those codes for a very dangerous activity. Westwood has had a real problem with safe construction practices, and I recall that a child died in Kansas City, Missouri a few years ago because someone thought covering a construction trench in a right of way (which would be required by our code) was not important.

My concern is based on history, not idle paranoia. Several years ago, under a then-existing franchise, Westwood was having a problem with a telecommunications company failing to adhere to proper construction practices. I talked to an attorney for that company to try to work out our differences, and he told me in no uncertain terms that his position was that Westwood's sole authority was its then-existing franchise, and the City had no other police power authority. He even said we could not so much as write their drivers a speeding ticket if they sped through the City, let alone enforce safe construction practices, because the franchise superseded all other legal authority. Although we were able to reach a satisfactory resolution at that time, several years later, when I insisted on inserting a clause in their franchise that said the City was reserving all its police powers, that company's representatives flatly denied that my previous conversation had ever taken place, and they baldly asserted that it had no such lawyer. Since the Westwood Public Works Director recalls the incident (and I recall that I went to college with the attorney's son) I can assure you that the "error" was not on my part. I am confident that if a provider were to take this aggressive approach with respect to SB 306, cities would have no construction safety powers.

The policing mechanisms for these codes also include construction permits, such as you or I would have to get if we were to build a room addition. Westwood charges a small fee to pay for plan review and inspection for such permits, as does, I suspect, nearly every other city in the country. Please note that Sec. 4(f) states that telecommunications providers who do not provide local exchange service do not have to pay any "construction or permit fee" at all. Thus the taxpayers will have to pick up the tab for the AT&T's of the world. Sec. 7(a)(1) states that if the City gets a \$1.81 per line charge for local providers, it cannot charge inspection fees to them either. Just in case this bill might have left any authority to cities to help defray the costs of inspection, Sec. 7(b) exempts whatever might remain of the industry from construction permit fees. Thus, we would have to pay a fee to help cover the costs of inspections on our room additions, but the multi-national entity that just carved a thirty-foot crevice on public property would not.

Although the statute gives lip service to preserving the rights of cities to assure proper construction standards, the version of the bill I downloaded a few days ago gives "companies created for the purpose of constructing and maintaining telecommunications systems" free rein to do any construction so long as it does not "*permanently* incommode the public use of such rights-of-way" [emphasis added]. See Sec.10 (a)(1). If you think for a minute that that will not be interpreted as carte blanche by the providers, I would respectfully suggest you are being naive. When your street is torn up for a year or two, you and your neighbors may not take much comfort in the fact that it is not, after all, *permanent*.

Senator, this is serious. I will not bore you with my life story on this subject, but let me give you a brief sample of my personal experience with the brave new world of telecommunications construction. I have participated in meetings with John Sullivan, Westwood's Public Works Director, when we had to stop a company from planning to drill through a high pressure gas main and a pedestrian tunnel. Ironically, this was the same company that hit a gas line, a water main, and tore up approximately 450 feet of sewer line in other cities. Should the people of Westwood bear all the costs of keeping these "companies created for the purpose of constructing and maintaining telecommunications systems" from killing us? Alternatively, will we even have any authority to stop such lunacy? At best this bill casts the safety authority of cities in doubt.

Also, a telecommunications company tore up the sidewalk across from the service station my wife and I go to, and simply left it demolished for about 9 months. Of course Sec. 10 only prohibits permanent problems, so this insult to our citizens would be perfectly legal under SB 306, because this did not *permanently* cause any problems. Please understand that the part of our yards that may constitute a right-of-way may lawfully be converted to an open trench for months if this bill passes. Please ask the telecommunications representatives who does put time limits on street construction under this bill, and what those limits will be.

Indeed, I have had two conferences in my law practice this week where people erupted with annoyance at the cavalier way telecommunications companies have torn up their city streets.

I can assure you Jane and Joe Citizen do not want less oversight of these activities, and would be furious at the thought of paying to re-pave the streets we are literally giving away by this bill.

Further, the continued tearing-up of streets greatly accelerates the deterioration of the paving, so this passes a huge hidden cost directly to the taxpayers. I recognize that some of that is a cost of being a city, but to say that someone can tear up streets, use public property, rely on city officials to save their neck, and not pay a dime is, to say the least, not a very good idea.

I should mention that I do not personally subscribe to either the MARC philosophy of regulation or the telecommunications philosophy of laissez faire, and there is room for honest debate between the various interests involved with telecommunications short of a legislative revolution. However, when I get a call, as I did this morning from Mr. Sullivan, about telecommunications conduits being placed directly on top of gas mains, I am confident that the answer is not to lessen the role of local government.

In short, I urge you to reject SB 306 resoundingly. I am sorry that I will be unable to attend the testimony to be given, but I would be happy to discuss this with you and answer any questions you may have on this subject. I appreciate all the hard work that goes into legislative service, and wish you and the Committee all the best.

Very truly yours,

James R. Orr

JRO/sg



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March 13, 2001

To: Members of the Senate Committee on Commerce
From: Rob Hodges
Re: Response to Request for More Information

During the March 12, 2001, hearing on SB 306, Senator Barone requested more information concerning right-of-way and franchise requirements being imposed by some cities that will inhibit competition and the rollout of advanced services. This memorandum is in response to that request for information.

The most complete listing of the industry's concerns regarding what has been imposed in some places, and is being contemplated in many others, is contained in a letter that was sent to the Mid-America Regional Council (MARC) on August 8, 2000, regarding the Kansas City Regional Telecommunications Consortium's proposed model ordinance. In that letter, the industry addressed, item-by-item, the provisions that raised our concerns. It should be noted that the industry's input did not result in any substantive changes to the proposed ordinance.

I have excerpted on the following pages the pertinent portions of that letter to MARC. A complete copy of the MARC model ordinance, to which we refer in the excerpts, has been provided to the committee secretary. That model ordinance is some 57 pages in length and I did not believe it was necessary to reproduce a copy for each member of the Senate Commerce Committee. If more copies are necessary, we will provide them.

We have also provided to the committee secretary a copy of the Wichita ordinance that was adopted in February and the proposed ordinance under consideration in Overland Park. Again, more copies of those documents are available, as well as copies of ordinances under consideration by other municipalities.

Using portions of the August 8, 2000, letter not only provides the members of the Senate Commerce Committee with a complete listing of the industry's concerns, it also illustrates how long ago we identified our concerns to municipalities. Quite obviously, many cities were made aware of the issues months in advance of the introduction of SB 306.

The letter excerpted in the attachment was part of a series of efforts that the industry engaged in to register concern with the MARC ordinance. Other representatives of the industry and I also attended several meetings – at every opportunity provided in the MARC process – to reinforce our concerns. In addition, industry representatives have appeared at public hearings in Wichita, Overland Park and other cities and have participated in many other meetings with city officials regarding proposed ordinances that adopted the MARC approach. Our comments seeking modification of the MARC model were largely ignored. Likewise, efforts with those cities which have been considering MARC-like ordinances have resulted in no modifications of consequence.

I hope this memorandum, the attachment, and the documents we have provided to the committee secretary satisfies the request for more information. If there is anything else we can do to assist the committee in making an informed decision, please let me know.

Senate Commerce Committee
March 15, 2001
Attachment 3-1

Excerpts from August 8, 2000, KTIA letter to MARC

[O]ur general concerns can be summarized in the following five key points. We consider these to be essential points of agreement if our mutual efforts on this issue are to be productive.

- Gross receipts and other general franchise fee proposals should be separated from the right-of-way issue. This proposal should focus on management of and access to the right-of-way and the recovery of actual, direct costs related to that effort.
- All permit, application and construction fees assessed to parties seeking access to the right-of-way should be set to recover only the actual, direct cost of managing the right-of-way as telecommunications providers are authorized by statute to place their poles, piers, abutments, wires and other fixtures in the right-of-way. K.S.A. § 17-1901.
- Under no circumstance should parties using the right-of-way be assessed ongoing rental payments or a general franchise fee. Any fee collected by a city should only reflect the city's cost to manage the right-of-way, and only be assessed when parties are excavating in the right-of-way.
- Provisions which would require telecommunications providers to install excess conduit or remove underground facilities are clear barriers to entry for new competitors and create an undue burden on incumbent companies. The provisions are contrary to the federal Telecommunications Act of 1996.
- This ROW agreement should be developed in tandem with other proposed ordinances and application forms, if any are planned or contemplated. The industry, and municipal governments, needs to view the entire process to adequately address the issue.

Our section-by-section comments follow:

§ 1.2 Authority. We recommend the title be changed to “Reservations of Rights” and that the following statement be added at the end of the section. “Neither party waives its right to seek judicial interpretation of this instrument or the right or duties hereunder in the event a dispute should arise between the parties. Further, neither party by entering into this agreement shall be prejudiced in, or estopped from, seeking any order from a court, state or federal agency of competent jurisdiction regarding the subject matter of this agreement, or any provision thereof, nor by entering into this agreement shall either party have waived any rights it has, had, or may have had under applicable law.”

§ 1.3.G. Communications Service. The definition as proposed is overly broad and includes “the transmission via Facilities, in whole or in part, of any writing, signs, signals, pictures, sounds or other forms of intelligence through wire, wireless or other means, including but not limited to, any “telecommunications service”, “enhanced service”, “information service”, or “internet service”, as such terms are defined now or may in the future be defined under federal law...”. The definition of “Communications Service” for purposes of permitting the use of public right of

way for the provision of telecommunications services and for determining fees for the use of the public right-of-way, cannot include wireless transmission services, enhanced information services, or the transmission of Internet services. Wireless transmission service makes no use of the public right of way and therefore places no additional burden on the public right-of-way. At most, wireless transmission may require a tower site on public right of way which, under most circumstances, approval would be granted under a fair market lease with the city, and not through a franchise agreement. Further, requiring wireless to obtain a franchise to provide service in the city would violate the OBRA of 1993 which provides that states and municipalities cannot regulate wireless market entry into any particular state or municipality and a franchise cannot be required to provide service in a particular state or municipality. In addition, the inclusion of wireless transmission service in the definition of "Communications service" is contradictory to Section 2.8 of the proposed Agreement which states, "wired access point antennae/towers located on the Rights-of-Way or other City owned or controlled property shall not be authorized by this Franchise, but shall require a separate Lease or Use agreement with the City." In addition, Internet service also places no additional burden on the right of way and should not be included in the definition of Communications service as it is a separate type of service different from other telecommunications services. Therefore, "wireless or other means" and "Internet service" in the first sentence of section 1.3.G. must be deleted and "or fiber" should be inserted after "wire".

§ 1.3.L. Gross Receipts. Under Kansas law, telecommunication providers have a right to place poles, piers, abutments, wires and other fixtures in the right-of-way. While the cities have a right to adequate compensation for granting permission to construct and operate telephone lines in a right of way, which may consist of a percentage of the gross receipts derived in connection thereto from recipients of such service within the city boundaries, the collection of gross receipts should be separated from this proposal. However, to expand the scope of the definition of gross receipts to include services that clearly originate or terminate outside city boundaries, or services offered through affiliated companies, exceeds the jurisdiction of the cities and should be deleted. Further, any fees collected by a city must be assessed in a competitively neutral and non-discriminatory manner.

§ 1.3.O. Reseller Service Provider. Reseller Service Providers do not physically occupy or conduct any physical activities within and, hence, do not "use" the public right-of-way. While the City may have a legitimate interest in regulating its rights-of-way, that interest is not implicated by a Reseller Service Provider's activities. That an end-user customer may cause electromagnetic radiation to travel through a third-party's network does not constitute a Reseller Service Provider's "use" of right-of-way in which the third-party's network may be located. *AT&T Communications of the Southwest v. City of Austin, Texas*, 40 F.Supp.2nd 852, 855-6. Accordingly, Reseller Service Providers should not be subject to the proposed Agreement.

§ 1.3.P. Rights-of-Way. The last sentence of this provision must be deleted as City right-of-way should include any property owned in fee by the City, or property owned or leased by the City.

1.3.R. System. For the reasons discussed in Section 1.3.G. above, any reference to wireless transmission service, "towers", "wave guides", and "antennae" must be deleted from this definition. The words "to or from" in the last line should be changed to "between or among" to clarify that only telecommunications services being provided to customers within the municipality are being referenced.

§ 1.3.S. Telecommunications and Cable Ordinances. This definition should be deleted. Companies cannot agree to abide by ordinances not yet developed.

§ 2.1. Unlawful to Operate Without a Franchise. The reference to a franchise should be deleted from this section. The words, “operate or maintain a Communications System or to provide Communications Services” should be deleted and inserted in its place, “and/or occupy the public right-of- way”. The City can only regulate the management and use of the public rights-of-way by a Franchisee that has facilities in the public right-of-way. A telecommunications provider that is providing services that do not make use of the public right-of-way should not be required to obtain a ROW agreement.

§ 2.7. Exclusion of Certain Locations/Facilities. The City has the right to exclude certain locations from use by the Franchisee. A sentence should be added to the end of this provision as follows; “Notwithstanding the above, Franchisee shall be permitted the use of the public right-of-way unless there is insufficient capacity or such use would be detrimental to the public welfare and safety.” KTIA would suggest that any exclusion by the City be in writing, provide the reason for the exclusion and include a process for the telecommunications providers to appeal such exclusion with a ruling to be made by the city on the appeal within a reasonable time period not to exceed thirty days. The city shall work with the telecommunications providers to determine an economically feasible alternative in the public rights-of-way.

§ 2.8 Location, Type and Design of Facilities Subject to Approval. KTIA is extremely concerned with the City Engineer having broad authority to approve how the industry provides service. We believe this is beyond the scope of managing the public right-of-way. For example, the requirement that all facilities are subject to height limitations or other applicable zoning restrictions is of extreme concern. Additionally, the application of this provision requiring new installations be underground could have discriminatory results. This requirement could result in a barrier to entry into the City by new entrants who will have a greater economic burden if they are required to construct underground as underground construction is substantially more costly than above-ground construction. Those telecommunications providers who are already in the City and were not required to construct underground have gained an unfair economic advantage. Therefore, this section must be revised to clarify that the decision to approve above-ground installations must be applied in a non-discriminatory manner, and if other telecommunications provider’s have facilities above ground and there is capacity available, above-ground installation should be permitted until such time as all telecommunications providers’ are required to relocate underground. In addition, it must be clarified that the placement of any tower or antenna on city right-of-way that is over 40 feet tall will not require a franchise.

§ 2.9 Additional Facilities Requirements; Planned Infrastructure. This section must be deleted. A City has the authority to manage and administer the use of the public right-of-way. It does not have the authority to require a Franchisee to install additional conduit for the needs of the City and other proposed users of the Rights-of-Way. It is unreasonable to require a Franchisee to provide conduit to the City where the city is permitted to allow the Franchisee’s competitors use of the conduit. In general, in-kind services are discriminatory in nature. As a practical concern, municipalities may well consider whether they wish to assume legal responsibilities for determining "competitively neutral" terms when the

telecommunications industry as a whole has been unable to do so without ongoing regulatory disputes and litigation.

§ 2.10 Rights-of-Way Ordinance. This section requires the Franchisee to agree to comply with the additional or supplementary terms and conditions of the "ROW Ordinance" which is incorporated by reference. Any ROW Ordinance must be reviewed before companies can agree to comply with it.

§ 2.11. Permit Requirements. This section must be clarified that a permit is required only for excavation in the public right-of-way and that a permit can only be denied if there is a lack of capacity or if such use would be detrimental to the public welfare or safety.

§ 2.11.B Bond Requirements. KTIA would ask the Consortium to provide various methods for the industry to meet any bonding requirements, including providing financial statements to demonstrate the net worth of the company in relation to the facilities in question or other evidence of self insurance. In lieu of a bond, Franchisee may provide an acceptable substitute acceptable to the City Engineer. Any bonding requirements must be determined in a non-discriminatory manner.

§ 2.11.C. Plan Requirements. This requirement for a telecommunications provider to obtain facility information of all other users of the right-of-way and place it in a digital format for the City is unreasonable and could be considered as a barrier to entry. Additionally, KTIA has serious security and competitive concerns about detail data on the public network being readily available. The city is unable to protect this proprietary information from public disclosure. Secondly, the security of the public network and confidentiality of information could be compromised if this data were obtained by terrorists, hackers or others bent on illegal activity. Thirdly, a competitive advantage could be obtained by being able to more thoroughly and easily analyze the vulnerability of competitors and how they serve targeted customers.

§ 2.12. Franchisee Responsible for Costs. The first two sentences of this section should be deleted as all appropriate costs set forth in the provision should be included in the permit fees charged to the Franchisee.

§ 2.13. Franchisee Subject to Pending Ordinances. This section must be deleted in its entirety. It is unreasonable to require a Franchisee to accept the terms and conditions of Ordinances it has not had an opportunity to review, comment on, or negotiate.

§ 3. Term/Termination. The proposed term of the Agreement is 5 years. This term is too short. A 20-year term or a 10-year term with a 10-year option to renew, where the Franchisee may terminate with 12 months notice would be acceptable.

§ 4.1 Application Fees. This franchise shall only be issued after submission of an application and the payment of a nonrefundable Application Fee as prescribed by the City. KTIA objects to any Application Fee unless it has a direct relationship to the City's costs of processing the application. Additionally, the extensive information required in the MARC model application is unnecessarily burdensome and unwarranted.

§ 4.2. Franchise Fees. While KTIA acknowledges the assessment of franchise fees is acceptable in Kansas as per Kansas Statute, KTIA disagrees with the inclusion of revenues from affiliated companies, linear foot fees, and services that are not wholly local in nature.

§ 4.3 Bundled Services. Bundled services are not relevant to management of the public right-of-way and should not be addressed in this agreement.

§ 4.11 Duty to Notify City of Resellers. This section must be deleted. Incumbent local exchange companies (ILEC) have no alternative but to allow other competitive telecommunications providers access to its facilities for resell purposes. It is unreasonable for the Consortium to demand the ILEC to be the network police for the City and incur an additional cost to report resellers to the City. Furthermore, Resellers of Communications services should not be subject to the provisions of this Agreement, as they place no additional burden on the public right of way as discussed in §1.3.O. above.

§ 4.12. Sale or Lease of Facilities. This section must be deleted or revised to permit the assignment of the ROW agreement to affiliates or entities under common control. The city cannot limit the assignability of facilities. Companies must have the ability to assign the agreement to their affiliates and entities controlled by, controlling or under common control with the Franchisee. Therefore, this section should be revised to read, "Franchisee may assign this ROW agreement to its affiliates and/or successors, or to an entity controlling, controlled by, or under common control with Franchisee, without the City's consent."

§ 5.2. Open Video Service. This section permits the City, at its option, to negotiate with the Franchisee to take capacity instead of the Use Fees. In-kind fees of any nature are objectionable to KTIA as they can only have discriminatory results.

§ 6. Transfer of Ownership. KTIA cannot agree to consent of the city being required prior to the sale, transfer, lease, assignment, sublet or disposal in whole or part, but, as a courtesy to the City, will agree to notify the City of any transfer of ownership or name change.

§ 7.1. Compliance with Laws. The City, as well as the Franchisee, must comply with all applicable federal, state and local laws. Therefore, "and City," should be inserted after "Franchisee" in the second line.

§ 7.1. Enforcement; Attorney's Fees. Attorney's fees should be reasonable and reciprocal.

§ 7.5 Tree Protection. KTIA would suggest adding at the beginning of this section the phrase, "Unless otherwise approved by the City". This change will provide the city latitude for an exception when removal of a tree may be in the best interest of providing telecommunications service to its citizens. In addition, "which will not be unreasonably withheld or delayed" should be inserted at the end of the second sentence.

§ 7.6. Forfeiture of Permit and Privilege. "Company" should be changed to "Franchisee". KTIA requests a 30-day cure period along with extension of the initial 30-day cure period if corrective action has begun. KTIA would also request a 30-day extension be granted after the city council has determined to terminate the agreement.

§ 7.7. Removal of Facilities. This section should be deleted. KTIA recommends this change to reduce disruptions to other utilities, the public and the surrounding public right-of-way.

§ 7.8 Relocation of Facilities. KTIA believes that the telecommunications providers should only have to incur the costs of relocating its facilities for street widening or straightening, or when relocation is deemed essential for the public's health, safety or welfare. KTIA does not disagree that a city may direct the telecommunications provider to relocate its facilities at other times within reason, but the Consortium should not expect the telecommunications provider to incur such relocation costs, especially when it is for the benefit of another utility or a potential competitor. The city should be required to use its best efforts to avoid any such relocations, and to provide the Franchisee with reasonable advance notice of the need for a relocation and provide a reasonable alternative in the public right-of-way acceptable to the Franchisee. KTIA would also suggest that for temporary raising, lowering or relocating of facilities, the Franchisee be provided at least ten (10) business days prior notice of such a requirement.

§ 7.9 No Cause of Action Against the City. This section must be revised and clarified to insure that the City is responsible for its own negligence and intentional acts. Therefore, "unless such loss, cost, expense, or damage is caused by the material misrepresentation or negligent or intentional acts of the City." should be inserted after "granted" in the fifth line and the remainder of the paragraph should be deleted as it is unclear and ambiguous.

§ 8. Public Inspection of Records. The last sentence of this section should be deleted. Additionally, the Franchisee must be promptly notified by the city of a request for disclosure under the Open Records Act and shall have the right to seek protective orders to prevent such disclosure.

§ 9. Indemnification. The industry needs a fairer indemnification provision. As written, this provision could create a barrier to entry for new entrants into the telecommunications market.

§ 10. Insurance. Companies we need to know the amounts of any insurance required and must be allowed to meet these requirements as determined by the Franchisee, including self-insurance. The Agreement does not set forth any such amounts but refers to the ROW Ordinance. We reserve the right to object and comment on the insurance required once we have had an opportunity to review the ROW Ordinance.

From: "Rob Hodges" <rhodges@kstelecom.com>
To: "Senator Karen Brownlee (E-mail)" <brownlee@ink.org>, "Senator Jay Emler (E-mail)" <emler@senate.state.ks.us>
Date: 3/12/01 2:49PM
Subject: Regarding indemnity questions

Senators:

During this morning's hearing, a question was raised about the language in SB 306 dealing with indemnity. The question has been raised before and was addressed in a document that the KCC staff made available during one of the meetings of the subcommittee. I am attaching a copy of the document to this message for your quick reference.

Our industry task force conducted a conference call this afternoon and we are working to respond to the request from Senator Barone about what some cities are asking for in their ordinances. Also, we are working on amendatory language that would address your questions about: 1) requiring construction permits to enter the ROW and 2) cities being required to process permit applications in something longer than the 15 days called for in the balloon. We believe 30 days would provide more than enough time for permit processing and we would hesitate to go to either 45 days or 60 days because of the impact that a longer delay (and inherent disclosure to competitors) could have on the roll-out plans of some companies.

I will furnish the products of our task force's efforts very soon.

rob

CC: "Lea Gerard (E-mail)" <LeaG@senate.state.ks.us>, "Bob Nugent (E-mail)" <bobn@rs01.wpo.state.ks.us>, "April J Rodewald (E-mail)" <ar2321@ksmail.sbc.com>, "Bruce A Ney (E-mail)" <bn7429@ksmail.sbc.com>, "Chris Carroll (E-mail)" <cc3088@sbc.com>, "Dave Ziegler (E-mail)" <dlziegl@qwest.com>, "Debbie Vignatelli (E-mail)" <dv3925@ksmail.sbc.com>, "Drew Fleming (E-mail)" <dfleming@everestgt.com>, "Ed Simms (E-mail)" <CS0326@ksmail.sbc.com>, "Gary Manderfeld (E-mail)" <gary.manderfeld@mail.sprint.com>, "Gary Reber (E-mail)" <Gary.Reber@alltel.com>, "James R Friend (E-mail)" <jrfriend@att.com>, "Jeanne Calkins (E-mail)" <jeanne.calkins@mail.sprint.com>, "Jim Campbell (E-mail)" <campbej@qwest.com>, "Jim Gartner (E-mail)" <jg4062@ksmail.sbc.com>, "Judy Gadd (E-mail)" <judith.a.gadd@mail.sprint.com>, "Mark P Johnson (E-mail)" <mpj@sonnenschein.com>, "Michael C Moffet (E-mail)" <mm1816@ksmail.sbc.com>, "Michael R Murray (E-mail)" <michael.r.murray@mail.sprint.com>, "Michelle O'Neal (E-mail)" <mo4282@txmail.sbc.com>, "Mike Reece (E-mail)" <mreece@worldnet.att.net>, "Nelson Krueger (E-mail)" <nkrueger@sunflower.com>, "Rachel Reiber (E-mail)" <rreiber@utilicorp.com>, "Richard Lawson (E-mail)" <richard.lawson@mail.sprint.com>, "Rob Hodges (E-mail)" <rhodges@kstelecom.com>, "Sandy Braden (E-mail)" <sbraden@gbbaks.com>

Senate Commerce Committee
March 15, 2001
Attachment 4-1

SENATE BILL No. 306

By Committee on Commerce

2-9

9 AN ACT concerning telecommunications; relating to the provision of lo-
10 cal exchange telephone service; amending K.S.A. 12-2001, 17-1901,
11 17-1902 and 17-1906 and repealing the existing sections.
12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 New Section 1 ~~(a c)~~ It is the public policy of this state to:

[insert new subsections (a) and (b) and re-letter the remaining sections – text of new subsections is attached]

15 (1) Encourage competition in the provision of telecommunications
16 services;

17 (2) reduce the barriers to entry for providers of telecommunications
18 services so that the number and types of services offered by providers
19 continue to increase through competition;

similarly situated [insert]

20 (3) ensure that ~~providers of telecommunications services do not ob-~~
21 ~~tain a competitive advantage or disadvantage in providing local exchange~~
22 ~~service within cities; and~~

23 (4) fairly reduce the uncertainty and litigation concerning franchise
24 fees.

25 ~~(b c)~~ It is also the policy of this state that municipalities receive from
26 telecommunications providers fair and reasonable compensation for the
27 right to construct and operate ~~telegraph and telephone lines~~ in the pro-
28 visioning of local exchange telephone service.

telecommunications facilities [insert]

29 ~~(e d)~~ The purpose of this act is to establish a uniform method for com-
30 pensating municipalities for the rights granted herein that:

31 (1) Is administratively simple for municipalities and telecommuni-
32 cations providers;

33 (2) is consistent with state and federal law;

34 (3) is competitively neutral; and

35 (4) is nondiscriminatory.

36 New Sec. 2. (a) “Access line” shall mean and be limited to retail
37 billed and collected residential lines; business lines; ISDN lines; PBX
38 trunks; simulated exchange access lines provided by a central office based
39 switching arrangement where all stations served by such simulated
40 exchange access lines are used by a single customer of the provider of
41 such arrangement. “Access line” may not be construed to include (1)
42 interoffice transport or other transmission media that do not terminate
43 at an end-use customer’s premises, or (2) to permit duplicate or multiple

[on previous page, insert new subsections (a) and (b) in New Section 1 of SB 306]

(a) The Kansas legislature hereby finds, determines, and declares that in 1996, the Kansas legislature and the congress of the United States enacted statutes to promote competition and reduce regulation in order to secure lower prices and higher quality services for telecommunication consumers and to encourage the rapid deployment of new telecommunications technologies. Such goals are essential to the economic and social well being of the citizens of Kansas and can be accomplished only if telecommunications providers are allowed to develop ubiquitous, seamless, statewide telecommunications network. Because competition has now developed in the telecommunications industry in the state of Kansas, it is no longer appropriate to treat telecommunications providers in the same manner as monopoly providers of other utility services. Therefore, to require telecommunications providers to seek authority from every city or other political subdivision within the state to conduct business pursuant to K.S.A. 12-2001 is unreasonable, impracticable and unduly burdensome. In addition, the legislature further finds and declares that since the public rights-of-way are held in trust for the use of the public, their use by telecommunications companies is consistent with such policies and appropriate for the public good.

(b) A telecommunications provider who has been issued a certificate of convenience and necessity, certificate of operating authority or service provider certificate of operating authority by the state corporation commission pursuant to Chapter 66 of the Kansas Statutes Annotated to offer local exchange service within the state requires no additional authorization or franchise by any city or other political subdivision of the state to conduct business within a given geographic area. No such city or other political subdivision has jurisdiction to regulate telecommunications providers based upon the content, nature or type of telecommunications service or signal they provide.

5.2

53

1 assessment of access line rates on the provision of a single service or on
2 the multiple communications paths derived from a billed and collected
3 access line. Further access line shall not include the following: Wireless
4 telecommunications services, unbundled loop facilities, special access
5 services, lines providing only data service without voice services processed
6 by a telecommunications provider and private line service arrangements.

7 (b) "Access line count" means the number of access lines serving
8 consumers within the corporate boundaries of the city on the last day of
9 each month.

10 (c) "Access line fee" means a fee ~~to be calculated monthly based on~~
11 ~~the number of access lines serving consumers within the corporate~~
12 ~~boundaries of the city that the city can require a telecommunications~~
13 ~~provider to pay.~~

14 (d) (e) "Commission" means the state corporation commission.

15 (e) (f) "Public right-of-way" means the area on, below, along or above a
16 public roadway, highway, street, public sidewalk, alley, waterway or utility
17 easement in which a city has an interest. The term does not include the
18 airwaves above a right-of-way with regard to wireless telecommunications
19 or other nonwire telecommunications or broadcast service or easements
20 obtained by utilities or private easements in platted subdivisions or tracts.

21 (f) (g) "Telecommunications provider" means ~~a person who has been~~
22 ~~issued a certificate of convenience and necessity, certificate of operating~~
23 ~~authority or service provider certificate of operating authority by the com-~~
24 ~~mission to offer local exchange service within the state.~~

25 New Sec. 3. (a) ~~Telecommunications providers require no additional~~
26 ~~authorization or franchise by any city or other political subdivision of the~~
27 ~~state to conduct business within a given geographic area, and no such~~
28 ~~political subdivision has jurisdiction to regulate telecommunications pro-~~
29 ~~viders based upon the content, nature or type of telecommunications~~
30 ~~service or signal they provide.~~

31 (b) (a) Any telecommunications provider certificated to do business in
32 this state pursuant to the authority of the commission shall have the right
33 to construct, maintain and operate poles, conduit, cable, switches and
34 related appurtenances and facilities along, across, upon and under any
35 public highway, roadway or street in this state, in accordance with and
36 subject to the provisions of this article and article 19 of chapter 17, Kansas
37 Statutes Annotated. Such appurtenances and facilities shall be so con-
38 structed and maintained as not to obstruct or hinder the usual travel or
39 public safety on such public ways.

40 (e) (b) No city shall create, enact or erect any unreasonable condition,
41 requirement or barrier for a provider's entry into or use of the public
42 rights-of-way for the conduct of its business as a telecommunications
43 provider.

*determined by a city, up to a maximum of \$1.81 per access line per month, to be
used by a telecommunications provider in calculating the amount of access line
remittance. [insert]*

*(d) "Access line remittance" means the amount to be paid by a
telecommunications provider to a city, the total of which is calculated by
multiplying the access line fee, as determined by the city, by the number of access
lines served by that telecommunications provider within that city for each month
in that calendar quarter. [insert]*

[re-letter subsections (d), (e), and (f)]

***certificated** local exchange carrier as defined in K.S.A. 66-1,187 (h) and a
telecommunications carrier as defined in K.S.A. 66-1,187 (m), except that it shall
not mean either an interexchange carrier or a competitive access provider as used
in K.S.A. 66-1,187. [insert]*

city or other [insert]

[strike subsection (a) and re-letter the remaining sections of New Section 3]

4.5

1 New Sec. 4. (a) The governing body of a city may require telecom-
 2 munications providers providing local exchange telephone service to col-
 3 lect and remit to each such city on a quarterly basis an access line fee of
 4 up to a maximum of \$1.81 per month per access line. The telecommu-
 5 nications provider shall calculate on a monthly basis an amount equal to
 6 the access line fee established by a city multiplied by the access line count.
 7 The telecommunications provider shall remit such total amount to the
 8 city on a quarterly basis, and not later than 45 days after the end of the
 9 quarter. The city shall have the right to examine, upon written notice to
 10 the telecommunications provider, no more than four times per calendar
 11 year, those access line count records necessary to verify the correctness
 12 of the access line count. If the access line count is determined to be
 13 erroneous, then the telecommunications provider shall revise the access
 14 line fees accordingly and payment shall be made upon such corrected
 15 access line count. The access line fee imposed under this section must
 16 be assessed in a competitively neutral manner, may not unduly impair
 17 competition, must be nondiscriminatory, and must comply with state and
 18 federal law. ~~A city shall not be entitled to any other franchise, right of way,
 19 construction, excavation, inspection, repair, restoration, degradation,
 20 application or other permit fee, cost or penalty from telecommunications
 21 providers being assessed an access line fee.~~

22 (b) Beginning January 1, 2004, and every 36 months thereafter, a city,
 23 subject to the public notification procedures set forth in subsection (c),
 24 may elect to adopt a new access line fee subject to the provisions and
 25 maximum access line fee contained in this act or may choose to decline
 26 all or any portion of any increase in the access line fee.

27 (c) Adoption of a new access line fee by a city, subject to the provi-
 28 sions and maximum access line fee contained in this act, shall not become
 29 effective until the following public notification procedures occur: (1) No-
 30 tice of the new access line fee has been read in full at three regular
 31 meetings of the governing body; (2) immediately thereafter, notification
 32 of the new access line fee shall be published in the official city paper once
 33 a week for two consecutive weeks; and (3) sixty days have passed from
 34 the date of the third regular meeting of the governing body at which the
 35 final reading of the new access line fee occurred. If, during the period of
 36 public notification of the new access line fee or prior to the expiration of
 37 60 days from the date of the third regular meeting of the governing body
 38 at which the final reading of the new access line fee occurred, 20% of
 39 the qualified voters of such city voting for mayor, or in case no mayor is
 40 elected then the commissioner or council member receiving the highest
 41 number of votes at the last preceding city election, present a petition to
 42 the governing body asking that the new access line fee be submitted to
 43 popular vote, the mayor of the city shall issue a proclamation calling a

[delete]

If the city and the telecommunications provider cannot agree on the access line count, or are in dispute concerning the amounts due under this section for the payment of access line fees, either party may seek appropriate relief in a court of competent jurisdiction, and that court may impose all appropriate remedies, including monetary and injunctive relief, and reasonable costs and attorneys' fees; provided, however, that all claims authorized in this section must be brought within one year of the date on which the disputed payment was due. [insert]

[delete]

ad

5-5

1 special election for that purpose. The proclamation calling such special
2 election shall specifically state that such election is called for the adoption
3 of the new access line fee, and the new access line fee shall be set out in
4 full in the proclamation. The proclamation shall be published once each
5 week for two consecutive weeks in the official city newspaper, and the
6 last publication shall not be less than 30 days before the day upon which
7 the special election is held. If, at the special election, the majority of votes
8 cast shall be for the new access line fee, the new access line fee shall
9 thereupon become effective. If a majority of the votes cast at the special
10 election are against the new access line fee, the new access line fee shall
11 not become effective and shall be void.

12 (d) A telecommunications provider may not be required to collect or
13 remit an access line fee to a city on those access lines that have been
14 resold, leased or otherwise provided to another telecommunications
15 provider.

16 (e) Notwithstanding any other provision of this act, payment by a
17 telecommunications provider that complies with the terms of an unex-
18 pired franchise ordinance that applies to the provider satisfies the pay-
19 ment attributable to the provider required by this act.

20 (f) Notwithstanding any other law, a telecommunications provider
21 that does not provide local exchange service within a city shall not be
22 required to collect, remit or pay an access line, franchise, right-of-way,
23 construction or permit fee.

24 New Sec. 5. (a) Information provided to municipalities and political
25 subdivisions under this act shall be governed by confidentiality proce-
26 dures in compliance with K.S.A. 66-1220a, and amendments thereto.

27 New Sec. 6. (a) Except as otherwise provided, this section does not
28 affect the validity of a franchise agreement or contract ordinance with a
29 telecommunications provider executed before the effective date of this
30 act. A city may continue to enforce a previously enacted franchise agree-
31 ment or contract ordinance and to collect franchise fees and other charges
32 under that franchise agreement or contract ordinance until the date on
33 which the agreement or ordinance expires by its own terms or is termi-
34 nated in accordance with the terms of this section. A telecommunications
35 provider may elect to terminate a franchise agreement or obligations un-
36 der an existing contract ordinance as of the effective date of this act. A
37 telecommunications provider terminating a franchise ordinance under
38 this section shall be governed by this act on the date of termination. A
39 telecommunications provider electing to terminate an existing franchise
40 agreement or contract ordinance under this section shall provide notice
41 to the affected city or political subdivision not later than 60 days after the
42 effective date of this act.

43 New Sec. 7. (a) A city which receives an access line fee pursuant to

9.5

1 this act may not require a telecommunications provider to:

2 (1) Pay any compensation other than the access line fee authorized
3 by this act, including ~~[an application, permit, excavation, construction or~~
4 ~~inspection fee, for the right to use a public right-of-way to provide local~~
5 ~~exchange telecommunications services in the city; or~~

*but not limited to any application, permit, excavation, construction, franchise,
right-of-way, inspection, repair, restoration, degradation, or other fee, cost,
surcharge, reimbursement, tax or penalty [insert]
service [insert]*

6 (2) provide services, facilities, equipment or goods in-kind for use by
7 the city, political subdivision or any other telecommunications provider.

8 (b) Notwithstanding any other law or any other provision of this act,
9 a city may require the issuance of a construction permit without cost to
10 a telecommunications provider locating facilities in or on public rights-of-
11 way within the city for the provisioning of local exchange service. The
12 terms of the permit shall be consistent with and no more restrictive than
13 construction permits issued to other persons excavating in a public right-of-
14 way.

15 (c) A city may exercise its home rule powers in the administration
16 and regulation of a public right-of-way that apply to all persons within
17 the city. A city may exercise home rule powers in the administration and
18 regulation of the activities of telecommunications providers within a pub-
19 lic right-of-way only to the extent that they are reasonably necessary to
20 protect the health, safety and welfare of the public. Any home rule based
21 regulation must be competitively neutral and may not be unreasonable
22 or discriminatory. A city or political subdivision specifically may not im-
23 pose regulations on telecommunications providers of local exchange serv-
24 ice that are not authorized by this act, including: _____

but not limited to: [insert]

25 (1) Requirements that particular business offices or other telecom-
26 munications facilities be located in the city;

27 (2) requirements for filing reports and documents with the city that
28 are not required by state law to be filed with the city and that are not
29 related to the use of a public right-of-way;

30 (3) requirements for inspection of a provider's business records ex-
31 cept to the extent necessary to conduct the review of the records related
32 to the access line count as provided for in this act;

33 (4) requirements for approval of transfers of ownership or control of
34 a telecommunications provider's business, except that a city may require
35 that a telecommunications provider maintain current point of contact in-
36 formation and provide notice of a transfer within a reasonable time; and

37 (5) requiring the provisioning of services, facilities, equipment or
38 goods in-kind for use by the city, political subdivision or any other tele-
39 communications provider or public utility.

40 (d) ~~In the exercise of its lawful regulatory authority, a city shall~~
41 promptly process each valid and administratively complete application of
42 a telecommunications provider for any permit, license or consent to ex-
43 cavate, set poles, locate lines, construct facilities, make repairs, affect

, and in no event more than ~~15~~ 30 days, [insert]

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1 traffic flow, obtain zoning or subdivision regulation approvals or for other
2 similar approvals, and shall make every reasonable effort to not delay or
3 unduly burden that provider in the timely conduct of its business.

4 (e) If there is an emergency necessitating response work or repair, a
5 telecommunications provider may begin that repair or emergency re-
6 sponse work or take any action required under the circumstances, pro-
7 vided that the telecommunications provider notifies the affected city as
8 promptly as possible after beginning the work.

9 (f) ~~The~~ compensation paid under this act is in lieu of any permit,
10 license, approval, inspection or other similar fee or charge, including all
11 general business license fees customarily assessed by a city for the use of
12 a public right-of-way against persons operating telecommunications-re-
13 lated businesses. The compensation paid under this act constitutes full
14 compensation to a city for all of a telecommunications provider's facilities
15 located within a public right-of-way, including interoffice transport and
16 other transmission media that do not terminate at an end-use customer's
17 premises, even though those types of lines are not used in the calculation
18 of the compensation. This act may not be construed to affect the ad
19 valorem taxation of a telecommunications provider's facilities ~~or to permit~~
20 ~~the ad valorem taxation of a certificated telecommunication provider's~~
21 ~~occupancy of a public right-of-way.~~

22 (g) (i) Telecommunications providers shall indemnify and hold the city
23 and its officers and employees harmless against any and all claims, law-suits,
24 judgments, costs, liens, losses, expenses, fees (including reasonable
25 attorney fees and costs of defense), proceedings, actions, demands, causes
26 of action, liability and suits of any kind and nature, including personal or
27 bodily injury (including death), property damage or other harm for which
28 recovery of damages is sought ~~that~~ is found by a court of competent
29 jurisdiction to be caused ~~solely by the negligent act, error or omission~~ of
30 the ~~franchised~~ * telecommunications provider, any agent, officer, director,
31 representative, employee, affiliate or subcontractor of the ~~franchised~~ * tel-
32 ecommunications provider, or their respective officers, agents, employ-
33 ees, directors or representatives, while installing, repairing or maintaining
34 facilities in a public right-of-way. The indemnity provided by this subsec-
35 tion does not apply to any liability resulting from the negligence of the
36 city, its officers, employees, contractors or subcontractors. If a ~~franchised~~ *
37 telecommunications provider and the city are found jointly liable by a
38 court of competent jurisdiction, liability shall be apportioned compara-
39 tively in accordance with the laws of this state without, however, waiving
40 any governmental immunity available to the city under state law and with-
41 out waiving any defenses of the parties under state law. This section is
42 solely for the benefit of the city and ~~franchised~~ * telecommunications pro-
43 vider and does not create or grant any rights, contractual or otherwise, to

The city shall use its best efforts to assist the telecommunications provider in obtaining all such permits, licenses and other consents in an expeditious and timely manner. [insert]

[delete "as" and "as possible" in lines 7 & 8]

Except as otherwise provided in subsections (g) and (h), the [insert]

[delete language as marked]

(g) A city may require a telecommunications provider to repair all damage to a public right-of-way caused by the activities of that provider, or of any agent affiliate, employee, or subcontractor of that provider, while installing, repairing, or maintaining facilities in a public right-of-way, and to return the right-of-way to its appearance before the damage. If the provider fails to make the repairs required by the city, the city may effect those repairs and charge the provider the cost of those repairs. If a city incurs damages as a result of a violation of this subsection (g), then the city shall have a cause of action against a provider for violation of this subsection, and may recover its damages, including reasonable attorneys' fees, if the provider is found liable by a court of competent jurisdiction. [insert]

[insert new subsection (h) and re-letter remaining sections – text attached]

to the extent that it [insert]

by the negligence [insert]

[delete "franchised" in four places marked with an asterisk (*) in lines 30, 31, 36, & 42 and re-letter (g) as (i)]

[on previous page, insert new subsection (h) in New Sec. 7 of SB 306]

*(h) A city may require a telecommunications provider to relocate or adjust any of its facilities in the **public** right-of-way for any public funded improvement or public funded project. Such relocation or adjustment shall be performed by such telecommunications provider at its sole expense without expense to the city, its employees, agents, or authorized contractors and shall be specifically subject to rules and regulations of the city. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any request by the city for such relocation or adjustment. Any damages suffered by the city or its contractors as a result of a telecommunications provider's failure to timely relocate or adjust its facilities shall be borne by said telecommunications provider.*

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1 any other person or entity.

2 ~~(h)~~ (j) A telecommunications provider or city shall promptly advise the
3 other in writing of any known claim or demand against the franchised *
4 telecommunications provider or the city related to or arising out of the
5 franchised * telecommunications provider's activities in a public right-of-
6 way.

[delete "franchised" in two places marked with an asterisk (*) in lines 3 & 5 and re-letter (h) as (j)]

7 New Sec. 8. A telecommunications provider which is assessed, collects and remits an access line ~~or other~~ fee assessed by a city shall add to
8 its end-user customer's bill ~~for charge as a part of the rate for service to~~
9 ~~that end-user customer located within the boundaries of the city, a sur-~~
10 ~~charge equal to the pro rata share of any access line, occupation, franchise,~~
11 ~~business license, excise, privilege or other similar special charge or tax,~~
12 ~~now or hereafter imposed upon the telecommunications provider by the~~
13 ~~city whether by statute, ordinance, law or otherwise, and whether pres-~~
14 ~~ently due or to hereafter become due.~~

Without prejudice to a telecommunications provider's other rights and authorities, a [insert] statement, or invoice [insert]

access line fee. [insert]

15
16 Sec. 9. K.S.A. 12-2001 is hereby amended to read as follows: 12-
17 2001. (a) The governing body of any city may permit any person, firm or
18 corporation to:

19 (1) Manufacture, sell and furnish artificial or natural gas light and
20 heat; electric light, water, power or heat; or steam heat to the inhabitants;

21 (2) build street railways, to be operated over and along or under the
22 streets and public grounds of such city;

23 (3) ~~construct and operate telegraph and telephone lines;~~

24 ~~—(4) lay pipes, conduits, cables and all appliances necessary for the~~
25 ~~construction, operation of gas and electric-light or steam-heat plants;~~

26 ~~(5) (4) lay pipes, conduits, cables and all appliances necessary for the~~
27 ~~construction and operation of electric railways or bus companies;~~

28 ~~(6) (5) lay pipes for the operation of a water plant for the distribution~~
29 ~~or furnishing of water over, under and along the streets and alleys of such~~
30 ~~city; or~~

31 ~~(7) (6) use the streets in the carrying on of any business which is not~~
32 ~~prohibited by law.~~

33 (b) If the governing body of a city permits any activity specified in
34 subsection (a), the granting of permission to engage in the activity shall
35 be subject to the following:

36 (1) All contracts granting or giving any such original franchise, right
37 or privilege, or extending or renewing or amending any existing grant,
38 right, privilege or franchise, to engage in such an activity shall be made
39 by ordinance, and not otherwise.

40 (2) No contract, grant, right, privilege or franchise to engage in such
41 an activity, now existing or hereafter granted, shall be extended for any
42 longer period of time than 20 years from the date of such grant or
43 extension.

1 (3) No person, firm or corporation shall be granted any exclusive
2 franchise, right or privilege whatever.

3 (4) The governing body of any city, at all times during the existence
4 of any contract, grant, privilege or franchise to engage in such an activity,
5 shall have the right by ordinance to fix a reasonable schedule of maximum
6 rates to be charged such city and the inhabitants thereof for gas, light and
7 heat, electric light, power or heat, steam heat or water; the rates of fare
8 on any street railway or bus company; ~~the rates of any telephone company;~~
9 or the rates charged any such city, or the inhabitants thereof, by any
10 person, firm or corporation operating under any other franchise under
11 this act. The governing body at no time shall fix a rate which prohibits
12 such person, firm or corporation from earning a reasonable rate upon the
13 fair value of the property used and useful in such public service. In fixing
14 and establishing such fair value, the value of such franchise, contract and
15 privilege given and granted by the city to such person, firm or corporation
16 shall not be taken into consideration in ascertaining the reasonableness
17 of the rates to be charged to the inhabitants of such city.

18 (5) No such grant, right, privilege or franchise shall be made to any
19 person, firm, corporation or association unless it provides for adequate
20 compensation or consideration therefor to be paid to such city, and re-
21 gardless of whether or not other or additional compensation is provided
22 for such grantee shall pay annually such fixed charge as may be prescribed
23 in the franchise ordinance. Such fixed charge may consist of a percentage
24 of the gross receipts derived from the service permitted by the grant,
25 right, privilege or franchise from consumers or recipients of such service
26 located within the corporate boundaries of such city, and, in case of ~~public~~
27 ~~utilities or common carriers~~ *entities affected by this act* situated and op-
28 erated wholly or principally within such city, or principally operated for
29 the benefit of such city or its people, from consumers or recipients located
30 in territory immediately adjoining such city and not within the boundaries
31 of any other incorporated city; and in such case such city shall make and
32 report to the governing body all such gross receipts once each month, or
33 at such other intervals as stipulated in the franchise ordinance and pay
34 into the treasury the amount due such city at the time the report is made.
35 The governing body shall also have access to and the right to examine, at
36 all reasonable times, all books, receipts, files, records and documents of
37 any such grantee necessary to verify the correctness of such statement
38 and to correct the same, if found to be erroneous. If such statement of
39 gross receipts is incorrect, then such payment shall be made upon such
40 corrected statement.

41 On and after the effective date of the act, any provision for compen-
42 sation or consideration, included in a franchise granted pursuant to this
43 section which is established on the basis of compensation or consideration

1 paid by the utility under another franchise, is hereby declared to be con-
2 trary to the public policy of this state and shall be void and unenforceable.
3 Any such provision, included in a franchise granted pursuant to this sec-
4 tion and in force on the effective date of this act which requires payments
5 to the city by a utility to increase by virtue of the compensation or con-
6 sideration required to be paid under a franchise granted by another city
7 to the utility's predecessor in interest, is hereby declared to be contrary
8 to the public policy of this state and shall be void and unenforceable.

9 (6) No such right, privilege or franchise shall be granted until the
10 ordinance granting the same has been read in full at three regular meet-
11 ings of the governing body. Immediately after the final passage, the or-
12 dinance shall be published in the official city paper once a week for two
13 consecutive weeks. Such ordinance shall not take effect and be in force
14 until after the expiration of 60 days from the date of its final passage. If,
15 pending the passage of any such ordinance or during the time between
16 its final passage and the expiration of 60 days before such ordinance takes
17 effect, 20% of the qualified voters of such city voting for mayor, or in case
18 no mayor is elected then the commissioner or council member receiving
19 the highest number of votes, at the last preceding city election present a
20 petition to the governing body asking that the franchise ordinance be
21 submitted for adoption to popular vote, the mayor of the city shall issue
22 a proclamation calling a special election for that purpose. The procla-
23 mation calling such special election shall specifically state that such elec-
24 tion is called for the adoption of the ordinance granting such franchise,
25 and the ordinance shall be set out in full in the proclamation. The proc-
26 lamation shall be published once each week for two consecutive weeks
27 in the official city newspaper, and the last publication shall not be less
28 than 30 days before the day upon which the special election is held. If,
29 at the special election, the majority of votes cast shall be for the ordinance
30 and the making of the grant, the ordinance shall thereupon become ef-
31 fective. If a majority of the votes cast at the special election are against
32 the ordinance and the making of the grant, the ordinance shall not confer
33 any rights, powers or privileges of any kind whatsoever upon the appli-
34 cants therefor and shall be void.

35 All expense of publishing any ordinance adopted pursuant to this sec-
36 tion shall be paid by the proposed grantee. If a sufficient petition is filed
37 and an election is called for the adoption of any such ordinance, the
38 applicants for the grant, right, privilege or franchise, upon receipt by the
39 applicants of written notice that such petition has been filed and found
40 sufficient and stating the amount necessary for the purpose, shall im-
41 mediately deposit with the city treasurer in cash an amount sufficient to
42 cover the entire expense of such election. The mayor shall not issue a
43 proclamation calling such election until such money is deposited with the

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1 treasurer. Upon such failure to so deposit such money the ordinance shall
2 be void.

3 (7) All contracts, grants, rights, privileges or franchises for the use of
4 the streets and alleys of such city, not herein mentioned, shall be governed
5 by all the provisions of this act, and all amendments, extensions or en-
6 largements of any contract, right, privilege or franchise previously granted
7 to any person, firm or corporation for the use of the streets and alleys of
8 such city shall be subject to all the conditions provided for in this act for
9 the making of original grants and franchises. The provisions of this section
10 shall not apply to railway companies for the purpose of reaching and
11 affording railway connections and switch privileges to the owners or users
12 of any industrial plants, or for the purpose of reaching and affording
13 railway connections and switch privileges to any agency or institution of
14 the state of Kansas.

15 Sec. 10. K.S.A. 17-1901 is hereby amended to read as follows: 17-
16 1901. ~~Corporations~~ ~~(a) Companies~~ [created for the purpose of constructing
17 and maintaining ~~magnetic telegraph lines~~ ~~telecommunications systems~~ [are
18 authorized to:

*Telecommunications companies certificated pursuant to K.S.A. Chapter 66 or
other entities [insert]
facilities [insert]*

19 (1) Set their poles, piers, abutments, wires and other fixtures includ-
20 ing but not limited to, conduits, ducts, lines, pipes, cables, culverts, tubes,
21 manholes, transformers, regulator stations, underground vaults, receivers,
22 transmitters, repeaters or amplifiers usable for the transmission or dis-
23 tribution of any [service along, upon, over, under and across any of the
24 public roads, streets, highways, bridges, and waters and other public
25 rights-of-way of this state, in such manner as not to permanently incom-
26 mode the public in the use of such ~~roads, streets and waters.~~ rights-of-
27 way; and

telecommunications [insert]

28 (2) use those facilities for the transmission or distribution of any
29 [service.

*telecommunications [insert]
[insert new language at the beginning of Section 10, subsection (b) - text
attached]*

30 (b) ~~No~~ [council of any city or trustee of any incorporated town or
31 village shall discriminate among or grant a preference to competing tel-
32 ecommunications ~~providers~~ [in the issuance of rights-of-way permits or
33 the passage of any ordinance for the use of its rights-of-way, nor impose
34 any unreasonable requirements for entry to the rights-of-way for such
35 ~~providers~~, including but not limited to, excess conduit and equipment
36 installation requirements; collocation requirements; facilities engineering
37 and design approval requirements; or consent provisions with respect to
38 ~~a telecommunications provider's ability to transfer ownership]~~

*[replace the word "providers" with "companies or other entities" in lines 32 and
35]*

39 Sec. 11. K.S.A. 17-1902 is hereby amended to read as follows: 17-
40 1902. ~~Telephone companies~~ ~~Telecommunications service providers~~ shall
41 have all the rights and powers conferred and be subject to all the liabilities
42 imposed by the general laws of this state upon ~~telephone and telegraph~~
43 ~~companies.~~

*the transfer of ownership of a telecommunications company or other entity.
[insert]*

[insert new subsections (c), (d) and (e) in K.S.A. 17-1901 - text attached]

[Strike Section 11 from the bill - KSA 17-1902 - and retain as current law]

[on previous page, insert the following new text at the beginning of subsection (b) in K.S.A. 17-1091]

A city may take all reasonable and necessary actions to manage its right-of-way, through the reasonable exercise of its police powers, to impose rights, duties, and obligations on all users of the public right-of-way in a reasonable, competitively neutral, nondiscriminatory, and uniform manner, reflecting the distinct engineering, construction, operation, maintenance, and safety requirements of each user of the right-of-way; provided that no action of the city may conflict with state or federal law or regulation, and that no ... [insert]

[on previous page, insert new subsections (c), (d) and (e) in K.S.A. 17-1901]

(c) A city may require a telecommunications company or other entity to repair all damage to a public right-of-way caused by the activities of that company or entity, or of any agent affiliate, employee, or subcontractor of that company or entity, while installing, repairing, or maintaining facilities in a public right-of-way, and to return the right-of-way to its appearance before the damage. If the company or entity fails to make the repairs required by the city, the city may effect those repairs and charge the company or entity the cost of those repairs. If a city incurs damages as a result of a violation of this subsection, then the city shall have a cause of action against the company or entity for violation of this subsection, and may recover its damages, including reasonable attorneys' fees, if the company or entity is found liable by a court of competent jurisdiction.

(d) A city may require a telecommunications provider to relocate or adjust any of its facilities in the public right-of-way for any public funded improvement or public funded project. Such relocation or adjustment shall be performed by such telecommunications provider at its sole expense without expense to the city, its employees, agents, or authorized contractors and shall be specifically subject to rules and regulations of the city. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any request by the city for such relocation or adjustment. Any damages suffered by the city or its contractors as a result of a telecommunications provider's failure to timely relocate or adjust its facilities shall be borne by said telecommunications provider.

(~~d~~ e) Telecommunications companies or other entities shall indemnify and hold the city and its officers and employees harmless against any and all claims, law-suits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of the telecommunications company or

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other entity, any agent, officer, director, representative, employee, affiliate or subcontractor of the telecommunications company or other entity, or their respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining facilities in a public right-of-way. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the city, its officers, employees, contractors or subcontractors. If a telecommunications company or other entity and the city are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the city under state law and without waiving any defenses of the parties under state law. This section is solely for the benefit of the city and telecommunications company or other entity and does not create or grant any rights, contractual or otherwise, to any other person or entity. [insert]

(f) For telecommunications providers that utilize public rights-of-way within a city but do not provide local exchange service, a city may assess a one-time permit fee in connection with issuing a construction permit for providers to set their fixtures in the public right-of-way within that city as provided in [K.S.A. 17-1901](a)(1) Any such fee shall be set in such a manner as to recover only the actual costs the city reasonably incurs managing the construction of such fixtures and must be applicable to all such users of the right of way in a non-discriminatory, competitively neutral manner. Such costs, if incurred, shall consist of (i) issuing, processing and verifying such permit application, (ii) inspecting the construction site and restoration project; and (iii) determining the adequacy of the right-of-way restoration. [insert]

51-5

1 Sec. ~~12~~ 11. K.S.A. 17-1906 is hereby amended to read as follows: 17-
 2 1906. The council of any city or trustees of any incorporated town or
 3 village through which the line of any ~~telegraph corporation~~ *telecommu-*
 4 ~~nications provider~~* is to pass, may, by ordinance or otherwise, specify
 5 where the ~~posts~~ poles, piers or abutments shall be located, the kind of
 6 ~~posts~~ poles that shall be used, the height at which the wires shall be run,
 7 and such ~~company telecommunications provider~~* shall be governed by the
 8 ~~regulation thus prescribed; and such regulations if such regulations are~~
 9 ~~reasonable, competitively neutral and nondiscriminatory and will not re-~~
 10 ~~sult in a reduction in service quality.~~ After the erection of ~~said telegraph~~
 11 ~~the poles and lines,~~ the council of any city or the trustees of any incor-
 12 porated town or village shall have power, *subject to the restrictions of this*
 13 *section,* to direct any alteration in the location or erection of ~~said posts~~
 14 ~~the poles,~~ piers or abutments, and also in the height at which the wires
 15 shall run, having first given such ~~company provider~~* or its agents oppor-
 16 tunity to be heard in regard to such alteration. ~~The council of any city or~~
 17 ~~the trustees of any incorporated town or village shall not arbitrarily re-~~
 18 ~~strict the provider's~~ *use of any public rights-of-way, so long as said use*
 19 *does not interfere with the public's use of same.*

20 *A telecommunications provider's* ~~right to access and use of public~~
 21 ~~rights-of-way shall not be unreasonably delayed or restricted. No such~~
 22 ~~council or trustees shall require any conditions that are inconsistent with~~
 23 ~~applicable federal law or the rules and regulations of the federal energy~~
 24 ~~regulatory commission, United States department of transportation, fed-~~
 25 ~~eral communications commission or the state corporation commission.~~

26 Sec. ~~13~~ 12. K.S.A. 12-2001, 17-1901, ~~17-1902~~ and 17-1906 are hereby
 27 repealed.

28 Sec. 14 13. This act shall take effect and be in force from and after its
 29 publication in the statute book.

[renumber Section 12 as Section 11]

consistent with industry standards [insert]

[replace the word "provider" with the words "telecommunications company or other entity" at each place marked with an asterisk () in lines 3, 7, & 15]*

A city may require a telecommunications provider to relocate or adjust any of its facilities in the public right-of-way for any public funded improvement or public funded project. Such relocation or adjustment shall be performed by such telecommunications provider at its sole expense without expense to the city, its employees, agents, or authorized contractors and shall be specifically subject to rules and regulations of the city. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any request by the city for such relocation or adjustment. Any damages suffered by the city or its contractors as a result of a telecommunications provider's failure to timely relocate or adjust its facilities shall be borne by said telecommunications provider Upon request from a city as part of that city's efforts to construct, operate, or maintain its right of way, a telecommunications provider shall forthwith remove, relocate, or reinstall its facilities in a right of way, and the cost of such removal, relocation, or reinstallation shall be the exclusive obligation of the telecommunications provider; provided, however, that the city's request to the telecommunications provider shall be reasonable and nondiscriminatory with respect to other occupants of the right of way.
[insert]

telecommunications company's or other entity's [insert]

company's or other entity's [insert]

[renumber Section 13 as Section 12, renumber Section 14 as Section 13, and strike the reference to 17-1902 in Section 13 (now 12).]

**March 15, 2001 Commerce Committee Meeting
SB 306 - Telecommunications; right-of-way.**

The chair announced to the committee members that the MARC model ordinance has been given to the committee secretary for committee members to view. The ordinance was requested on March 12 by Senator Barone.

Senator Steineger - clarification Page 1, Line 27 - "*Telecommunications facilities*"
Is Sprint World Campus a facility? Is it a large building that holds all the switches?

April Rodewald was asked by the chair to comment on that - the purpose of using this term is simply to encompass the type of facilities that providers including the rights-of-way and central offices and switches etc. to provide local exchange service.

- *Chair requested that Bob Nugent write a definition of telecommunication facilities.*

Bob Nugent explained facility to mean both equipment and services. Not defined in Chapter 66 but will check.

Senator Jordan moved, seconded by Senator Kerr that SB 306 provide both options, the access line fee or the gross receipts with a 5% cap. The voice vote was unanimous in favor of the motion.

- *Senator Emler - do we have a good definition of "access line fee"?
Perhaps need to link to 10-digit
Janet Buchanan - definition of access line fee.
How do we count the access lines today
Need to be equitable between business and residence lines.*

Senator Emler moved, seconded by Senator Kerr that the three balloon amendments on Page 3, starting with Line 10 through Line 21 be adopted. The voice vote was unanimous in favor of the motion.

- *Senator Steineger raised question regarding 1.81 maximum per line.
Need to revisit \$1.81 access line fee*

Senator Emler moved, seconded by Senator Jenkins that SB 306 be amended on Page 3, to strike the language in subsection (a) Line 25 thru Line 30. The voice vote was unanimous in favor of the motion.

Senator Emler moved, seconded by Senator Jenkins that SB 306 be amended on Page 4 to insert the balloon amendment and to further clarify within the balloon amendment what party may be awarded attorney fees and to strike the language on Line 18 starting with "*A city shall not*" and continue thru Line 21. The voice vote was unanimous in favor of the motion.

Senate Commerce Committee
March 15, 2001
Attachment 6-1

Senator Jenkins moved, seconded by Senator Jordan, to adopt a conceptual amendment that would apply the aforementioned concept to “gross receipts”. The voice vote was unanimous in favor of the motion.

Marvin Rainey, City Attorney, City of Shawnee, stated it is his understanding that under the Federal law, the city cannot collect unless the company is using the right-of-way. Cities get very little information from the companies.

- *Need to come back to Paragraph D needs to reflect the option of “gross receipts”.*
- *Come back to Senator Emler regarding Page 5, Line 20 - not worded correctly in view of language on Page 14.*

Senator Emler moved, seconded by Senator Brungardt, to amend Page 5, Line 12, subsection (d) to provide cross-reference to the open records act. The voice vote was unanimous in favor of the motion.

Meeting adjourned at 9:30 a.m.

Next meeting scheduled March 16, 2001 at 8:00 a.m.