

**ORDINANCE NO. 07-08-14**

**AN ORDINANCE BY THE CITY OF DILLEY, TEXAS TO ESTABLISH RULES GOVERNING THE USE OF CITY RIGHTS-OF-WAY BY PROVIDERS OF TELECOMMUNICATIONS SERVICES, SETTING FEES FOR THE USE OF CITY RIGHTS-OF-WAY, PROVIDING FOR MUNICIPAL CONSENT PROCEDURES AND CONSTRUCTION OBLIGATIONS**

WHEREAS, the City of Dilley ("City") seeks to facilitate competition in the provision of telecommunications services on a competitively neutral basis and encourage the availability of such services to all residences and businesses with the City; and

WHEREAS, in accordance with applicable federal and state laws, the City seeks to exercise its historical rights to control and manage its public rights-of-way and to receive fair and reasonable compensation for their use on a competitively neutral and nondiscriminatory basis; and

WHEREAS, the public streets, alleys, easements, and other rights-of-way to be used by the telecommunications service providers in the operation of their telecommunications network(s) within the boundaries of the City are valuable public properties, acquired and maintained by the City at great expense to its taxpayers, and because the City may authorize telecommunications providers the nonexclusive right to use said public streets, alleys, easements, and rights-of-way, such right being a valuable property right, therefore, the City finds that users thereof should pay the City reasonable compensation for the use of the City's public rights-of-way; and

WHEREAS, the City recognizes and finds that continuing changes in the telecommunications industry, changes in technology, and changes in state and federal law make telecommunications services and providers unique as opposed to other uses of the City's public rights-of-way.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DILLEY, TEXAS**

**SECTION 1 – FINDINGS AND PURPOSE**

The purpose of this Ordinance is to:

- (A) Assist in the management of the City's Rights-of-Way in order to minimize the congestion, inconvenience, visual impact and other adverse effects, and the costs to the citizens resulting from the placement of telecommunications facilities within the Public Rights-of Way;
- (B) Govern the Telecommunications Provider's ("Provider") use and occupancy of the Rights-of-Way;

- (C) Secure fair and reasonable compensation for the private commercial use and occupancy of the Rights-of-Way by Telecommunications Providers in a non-discriminatory and competitively neutral manner; and
- (D) Assist the City in its efforts to protect the public health, safety and welfare; and
- (E) Facilitate competition among telecommunications service providers and encourage the universal availability of advanced telecommunications services to all residents and businesses of the City; and
- (F) Conserve the limited physical capacity of the Public Rights-of-Way held in public trust by the City.

## SECTION 2 – AUTHORITY; SCOPE

- (A) This Ordinance applies to all telecommunications service providers under Title II of the Communications Act of 1934, as amended (47 U.S.C. 201 et seq.) (“Title II”) excluding services provided solely by means of a wireless transmission. No consent conveyed under this Ordinance authorizes the provision of any services not covered by Title II. Cable service and open video systems as defined in Title VI of the Communications Act of 1934, and any another content service, are expressly excluded.
- (B) The grant of a Municipal Consent under this Ordinance does not grant attachment rights or authorize the use of utility infrastructure.

## SECTION 3 – DEFINITIONS

In this Ordinance:

- (A) **Access Line** means: (1) each access line consisting of Provider’s Transmission Media that is located between the end-user customer’s premises network interface within the City and the Provider’s local servicing Facilities (these servicing facilities include central office facilities, distribution frame facilities or other similar facilities) and that allow delivery of telecommunication services within the City; and (2) each termination point or points within the City of a non-switched telephone circuit consisting of Provider’s Transmission Media dedicated for use between specific locations identified by an end-user customer. Interoffice-transport and other Transmission Media that do not terminate at an end-user customer’s network interface device are not Access Lines that would be separately identified and counted for the purposes of assessing the monthly Line Fee.
- (B) **Affiliate** means a person who controls, is controlled by, or is under common control with a Provider. Affiliate does not include a person who serves end-user

- customers by means of a wireless transmission. There is a rebuttable presumption of control if a Provider owns at least 25% of the affiliate's stock or assets.
- (C) **City** means the City of Dilley, Texas. As used throughout, the term City also includes the designated agent of the City.
- (D) **Direction of the City** means all ordinances, laws, rules, and regulations of the City that are not inconsistent with this Ordinance and that are now in force or may hereafter be passed and adopted.
- (E) **Director** means the Finance Director for the City or the Director's designee.
- (F) **Facilities** means any and all of the Provider's duct spaces, manholes, poles, conduits, underground and overhead passageways and other equipment structures, plant and appurtenances and all associated Transmission Media.
- (G) **Line Fee** means a monthly fee that is assessed on each Access Line owned by the Provider and that is paid by the Provider to the City as compensation for the use and occupancy of the Rights-of-Way.
- (H) **Municipal Consent** means the individual agreement entered into by and between the City and individual Providers under this Ordinance governing the Provider's use of the Rights-of-Way and the payment of compensation.
- (I) **Person** means a natural person (an individual), corporation, company, association, partnership, firm, limited liability company, joint venture, joint stock company or association, and other such entity.
- (J) **Provider** means a person delivers telecommunications services within the City to the public and either: (a) has been granted a certificate under Art. 1446c-O, Title 3 V.A.C.S. ("PURA 95") or other certificate; or (b) operates or uses a telecommunications network within the City. Provider does not include persons who are authorized by the City to occupy the Rights-of-Way in specifically approved routes within the City, unless they also have a consent under this Ordinance.
- (K) **Rights-of-Way** means all present and future public streets, highways, lanes, paths, alleys, sidewalks, boulevards, drives, bridges, tunnels, easements or similar property in the City limits in which the City holds a property interest or exercises rights of management or control.
- (L) **SPCOA (Service Provider Certificate of Authority)** means a person or entity that holds a Service Provider Certificate of Authority issued by the Texas Public Utility Commission.

(M) **Telecommunications Network or Network** means all Facilities placed in the Rights-of-Way and used to provide telecommunications services to the public.

(N) **Telecommunications Services** means all transmissions between or among points identified by the user, of information of the user's choosing, including voice, video or data, without change in content of the information as sent and received, if the transmissions are accomplished through a telecommunications network. Telecommunications services include ancillary or adjunct switching services and signal conversions rendered as a function of underlying transmission services, but excludes long distance transmissions (inter-LATA [Local Access Transport Area] and intra-LATA toll transmissions). Telecommunications services includes all communications services capable of being provided over a telephone system and permitted to telecommunications providers under the Public Utility Regulatory Act of 1995, Tex.Rev.Civ.Stat.Ann.Art. 1446c-O, as amended and Title II of the Communications Act of 1934, as amended, expressly excluding cable services or open video systems as defined in Title VI of the Communications Act of 1934, as amended. Also excluded are "wireless services" as defined by law.

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

(P) **Use** means the Provider's acquisition, construction, reconstruction, maintenance or operation of any Facilities in, over, along, through or across the Rights-of-Way for any purpose whatever.

(Q) **Area** as used in Section 27(B) herein means the corporate limits of the City.

#### **SECTION 4 – MUNICIPAL CONSENT REQUIRED**

(A) Persons seeking to provide telecommunications services by means of a network, whether such network is owned by the person seeking to provide the services or by some other person, must obtain a Municipal Consent.

(B) The use of Rights-of-Way for the delivery of any service not covered by this Ordinance is subject to all other applicable City requirements.

#### **SECTION 5 – APPLICATION FOR MUNICIPAL CONSENT**

(A) A person must submit an application to the Director to grant, renew, extend, amend, or transfer a Municipal Consent.

(B) The application must be on a form prescribed by the Director, and it must include the following:

- (1) The identity of the Applicant, including all Affiliates of the Applicant and the identity of any other Provider which may use in any manner the Telecommunications Network,
- (2) A description of the services to be provided;
- (3) With respect to post-application construction, an outline of the Applicant's proposed network, if any, and
- (4) With respect to post-application construction, a description of the effect on the Rights-of-Way, if any, including:
  - (a) The location and route required for Applicant's proposed Telecommunications Network.
  - (b) The location of all overhead and underground public utility, telecommunication, cable, water, sewer drainage and other facilities in the Public Rights-of-Way along the proposed route.
  - (c) The location(s), if any, for interconnection with other telecommunications facilities or Networks of other Telecommunications Providers.
  - (d) The specific trees, structures, improvements, facilities and obstructions, if any, that Applicant proposes to temporarily or permanently remove or relocate.
- (5) Information to establish that the Applicant will obtain all other governmental approvals and permits prior to construction and operation of the Telecommunications Network and prior to offering or providing the Telecommunications Services.
- (6) Information in sufficient detail that evidences that the Applicant will provide or ensure a seamless interconnection with or through other telecommunication service providers to the local Emergency Number District and evidence of compliance with Ordinance 771 and 772 of the Texas Health and Safety Code on Emergency Communication, and the Texas Public Utility Commission ("PUC") Substantive Rules on interconnection, particular Section 23.97(a), (d) and (e), as amended.
- (7) Such other and further information as may be reasonably requested by the Director.

(C) Each applicant shall submit a non-refundable application fee of \$1,500.00 with the application.

(D) The Director shall review an application submitted under this Ordinance and shall recommend to the City Council that it grant or deny the application. The Director shall make recommendation to the City Council no later than the 120<sup>th</sup> day after an application is filed. Upon mutual written agreement between the City and the Provider, action may be postponed for periods not exceeding 30 days each.

(E) The following timeline will be followed:

- (1) The application, as submitted, shall be considered approved unless the Director acts within one hundred twenty (120) days after its submission.
- (2) The City may request additional information related to the application for which a mutually agreed reasonable time may be granted for reply.
- (3) Except for delay by the applicant, the City Council must act on the Director's recommendation within sixty (60) days after receipt by the Council of the Director's recommendation or the Director's recommendation shall be deemed approved.

#### **SECTION 6 – MUNICIPAL CONSENT ORDINANCE**

(A) If the Director finds that the application meets the requirements of this Ordinance, the Director shall request the City Attorney to prepare a Municipal Consent ordinance for the City Council's consideration.

(B) A Municipal Consent ordinance submitted to the City Council must include the following provisions:

- (1) a term of no less than three years for the consent agreement;
- (2) a requirement that the Provider substantially comply with this Ordinance;
- (3) a requirement that the Provider's Municipal Consent is subject to termination by the City Council, after notice and hearing, for the Provider's failure to comply with this Ordinance or on a showing that the Provider has breached the terms of the Municipal Consent;
- (4) a provision that incorporate the requirements of Section 13 of this Ordinance;
- (5) a provision that incorporates the requirements of Sections 16, 17, and 18 of this Ordinance, if applicable;

(6) a provision that allows for adjustments to the Line Fee calculation method with the agreement of the Provider, if the fees set forth in this Ordinance are changed by the City Council.

(C) Review and approval by the City does not constitute a guarantee of sufficiency of the design of the Telecommunications Network. The Applicant retains full responsibility for the adequacy of the design of the Telecommunications Network.

#### **SECTION 7 – PETITION FOR RECONSIDERATION**

The act of granting, amending, denying or terminating a Municipal Consent is a legislative function within the discretion of the City Council. A person whose application for a Municipal Consent is denied, or whose application is not considered by the City Council on or before the 45<sup>th</sup> day after the Director submits a recommendation under Section 6 or whose Municipal consent is terminated must petition the City Council for reconsideration before seeking judicial remedies. A petition for reconsideration is considered denied if the City Council does not act within 45 days after the petition is filed with the City Secretary.

#### **SECTION 8 – ADMINISTRATION AND ENFORCEMENT**

- (A) The Director shall administer this Ordinance and enforce compliance with a Municipal Consent granted under this Ordinance.
- (B) A Provider shall report information that the Director requires in the form and manner prescribed by the Director relating to the use of Rights-of-Way for the telecommunications services authorized by a Municipal Consent granted under this Ordinance.
- (C) The Director shall report to the City Council the Director's determination that a Provider has failed to comply with this Ordinance.

#### **SECTION 9 – APPLICABILITY**

- (A) Sections 16, 17 and 18 of this Ordinance apply only to a Provider that owns or controls physical Facilities in the Rights-of-Way.
- (B) Section 19 of this Ordinance applies to a Provider that has a property interest in a network.

#### **SECTION 10 – COMPENSATION TO CITY**

- (A) Line Fee. To compensate the City for the use and occupancy of the Rights-of-Way, a Provider shall pay the City a monthly Line Fee for each Access Line owned and/or leased by Provider as calculated as of month-end, that is activated for use by an end-use customer.

(1) Line Fee:

- (a) Following the effective date of this Ordinance, a Provider shall submit to the Director on a quarterly basis, a certified statement with the Line Fee payment under Section 11, indicating the number of Access Lines for the customer classes indicated herein used to provide telecommunications services at month end, for each month of the quarter, the statement shall be provided on a form prescribed by the Director.
- (b) For each month of the quarter for the first year following the effective date of the consent, a Provider shall pay a Municipal Consent fee based on its number of access lines calculated as follows:

<u>Access Line</u>	<u>Monthly Amount</u>
Residential	\$0.70
Nonresidential and Private Line Termination	\$1.80

(For purposes of this Section only, lines terminating at customers with "Lifeline," "Tel-Assistance," or other service that is similarly discounted for the purpose of advancing universal service to the economically disadvantaged shall not be included in the lines upon which the fee is calculated.)

- (c) A Provider shall report to the Director revenue subject to the state telecommunications sales tax with the City on July 15 of each year in a form prescribed by the Director.

(2) Adjustments to Municipal Consent Fee

- (a) The total of all Line Fees paid by the Provider each year shall be known as the Municipal Consent Fee. The total of all Municipal Consent Fees by all Providers shall be known as the Aggregate Municipal Consent Fee. For each year, after the year of enactment of this Ordinance, the Aggregate Municipal Consent Fee and the Municipal Consent Fee for each Provider shall be determined by application of the provisions of subsection (b) of this section. The Line Fee shall then be calculated (and, if necessary, adjusted) on July 31 of each year following enactment of this Ordinance by dividing the adjusted Aggregate Municipal Consent Fee by the total number of Access Lines reported by all Providers



during the most recent, current reported month. The City shall have the sole discretion to allocate any increases between Residential and Nonresidential/Private Line Termination categories. The City will provide the Providers with the new Line Fee amount, if any, for each class of line (Residential and Nonresidential/Private Line Termination) on or before \_\_\_\_\_ of each year. The adjusted Line Fee shall be implemented by Provider on the 1<sup>st</sup> day of the calendar month following notification by City of the adjustment, if any. Until such time as Provider is notified of a new Line Fee amount, Provider shall continue to use current Line Fee amounts and nothing herein shall be construed so as to require Provider to apply an adjusted Line Fee retroactively.

- (b) Annually on June 30, the Aggregate Municipal Consent Fee shall be adjusted by multiplying the Aggregate Municipal Consent fee for the preceding year (the current year minus one) by a growth factor. (For June 30, 2007, the "Aggregate Municipal Consent Fee for the preceding year" shall be the total of all municipal fees by paid by all Providers for the year ending June 30, 2006.) The growth factor shall be calculated by dividing the total of all Providers' aggregate revenue within the City subject to the state telecommunications sales tax, pursuant to Texas Tax Code Section 151.0103, for the twelve month period ending June 30 of the current year by the aggregate revenue within the City subject to the state telecommunications sales tax for the twelve month period ending June 30 of the preceding year. In the event of a substantial change in services subject to the state telecommunications sales tax, the City may, in its sole discretion, adopt an alternative method of calculating the growth factor so as to result in substantially the same Aggregate Municipal Consent Fee. Notwithstanding any calculation made pursuant to this section, in no event shall the adjusted Aggregate Municipal Consent Fee for the current year be less than the Aggregate Municipal Consent Fee for the preceding year.

- (B) Number of Access Lines. Subject to City's agreement not to disclose this information unless required by law, Provider agrees to provide annually or as requested by the City, within a reasonable time after receipt of the City's written request, a report showing the number of Access Lines being maintained or operated by Provider that are serving premises within the City. Such report shall specifically identify lines maintained or operated by Provider that are leased and/or used by holders of SPCOA. The City agrees that the report shall be used solely for the purposes of verifying the number of Provider's Access Lines

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

- (C) Confidential Records. If the Provider notifies the City of the confidential nature of any information (including, but not limited to the information in paragraph (B) of this section), reports, documents, or writings, the City agrees to maintain the confidentiality of the information, reports, documents, and writings to the extent permitted by law. Upon receipt by the City of requests for the Provider's confidential information, reports, documents, or writings, the City shall notify the Provider of the request in writing by facsimile transmission. The City shall furnish the Provider with copies of any Attorney General Opinion requests it makes pertaining to the Provider's confidential information, reports, documents or writings.
- (D) No Other Fees. Unless otherwise provided in this Ordinance, the payments due hereunder shall be in lieu of any permit license, approval, inspection, or other similar fees or charges including, but not limited to, all general business license fees customarily assessed by City for the use of the Rights-of-Way against any business operating in a similar business that is conducted by the Provider.
- (E) Uncollectibles. City and Provider understand and agree that Provider has a statutory right to pass through to its customers on a pro-rata basis any compensation paid to the City for access to the Rights-of-Way. Any other provision of this franchise agreement notwithstanding, Provider shall not be obligated to pay the City for any Access Lines or private line termination points the revenues for which remain uncollectible.
- (F) Other Telecommunications Carriers and Providers. Other provisions of this Section notwithstanding, Provider shall not include in its monthly count of Access Lines, and shall not remit a Line Fee to the City of such lines and points, those Access Lines that are leased or otherwise provided to another telecommunications carrier or Provider for consideration if the other telecommunications carrier or Provider declares its intent to both include the leased Access Line in its own monthly count of such facilities to the City and remit to the City a Line Fee on those lines and points. A Provider that does not own or operate a network and that demonstrates to the Director that the lines it utilizes for resale of services from other Providers are included in the other Provider's fee calculation is not required to comply with the payment requirement of Section 10(A)(1)(b). A Provider excluded from payment requirements pursuant to this Section shall report to the Director changes in operation that may affect availability of this payment option before the end of the quarter in which payment would otherwise

be required and the Provider that leases or otherwise provides the lines to a Provider excluded under this Section shall report the existence of those lines to City, such lines to include, but not be limited to, lines leased or otherwise provided to SPCOA holders.

**(G) Public Street Crossing Fee.**

- (1) Any Provider which is not required to pay the Municipal Consent Fees, but which utilizes the City's Public Rights-of-Way, shall pay the City an annual Public Street Crossing Fee of:
  - i. \$0.35 per linear foot for each diameter inch or less of underground conduit or wire and for each .250 diameter inch or less of aerial wire that is in the Public Rights-of-Way per annum; and
  - ii. \$1,000.00 for the first street crossing and \$250 for every street crossing thereafter.
- (2) The Public Street Crossing Fee shall be due on July 15 or every year pro-rated as applicable. A report as required by the Director shall be provided with each annual payment showing the calculation of the payment, including the length of the network and whether it is overhead or underground, as applicable, and number and name of each street crossing.
- (3) This fee is to compensate the City for the reasonable rental value of the Public Rights-of-Way used by the Provider, and to recover the administrative cost in monitoring and enforcing the provisions of this Ordinance. Each Municipal Consent Ordinance requiring payment under this section shall provide that such fee may be adjusted once every two (2) years to properly reflect the reasonable rental value of the Public Rights-of-Way and administrative cost to the City.

**SECTION 11 – FEE PAYMENTS**

A Provider shall remit the Line Fee on a quarterly basis together with the certified statement required in Section 10(A)(1)(a). Payment shall be made on or before the 45<sup>th</sup> day following the close of each calendar quarter for which the payment is calculated and shall be paid by wire transfer to an account designed by the Director.

**SECTION 12 – AUDITS**

- (A) On 30 days notice to a Provider, the City may audit a Provider at any time. The Provider shall furnish all relevant information to demonstrate its compliance with the consent and/or other provisions of this Ordinance.

- (B) A Provider shall keep complete and accurate books of accounts and records of business and operations in accordance with generally accepted accounting principles for a period of five years. If the Federal Communications Commission requires, a Provider shall use the system of accounts and the forms of books, accounts, records, and memoranda prescribed in 47 CFR Part 32 or its successor. The Director may require the keeping of additional records or accounts that are reasonably necessary for purposes of identifying, accounting for, and reporting the number of lines used to deliver telecommunication services. The City may examine the Provider's books and records, expressly excluding any customer specific records and any records, documents, or other writings the disclosure of which is prohibited by state or federal law, including the Electronic Communications Privacy Act, 18 U.S.C. Sec. 2701, et seq.
- (C) A Provider shall make available to the City of the City's designated agent (hereinafter "agent"), for the City or its agent to examine, audit, review and copy, in Dilley, Texas, on the Director's written request, its books and records including papers, books, accounts, documents, maps, plans and other Provider records pertaining to a Municipal Consent granted under this Ordinance. A Provider shall fully cooperate in making records available and otherwise assist the City examiner. The City examiner shall not inspect or copy or otherwise demand production of customer specific information or any records, documents, or other writings the disclosure of which is prohibited by state or federal law, including the Electronic Communications Privacy Act, 18 U.S.C. Sec. 2701, et seq.
- (D) The Director may, at any time, make inquiries pertaining to a Provider's performance of the terms and conditions of a consent granted under this Ordinance. A Provider shall respond to such inquiries on a timely basis.
- (E) The provisions of this Section shall be continuing and shall survive the termination of the Consent granted under this Ordinance and shall extend beyond the term of the Consent granted to the Provider and City shall have all the rights described in this Section for so long as Provider is providing any telecommunications services within the City.

### **SECTION 13 – TRANSFER**

- (A) A consent granted under this Ordinance, the assets held by Providers for use under such consent which are in the Public Rights-of-Way, any rights or privileges of Providers under a consent, either separately or collectively, shall not be sold, resold, assigned, transferred or conveyed by Providers to any other person, without the prior written consent of the City by ordinance or resolution. Such approval shall not be unreasonably withheld. Should the Provider sell, assign, transfer, convey or otherwise dispose of any of its rights or interests under this consent, including such Provider's Telecommunications Network, or attempt to do so, without the City's prior consent, the City may revoke the consent for default, in which event all rights and interest of the Provider shall cease.

- (B) Any transfer in violation of this Section shall be null and void and unenforceable. Any change of Control of a Provider shall constitute a transfer under this Section.
- (C) There shall be a rebuttal presumption of a change of Control of a Provider upon a change of 15% or greater in the ownership of such Provider. Such a change in Control shall be deemed a transfer, which requires the consent of the City.
- (D) A mortgage or other pledge of assets to a bank or lending institution in a bona fide lending transaction shall not be considered an assignment or transfer.
- (E) Every consent granted under this Ordinance shall specify that any transfer or other disposition of rights which has the effect of circumventing payment of required consent fees and/or evasion of payment of such fees by non-collection or non-reporting of revenues derived from Telecommunications Services, bartering or any other means which evade the actual collection of revenues for business pursued by a Provider is prohibited.

#### **SECTION 14 – NOTICES TO CITY**

- (A) A Provider shall notify the Director in writing with the transmittal of all petitions, applications, and reports submitted by the Provider to the Federal Communications Commission and the Public Utility Commission, or their successor agencies, relating to matters affecting both the telecommunications services of Provider within the City and the use of the City's Rights-of-Way as authorized by a Municipal Consent granted under this Ordinance. A Provider shall furnish the Director copies of the documents upon request.
- (B) If a Provider notifies the City of the confidential nature of information, the Director shall maintain the confidentiality of the information to the extent permitted by law. Upon receipt of requests for confidential information, the City shall notify the affected Providers of the request by facsimile transmission. The City shall furnish Providers with copies of any Attorney General opinion requests it makes pertaining to the confidential information.
- (C) A Provider shall give written notice to the City not less than 15 days before a transfer or change in operations that may affect the applicability of Sections 17, 18, 19, and 20, to the Provider.
- (D) A Provider shall submit to the City on an annual basis the amounts reported to the Comptroller of Public Accounts regarding revenue subject to the state telecommunications sales tax in the City, as described in Section 10.

#### **SECTION 15 – CIRCUMVENTION OF FEE PROHIBITED**

A person may not circumvent payment of Line Fees or evade payment of fees by bartering, transfer of rights, or by any other means that result in undercounting a Provider's number of lines. Capacity or services may be bartered if the imputed lines are reported in accordance with Section 10.

## **SECTION 16 – CONSTRUCTION OBLIGATIONS**

- (A) A Provider is subject to the police powers of the City, other governmental powers, and the City's rights as a property owner under state and federal laws. A Provider is subject to City requirements and federal and state rules in connection with the construction, expansion, reconstruction, maintenance or repair of Facilities in the Rights-of-Way.
- (B) A Provider shall place certain Facilities within the Rights-of-Way underground according to applicable City requirements absent a compelling demonstration by Provider that, in any specific instance, this requirement is not reasonable or feasible.
- (C) At the City's request, a Provider shall furnish the City accurate and complete information relating to the construction, reconstruction, removal, maintenance, operation and repair of Facilities performed by the Provider in the Rights-of-Way.
- (D) The construction, expansion, reconstruction, excavation, use, maintenance and operation of a Provider's Facilities within the Rights-of-Way are subject to applicable City requirements.
- (E) A Provider shall perform excavations and other construction in the public Rights-of-Way in accordance with all applicable City requirements, including the obligation to use trenchless technology whenever possible. The City shall waive the requirement of trenchless technology if it determines that the field conditions warrant the waiver. A Provider shall minimize interference with the use of public and private property and shall follow the construction directions given by the City.
- (F) When a Provider completes construction work, a Provider shall promptly restore the Rights-of-Way in accordance with applicable City requirements. A Provider may excavate only for the construction, installation, expansion, repair, removal, and maintenance of the Provider's Facilities.
- (G) The City may require a Provider to allow attachment of other Provider's Facilities to its poles and conduits, in accordance with state and federal law, upon such terms and conditions as may be agreed by Provider and the other Provider.
- (H) A Provider shall furnish the City with construction plans and maps showing the routing of new construction at least 45 days before beginning construction that involves an alteration to the surface or subsurface of the public Rights-of-Way. A

Provider may not begin construction until the plans and drawings have been approved in writing by the Director of Public Works.

- (I) For construction that involves a minor alteration to the surface or subsurface of the Rights-of-Way, and does not involve the routing of new Facilities, the City shall implement a streamlined permitting process of less than 5 days.
- (J) If the Director declares that an emergency situation exists due to an urgent public necessity, an immediate or imminent threat to public health or safety, or a reasonably unforeseeable situation requiring immediate action and requests by written notice the removal or abatement of Provider's Facilities, a Provider shall remove or abate the Provider's Facilities by the deadline provided in the Director's request. A Provider and the City shall cooperate to the extent possible to assure continuity of service. If a Provider, after notice, fails or refuses to act, the City may remove or abate the facility, at the sole cost and expense of the Provider, without paying compensation to the Provider and without the City incurring liability for damages.
- (K) Except in an emergency, a Provider may not excavate the pavement of a street or public Rights-of-Way without first complying with City requirements.
- (L) Within 120 days of completion of each new segment of a Provider's Facilities, a Provider shall supply the City with a complete set of "as built" drawings for the segment in a format prescribed by the City. A Provider must obtain the City's approval before relocating the Provider's Facilities in the Rights-of-Way. The City may not unreasonably withhold approval.

## **SECTION 17 – CONDITIONS OF RIGHTS-OF-WAY OCCUPANCY**

- (A) In the exercise of governmental functions, the City has first priority over all other uses of the Rights-of-Way. The City reserves the right to lay sewer, gas, water, and other pipe lines or cables and conduits, and to do underground and overhead work, and attachment, restructuring or changes in aerial Facilities in, across, along, over or under a public street, alley or Rights-of-Way occupied by a Provider, and to change the curb, sidewalks or the grade of streets.
- (B) The City shall assign priorities among competing uses of the Rights-of-Way according to the order of completed permit applications.
- (C) If, during the term of a Municipal Consent, the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or Rights-of-Way, the grant to an abutting landowner shall be subject to the rights of the Provider. If the City closes or abandons a Rights-of-Way that contains a

portion of a Provider's Facilities, the City shall convey the land in the closed or abandoned Rights-of-Way subject to the rights granted in the Municipal Consent.

- (D) If the City gives written notice, a Provider shall, at the Provider's expense, temporarily or permanently, remove, relocate, change or alter the position of Provider's Facilities that are in the Rights-of-Way within 120 days. For projects expected to last beyond 120 days, City will confer with Provider before determining the alterations to be required and the timing thereof. The City shall give notice whenever the City has determined that removal, relocation, change or alteration is reasonably necessary for the construction, operation, repair, maintenance or installation of a City public improvement in the Rights-of-Way. This section shall not be construed to prevent a Provider's recovery of the cost of relocation or removal from private third parties who initiate the request for relocation or removal, nor shall Provider be required to construct improvements which are solely for esthetic or beautification purposes without prior consultations between City and Provider.
- (E) During the term of its Municipal Consent, a Provider may trim trees in or over the Rights-of-Way for the safe and reliable operation, use and maintenance of its network. All tree trimming shall be performed in accordance with standards promulgated by the City. When ordered by the City, tree trimming shall be done under the supervision of the City.
- (F) Providers shall temporarily remove, raise or lower its aerial Facilities to permit the moving of houses or other bulky structures, if the City gives written notice of no less than 48 hours. The expense of these temporary rearrangements shall be paid by the party or parties requesting and benefiting from the temporary rearrangements. Provider may require prepayment or prior posting of a bond from the party requesting the temporary move.

## **SECTION 18 – INSURANCE REQUIREMENTS**

- (A) A Provider shall obtain and maintain insurance in the amounts prescribed by the City with an insurance company licensed to do business in the State of Texas acceptable to the City throughout the term of a Municipal Consent granted under this Ordinance. A Provider shall furnish the City with proof of insurance at the time of filing the acceptance of a Municipal Consent. The City reserves the right to review the insurance requirements during the effective period of a Municipal Consent, and to reasonably adjust insurance coverage and limits when the City's Risk determines that changes in statutory law, court decisions, or the claims history of the industry or the Provider require adjustment of the coverage. For purposes of this section, the City will accept certificates of self-insurance issued by the State of Texas providing the same coverage.
- (B) The City may, on request and at no cost to the City, receive copies of certificates of insurance evidencing the coverage required by this Section. The City may



request the deletion, revision or modification of particular policy terms, conditions, limitations or exclusions, unless the policy provisions are established by a law or regulation binding the City, the Provider, or the underwriter. If the City requests a deletion, revision or modification, a Provider shall exercise reasonable efforts to pay for and to accomplish the change.

(C) An insurance certificate shall contain the following required provisions:

- (1) Name the City of and its officers, employees, board members and elected representatives as additional insureds for all applicable coverage;
- (2) Provide for 30 days notice to the City of cancellation, non-renewal, or material change;
- (3) Provide that notice of claims shall be provided to both the Director and the Office of Risk Management by certified mail; and
- (4) Provide that the terms of the Municipal Consent which impose obligations on the Provider concerning liability, duty, and standard of care, including the indemnity section, are included in the policy and that the risks are insured within the policy terms and conditions.

(D) A Provider shall file and maintain proof of insurance with the Director and the Office of Risk Management during the term of a Municipal Consent or an extension or renewal. An insurance certificate obtained in compliance with this section is subject to City approval. The City may require the certificate to be changed to reflect changing liability limits. A Provider shall immediately advise the Director of actual or potential litigation that may develop that would affect insurance coverage required by this Section related to a Municipal Consent and/or that may affect the Provider's obligation to defend and indemnify the City.

(E) An insurer has no right of recovery against the City. The required insurance policies shall protect the Provider and the City. The insurance shall be primary coverage for losses covered by the policies.

(F) The policy clause "Other Insurance" shall not apply to the City if the City is an insured under the policy.

(G) The Provider shall pay premiums and assessments. A company which issues an insurance policy has no recourse against the City for payment of a premium or assessment. Insurance policies obtained by a Provider must provide that the issuing company waives all right of recovery by way of subrogation against the City in connection with damage covered by the policy.

## **SECTION 19 – INDEMNITY**

Each consent granted under this Ordinance shall contain provisions whereby Providers agree to defend, indemnify and hold City harmless from and against all damages, costs, losses or expenses (i) for the repair, replacement, or restoration of City property, equipment, materials, structures and facilities which are damaged, destroyed or found to be defective as a result of such Provider's acts or omissions, (ii) from and against any and all claims, demands, suits, causes of action, and judgments for: (a) damage to or loss of the property of any person (including, but not limited to, such Provider, its agents, officers, employees and subcontractors, City's agents, officers and employees, and third parties); and/or (b) death, bodily injury, illness, disease, loss of services, or loss of income or wages to any Person (including, but not limited to, the agents, officers and employees of such Provider, Provider's subcontractors, and City, and third parties), arising out of, incident to, concerning or resulting from the negligent or willful acts or omissions of such Provider, its agents, employees, and/or subcontractors, in the performance of activities pursuant to such consent.

#### **SECTION 20 – RENEWAL OF MUNICIPAL CONSENT**

A Provider shall request a renewal or a new consent by making written application to the Director at least six month before the expiration of the then current consent period.

#### **SECTION 21 – ANNEXATION; DISANNEXATION**

Within thirty days following the date of the passage of any action effecting the annexation of any property to or the disannexation of any property from the City's corporate boundaries, the City agrees to furnish Provider written notice of the action and an accurate map of the City's corporate boundaries showing, if available, street names and number details. The Provider shall have 180 days from the date on which the City provides all necessary notice of the annexation in which to start including Access Lines within the affected area in the Provider's count of Access Lines for the purpose of calculating the monthly Line Fee.

#### **SECTION 22 – SEVERABILITY**

The provisions of this ordinance are severable. However, in the event this Ordinance or any tariff that authorizes the Provider to recover the fee(s) provided for this Ordinance or any procedure provided in this Ordinance or any compensation due the City under this Ordinance becomes unlawful, or is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, illegal or otherwise inapplicable, in whole or in part, or is exchanged for another means of compensation under higher authority, the Provider and City shall meet and negotiate a new agreement that is in compliance with the authority's decision or enactment. Unless explicitly prohibited, the new agreement shall provide the City with a level of compensation comparable to that set forth in this Ordinance as long as the agreed-to compensation is recoverable by the Provider in a manner permitted by law for the unexpired portion of the term of this Ordinance.

## **SECTION 23 – GOVERNING LAW**

This Ordinance shall be construed in accordance with the City Code(s) in effect on the date of passage of this Ordinance to the extent that such Code(s) are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas.

## **SECTION 24 – TERMINATION**

- (A) The City shall reserve the right to terminate any consent and any rights or privileges granted under this Ordinance in the event of a material breach of the terms and conditions of the consent or of this Ordinance, subject to a thirty (30) day written notice and the opportunity to cure the breach during that thirty (30) day period.
- (B) Material breaches of a consent specifically including, but are not limited to, continuing violations of Sections 10, 16 and/or 17, the performance of any act not authorized by the consent, and/or the failure to perform any act required by the consent.
- (C) A material breach shall not be deemed to have occurred if the violation occurs without the fault of a Provider or occurs as a result of circumstances beyond its control. Providers shall not be excused from performance of any of its obligations under this Ordinance by economic hardship, nor misfeasance or malfeasance of its Directors, officers or employees.
- (D) A termination shall be declared only by a written decision of the City Council after an appropriate public proceeding before the City Council, which shall accord the Provider due process and full opportunity to be heard and to respond to any notice of grounds to terminate. All notice requirements shall be met by giving the Provider at least fifteen (15) days prior written notice of any public hearing concerning the proposed termination of its consent. Such notice shall state the grounds for termination alleged by City.

## **SECTION 25 – UNAUTHORIZED USE OF PUBLIC RIGHTS-OF-WAY**

- (A) It shall be unlawful for any person to knowingly provide Telecommunications Services by use of the City's Public Rights-of-Way if such use has not been authorized by the City in accordance with the terms of this Ordinance and its consent.
- (B) It shall be unlawful for any person to place a Telecommunications Network or any facilities on, in or over the Public Rights-of-Way, City Property, City Structures or Utility Infrastructure unless expressly allowed under this Ordinance or the terms of a consent.

(C) Each unauthorized use shall be deemed to be a distinct and separate offense. Each day a violation of this Ordinance continues shall constitute a distinct and separate offense.

(D) The violation of any provision of this Ordinance shall be unlawful and a misdemeanor offense. Upon conviction, any person who shall violate any of the provisions of this ordinance, or fail to comply therewith or with any of the provisions thereof, shall be fined a sum not less than twenty-five dollars (\$25.00) and not more than two hundred dollars (\$200.00), and subsequent convictions for any violation of this ordinance within a twelve-month period shall double the minimum applicable fine, up to and including the maximum allowed by law.

**SECTION 26 – PREEMPTION**

No provision of this Ordinance or a Municipal Consent granted hereunder shall be deemed void or unenforceable as a result of state or federal preemption unless and until so determined by a final, nonappealable order of a state or federal agency or court.

**SECTION 27 - EMERGENCY NUMBER (911) COMPLIANCE AND CUSTOMER SERVICE**

(A) Provider shall provide or ensure a seamless and technically efficient interconnection, that is transparent to the customer, with or through any other telecommunication service provide to the area’s Emergency Number District’s 9-1-1 system to include compatibility for automatic number identification (ANI) and automatic location identification (ALI), in compliance with all applicable requirements of Ordinance 771 and 772 of the Texas Health and Safety Code, as amended, concerning emergency communications and the Public Utility Commission Substantive Rules, Section 23-97 et seq. and in particular Section 23.97(a),(d) and (e), all as amended to January 1, 1997.


(B) Provider shall comply with all requirements of state law and the PUC in making reasonably available to its customers a consumer information pamphlet (in English and Spanish) explaining how to register complaints concerning service and billing. Provider shall maintain an adequate number of pay stations within the area at which customers may pay their bills. Provider shall maintain a toll free phone number for customer assistance where customers can register complaints as to service and request such other assistance as may be necessary and proper. Provider shall designate an individual employed by Provider to serve as a liaison between the City and Provider, which person shall respond within seven (7) business days to any complaints forwarded to Provider by City.

**SECTION 28 – EFFECTIVE DATE**

This Ordinance takes effect on August 14, 2007.

PASSED AND APPROVED:

August 14, 2007.

  
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Russell J. Foster

ATTEST:

  
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Juanita Gonzalez  
City Secretary

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