

SUBSTITUTE ORDINANCE NO. 5551

AN ORDINANCE AUTHORIZING THE ISSUANCE OF CONTRACTUAL LICENSES, PERMITS AND/OR AUTHORIZATIONS FOR USE AND OCCUPATION OF THE STREETS, ALLEYS, THOROUGHFARES AND RIGHTS-OF-WAY OF THE CITY OF MEMPHIS FOR INSTALLATION AND USE OF FACILITIES FOR THE OPERATION OF FIBER OPTIC AND OTHER COMMUNICATIONS SYSTEMS AND PUBLIC UTILITIES AND ESTABLISHING REQUIREMENTS, TERMS, CONDITIONS, LIMITATIONS AND PROVISIONS FOR RECOVERY OF THE CITY'S COSTS INCURRED FOR THE CONSTRUCTION, MAINTENANCE, POLICING, MANAGEMENT OR REPAIR OF THE STREETS, ALLEYS, THOROUGHFARES AND RIGHTS-OF-WAY OF THE CITY

WHEREAS, it is proper under Tennessee law that permission to use the public rights-of-way for communications systems and public utilities be sought and obtained from the City by public and private utilities and telecommunications providers under authority of Section 15 of Ordinance No. 1852, the Home Rule Charter of the City of Memphis and Section 3 of Chapter 11 of the Acts of 1879, which is preserved by Section 17 of the City's Home Rule Charter, and from all of which authority the City is made the proprietor of its streets and public rights of way in trust for its citizens; and

WHEREAS, the Council desires to adopt a new ordinance that governs access, use and occupation of its streets and public rights of way by public and private utilities and telecommunications providers;

WHEREAS, the Council desires to formally repeal all ordinances and compensation schemes based on a percentage of gross revenues or other methods of compensation, whether set by ordinance or administrative directive, and to adopt uniform provisions that specify conditions and requirements for access, use and occupation of its streets and public rights of way by public and private utilities and telecommunications providers, including methods and procedures for setting rates and fees based on that portion of the City's right of way costs reasonably related to regulating specific activities or defraying

the cost of providing services or benefit to such public and private utilities and telecommunications providers.

NOW, THEREFORE, BE IT ENACTED AND ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, AS FOLLOWS:

Article I. DECLARATION OF AUTHORITY.

The City of Memphis has been delegated, as proprietor, the entire control over the streets, alleys, thoroughfares and rights-of-way located within its corporate limits by the General Assembly pursuant to Chapter 11 of the Acts of 1879 and subsequent Acts, all of which were preserved by Section 17 of the City's Home Rule Charter. In addition the City possesses police powers to regulate the use of its streets, alleys, thoroughfares, rights-of-way and public places for the protection of the health, safety and welfare of its citizens. The City acts in its proprietary capacity by enacting this Ordinance and by authorizing the Mayor to issue any authorization, license, permit or easement issued or made pursuant to this ordinance or to enter into any contracts pursuant thereto and as such intends to be bound by the provisions of this Ordinance and any Authorization, license, contract, permit or easement issued or made pursuant to this Ordinance as a natural person, except when its duty and obligation to protect the health, safety and welfare of its citizens requires that it act contrary to the express provisions of this Ordinance or any resulting Authorization, license, contract, permit or easement issued or made pursuant to this ordinance, since the abrogation or waiver of its police powers by contract or otherwise is contrary to the laws and public policy of this State. Upon adoption of this Ordinance, the Mayor and those acting at his direction are hereby authorized, empowered and directed to implement the provisions of this Ordinance and to take any and all other steps they deem necessary or appropriate to implement this Ordinance and any Authorization, license, contract, permit or easement issued or made pursuant to this Ordinance.

Article II. Statement of Policy.

(a) Any person or corporation organized by virtue of the laws of this State, or of any other State of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence or the equivalent thereof, which may be hereafter invented or discovered, is authorized, under Tennessee and federal statutes, to construct, operate and maintain a telegraph, telephone, or other lines necessary for the speedy transmission of intelligence, along and over the public highways and streets of the cities and towns of this State, subject to all reasonable police powers of the City to regulate the construction, maintenance, or operation of such line within its limits, including the right to exact reasonable rentals and compensation for the use of its streets on a non-discriminatory and competitively neutral basis.

(b) It is the policy of the City of Memphis to maintain the integrity, operational safety and functions of the City's streets and rights-of-way, including accommodating access to the City's streets and rights-of-way by Telecommunications Companies for the installation of their Telecommunications Systems. It is also the policy of the City of Memphis to grant non-exclusive franchises, licenses, authorizations and permits, on a competitively neutral and non-discriminatory basis, allowing the installation of underground Telecommunications Systems and related facilities within the rights-of-way of the City; provided, however, that any such access, use and/or occupation of the City's streets and rights-of-way by Telecommunications Companies with their Telecommunications Systems shall be subject to this Ordinance and conditioned on the payment of compensation by such Telecommunication Companies using and occupying the City's rights-of-way with their Telecommunications Systems in such amounts determined by the City Council from time to time in accordance with applicable law. The City may, at its option, accept monetary compensation or in-kind compensation, or both. Valuation of in-kind compensation shall be calculated in accordance with the method of valuation adopted by the Council.

Article III. Governing Law.

It is the intent of the Council that this Ordinance and any agreement made under the authority of this Ordinance be governed by and interpreted in accordance with Tennessee law, including but not limited to Tennessee Code Annotated, Sections 65-21-101, -103 and -201 and the applicable provisions of the Federal Telecommunications Act of 1996, 47 U.S.C. § 253, as construed by the United States Court of Appeals for the Sixth Circuit and by Tennessee appellate courts.

Article IV. Definitions.

For the purpose of this Ordinance the following definitions shall apply:

3.01 "**Anniversary Date**" shall mean each anniversary of the date on which any contract under this Ordinance is fully executed.

3.02 "**Charter**" shall mean collectively (i) Ordinance No. 1852, Home Rule Charter adopted by Referendum vote on November 8, 1966 (the "Home Rule Charter") and (ii) the Charter of the City of Memphis as enacted in Acts 1879 as amended, to the extent not repealed by the Home Rule Charter.

3.03 "**City**" shall mean the City of Memphis.

3.04 "**City Engineer**" shall mean the position of City Engineer created by the Charter or a successor position, or an acting City Engineer or the designee of the City Engineer.

3.05 "**Contract Year**" means with respect to any payments due the City under this Authorization Ordinance, each twelve (12) month period during the term of any Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance.

3.06 "**Confidential Information**" shall mean any Trade Secrets (as defined below) or other information relating to a Grantee that derives economic value from not being generally known to or readily accessible to other persons and is the subject of reasonable efforts to maintain its secrecy. Confidential Information shall include, but not be limited to, (i) a Grantee's manner of operation, forms

of agreements, plans, processes and programs; (ii) information about its finances and financial condition and about the finances and financial condition of clients or other entities affiliated with a Grantee; (iii) research, marketing plans, designs, procedures, formulas, discoveries, inventions, concepts, ideas, specifications, flowcharts, listings of customers, supplies, or analyses; and (iv) information supplied to Grantee by other parties which a Grantee is obligated to keep confidential. As used herein, "Trade Secrets: shall include any technical or non-technical data or information, design, procedure or improvement that derives economic value, actual or potential, from not being generally known to or readily ascertainable by proper means by the competitors of a Grantee. "Confidential Information" shall not include any information which has entered the public domain.

3.07 "**Council**" shall mean the Council of The City of Memphis.

3.08 "**Day**" or "**Days**" shall mean a calendar day or days.

3.09 "**Director of Finance**" shall mean the position of Director of Finance and Administration created pursuant to and under the Charter or a successor position, or an acting Director of Finance, or the designee of the Director of Finance.

3.10 "**FCC**" shall mean the Federal Communications Commission, or any successor agency.

3.11 "**Authorization**" shall mean the non-exclusive contractual privilege, authorization license or easement granted as provided in this ordinance to occupy or use the streets and/or public rights-of-way within the City for the construction, operation and maintenance of any Public Works or any fiber optic and/or other telecommunications systems within all or a portion of the City.

3.12 "**Right of Way Agreement**" shall mean a fully executed and notarized Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance by and between the City and Grantee in form and substance agreeable to the City, wherein the City grants certain non-exclusive revocable rights to use and occupy its streets and rights-of-way and wherein Grantee accepts and agrees to be bound by the terms and provisions of this ordinance.

3.13 “**Grantee**” shall mean any public or private utility or any company operating Public Works, utility systems or telecommunications systems using facilities either constructed, owned or leased within the Public Right-of-Way for any purpose.

3.14 “**Public Right-of-Way**” shall mean real property surface, subsurface and air rights (appurtenant to surface rights) acquired by the City by any lawful means and devoted to transportation of people, goods or information and to the provision of governmental services and includes the surface and that area below the surface which is necessary to support the public street, alley, path, bridge, tunnel, sidewalk, planting strip, median, waterway, dock, wharf, pier, public ground, utility easement or other public right-of-way. Public right-of-way also includes the surface of any public street, alley, public ground or other public right-of-way acquired by the City. No reference herein or in any Authorization for use of any public right-of-way shall be deemed to be a representation or guarantee by the City that its title to any public right-of-way or any improvement or object located therein is sufficient to permit or authorize its use by the Grantee. Public Right-of-Way shall not include any real or personal property, buildings, infrastructure, such as sewers, conduits, poles and bridges, owned by the City that is not a utility, easement or right-of-way.

3.15 “**Public Works**” shall mean any water, gas or electric heat, light or power works, plants and systems as defined in Tennessee Code Annotated § 7-34-102 and any such systems owned and operated by privately owned utility companies.

3.16 “**Public Right of Way Administrator**” shall mean who shall be a person designated by the Mayor within the Office of the City's Chief Administrative Officer, whose responsibility shall be to coordinate with all divisions of City government having any responsibility for managing, supervising or inspecting any construction or use of the City’s Public Rights of Way by private or public entities.

3.17 “**System**” or “**Telecommunications System**” shall mean Grantee's network of cables, wires, lines, conduits, innerducts, wave guides, optic fiber, microwave, laser beams, and any associated

converters, equipment, or facilities that are placed in, on, across or over the public rights-of-way that are designed and constructed for the purpose of producing, receiving, amplifying or distributing by audio, video or other forms of electronic signals to or from subscribers or locations within the City, but not including cable television services as defined under the Cable Communications Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, and/or any Authorization granted by the City pursuant to said Act.

3.18 "**TRA**" shall mean the Tennessee Regulatory Authority or any successor agency.

3.19 "Telecommunications Act of 1996" or "TCA 1996" shall mean and refer to 47 U.S.C. §§ 251, 252 and 253.

3.20 "Conduit" means a hollow tube, duct or tabular runaway (of varying sizes) used to enclose and protect innerducts, fiber optic wires, cable or other wires for underground installation of such innerducts, fiber optic wires, cable or other wires.

3.21 "Innerduct" means a hollow, flexible tube (of varying sizes) used to enclose fiber optic wires, cables or other wires for underground installation, and which may be enclosed within conduit.

3.22 "Telecommunications Company" means any cooperative, corporation, partnership or individual named in the Right of Way Agreement that may locate, install or maintain fiber optic cable facilities within the City's rights-of-way.

3.23 "Term" means the duration of the Right of Way Agreement under which a telecommunications company locates, installs and maintains fiber optic cable facilities within the rights-of-way of state freeways.

3.24 "Fiber Optic Facilities" means underground fiber optic conduit, ducts, cable lines, wires

or related facilities.

3.25 “Cover”. Depth of Lop of pipe, conduit, casing or gallery below grade of roadway, ditch or other utility facilities.

3.26 “Direct Burial.” Installing Fiber Optic Facilities underground without encasement.

3.27 “Encasement.” Structural element surrounding a pipe.

3.28 “Encroachment.” Unauthorized use of the City’s streets and rights-of-way or easements for signs, fences, utilities, parking, storage, etc.

3.29 “Gallery. An underpass for two or more utility lines.

3.30 “Manhole. An opening in an underground system which workmen or others may enter for the purposes of making installations, inspections. repairs, connections and tests.

3.31 “Median. The portion of a divided highway or street separating the Traveled Ways for traffic in opposite directions.

3.32 “New Utility Installation. An initial installation on the City’s streets and rights-of-way and the replacement of existing facilities with those of a different type, capacity or design of replacement at a new location on the right-of-way.

3.33 “Normal. Crossing at a right angle.

3.34 “Oblique. Crossing at an acute angle.

3.35 “Pavement structure. The combination of subbase, base course, and surface course placed on a subgrade to support the traffic load and distribute it to the roadbed.

3.36 “Pipe. A tabular product made as a production item for sale as such. Cylinders formed from plate in the course of the fabrication of auxiliary equipment are not pipe as defined here.

3.37 “Plowing. Direct burial of utility lines by means of a “plow” type mechanism which breaks the ground, places the utility line and closes the break in the ground in a single operation.

3.38 “Private lines. Privately owned facilities which convey or transmit intelligence or information but are devoted exclusively to private use.

3.39 Roadside. A general term denoting the area adjoining the outer edge of the travelled roadway. Extensive areas between the roadways of a divided highway may also be considered roadside.

3.40 “Roadway. The portion of a highway, including shoulders, for vehicular use. A divided street or highway has two or more roadways.

3.41 Specifications. Standard Specifications for Road and Bridge Construction approved by the City Engineer.

3.42 “Surety. The corporation, partnership or individual other than the utility owner, executing a bond furnished the City by the utility owner.

3.43 “Traveled Way. The portion of the roadway for the movement of vehicles, exclusive of shoulders, auxiliary lanes and rights of way designed for placement of utilities.

3.44 “Trenched. Installed in a narrow open excavation.

3.45 “Untrenched. Installed without breaking ground or pavement surface, such as by jacking or boring.

3.46 Utility Owner. The public agency or cooperative and any private cooperative,

corporation, company or individual named in the Right of Way Agreement and responsible for the construction, operation and maintenance of the telecommunications and utility facilities or private lines.

Article V. Administration

The administration of the access, use and occupation of the City's Public Right of Way by private and public entities shall be under the supervision of the Chief Administrative Officer of the City. The Mayor shall designate a person within the Office of the City's Chief Administrative Officer, whose responsibilities shall be:

- 1) To coordinate with all divisions of City government who perform services, functions or activities in all or a portion of the City's Public Rights of Way;**
- 2) To coordinate with all divisions of City government having any responsibility for managing, supervising or inspecting any construction, use, operation or maintenance of a fiber optic and/or other telecommunications systems within all or a portion of the City's Public Rights of Way by private or public entities;**
- 3) To manage the application process;**
- 4) To insure that all requirements, limitations and conditions imposed by this Ordinance and other laws, ordinances, rules and regulations are satisfied before any authorization to access the City's Public Rights of Way is granted;**
- 5) To insure that all statutes, laws, ordinances, rules and regulations pertaining to the City's Public Rights of Way are observed by Grantees;**
- 6) To develop a system for preserving, recording and maintaining all contracts, licenses, permits or easements granted under this ordinance to occupy or use the streets and/or Public Rights-of-Way for the construction, operation and maintenance of a fiber optic and/or other telecommunications systems within all or a portion of the City.**

Article VI. Conditions for Access to the City's Rights of Way

(a) No telecommunications company or utility owner shall be permitted to install underground any Telecommunication System or related facilities within the City's rights-of-way without first obtaining permission from the City by executing a Right of Way Agreement or a permit. No telecommunications company or utility owner shall cause or allow any Telecommunication Systems or related facilities to continue to occupy the City's rights of way after the effective date hereof without obtaining a Right of Way Agreement or other Authorization from the City, except that any such telecommunications company or utility owner shall be permitted to continue to occupy the City's streets and rights of way pursuant to any unexpired Specific Route or Encroachment Agreement as long as any such company is not in default thereunder.

(b) Upon making application to the Chief Administrative Officer for a Right of Way Agreement under this Ordinance, the telecommunications company shall pay an application fee to the City for processing the application, reviewing plans, and other administrative services, but not including inspection services, which shall be separately charged as herein provided. The total amount of the required application fee shall include a base fee of \$350 plus \$10 for each mile of the proposed installation within all or a portion of the City's Public Rights of Way.

(c) All utility installations within the City's streets and rights-of-way and all work performed within the City's streets and rights-of-way or otherwise, including without limitation any work performed for the City, shall be subject to inspection by the City Engineer to insure conformity with all City engineering and construction standards which standards shall be deemed a part of the Right of Way Agreement by reference. When new utility installations within the City's streets and rights-of-

way are of such magnitude and complexity as to require extensive inspectional services by the City Engineer to ascertain that all provisions of the City's requirements are carried out, the City Engineer shall assign one or more inspectors, either City employees or specially employed engineering contractors, to inspect the installation periodically and if necessary place one or more inspectors on the site for the duration of construction activities. The utility in accepting the Right of Way Agreement shall agree to reimburse the City for said inspector's salary, inclusive of benefits, or compensation, equipment used and miscellaneous expenses incurred applicable to the installation of the utility facilities. The necessity for such inspectional services will be determined by the City Engineer on a case by case basis and his decision shall be conclusive and final.

(d) The City Engineer shall have the authority to reject substandard work or materials and/or to suspend or stop work, in whole or part, where the telecommunications company fails to comply with any requirement of this Ordinance or the terms of the Right of Way Agreement or where any unsafe or hazardous condition exists unless and until corrective measures have been made to the satisfaction of the City Engineer.

(e) Any inspection or control exercised by the City over the construction activities of the utility owner shall in no way relieve the utility owner of any duty or responsibility to the general public nor shall such services and/or control by the City relieve the utility owner from any liability for loss, damage or injury to persons or adjacent properties.

(f) The decision of the Mayor or the City's Chief Administrative Officer and if required the City Engineer, shall be final and conclusive with respect to conditions, terms, stipulations and provisions to be included in any Right of Way Agreement.

Article VII. Right of Way Agreement Requirements

Each Right of Way Agreement for the installation of fiber optic facilities within City's rights-of-way shall be subject to this Ordinance and specifically, but without limitation, to the following terms and conditions:

(a) Assignment. The telecommunications company and/ or utility owner may not assign or transfer its rights or obligations under the Right of Way Agreement to another telecommunications company or other entity or person without first giving written notice to, and obtaining the consent of, the City, which consent shall not be unreasonably withheld.

(b) Indemnification and Hold Harmless.

- 1) The telecommunications company and/ or utility owner shall indemnify the City of Memphis and their officers, employees and agents, and hold them harmless to the maximum extent allowed under Tennessee law for any and all claims arising from the telecommunications company's use of the City's right-of-way to install, operate and/or maintain fiber optic facilities, including claims by third parties, and including attorneys' fees and all other costs of preparing for and defending against such claims, regardless of any negligence or fault of the City of Memphis.**
- 2) Without limiting the foregoing, the telecommunications company shall hold the City of Memphis, and their officers, employees and agents, harmless, to the maximum extent allowed under Tennessee law, for any personal injury or property damage, including interruption of service or loss of business, incurred by the telecommunications company, or its officers, employees or agents, arising from the City of Memphis' construction, reconstruction, operation or maintenance of the City's right-of-way, regardless of any negligence or fault of the City of Memphis.**
- 3) The City agrees to give Grantee prompt and reasonable notice of any claims or lawsuits; and Grantee shall have the right to investigate, compromise, intervene and defend same to the extent of its own interest. The above indemnification shall**

not apply to any judgment of liability resulting from the gross negligence or willful misconduct of the City. The terms and provisions contained in this Section are intended to be for the benefit of the City and Grantee, and are not intended to be for the benefit of any third party. The City shall have the right to participate or conduct the defense of its interests in any proceeding, and thereby assume risks and liabilities for its own acts or omissions.

(c) Insurance. The telecommunications company shall at all times have and maintain, and upon the request of the City shall provide written proof of, liability insurance policies containing, at a minimum, the following insurance coverage:

- 1) All such liability insurance policies shall provide liability coverage sufficient, at a minimum, to match the City limits of liability under City Ordinances. These limits are currently set at One Million Dollars (\$1,000,000.00) combined single limit, bodily injury and for real property damage in any one occurrence and Five Million Dollars (\$5,000,000.00) aggregate.***
- 2) Grantee shall also file with the City a certificate of insurance for a comprehensive automobile liability insurance policy written by a company authorized to do business in the State of Tennessee, for all owned, non-owned, hired and leased vehicles operated by Grantee, with limits no less than One Million Dollars (\$1,000,000.00) each accident, single limit, bodily injury and property damage combined, or evidence of self-insurance.***
- 3) Grantee shall also maintain and specifically agrees that it will maintain throughout the term of the Authorization, workers compensation and employers liability, valid in the State, in the minimum amount of the statutory limit for workers compensation.***
- 4) All liability insurance required pursuant to this section shall be kept in full force and effect by Grantee during the term of any Right of Way Agreement or other Authorization and until after the removal of all poles, wires, cables, underground***

conduits, manholes and any other conductors and fixtures installed by Grantee in the Public Rights-of-Way incident to the maintenance and operation of the Telecommunications System as defined in this Ordinance.

- 5) All policy limits set forth herein are subject to change by order of the City's Chief Administrative Officer without amendment of this Ordinance.***
- 6) All such liability insurance policies shall name the City of Memphis as an additional insured for the purposes of fulfilling the telecommunications company's obligations under the Use and Occupancy Agreement, including without limitation any and all obligations to indemnify and hold harmless the City of Memphis, and their officers, employees and agents. All policies shall be endorsed to give the City thirty (30) days written notice of the intent to amend or cancel by either Grantee or the insuring company.***

(d) **Surety Bond.** The telecommunications company or utility owner shall furnish a surety bond, issued by a company licensed to do business in the State of Tennessee, and in such form and amount acceptable to the City, guaranteeing full and faithful performance of the terms and conditions of the Use and Occupancy Agreement, including without limitation the repair and restoration of the right-of-way premises, the payment of any monetary compensation remaining due to the City for use of the City's Streets and rights-of way, and the completion of any installation or relocation of fiber optic facilities.

(e) **Relocation or Removal.**

- 1) If, at any time, the City determines that any fiber optic facilities need to be relocated within, or removed from, the City's streets and rights-of-way for any reason related to the use, operation, maintenance, construction, reconstruction, modification or redesign of any such streets and rights-of-way, the***

telecommunications company or utility owner shall relocate or remove the facilities as directed by written notice from the City Engineer.

- 2) All such costs of relocation or removal shall be borne solely by the telecommunications company or utility owner and not by the City, except as the City may otherwise agree in accordance with a special condition of the Right of Way Agreement executed prior to the installation, or as the City may subsequently agree in writing under a utility relocation contract.***

- 3) The telecommunications company or utility owner shall complete the relocation or removal within such time as the City shall specify by written notice, or within such additional time as the City Engineer may authorize in writing. Upon the failure of the telecommunications company or utility owner to relocate or remove the fiber optic facilities within the specified time, or such additional time as the City Engineer may authorize in writing, the fiber optic facilities shall be deemed to be abandoned by the telecommunications company or utility owner, and the City shall be deemed the owner thereof; provided, however, that the City, in its sole discretion, may refuse ownership of the abandoned fiber optic facilities at any time within one year after the abandonment and thereupon hold the telecommunications company or utility company liable for the costs of removing such facilities from the City's streets and rights-of-way.***

- 4) To the extent that the telecommunications company or utility owner is required to remove fiber optic cable facilities from the City's streets and rights-of-way, the telecommunications company shall to that extent be relieved of any further obligation under the Right of Way Agreement to compensate the City for the use of the City's streets and rights-of-way. To the extent that the telecommunications company is allowed to relocate fiber optic cable facilities to another location within the City's streets and rights-of-way, the telecommunications company or utility owner may elect either to remain under the terms of compensation specified in the Right of Way Agreement, or the telecommunications company or utility owner may choose to enter into a new Right of Way Agreement for the new location.***

(f) Duration and Renewal of Right of Way Agreements.

- 1) Initial Term.** *The Right of Way Agreement for the installation of fiber optic facilities within City's streets and rights-of-way shall have an initial term of up to 5 years at the option of the telecommunications company or utility owner, without any necessity of approval from the City Council. For any term longer than 5 years, City Council approval by resolution shall be required.*

- 2) Renewal Options.** *Upon the expiration of the initial term of the Use and Occupancy Agreement, the telecommunications company shall have an option to renew the Right of Way Agreement for one (1) additional term of 5 years, or longer term approved by the City Council, but shall be subject to the applicable rate of compensation in effect as of the date of renewal. In no event shall any initial term or any successive renewal term exceed a combined total of 20 years.*

Article VIII. Compensation.

(a) Compensation Requirement.

- 1)** *No telecommunications company or utility owner shall be permitted to install underground fiber optic facilities within City's streets and rights-of-way except upon the payment of compensation for the use and occupation of such rights-of-way, as adopted by the Memphis City Council from time to time.*

- 2)** *The City may, at its option, may receive the compensation for use of City's streets and rights-of-way in the form of money or as in-kind compensation in the form of telecommunications facilities or services, or both.*

(b) Rate and Method of Compensation.

1) The rate of monetary compensation shall be as established by the Memphis City Council from time to time by Ordinance to affix an addendum to this Ordinance. In establishing the monetary rate of fair and reasonable compensation for use and occupation of City's streets and rights-of-way, the City Council shall consider the following factors:

- i) The City's costs in regulating the right of way activities of telecommunications companies and utility owners,
 - ii) the extent the City's streets and rights-of-way are used and occupied by such companies and owners,
 - iii) the proportionate share of the City's cost of making and keeping in repair and policing the City's streets and rights-of-way to be assigned to such companies and owners in order to defray the total amount of the City's right of way costs to provide right of way services to such companies and owners,
 - iv) the cost of providing the benefit to such companies and owners of the use and occupation of the City's streets and rights-of-way for installation of their telecommunications facilities, including, but not limited to, savings on construction costs due to ease of installation in established rights-of-way conveniently located in close proximity to their customers and businesses, comparable rates charged for the use and access, the amount of right-of-way available in certain locations and demand for certain locations. Information pertaining to these factors shall be presented to the City administration and by any other interested parties.
 - v) any other factors the Council deems relevant.
- (c) The method of valuation for in-kind compensation and the valuation for the purposes of a Right of Way Agreement shall be as established by the Memphis City Council with input from the City's Chief Information Officer.
- (d) Total Amount of Compensation. The total amount of compensation due for use of the right-of-way for a shall be fixed as of the date of execution of the Use and Occupancy Agreement, in accordance with the rate and method of valuation of in-kind compensation established by the City Council and in effect at that time.
- (e) Unit Measure of Compensation.

- 1) ***Compensation shall be stated and computed on a measured unit of right of way used by a Telecommunications Company and may be based (i) on the cubic feet of right-of-way such provider occupies in the public right-of-way, including clearance zones required by this Ordinance or by applicable industry and safety standards or (ii) on a unit charge for each linear foot conduit of four inches (4") or less or the equivalent thereof if innerducts containing fiber optic cable are installed without conduit or if fiber optic cable is buried in the right-of-way without a conduit or an innerduct, except that there shall be no charge for any innerduct or fiber optic cable provided to the City as in-kind compensation.***

- 2) ***The linear foot charge for conduit, innerduct or cable shall be calculated on a pro rata basis. For example, the charge for a five inch conduit or five inches (5") of combined innerducts or cables shall be 1.25 times the charge for a four inch conduit or four inches (4") of combined innerducts or cables.***

- 3) ***In-Kind Compensation. If the City's Chief Administrative Officer chooses to receive in-kind compensation under a Right of Way Agreement, it shall provide the Telecommunications Company with a list of the specific telecommunications facilities and/or services that it wishes to obtain. The value of such in-kind compensation, as determined in accordance with the method of valuation established by the City Council, shall be subtracted from the total amount of monetary compensation due for use of the right-of-way and the remaining balance, if any, shall be remitted as monetary compensation.***

Article IX. Policy and Methodology for Monetary Rate Setting.

The Council shall establish monetary compensation that is fair and reasonable considering the City's annual costs that are reasonably related to making the City's streets and rights-of-way available to telecommunications companies and utility owners for the installation of their telecommunications facilities. The rate of monetary compensation established should be within a zone of reasonableness rather than a rate determined with mathematical precision. To this end the City Council adopts as its rate

making policy the method approved by the Federal Communications Commission to govern the FCC's rate making activities in the closely analogous area of just and reasonable cost based pole attachment rates under the Pole Attachment Act, 47 U.S.C. § 224(d). *In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, 26 F.C.C Rcd. 5240 (Apr. 7, 2011) ("2011 Rate Order"). While the Pole Attachment Act does not apply to municipal governments and municipal utilities, it is instructive of an accepted method for determining just and reasonable cost based rates for the use by non-owning telecommunications companies of telephone poles, fiber optic conduit, rights of way and other telecommunication infrastructure owned by private utilities and telephone companies.

Under the FCC's 2011 Rate Order the FCC approved an approach which established a zone of reasonableness for an access fee as that compensation that was based on a facilities owner's costs falling between an "upper bound rate" and a "lower bound rate", the Commission reasoned that such an approach balanced the goals of increased competition with the historical role of proportionate cost recovery to facilities owners and their ratepayers. *Id.* ¶¶ 138-146.

Under the FCC's 2011 Rate Order, it defined the "upper bound rate" as that rate derived from its telecom rate formula applied to a facilities owners' fully allocated costs using a fully allocated cost methodology, which recovers a full range of costs of the facilities owner, such as (i) operational costs related to the pole, conduit or right of way, (ii) capital cost of acquiring the pole, conduit or right of way, and (iii) borrowing costs and depreciation, which is the method presently used by MLGW and other municipal utilities in Tennessee and in other states. *Id.* at ¶142. The FCC defined the "lower bound rate" as "a rate that covers the facilities owners' incremental cost associated with an attachment," which partly incorporates the economic cost causation principles advocated by the telecommunications industry. Under a strict application of cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer – the cost causer – pays a rate that covers this cost. Under this theory that is usually espoused by telecommunication providers seeking access to another's facilities,

sometimes called the “free rider” theory, there is very little incremental cost caused by the “free rider” since most costs would be incurred by the owner if the “free rider” was not present.

Even though the FCC found some support in economic theory for the application of strict cost causation principles in the lower bound rate the FCC did not follow the incremental cost causation method exactly as advocated by the non-incumbent telecommunication provider industry; rather, it included maintenance and administrative expenses in its calculation of allowable costs under its “lower bound rate”, even though the attacher might not be the cost causer with respect to all the operating costs that might be incurred by a facilities owner, to avoid shifting the full operating cost burden to the owning utility’s ratepayers. *Id.* at ¶146.

The net cost of a facilities owner’s telecommunications infrastructure is the initial capital outlay, i.e., the investment, for a telephone pole, fiber optic conduit, rights of way or other telecommunication infrastructure, minus accumulated depreciation. The carrying charge rate is a composite rate that reflects separate carrying charge rates for the costs of owning and maintaining such facilities. *See, e.g., 1987 Rate Order*, 2 FCC Rcd at 4391, para. 25; *2001 Order on Reconsideration*, 16 FCC Rcd. at 12121, ¶ 28. The carrying charges include a facilities owner's administrative, maintenance, interest and depreciation expenses, a return on investment [a factor not applicable here], and taxes.

The Council finds that the reasoning and rationale set forth in the FCC’s 2011 Rate Order is sound and addresses many of the policy considerations applicable to the City. The Council therefore adopts a rate setting methodology that defines a just and reasonable compensation as that fee or compensation that is based on the City’s right of way costs falling between the “upper bound rate” and the “lower bound rate,” as defined by the FCC in its 2011 Rate Order.

Article X. General Installation Policies and Procedures.

(a) **Timing of Installations.** To minimize interference with the safe use, operation and maintenance of the freeway, and as reasonably necessary to manage the right-of-way, the City Engineer may limit the timing of access so that, to the extent possible, there is no more than one fiber optic cable installation project underway at any given time on any particular segment of a state freeway.

(b) Location and Alignment Criteria.

- 1) General Location Policy.** *To minimize interference with the safe use, operation and maintenance of the City's streets, longitudinal installations of Telecommunications Systems and facilities shall be located outside the Travelled Way and as near to the outer edge of the right-of-way line as is reasonably practical; provided, however, that alternative locations within the right-of-way, including the Travelled Way, may be permitted where the City Engineer determines that it is not reasonably practical to locate the Telecommunications Systems and facilities along the outer edge of the right-of-way and that the use of the alternative location is consistent with the City's goal to minimize interference with the safe use, operation and maintenance of the streets and highways.*

- 2) Horizontal and Vertical Clearance Zones.** *As a general rule, subsequent installations of underground Telecommunications Systems and facilities outside the Travelled Way shall be located not less than three feet (3') from any previously installed Telecommunications System or other utility installation, if any, within the City's right-of-way or such greater clearance zones required by utility codes as they relate to electrical, water, gas or sewer systems. Exceptions may be considered on a case-by-case basis and as may be reasonably necessary to manage the City's right-of-way.*

- 3) Depth.** *All underground Telecommunications Systems and facilities shall be located and installed in accordance with a minimum depth of thirty six inches (36"), or at such greater depths as the City Engineer may require as a special condition of a*

Right of Way Agreement or as shall be necessary to comply with the Horizontal and Vertical Clearance Zone requirement.

- 4) Access Points. Devices for accessing underground Telecommunications Systems and facilities for routine service or site visits shall not be allowed within the Travelled Way, except as the City Engineer may otherwise expressly permit or require.***
- 5) Support Facilities. All above-ground support facilities for underground Telecommunications Systems and facilities shall be located outside the Travelled Way and as near to the outer edge of the right-of-way line as is reasonably practical. No above-ground facility may be located on the City's right-of-way without the express written approval of the City Engineer.***
- 6) Attachment to Roadway and Roadside Structures. The attachment of Telecommunications Systems and facilities to Roadway and Roadside Structures -- including without limitation bridges, overpasses, underpasses, culverts and tunnels -- shall be permitted only with the prior written approval of the City Engineer.***

Article XI. Installation and Maintenance Requirements.

(a) General Standards of Care.

- 1) The telecommunications company shall take care not to install any Telecommunications System in such a manner as to create a potential hazard to life, health or property or in such a manner as to impair the use, operation and maintenance of the City's rights of way.***
- 2) The telecommunications company shall cooperate with the City Engineer to identify locations for its Telecommunications System or facilities within the City's right-of-way that will, to the extent it is reasonably practical, minimize any potential conflict with the future expansion or reconstruction of the right-of-way. The telecommunications company shall also take care to install all Telecommunications Systems or facilities in such manner as to require only minimal maintenance within the City's right-of-way after installation.***

(b) Tennessee One-Call Service. Telecommunications companies, utilities and private entities accessing the City's rights of way shall comply with the Tennessee One-Call Service as provided in Section 65-31-107 of the Tennessee Code, or as it may be amended.

(c) Permits and Approvals. The telecommunications company shall be responsible for obtaining all approvals and/or permits that may be required for activities authorized under this Rule, including without limitation all environmental permits and federal regulatory approvals or permits, if applicable.

Article XII. Minimum Installation and Maintenance Controls.

The following minimum controls shall apply to the installation, servicing and maintenance of all fiber optic cable facilities within state freeway rights-of-way, in addition to such other requirements as the City Engineer may provide as a general or special condition of the Right of Way Agreement:

(a) Installation and Maintenance Plan. Before commencing any installation, servicing or maintenance of a fiber optic cable facility, the telecommunications company shall submit an installation and maintenance plan to the City Engineer for review and approval, and upon approval such plan shall be made a part of the Right of Way Agreement. At a minimum, the installation and maintenance plan shall specify:

- 1) *The location and method of installing each part of the Telecommunications Systems and facilities within the right-of-way;*
- 2) *The means by which access to and within the right-of-way shall be accomplished for the purpose of installing, servicing and maintaining each part of the Telecommunications Systems*

and facilities, including provisions for ingress and egress, parking of vehicles and equipment, and storage of materials;

- 3) *The means by which the telecommunications company will provide for the control of traffic on the Travelled Way, if needed, in the course of installing, servicing or maintaining any part of the Telecommunications Systems and facilities;*
- 4) *The schedule for completing the installation of the Telecommunications Systems and facilities, or parts thereof, within the right-of-way; and*
- 5) *The procedure by which the telecommunications company will conduct emergency maintenance operations within the right-of-way.*

(b) Preservation of Pavement Structure. Open cutting or trenching of the pavement structure of a street, highway or roadway, including without limitation the Traveled Way and shoulders, if any, shall not be permitted. Wherever the City Engineer permits a crossing of the pavement structure of a street, highway or roadway in accordance with this Ordinance, the crossing shall be accomplished by boring or other untrenched method as approved by the City Engineer.

(c) Access to Right-of-Way for Installation and Maintenance.

- 1) *As far as it is reasonably practical, all fiber optic cable facilities should be designed and located in such a manner that they can be installed, serviced and maintained without direct access thereto from the traveled way. Such direct access may be permitted in special circumstances where there is no reasonably practical alternative means of access and the telecommunications company has made adequate provisions for controlling access to the work zone, directing traffic, and protecting the safety of workers and the traveling public, as specified in the installation and maintenance plan approved by the City Engineer.*

(d) **Parking of Vehicles.** The telecommunications company shall not be permitted to park vehicles and equipment or to store materials on the freeway right-of-way without express prior approval by the City Engineer. In no case shall the telecommunications company be permitted to park vehicles and equipment or store materials within the clear zone of the freeway, except as may be required during actual installation operations within the clear zone and while all required traffic control is present and in place.

(e) **Traffic Control.**

- 1) *All traffic control signs or other traffic control devices that the telecommunications company may use in the course of any installation, servicing or maintenance of a fiber optic cable facility shall comply with the provisions of Chapter 1680-6-1 and the Manual on Uniform Traffic Control Devices, as adopted in Chapter 1680-3-1.*
- 2) *In addition, the telecommunications company shall arrange for law enforcement officers having appropriate enforcement authority to be present to ensure the safe flow of traffic whenever any installation, servicing or maintenance of a fiber optic cable facility occurs within the clear zone of the freeway or as may be required in the installation and maintenance plan approved by the City Engineer where access to the work zone has been permitted from the traveled way, shoulders or access ramps of the freeway. The telecommunications company may not conduct any such work within the right-of-way without giving specific advance notice thereof to the City Engineer.*
- 3) *Advance Notice of Installation or Maintenance Work. Before performing any non-emergency servicing or maintenance of a fiber optic cable facility at any location within the freeway right-of-way and before performing any installation of a fiber optic cable facility within the clear zone or where access to the utility work zone has been permitted from the traveled way, shoulders or access ramps of the freeway, the telecommunications company shall give at least five (5) work days advance notice thereof to the Regional Director of the City Engineer Region in which the work is to be performed.*

(f) Emergency Maintenance or Repair. The telecommunications company shall notify the appropriate Regional Director of the City Engineer as soon as possible, and in any event not more than twenty-four (24) hours, after the occurrence of an event requiring emergency maintenance or repair of a fiber optic cable facility within the City's right-of-way, or as otherwise specified in the installation and maintenance plan approved by the City Engineer.

(g) Cessation of Work for Public Safety. If the telecommunications company fails to comply with the traffic control plan or any other provision of the installation and maintenance plan, or if any activity of the telecommunications company within the City's right-of-way interferes with the safe and efficient use of the travelled way as determined by the City Engineer, the telecommunications company shall immediately cease such activity upon notice being given by the City Engineer, and the telecommunications company shall thereafter work with the City Engineer to bring its activities into compliance with the installation and maintenance plan and/or implement such additional safety requirements as may be specified by the City Engineer.

(h) Trees. The cutting or removal of trees along the freeway right-of-way shall not be permitted without the express approval of the City Engineer.

(i) Hazardous Substances. The telecommunications company shall not place, install or deposit any hazardous substance or hazardous waste within or on any part of the state freeway or state freeway right-of-way. If at any time the telecommunications company causes or allows a spill of a hazardous waste or substance within the freeway right-of-way, the telecommunications company shall remain solely liable for the clean-up and removal of such hazardous waste or substance. The telecommunications company shall indemnify the State of Tennessee and City Engineer, and their

officers, employees and agents, and shall hold them harmless against any and all claims or expenses of any kind related to the deposit, spillage and/or clean-up of any such hazardous wastes or substances.

(j) Installation of Access Points for the City Engineer. Where the City Engineer requests in-kind compensation for the use of City's rights of way in accordance with this Ordinance, the telecommunications company shall provide pull boxes, splice boxes and/or other access points at such intervals and locations as the City Engineer may require. Covers for such access points shall be traffic rated in accordance with the requirements of the City Engineer's Standard Specifications for Road and Bridge Construction, and each cover shall be marked to identify it as a fiber optic cable or Telecommunications facility.

(k) Above-Ground Markers. The telecommunications company shall install permanent above-ground markers indicating the location of its underground Telecommunications Systems and facilities at such intervals as the City Engineer may approve or require in the installation and maintenance plan. These markers shall not interfere with the safe use, operation and maintenance of the freeway, nor shall they constitute a hazard to the traveling public.

(l) Repair and Restoration of Premises.

- 1) *The telecommunications company shall, as directed by and in a manner satisfactory to the City Engineer, promptly replace or repair any portion of the pavement, shoulders, structures, ramps, guardrail, drainage, or any other part of the freeway that may have been damaged in the course of any work within the state freeway right-of-way.*
- 2) *Upon the completion of any installation, replacement, repair or relocation of fiber optic cable facilities within the state freeway rights-of-way, the telecommunications company shall promptly restore the premises to a condition similar to that which existed prior to such work, in a manner satisfactory to the City Engineer.*

3) *The telecommunications company shall remain responsible for maintaining any excavation or trench on or along the state freeway right-of-way, as directed by and in a manner satisfactory to the City Engineer.*

(m) As-Built Drawings. “As-built” drawings that adequately demonstrate the location, size length and nature of all underground and aboveground Telecommunications Systems located on, over or under the City’s right-of-way shall be submitted by a Telecommunications Company to the City Engineer in such format as he shall direct within one hundred twenty days after completion of construction of such systems. Where the system is installed in duct, conduit or on poles owned by another entity, the owner shall be identified and the overall length, size, and shape of system installed in the shared facilities shall be indicated. A Telecommunications Company shall update such drawings within sixty days whenever material changes are made to such company’s system which impact the public right-of-way. Said drawings, set forth by utility quarter sections, shall at a minimum include cable routings and the location of amplifiers, power supplies and system monitor test points.

(n) Completion of any installation or relocation. It shall be the responsibility of the Telecommunications Company to seasonably submit “as built” drawings of its facilities in the City’s right-of-way and to provide other information upon request.

Article XIII. Compliance and Revocation.

(a) In the event that the City Engineer determines that the telecommunications company is in violation of any provision of this Ordinance or any Right of Way Agreement, the City Engineer may order the telecommunications company to comply.

(b) In any case not presenting any imminent threat to public safety, as determined by the City Engineer, the telecommunications company shall be given thirty (30) days, or such other reasonable time as the City Engineer may provide, within which to correct the noncompliance.

(c) In any case presenting an imminent threat to public safety, as determined by the City Engineer, the telecommunications company shall correct the noncompliance promptly as directed by the City Engineer.

(d) If a Telecommunications Company fails to comply with any order or directive given by the City Engineer or otherwise violates any provision of this Ordinance, after the above-stated notice and opportunity to cure, then the City may take any action authorized by law, including revocation, withholding of all other licenses and permits until the violation is cured, or repeal of any permit or Authorization previously granted or filing a suit in court to compel compliance. If, in any such proceeding, default is finally established, the Telecommunications Company shall be required to pay to the City the reasonable expenses incurred in the prosecution of such suit and all the City's damages and costs (including attorneys' fees). A Telecommunications Company that in good faith disputes a finding that it is in default, and that promptly files a court proceeding challenging the determination may continue to provide service pursuant to the terms of any permit or Authorization unless otherwise ordered by the court.

(e) A violation of the provisions of this Article after the above-stated notice and opportunity to cure shall subject the offending Telecommunications Company to an initial fine of \$50. Each day of

continued violation of this Ordinance constitutes a separate offense and will subject the offending Telecommunications Company to continuing fines, above the initial fine, of \$50 per day for each day that the a Telecommunications Company fails to comply with any order or directive given by the City Engineer to comply with any provision of this Ordinance.

(f) The telecommunications company shall not be entitled to any compensation, lost profits, consequential damages or reimbursement of suit expenses or attorney's fees in the event of a revocation of a Right of Way Agreement or enforcement action taken by the City to enforce this Ordinance.

(g) Upon the revocation of a Right of Way Agreement, the telecommunications company shall promptly remove any Telecommunications Systems located on, over or under the City's right-of-way, in such manner and within such time as the City Engineer may direct. If the telecommunications company fails to remove the Telecommunications Systems within the time directed, the Telecommunications Systems may be deemed to be abandoned by the telecommunications company, and the City shall be deemed the owner thereof; provided, however, that the City Engineer, in its sole discretion, may refuse ownership of the abandoned Telecommunications Systems at any time within one year after the abandonment and thereupon hold the telecommunications company liable for the costs of removing such facilities from the City's right-of-way.

Article XIV. RIGHT OF WAY FUND

(a) There is hereby created a right-of-way fund, which shall be used exclusively to help defray the costs associated with the management of the rights of way, including but not limited to the costs of preparing studies of the right-of-way and costs of any special committee and the costs of staff and other reasonable expenses necessary to administer the provisions of this Ordinance.

(b) All payments for the use of the right-of-way made pursuant to this Ordinance shall be deposited into the fund, less reasonable administrative costs incurred by the City in connection with the collection of fees owed.

(c) Operating transfers shall be made from this fund to other funds of the City incurring costs associated with Right of Way management. Such operating transfers will be established in accordance with the City's annual Appropriation Ordinance.

Article XV. SEVERABILITY

If any section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Authorization ordinance is for any reason held invalid or unenforceable by any court of competent jurisdiction, the remainder of this Authorization ordinance shall not be affected thereby, but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant and portion of this Authorization ordinance shall be valid and enforceable to the fullest extent permitted by law.

Article XVI. ENACTMENT CLAUSE

Be it ordained, that this ordinance shall take effect from and after the date it shall have been passed by the Council, signed by the chairman of the council, certified and delivered to the office of the Mayor in writing by the comptroller, and become effective as otherwise provided by law.