

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 addresses and complies with federal decisions construing TCA 1996 and Tennessee statutes pertaining to the City's regulation of its streets and public rights of way by public and private companies;

WHEREAS, the Council desires to formally repeal its prior compensation scheme based on a percentage of gross revenues and adopt provisions that permit the City to recover 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 as allowed under Tennessee Law ;

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

SECTION 1. 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 Authorization 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 Authorization 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 Authorization 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 Authorization ordinance.

SECTION 2. DEFINITIONS.

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

2.2 "**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.

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

2.4 "**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.

2.5 "**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.

2.6 "**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.

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

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

2.9 "**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.

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

2.11 "**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.

2.12 "**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.

2.13 "**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.

2.14 **"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 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 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.

2.15 **"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.

2.16 **"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.

2.17 **"System" or "Telecommunications System"** shall mean Grantee's network of cables, wires, lines, conduits, 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.

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

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

SECTION 3. ADMINISTRATION

3.01 The administration of the access and use of the City's Public Right of Way 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 having any responsibility for managing, supervising or inspecting any construction or use construction, 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;

(2) to manage the application process;

(3) 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;

(4) to insure that all statutes, laws, ordinances, rules and regulations pertaining to the City's Public Rights of Way are observed by Grantees;

(5) 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.

SECTION 3. RESTRICTIONS ON ACCESS TO CITY'S PUBLIC RIGHTS OF WAY.

3.17 No person or entity shall construct, expand, reconstruct, maintain any Telecommunications System or Public Works in, along, across, on, over, through, above and under the public streets, alleys and rights-of-way of the City without first either obtaining a non-exclusive, revocable contract, license, permit or easement from the City.

3.18 **Grant conditions, terms.**

(A) Any access to the City's Public Right of Way shall be granted only by a non-exclusive, revocable contract, license, permit or easement from the City. The Council reserves the right power and authority in its discretion to enter into citywide Authorization agreements by ordinance when it determines that such citywide Authorizations are in the public's interest..

(B) Before any revocable contract, license, permit or easement is made by the Mayor, any telecommunications provider or utility seeking access shall file an application therefor with the Public Right of Way Administrator on forms promulgated by the City's Chief Administrative Officer and approved by the Council. Authorization to use the City's Public Rights of Way by telecommunications provider or utility seeking access shall not be unreasonably withheld or delayed

(C) Prior to adoption of any Authorization ordinance the Council may, from time to time, request such other information as it deems appropriate, but only to the extent the information pertains to the use of the Public Rights-of-Way or whether Applicant is in compliance with all rules or orders of the FCC or TRA. The City does not intend to regulate in any manner telecommunication services, or to request information about such service, except to the extent it may determine the nature and extent of the Authorization required.

(D) No Grantee shall provide cable services or operate a cable system as defined in the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C.A. §521, et seq., as amended) or an Open Video System ("OVS") as defined by federal law or as recognized by the FCC without first obtaining a separate cable Authorization from the City and shall not allow the use of the System by a cable system that has not been granted a Authorization by the City. Nor shall any provider of cable services or grantee of cable television service operate or provide OVS service or non-cable television service, unless a separate Authorization is obtained from the City, as may be required by this ordinance or bylaw.

(E) Grantee shall not provide services directly regulated by the TRA under the laws of Tennessee unless and until duly authorized by the TRA or by any successor entity.

(F) Any contract made pursuant to the authority of this ordinance shall be enforceable in accordance with its terms even if this ordinance or any subsection, sentence, clause, phrase, term, provision, condition, covenant or portion thereof is held invalid or unenforceable by a court of competent jurisdiction. Grantee waives to the fullest extent of the law any right to contest the terms and conditions of any contract between the Grantee and the City.

SECTION 4. APPLICATION OF OTHER LAWS.

4.17 Licenses and Permits. The Grantee shall have the sole responsibility for diligently obtaining, at its own cost and expense, all permits, licenses, or other forms of approval or authorization necessary to construct, operate, maintain or repair the System, and to construct, maintain and repair any part thereof prior to commencement of any such activity.

Issuance of a permit by any agency of the City as to the construction and installation of any portion of Grantee's System does not waive other applicable requirements of federal or Tennessee law, and Grantee shall comply with such other legal requirements prior to commencement of any work in the Public Right-of-Way.

4.18 Subject to Police Power.

Although the City may grant any Grantee permission to use its rights-of-way in the exercise of the City's proprietary powers, the construction, expansion, reconstruction, excavation, use, maintenance, removal and operation of the System shall be subject to all lawful police regulations of the City and performed in accordance with all ordinances, laws, resolutions and regulations of the City for utility location and excavation in Public Rights-of-Way presently in effect or hereafter adopted. In addition to the duty under any other law or regulation of the City, not less than seven (7) days prior to filing of a request for a construction permit, Grantee shall provide to the City Engineer a copy of all the construction work plans and drawings for the System, or any segment or expansion thereof. Grantee shall not proceed with any construction until the plans and drawings have been approved in writing by the City Engineer. Such construction plans and permit application shall be approved if in compliance with the requirements of this and other applicable ordinances. Considering other normal work assignments of the City Engineer, the City Engineer shall not unreasonably delay or deny

permission to Grantee to proceed with construction in the Public Rights of Way. Any denial must be in writing specifying the reasons for the denial. Any denial may be appealed to City Council or to a third party hearing examiner at the City's discretion, if a written request to appeal is submitted within ten days of the denial.

Nothing in this Ordinance shall be construed as preventing the City of Memphis, whenever it shall be empowered by applicable state and federal law so to do, from fixing or regulating the rates, rentals, charges, services, facilities and equipment of Grantee or from exercising general supervision and regulation of, jurisdiction and control over, a telecommunication Authorization, the Grantee, and its property, property rights, facilities and Authorizations located within the City. It being the intention of this Ordinance, that the City of Memphis in no way surrenders such general powers it may now have, or may hereafter have or acquire.

SECTION 5. AS BUILT DRAWINGS.

Upon request, Grantee shall submit to the City Engineer "as built" drawings of the portions of Grantee's System located along the public right-of-way of a size and material satisfactory to the City Engineer within sixty (60) days after completion of construction of such portions. Grantee shall at least annually update such drawings or within sixty (60) days of any material changes to Grantee's System which impact the public right-of-way. Said drawings, set forth by utility quarter sections, shall at a minimum include the location, both linear and depth, of cable routings and the location of amplifiers, power supplies and system monitor test points that are in, on , across, under or over the Public Rights-of-Way.

SECTION 6. CONSTRUCTION STANDARDS.

6.17 All work performed in connection with the construction, expansion, reconstruction, maintenance or repair of the System shall be subject to and governed by all laws, rules, and regulations of the City in accordance with the applicable provisions of the City's Building Code and rules promulgated by the City Engineer. Grantee shall excavate only for the construction, installation, expansion, repair, removal, and maintenance of all or a portion of its System.

All installations shall be underground in those areas of the City where public utilities providing telephone and electric service are underground at the time of installation. In areas where either telephone or electric utility facilities are above ground at the time of installation, Grantee may install its service above ground, provided that, at such time as any facilities are required to be placed underground by the City, or are placed underground, Grantee shall likewise place its facilities underground without additional cost to the City or to the individual subscriber so served.

6.18 **Electrical Standards.**

Grantee shall at all times comply fully with provisions of the Electrical Code of the City.

6.19 **Interference with persons, improvements, public and private property and utilities.** Grantee's System and facilities, including poles, lines, equipment and all appurtenances, shall be located, erected and maintained so that such facilities shall not:

- (A) endanger or interfere with the health, safety or lives of persons;
- (B) interfere with any improvements the City, MLGW or State may deem proper to make;

(C) interfere with the free and proper use of public streets, alleys, bridges, easements or other public ways, places or property, except to the minimum extent possible during actual construction or repair;

(D) interfere with the rights and reasonable convenience of private property owners, except to the minimum extent possible during actual construction or repair; or

(E) obstruct, hinder or interfere with any gas, electric, water or telephone facilities or other utilities within the City.

6.20 **Protect Structures.** In connection with the construction, maintenance, repair or removal of the System, the Grantee shall, at its own cost and expense, protect any and all existing structures and improvements, including landscaping and trees belonging to the City, and all designated historical landmarks, as well as all other structures within any designated historical district. The Grantee shall obtain the prior approval of the City before altering or crossing any water main, sewerage or drainage system, or any other municipal, state or federally-owned structure in the streets required because of the presence of the System in the Streets. Any such alteration shall be made by the Grantee at its sole cost and expense, and in a manner prescribed by the City. The Grantee shall be liable, at its own cost and expense, to replace or repair and restore to serviceable condition in a manner as may be specified by the City, any street or any municipal, state or federally-owned structure involved in the construction of the System that may become disturbed or damaged as a result of any work thereon by or on behalf of the Grantee pursuant to its Authorization.

6.21 **Erection, Removal and Use of Poles.**

No poles shall be erected by Grantee without prior approval of the City with regard to location, height, types and any other pertinent aspect. However, no location of any pole or wire-

holding structure of Grantee shall give rise to a vested interest, and such pole or structures shall be removed or modified by Grantee at its own expense whenever the City determines that the public convenience would be enhanced thereby. Approval under this section shall require the prior written approval of the City Engineer, who shall not unreasonably withhold his approval. Such location height, types and any other pertinent aspect shall be approved if in compliance with the requirements of this and other applicable ordinances. The City Engineer shall not unreasonably delay or deny permission to Grantee to proceed with construction. Any denial must be in writing specifying the reasons for the denial. Any denial may be appealed to City Council or to a third party hearing examiner at the City's discretion, if a written request to appeal is submitted within ten days of the denial.

6.22 Upon request of the City or other authority of competent jurisdiction, Grantee shall remove and abate any portion of the System or any facility that is dangerous to life or property, and in case Grantee, after ten (10) days written notice from the City Engineer, fails or refuses to act, the City may remove, relocate or abate the same, at the sole cost and expense of Grantee, all without compensation or liability for damages to Grantee; provided, however, Grantee may recover damages sustained by it from any person other than the City who relocates, removes or abates any such Grantee facility negligently or without the City Engineer giving ten (10) days written notice to Grantee authorizing such other person to relocate or remove Grantee's facilities on behalf of the City.

SECTION 7. SUSPENSION OR REVOCATION OF CONSTRUCTION PERMIT.

The City Engineer may suspend or revoke any permit issued by the City or take any action he deems reasonably necessary, including the stopping of work, should Grantee violate the terms of said permit, until said violation has been corrected to the City Engineer's reasonable

satisfaction. The City Engineer shall not unreasonably suspend or revoke any permit. Any suspension or revocation must be in writing specifying the reasons for the suspension or revocation. Any suspension or revocation may be appealed to City Council or to a third party hearing examiner at the City's discretion, if a written request to appeal is submitted within ten days of the suspension or revocation.

SECTION 8. ADJUSTMENT OF UTILITY FACILITIES.

In the event that the location of Grantee's System will require an adjustment of the location of existing public or private utility facilities, Grantee must obtain written consent of the owner of such utility, including, where applicable, all relevant City departments to such adjustment and make such arrangements for the payment or reimbursement of the cost of such adjustment as are satisfactory to the owner of such utility, including, where applicable, all relevant City departments. No permit for construction will be issued until the City Engineer is satisfied that the requirements of this section have been satisfied. In no case shall Grantee be entitled to perform such adjustment or disturb such utility facilities without the written consent of the owner of such utility.

SECTION 9. ADJOINING PROPERTY OWNERS.

All of Grantee's System shall be so installed and located so as to cause minimum interference with the rights and appearance and reasonable convenience of adjoining property owners and all times shall be kept and maintained in a safe, adequate and substantial condition, and in good order and repair. Grantee shall at all times employ reasonable care, and shall install and maintain in use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injuries or nuisances to the public.

SECTION 10. EMERGENCY OR DISASTER.

To the extent allowed by law, in case of emergency or disaster, Grantee shall, upon request of the City, make available its facilities to the City, without cost, for emergency use.

SECTION 11. MOVING WIRES. The City may, at any time, in case of fire, disaster or other emergency, as determined by the City in its reasonable discretion, cut or move any other optical fibers, wires, cable, amplifiers, appliances, or other parts of the System in the streets or in City buildings, in which event the City shall not be liable therefor to the Grantee. Grantee shall be given prior telephonic notice to the extent practicable under the circumstances.

SECTION 12. TEMPORARY REMOVAL OF FACILITIES FOR DEMOLITION OF BUILDINGS.

Upon the request of a person holding a permit issued by the City for the moving or demolition of a building, and at least ten 10 days notice, Grantee shall temporarily raise, lower or removing its facilities to permit the removal or demolition of such building. The expense of such temporary removal, raising or lowering of facilities shall be paid by the person requesting the same and Grantee shall have the authority to require such payment in advance; provided, however, that no payment (direct or indirect) shall be required of the City.

SECTION 13. REMOVAL OF CITY PROPERTY. No property of the City is to be removed from the right-of-way, including signage on utility poles, without prior written approval from the City.

SECTION 14. RESERVATION OF RIGHTS.

The City reserves the right to exercise its police and/or proprietary powers to modify, vacate or transfer any right-of-way in use by Grantee for a public purpose. At Grantee's own risk, the City has the predominant right to use its right-of-way in the placement, maintenance and

repair of sewers, water mains and other public utility facilities or to relocate or remove Grantee's System where the City determines that the public convenience and/or necessity would be enhanced or for any other public purpose, including, but not limited to the use of any Public Right-of-Way used by Grantee for public transportation purposes. The permits referred to in Section 4 may be amended or revoked in whole or in part by the issuing department whenever such action is necessary or advisable for a public purpose. Grantee shall make no claims for costs or damages against the City by reason of such removal or relocation. Upon 30 days written notice to Grantee of partial or complete revocation of such permit from the City Engineer, Grantee shall remove, modify, replace or relocate its facilities as required at its own expense. In the event Grantee does not remove, modify, replace or relocate its facilities as required by said notice within thirty (30) days as aforesaid, the City Engineer may cause the same to be done at Grantee's expense and all expenses incurred or damages paid by the City on account of such action shall be paid by Grantee on demand. Grantee shall remove, replace or modify, at its own expense, the installation of any of its facilities as may be deemed necessary by any other appropriate governmental authority to meet such authority's proper responsibilities. In the event the City exercises its predominant right to use any Public Right-of-Way used by Grantee for a public purpose, the City shall reasonably cooperate with Grantee in finding an alternate site for any telecommunications facilities removed and in avoiding disruption to Grantee's telecommunications system to the extent not reasonably required by the City. In an emergency, as determined by the City Engineer, the City may order Grantee to remove or relocate its facilities within forty-eight (48) hours. If the City exercises any of its rights pursuant to this Section, Grantee shall have the option, upon notice to the City Engineer, of abandoning the

portion of its Telecommunications System to be so removed or relocated and deleting such portion from the Public Right-of-Way.

Notwithstanding the above, in the event Grantee provides documentary support that the time allowed for removal or relocation of facilities as required by this Section are inadequate in the reasonable judgment of the City Engineer, the City Engineer may grant additional time, but not to exceed 180 days.

SECTION 15. ABANDONMENT OF RIGHT-OF-WAY.

In the event that the City shall close or abandon any public street, alley or right-of-way, which contains any portion of Grantee's system, any conveyance of land contained in such closed or abandoned public street, alley, highway or right-of-way shall be subject to the rights herein granted.

SECTION 16. RELOCATION OF THE SYSTEM.

16.17 **New Grade or Lines.** If the grades or lines of any street on which Grantee's System is placed are changed at any time during the term of the Authorization, then the Grantee shall, at its own cost and expense and upon the request of the City, protect or promptly alter or relocate the System, or any part thereof, so as to conform with such new grades or lines. In the event that the Grantee refuses or neglects to so protect, alter, or relocate all or part of the System, the City shall have the right to break through, remove, alter or relocate such part of the System, without any liability to the City, and the Grantee shall pay to the City the costs incurred in connection with such breaking through, removing, altering or relocating.

16.18 **Relocation of Right-of-Way.** Wherever a Public Right-of-Way or other public property is being constructed, paved (whether or not such paving is part of a more extensive improvement project), resurfaced, relocated or otherwise altered or improved (including, but not

limited to, the installation of sidewalk, curb, gutter, drainage facilities, water mains, or sewer mains, traffic signals or trees), Grantee shall, within ninety (90) days of written notice from the City Engineer, and at no cost (direct or indirect) to the City, remove or relocate any Grantee facility located within the Public Right-of-Way or public property or perform such work as it deems necessary for the extension of new facilities, except that Grantee may recover from any other person other than the City who relocates any such Grantee facility without ninety (90) days written notice from the City Engineer authorizing such other person to relocate or remove Grantee's facilities. The relocation or extension of new facilities shall be to a location approved by the City. Failure to obtain the City's approval of the location of facilities relocated under this section will be considered a forfeiture under Section 31 of this Ordinance. Grantee shall be responsible for any damage it causes to property, including damage to trees and other landscaping, as a result of the relocation or removal of facilities.

16.19 **Time Limit - Liquidated Damages**. Failure of Grantee to remove or relocate the facility to a location approved by the City within ninety (90) days of the City's written notice shall entitle the City to recover liquidated damages from Grantee. The liquidated damages for failure to remove or relocate a facility shall not exceed \$250.00 per diem.

If Grantee believes it will be unable to complete the relocation within ninety (90) days from receipt of notice from the City, Grantee shall explain the reasons for its inability in detail and the City and Grantee shall attempt to agree on an alternate schedule, subject, however, to the City's right to finally determine the schedule and liquidated damages, as long as Grantee's explanation is not unreasonable, Grantee shall be excused, unless the City is subject to construction delay claims which exceed this amount.

SECTION 17. BONDS.

(A) Grantee shall obtain and maintain, at its sole cost and expense, and file with the Division of Finance and Administration, a corporate surety bond with a surety company authorized to do business in the State of Tennessee and found acceptable by the City Attorney, in the amount of Two Hundred Fifty Thousand Dollars (\$250,000), to secure Grantee's performance of its obligations and faithful adherence to all requirements of this Authorization ordinance. On and after June 30, 2015, the City reserves the right to impose a reasonable bond requirement applicable to all Grantees to secure each such Grantee's performance of its obligations and faithful adherence to all of the requirements of this Authorization Ordinance, considering the extent of rights-of-way used, the financial condition of the Grantee, and the past experience, if any with the Grantee. Grantee shall provide this corporate surety bond at the time of execution of a written acceptance of an Authorization Agreement as required by Section 22.1 herein.

(B) The rights reserved to the City with respect to the bond are in addition to all other rights of the City, whether reserved by this Authorization Ordinance or authorized by law; and no action, proceeding or exercise of a right with respect to such bond shall affect any other right the City may have.

(C) The bond shall contain the following endorsement; it is hereby understood and agreed that this bond may not be cancelled by the surety nor any intention not to renew be exercised by the surety until sixty (60) days after receipt by the City, by registered mail, of written notice of such intent.

SECTION 18. INSURANCE REQUIREMENTS.

On or before the effective date of a Authorization granted hereunder, if Grantee owns or controls facilities in the Public Rights-of-Way, Grantee shall file with the City a certificate of insurance and thereafter maintain in full force and effect at all times for the full term of the Authorization, at the expense of Grantee, a comprehensive general liability insurance policy, including underground property damage coverage, naming the City as additional insured, written by a company authorized to do business in the State of Tennessee, protecting the City against liability for loss or bodily injury and property damage occasioned by the installation, removal, maintenance, or operation of the communications system by Grantee in the following minimum amounts:

- (1) One Million Dollars (\$1,000,000.00) combined single limit, bodily injury and for real property damage in any one occurrence.
- (2) Five Million Dollars (\$5,000,000.00) aggregate

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.

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.

All liability insurance required pursuant to this section shall be kept in full force and effect by Grantee during the existence of the 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 communications System as defined in this ordinance. 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.

SECTION 19. INDEMNIFICATION.

Grantee shall indemnify, defend and save whole and harmless the City and all of its officers, agencies, and employees against and from any and all claims, suits, final judgments, actions, losses, costs and expenses, including attorney's fees and costs or expenses incidental to the investigation and defense of claims and lawsuits brought for, on behalf of, or on account of any injuries or damages received or sustained by any person, firm or corporation or to any property, which may be occasioned by, or arising out of or from, the conduct of Grantee in connection with this Authorization ordinance, the construction, reconstruction, expansion, removal, maintenance, operation, or repair of Grantee's System, the conduct of Grantee's business in the City of Memphis pursuant to this Authorization ordinance, any occurrence in connection with the Authorization ordinance, any and all claims and lawsuits arising from any breach or default on the part of Grantee in the performance of any term, condition, provision, covenant or agreement to be performed by Grantee pursuant to this Authorization ordinance or the Authorization Agreement, any act or omission of Grantee, or any of its agents, contractors, subcontractors, servants, employees or licensees, or any relationship between Grantee and its end use customers and retailers whether caused by or attributable solely to Grantee and others, or the City, and Grantee shall pay all final judgments, with costs, attorneys fees and expenses, which may be obtained against the City related to any such claim. 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.

SECTION 20. COST REIMBURSEMENT PAYMENTS TO THE CITY.

20.17 **Cost Reimbursement Payments.** The City finds that the public streets, alleys and Public Rights-of-Way to be used by Grantee in the operation of its telecommunications or public works systems within the boundaries of the City are valuable, public properties, acquired and maintained by the City at great expense to its taxpayers, and that the grant to Grantee of the use of said public streets, alleys and public rights-of-way is a valuable property right, without which the Grantee would be required to invest substantial capital in Public Right-of-Way costs and acquisitions; the Grantee agrees to pay to the City as its allocable share if the City's Public Right of Way Costs during each year Grantee's facilities occupy any portion of the City's Public Rights of Way, an amount each year computed in accordance with City Code Section _____. Grantee shall forward by check or money order an amount equal to the annual payment by the fifteenth day of the calendar month immediately following the Anniversary Date. Any necessary prorations shall be made. Failure to make any such payment when due shall be an event of default of any Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance within the meaning of Section 24 hereof.

SECTION 21. ACCOUNTS, RECORDS AND REPORTS.

21.17 Grantee shall keep complete and accurate books of account and records of its business and operations pursuant to this Authorization ordinance in accordance with generally accepted accounting principles, subject to approval by the City. If required by the FCC or the TRA, Grantee shall use the system of accounts and the forms of books, accounts, records, and memoranda prescribed by the FCC in 47 CFR Part 32 or its successor provision.

21.18 Grantee shall provide the City with access at reasonable times and for reasonable purposes, to examine, audit, review and/or obtain copies of the papers, books, accounts, documents, maps, plans and other records of Grantee but only as they pertain to the use of the Public Rights-of-Way and compliance with this Authorization Agreement. Grantee shall fully cooperate in making available these records and otherwise assisting in these activities.

21.19 The City agrees that:

- (i) any Confidential Information received by the City hereunder will be held in confidence and will not be disclosed to third parties, except as otherwise provided herein;
- (ii) the disclosure and use of any Confidential Information will be limited to recipient's employees and affiliates having a need-to-know and use such Confidential Information; or
- (iii) it will use the Confidential Information only for the purposes contemplated under this Agreement;

Notwithstanding any provision of this Ordinance to the contrary, the City shall not be precluded from disclosing Confidential Information if such disclosure is:

- (i) in response to a valid order of a court, regulatory or other governmental body of the United States or any political subdivision thereof; provided, however, that the recipient shall first have given notice of such order to the Grantee, and the recipient shall, to the extent possible, give Grantee the opportunity to obtain a protective order requiring that the information and/or documents so disclosed be used only for the purpose for which the order was issued;
- (iv) otherwise required by law or government regulation;
- (v) of Confidential Information already in the possession of the recipient;
- (vi) of Confidential Information independently developed by the recipient;
- (vii) of Confidential Information that becomes publicly available without breach of this Agreement;
- (viii) of Confidential Information rightfully received by the recipient from a third party free of restriction and without breach of this Agreement; or
- (ix) released for disclosure by the Grantee with the Grantee's prior written consent.

The City shall not be liable to any Grantee hereunder for any disclosure of information, which the City determines in good faith or on advice of counsel not to be Confidential Information or which the City determines on advice of counsel that it is required to disclose based on applicable law.

SECTION 22. TERM OF AUTHORIZATION, LICENSE, CONTRACT OR PERMIT.

22.17 **Term.** Any Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance shall be in full force and effect for a term and period so specified in any such Authorization, license, contract, permit or easement, but in no event in excess of five (5) years.

SECTION 23. EXTENSION OF TERM.

If, on the expiration date, Grantee shall not be in default under any Authorization, license, contract or permit, such Authorization, license, contract or permit shall be deemed extended on an interim basis until terminated, renewed or renegotiated. Said interim extension period shall not extend beyond a date sixty (60) days after the expiration date.

SECTION 24. VIOLATIONS AND CURE PROVISIONS.

If the City has reason to believe that Grantee is in violation of this Ordinance, the City shall notify Grantee in writing of the violation, setting forth the nature of such violation. Within ten (10) days of receipt of such notice, Grantee shall respond in writing to provide explanation or documentation to support that the violation did not occur. Grantee shall be allowed thirty (30) days to cure violations after written notice is received from the City, unless prevented from doing so for reasons wholly beyond control of Grantee.

Upon evidence being received by the City that any violation of this Authorization ordinance, any City Charter provisions or any ordinances lawfully regulating Grantee in the construction, repair or in the maintenance of Grantee's facilities in the Public Rights-of-Way is occurring, or has occurred, the City shall cause an investigation to be made. If the City finds that such a violation exists or has occurred, the Grantee shall take appropriate steps to comply with

the terms of this Authorization ordinance and any lawful regulations. Should Grantee fail to comply, after the above-stated notice and opportunity to cure, then the City may take any action authorized by law, including revocation or repeal of the Authorization in accordance with the terms hereof or a suit in court to compel compliance. If, in any such proceeding, default is finally established, Grantee 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 attorney fees); provided, however, the preceding sentence shall be inapplicable unless its provisions may be lawfully enforced against other Grantee of the City. Grantee agrees that the terms of this Agreement may be enforced by specific performance or other injunction relief, since monetary damages may be an inadequate remedy.

SECTION 25. REVOCATION AND TERMINATION.

25.17 In addition to all other rights and powers retained by the City under this Authorization ordinance or otherwise, the City reserves the right to revoke and terminate any Authorization issued by authority of this Ordinance, and all rights and privileges of Grantee hereunder shall cease in the event of substantial breach, subject to reasonable notice and opportunity to cure, of its terms and conditions. A substantial breach of Grantee shall include, but shall not be limited to, the following:

- (1) Grantee's violation of any material provision of the Authorization ordinance or any material rule, order or regulation of the City made pursuant to this Authorization ordinance;
- (2) Grantee's failure to properly reimburse the City for its share of allocable Right of Way costs of the City as required in this Authorization ordinance;
- (3) Grantee's attempt to evade any material provision of the Authorization ordinance or to practice any fraud or deceit upon the City;
- (4) For failure to file and maintain the bond, security or insurance required under this ordinance;

- (5) Grantee's attempt to sell, resell, lease, sublease, transfer, convey or assign any of the rights and privileges granted pursuant to this Authorization ordinance in violation of this ordinance without Council approval where required;
- (6) Grantee's failure to respond to or comply with reports, audits, statements and other information requested by the City pertaining to its use of the Public Rights-of-Way or the payments required to be made to the City as required by this Ordinance; or
- (7) Any material cessation in the operation of Grantee's system for six months after it has been constructed, which shall be presumed to be an abandonment of the system subject to rebuttal by documentary evidence timely provided to the City.

25.18 The foregoing shall not constitute a substantial breach if the violation occurs without the fault of Grantee or occurs as a result of circumstances wholly beyond its control. Grantee shall not be excused by mere economic hardship, nor misfeasance or malfeasance of its directors, officers or employees. Revocation or termination shall only take place for material cause.

25.19 In the event Grantee believes the City Engineer has unreasonably delayed or refused his approval of any matter required by Sections 4.2, 6.5, 6.6, 7 or 14 of this Ordinance Grantee is authorized to appeal any such decision or non-action to the Memphis City Council within ten (10) days of any decision by the City Engineer. When the City Engineer is authorized to give his approval but does not do so within sixty (60) days of Grantee completing all requirements to obtain such approval, Grantee shall be authorized to appeal such inaction by the City Engineer to the Memphis City Council within ten (10) days after the expiration of such sixty (60) day period.

SECTION 26. ADDITIONAL OBLIGATIONS.

Grantee shall comply with all applicable federal, state and local laws, rules and regulations, including those adopted by the FCC, TRA or by any successor agency or commission continuously throughout the term of any Authorization, license, contract or permit.

SECTION 27. CONFLICT WITH OTHER LAWS.

Where a provision of this ordinance is in conflict with any state or federal statute or a rule of the TRA or FCC, so that Grantee cannot reasonably comply with both the provisions of this ordinance or Authorization and the statute or rule of the TRA or FCC, then Grantee may, after giving the City written notice of its intent to do so and a statement of the legal grounds for its position, comply with such rule instead of the conflicting provision of this ordinance or the Authorization until such time as the City obtains a contrary ruling or other relief from an appropriate regulatory agency or court of competent jurisdiction; but Grantee shall comply with all remaining provisions of this ordinance or Authorization. Notice of intention not to comply given pursuant to this section shall not relieve Grantee--upon determination that the noncompliance was unlawful or otherwise improper--from the obligation to pay more damages, redo work at Grantee's expense, or otherwise take such steps as may be necessary to restore the City to the position it would have been in if Grantee had remained in compliance with this ordinance and its Authorization.

All other ordinances of the City inconsistent with this Authorization Ordinance are hereby repealed.

SECTION 28. COMPLIANCE WITH APPLICABLE LAWS AND ORDINANCES.

Grantee shall, at all times during the term of its Authorization, license, contract or permit, be subject to the provisions of the present Charter of the City, the present ordinances, resolutions, rules, regulations and laws of the City and the State of Tennessee, and to the provisions of any further charter, ordinance, resolution, rule, regulation or law of the City or of the State of Tennessee, so far as they may be applicable.

SECTION 29. TENNESSEE LAW GOVERNS.

In any controversy or dispute under this ordinance, the law of the State of Tennessee, including its choice of law provisions, shall apply to the extent such law has not been superseded or preempted.

SECTION 30. CITY TAKING PART IN LITIGATION.

The City shall have the right to take part, by intervention or otherwise at its option, in any suit, action, or proceeding instituted by or against Grantee in which any judgment, decree, or order can be rendered affecting the rights, powers or duties of Grantee to do or not to do anything which, by its Authorization, license, contract or permit or this ordinance, it is obligated or may be required to do or not to do or affecting, such as by foreclosure or lien, Grantee's title to any facility. Grantee shall not object to the City's exercise of such right.

SECTION 31. 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.

SECTION 32. ENACTMENT CLAUSE.

32.17 Be it further 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.

JIM STRICKLAND
Chairman of Council

Attest:
Comptroller

EXHIBIT "A"

**TELECOMMUNICATIONS AUTHORIZATION CONTRACT
BY AND BETWEEN
THE CITY OF MEMPHIS
AND
[GRANTEE]**

THIS AUTHORIZATION AGREEMENT is entered into this ____ day of _____, 20___, by and between **THE CITY OF MEMPHIS** and **[GRANTEE]**, duly authorized to do business in the State of Tennessee (hereinafter "Grantee").

WITNESSETH:

WHEREAS, Grantee has duly filed its application for a telecommunications Authorization pursuant to the terms of Ordinance No. 4404, as amended; and,

WHEREAS, the grant of a telecommunications Authorization to Grantee has been approved by ordinance of the Council of The City of Memphis in accordance with Section 15 of the Charter of the City.

NOW, THEREFORE, pursuant to the authority granted by the Charter of The City and by Ordinance No. 4404, as amended, and for good and valuable consideration, The City hereby grants a telecommunications Authorization to Grantee subject to the following terms and conditions:

1. Grantee's application for a Authorization to construct and operate a telecommunications system using fiber optic cable, in whole or in part, which application was filed with the Chief Administrative Officer of the City on **[APPLICATION DATE]**, and is incorporated herein by reference is hereby accepted by The City.

2. Pursuant to the terms of said application and the provisions of Ordinance No. 4404, Grantee is hereby awarded a Authorization to construct, maintain and operate a telecommunications system, as defined in said ordinance, within the City of Memphis.

3. Grantee hereby agrees to and accepts the terms and conditions contained in Ordinance No. 4404, which is hereby incorporated into this Contract by reference.

4. Grantee shall, prior to execution of this Authorization Contract, file with the Director of Finance a bond and certificate of insurance meeting the requirements of Ordinance No. 4404. Grantee shall not commence construction, operation or activation of its telecommunications system until these bond and insurance requirements are satisfied.

5. Grantee warrants that it has the financial capability to construct, maintain, and operate a telecommunications system and to comply with the provisions of Ordinance No. 4404.

6. Grantee shall provide no service regulated by the Federal Communications Commission and/or the Tennessee Regulatory Authority until it has received all necessary approvals and permits from said bodies.

7. The City of Memphis agrees to use its best efforts to preserve the confidentiality of information designated by Grantee as proprietary, to the extent permitted by law.

8. The time within which Grantee shall be required to perform any act under the Authorization ordinance shall be extended by a period of time equal to the number of days due to a force majeure. The term "force majeure" shall mean delays due to acts of God, inability to obtain governmental approvals, governmental restrictions, war, civil disturbances, fire unavoidable casualty, construction delays due to weather, or other similar causes beyond the control of Grantee. Grantee shall not be excused from performance of any of its obligations

under Ordinance No. 4404, by misfeasance or malfeasance of its directors, officers or employees or by mere economic hardship.

9. Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in the manner which would indicate any such relationship with the other.

10. This Authorization Contract shall be subject to revocation or termination in accordance with the terms and conditions and procedures of Sections 26 and 27 of Ordinance No. 4404.

11. The Authorization granted by this Authorization Contract is subject to the provisions of Tennessee Code Annotated, Section 65-4-107, which requires approval by the Tennessee Regulatory Authority of any municipal Authorization granted to a public utility to the full extent that said statute is applicable under the laws of Tennessee.

12. Upon the execution of this Authorization Contract, said Authorization Contract shall be deemed to constitute a contract by and between Grantee and The City of Memphis and shall be enforceable in accordance with its terms as between the City and Grantee even if Ordinance No. 4404 or any subsection, sentence, clause, phrase, term, provision, condition, covenant or portion thereof is held invalid or unenforceable by a court of competent jurisdiction.

13. This Authorization Contract and all attachments hereto represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof, and can be amended, supplemented, modified, or changed only as provided in Ordinance No. 4404.

IN WITNESS WHEREOF, the Grantee and The City of Memphis have executed this Authorization Contract by signatures of their lawfully designated representatives, on the day, month and year first above written.

THE CITY OF MEMPHIS:

W. W. Herenton, Mayor

GRANTEE:

[GRANTEE]

By: _____
Title: _____

APPROVED AS TO LEGALITY OF
FORM AND COMPOSITION:

City Attorney