

ORDINANCE NO. 6727

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF AUBURN, WASHINGTON, GRANTING NEW CINGULAR WIRELESS PCS, LLC, A FRANCHISE FOR WIRELESS TELECOMMUNICATIONS FACILITIES

WHEREAS, New Cingular Wireless PCS, LLC (“Grantee”), has applied to the City of Auburn (“City”) for a non-exclusive Franchise for the right of entry, use, and occupation of certain public right(s)-of-way within the City, to install, construct, erect, operate, maintain, repair, relocate and remove Grantee’s facilities in, on, over, under, along and/or across those right(s)-of-way; and

WHEREAS, following proper notice, the City Council held a public hearing on Grantee’s request for a Franchise; and

WHEREAS, based on the information presented at the public hearing, and from facts and circumstances developed or discovered through independent study and investigation, the City Council now deems it appropriate and in the best interest of the City and its inhabitants to grant the franchise to Grantee.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF AUBURN WASHINGTON, DO ORDAIN as follows:

Section 1. Grant of Right to Use; Franchise Area

A. Subject to the terms and conditions stated in this Agreement, the City grants to the Grantee general permission to enter, use, and occupy the Franchise Area, located within the incorporated area of the City. Grantee may locate the Grantee Facilities within the Franchise Area subject to all applicable laws, regulations, and permit conditions.

B. The Grantee is authorized to install, remove, construct, erect, operate, maintain, relocate, upgrade, replace, restore and repair Grantee Facilities to provide Wireless Telecommunications Services in the Franchise Area.

C. This Franchise does not authorize the use of the Franchise Area for any facilities or services other than Grantee Facilities and Wireless Telecommunications Services, and it extends no rights or privilege relative to any facilities or services of any type, including Grantee Facilities and Wireless Telecommunications Services, on public or private property elsewhere within the City.

D. This Franchise is non-exclusive and does not prohibit the City from entering into other agreements, including Franchises, impacting the Franchise Area, for any purpose that does not interfere with Grantee's rights under this Franchise.

E. Except as explicitly set forth in this Agreement, this Franchise does not waive any rights that the City has or may acquire with respect to the Franchise Area or any other City roads, rights-of-way, property, or any portions thereof. This Franchise shall be subject to the power of eminent domain, and in any proceeding under eminent domain, the Grantee acknowledges its use of the Franchise Area shall have no value.

F. The City reserves the right to change, regrade, relocate, abandon, or vacate any right-of-way within the Franchise Area. If, at any time during the term of this Franchise, the City vacates any portion of the Franchise Area containing Grantee Facilities, the City shall reserve an easement for public utilities within that vacated portion, pursuant to RCW 35.79.030, within which the Grantee may continue to operate any existing Grantee Facilities under the terms of this Franchise for the remaining period set forth under Section 3.

G. The Grantee agrees that its use of Franchise Area shall at all times be subordinated to and subject to the City and the public's need for municipal infrastructure, travel, and access to the Franchise Area, except as may be otherwise required by law.

Section 2. Notice

A. Written notices to the parties shall be sent by a nationally recognized overnight courier or by certified mail to the following addresses, unless a different address shall be designated in writing and delivered to the other party. Any such notice shall become effective upon receipt by certified mail, confirmed delivery by overnight courier, or the date stamped received by the City.

City: Right-of-Way Specialist
Public Works Department - Transportation
City of Auburn
25 West Main Street
Auburn, WA 98001-4998
Telephone: (253) 931-3010; Fax: (253) 931-3048

with a copy to: City Clerk
City of Auburn
25 West Main Street
Auburn, WA 98001-4998

Grantee: New Cingular Wireless PCS, LLC
Attn: Network Real Estate Administration
Site No. City of Auburn Wireless Franchise Agreement (WA)
1025 Lenox Park Blvd NE, 3rd Floor
Atlanta, GA 30319

With a copy to: New Cingular Wireless PCS, LLC
Attn: AT&T Legal Dept – Network Operations
Site No. City of Auburn Wireless Franchise Agreement (WA)
208 S. Akard Street
Dallas, TX 75202-4206

B. Any changes to the above-stated Grantee information shall be sent to the City at City's notice addresses, referencing the number of this Ordinance.

C. The City may also contact Grantee at the following number during normal business hours and for emergency or other needs outside of normal business hours of the Grantee: (800) 832-6662.

Section 3. Term of Agreement

A. This Franchise shall run for a period of five (5) years, from the effective date of this Franchise specified in Section 5.

B. Renewal Option of Term: The Grantee may renew this Franchise for one, additional five (5) year period upon submission and approval of the application specified under ACC 20.06.130, as it now exists or is amended, within the timeframe set forth in that section (currently not more than 240 and not less than 180 days prior to expiration of the then-current term). Any materials submitted by the Grantee for a previous application may be considered by the City in reviewing a current application, and the Grantee shall only submit those materials deemed necessary by the City to address changes in the Grantee Facilities or Telecommunications Services, or to reflect specific reporting periods mandated by the ACC.

C. Failure to Renew Franchise – Automatic Extension. If the Parties fail to formally renew this Franchise prior to the expiration of its term or any extension thereof, the Franchise automatically continues month to month until renewed or either party gives written notice at least one hundred and eighty (180) days in advance of intent not to renew the Franchise.

Section 4. Definitions

For the purpose of this agreement:

A. "ACC" or "City Code" means the Auburn City Code.

B. "Emergency" means a condition of imminent danger to the health, safety and welfare of persons or property located within the City including, without limitation, damage to persons or property from natural consequences, such as storms, earthquakes, riots, acts of terrorism or wars.

C. "Franchise Area" means all present and future Rights-of-Way as defined in Section 4.H. herein, within the City Limits as they currently exist or as amended in the future.

D. "Grantee Facilities" means any and all equipment, appliances, attachments, appurtenances and other items necessary for Telecommunications Services or "personal wireless services" as defined in RCW 80.36.375 or 35.99.010(7), respectively, that are located in the Right-of-Way. It includes microcell, minor and small cell facilities and strand-mounted units.

Grantee Facilities do not include anything used to provide wireline services, front-haul or back-haul services, including fiber optic cables, coaxial cables, wires, conduit or other equipment, appliances, attachments and appurtenances. They do not include any equipment that is not within ten (10) feet of the pole (excluding any strand-mounted unit) or base station, or that is not within the Right-of-Way, or that is covered under a separate Franchise Agreement or agreement.

E. "Grantee's Wireless Telecommunications Services" means the transmission and reception of wireless communications signals, including but not limited to personal wireless and data communications services, over Licensee's federally licensed frequencies, pursuant to all the rules and regulations of the Federal Communications Commission, and in accordance with the terms of this Agreement, for the benefit of wireless communications subscribers in and around the Franchise Area.

F. "Maintenance" or "maintain" shall mean examining, testing, inspecting, repairing, maintaining, restoring and replacing the existing Grantee Facilities or any part thereof as required and necessary for safe operation.

G. "Relocation" means permanent movement of Grantee Facilities required by the City, and not temporary or incidental movement of such facilities, or other revisions Grantee would accomplish and charge to third parties without regard to municipal request.

H. "Rights-of-Way" means the surface and the space above and below streets, roadways, highways, avenues, courts, lanes, alleys, sidewalks, shoulders, curbs, landscaping areas between sidewalks and curbs or shoulders, and other public rights-of-ways and similar public properties and areas to the extent that the City has the authority to grant permission to use any of the foregoing. It does not include structures, including poles and conduit, located in the right-of-way and, any other property owned by the City in its proprietary capacity.

Section 5. Acceptance of Franchise

A. This Franchise shall not become effective until Grantee files with the City Clerk (1) the Statement of Acceptance (Exhibit "A"), (2) all verifications of insurance coverage specified under Section 15, (3) the financial guarantees specified in Section 16, and (4) payment of any outstanding application fees per the City Fee Schedule. These four items shall collectively be the "Franchise Acceptance". The date that such Franchise Acceptance is filed with the City Clerk shall be the effective date of this Franchise.

B. Should the Grantee fail to file the Franchise Acceptance with the City Clerk within thirty (30) days after the effective date of the ordinance approving the Franchise, the City's grant of the Franchise will be null and void.

Section 6. Location, Siting, Construction and Maintenance

A. The Grantee shall apply for, obtain, and comply with the terms of all permits, approvals and facilities lease agreements as required under ACC Chapters 12.24, 13.32A and 20 for any work done within the Right-of-Way or to site Grantee Facilities on any facilities, structures or poles owned by third parties within the Right-of-Way or on any City-owned facilities, structures or poles within the Right-of-Way. City Council authorizes the Director of Public Works or the Director's designee to negotiate and execute all agreements necessary for the use of City owned property. Grantee shall comply with all applicable City, State, and Federal codes, rules, regulations, and orders in undertaking such work, which shall be done in a thorough and proficient manner.

Grantee shall be required to submit the appropriate application to the City related to siting within the public Right-of-Way as provided under this Franchise, for review and approval by the City Engineer, prior to submitting an application for a construction permit(s) for any and all locations in the public Right-of-Way, whether Grantee is proposing to locate on City owned facilities, structures or poles, or on third party owned facilities, structures or poles. The siting application shall be submitted to the City and shall be in addition to any other required permits for construction, building, land use, zoning, lease agreements or other approvals as required by applicable City Code.

B. Grantee agrees to coordinate its activities with the City and all other utilities located in the public Right-of-Way within which Grantee is undertaking its activity.

C. The City expressly reserves the right to prescribe how and where Grantee Facilities shall be installed within the public Right-of-Way and may from time to time, pursuant to and in accordance with the applicable sections of this Franchise or the ACC, require the adjustment, securement, removal, relocation and/or replacement thereof in the public interest and safety at the expense of the Grantee.

D. Before commencing any work within the public Right-of-Way, the Grantee shall comply with the One Number Locator provisions of RCW Chapter 19.122 to identify existing utility infrastructure.

E. Tree Trimming. Upon prior written approval of the City and in accordance with City ordinances, Grantee shall have the authority to reasonably trim trees upon and overhanging streets, public rights-of-way, and public places in the Franchise Area to the extent necessary to prevent the branches of those trees from coming in physical contact with the Grantee Facilities. Grantee shall be responsible for debris removal from such activities. If such debris is not removed within twenty-four (24) hours of completion of the trimming, the City may, at its sole discretion, remove such debris and charge Grantee for the cost of removal. This section does not, in any instance, grant automatic authority to clear vegetation for purposes of providing a clear path for radio signals. Any such general vegetation clearing will require a land-clearing permit.

Section 7. Repair and Emergency Work

In the event of an emergency, the Grantee may commence repair and emergency response work as required under the circumstances. The Grantee shall notify the City telephonically during normal business hours (at 253-931-3010) and during non-business hours (at 253-876-1985) as promptly as possible, before such repair or emergency work commences, and in writing as soon thereafter as possible. Such notification shall include the Grantee's emergency contact phone number for the corresponding response activity. The City may commence emergency response work, at any time, without prior written notice to the Grantee, but shall notify the Grantee in writing as promptly as possible under the circumstances. Grantee will reimburse the City for the City's actual cost of performing emergency response work.

Section 8. Damages to City and Third-Party Property

Grantee agrees that if any of its actions under this Franchise impairs or damages any property, Grantee will restore, at its own cost and expense, the property to a safe condition. Upon returning property to a safe condition, the property shall then be returned to the condition it was in immediately prior to being damaged (if the safe condition of the property is not the same as that which existed prior to damage). Such repair work shall be performed and completed to the satisfaction of the City Engineer.

Section 9. Location Preference

A. Any structure, equipment, appurtenance or tangible property of a utility, other than the Grantee's, which was installed, constructed, completed or in place prior in time to Grantee's application for a permit to construct or repair Grantee Facilities under this Franchise shall have preference as to positioning and location with respect to the Grantee Facilities. However, to the extent that the Grantee Facilities are completed and installed prior to another telecommunication or utility operator's or carrier's submittal of a permit for new or additional structures, equipment, appurtenances or tangible property, then the Grantee Facilities shall have priority. These rules governing preference shall continue in the event of the necessity of relocating or changing the grade of any City road or right-of-way. A relocating utility shall not necessitate the relocation of another utility that otherwise would not require relocation. This Section shall not apply to any City facilities or utilities that may in the future require the relocation of Grantee Facilities. Such relocations shall be governed by Section 11.

B. Grantee shall maintain a minimum underground horizontal separation of five (5) feet from City water, sanitary sewer and storm sewer facilities and ten (10) feet from above-ground City water facilities. For development of new areas, the City, in consultation with Grantee and other telecommunication and utility purveyors or authorized users of the Rights-of-Way, will develop guidelines and procedures for determining specific telecommunications and utility locations.

Section 10. Grantee Information

A. Grantee agrees to supply, at no cost to the City, any information reasonably requested by the City to coordinate municipal functions with Grantee's activities and fulfill any municipal obligations under state law. This information shall include, at a minimum, as-built drawings of Grantee Facilities, including installation inventory, and maps and plans showing the location of existing Grantee Facilities and planned Grantee Facilities (to the extent that maps and plans showing planned facilities are available) within the Rights of Way. This information

may be requested either in hard copy or electronic format, compatible with the City's data base system, as now or hereinafter exists, including the City's Geographic Information System (GIS) data base. Upon the City's request, Grantee shall inform the City of its long range plans for installation, if such plans are available, so that the City may coordinate any future development with Grantee's proposed designs. If such plans are not immediately available, are not finalized, or are proprietary in nature, then Grantee is under no obligation to provide such information to the City. Should the Grantee fail, for any reason, to provide information regarding its long range plans or planned Grantee Facilities upon the City's request, then the City is under no obligation to coordinate with, account for or authorize their facilities in future Right-of-Way projects or the City's long range plans.

B. The parties understand that Washington law limits the ability of the City to shield from public disclosure any information given to the City; however, nothing in this Section shall be construed to require Grantee to disclose proprietary or confidential information without adequate safeguards to protect the confidential or proprietary nature of the information. Accordingly, in the event the City receives a public records request under applicable state or federal law, the City agrees to notify the Grantee of such request related to the Grantee, and to give the Grantee ten (10) working days to obtain an injunction prohibiting the release of the records.

C. Grantee shall defend, indemnify and hold the City harmless for any loss or liability for fines, penalties, and costs (including attorneys' fees) imposed on the City because of non-disclosures requested by Grantee under Washington's public records act, provided the City has notified Grantee of the pending request.

Section 11. Relocation of Grantee Facilities

A. Pursuant to Auburn City Code Chapter 13 and Chapter 20 as currently written or as amended in the future, except as otherwise so required by law, Grantee agrees to relocate, remove, or reroute its facilities as ordered by the City Engineer at no expense or liability to the City, except as may be required by RCW Chapter 35.99. Pursuant to the provisions of Section 14, Grantee agrees to protect and save harmless the City from any customer or third-party claims for service interruption or other losses in connection with any such change, relocation, abandonment, or vacation of the Public Right-of-Way.

B. If securement, adjustment or relocation of the Grantee Facilities is necessitated by a request from a party other than the City, that party shall pay the Grantee the actual costs.

Section 12. Abandonment and or Removal of Grantee Facilities

A. Within one hundred and eighty days (180) of Grantee’s permanent cessation of use of all or a portion of the Grantee Facilities, the Grantee shall, at the City’s discretion, either abandon in place or remove the affected facilities.

B. Grantee may ask the City in writing to abandon, in whole or in part, all or any part of the Grantee Facilities. Any plan for abandonment of Grantee Facilities must be approved in writing by the City, which approval shall not be unreasonably withheld.

C. The parties expressly agree that this Section shall survive the expiration, revocation or termination of this Franchise.

Section 13. Undergrounding

A. The parties agree that this Franchise does not limit the City’s authority under federal law, state law, or local ordinance, to require the undergrounding of utilities.

B. Subject to applicable law addressing the undergrounding of telecommunication facilities, whenever the City requires the undergrounding of aerial utilities in the Franchise Area, the Grantee shall underground the Grantee Facilities, in the manner specified by the City Engineer at no expense or liability to the City, except as may be required by RCW Chapter 35.99. Where other utilities are present and involved in the undergrounding project, Grantee shall only be required to pay its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of Grantee Facilities. Common costs shall include necessary costs for common trenching and utility vaults. Fair share shall be determined in comparison to the total number and size of all other utility facilities being undergrounded.

Section 14. Indemnification and Hold Harmless

A. The Grantee shall defend, indemnify, and hold the City and its officers, officials, agents, contractors and employees, and volunteers harmless from any and all costs, claims, injuries, damages, losses, suits, or liabilities including attorneys’ fees arising out of or in connection with the Grantee’s performance (including Grantee’s agents’ or representatives’ performances) under this Franchise, except to the extent such costs, claims, injuries, damages, losses, suits, or liabilities are caused by the sole negligence or willful misconduct of the City or its officers, officials, agents and employees. Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the

event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Grantee and the City, its officers, officials or employees, and volunteers, the Grantee's liability hereunder shall be only to the extent of the Grantee's negligence.

B. The Grantee shall hold the City harmless from any liability arising out of or in connection with any damage or loss to the Grantee Facilities caused by maintenance and/or construction work performed by, or on behalf of, the City within the Franchise Area or any other City road, right-of-way, or other property, except to the extent any such damage or loss is directly caused by the negligence or willful misconduct of the City, or its employees, contractors and agents performing such work.

C. The Grantee acknowledges that neither the City nor any other public agency with responsibility for firefighting, emergency rescue, public safety or similar duties within the City has the capability to provide trench, close trench or confined space rescue. The Grantee, and its agents, assigns, successors, or contractors, shall make such arrangements as Grantee deems fit for the provision of such services with regard to work performed by or at the direction of Grantee. The Grantee shall hold the City harmless from any liability arising out of or in connection with any damage or loss to the Grantee for the City's failure or inability to provide such services, and, pursuant to the terms of Section 14(A), the Grantee shall indemnify the City against any and all third-party costs, claims, injuries, damages, losses, suits, or liabilities based on the City's failure or inability to provide such services.

D. Acceptance by the City of any work performed by the Grantee shall not be grounds for avoidance of this section.

E. It is further specifically and expressly understood that the indemnification provided herein constitutes the Grantee's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of indemnity claims made by the City against Grantee or claims made by Grantee's employees directly against the City. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

Section 15. Insurance

A. The Grantee shall procure and maintain for the duration of this Franchise, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Grantee, its officers, officials, and employees in the amounts and types set forth below:

1. Commercial Automobile Liability insurance ISO Form CG 00 01 covering all owned, non-owned, hired, and leased vehicles with a combined single limit for bodily injury and property damage of \$1,000,000.00 per accident including contractual liability. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01, or a substitute form used by Grantee, so long as it provides equivalent liability coverage.

2. Commercial General Liability insurance with limits of \$5,000,000.00 each occurrence for bodily injury and property damage and, \$5,000,000.00 general aggregate including \$5,000,000.00 products-completed operations aggregate limit, premises-operations, independent contractors, products-completed operations, personal injury and advertising injury and contractual liability coverage. There shall be no exclusion for liability arising from explosion, collapse, or underground property damage. The City shall be included as an additional insured as their interest may appear under the Grantee's Commercial General Liability insurance policy with respect to the work performed under this Franchise by means of a blanket additional insured endorsement using ISO Additional Insured Endorsement for Ongoing Operations, CG 20 10 10 01 and Additional Insured Completed Operations Endorsement, CG 20 37 10 01, or substitute endorsements utilized by Grantee providing equivalent coverage.

3. Professional Liability insurance with limits of \$1,000,000.00 per claim and aggregate covering the negligence, acts, errors, and/or omissions of Grantee in the performance of professional services under this Franchise.

4. Workers' Compensation coverage (or qualified self-insurance coverage) as required by the Industrial Insurance laws of the State of Washington.

B. The insurance policies shall:

1. Provide that the Grantee's insurance coverage shall be primary insurance as respects the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be in excess of the Grantee's insurance and shall not contribute with it.

2. Upon receipt of appropriate notice from its insurer(s), Grantee shall provide the City with thirty (30) days prior written notice of cancellation or nonrenewal of any of the required insurance policies that are not replaced.

C. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII.

D. Verification of Coverage. Grantee shall furnish the City with documentation of insurer's A.M. Best rating and with original certificates and a copy of amendatory endorsements, including but not necessarily limited to the blanket additional insured endorsements evidencing the insurance requirements of Grantee before commencement of the work.

E. Grantee shall have the right to self-insure any or all of the above-required insurance. Any such self-insurance is subject to approval by the City.

F. Grantee's maintenance of insurance as required by this Franchise shall not be construed to limit the liability of Grantee to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy to which the City is otherwise entitled at law or in equity.

Section 16. Performance Security

The Grantee shall provide the City with a bond or financial guarantee in the amount of Fifty Thousand Dollars (\$50,000.00) running for, or renewable for, the term of this Franchise, in a form and substance acceptable to the City, for all of the Grantee Facilities in the City. If Grantee fails to substantially comply with any one or more of the provisions of this Franchise, the City shall recover jointly and severally from the Grantee, bond or any surety of such financial guarantee, any actual and direct damages suffered by City as a result thereof, including but not limited to staff time, material and equipment costs and the cost of removal or abandonment of facilities. Grantee specifically agrees that its failure to comply with the terms of Section 19 shall constitute a material breach of this Franchise. Such a bond or financial guarantee shall not be construed to limit the Grantee's liability to the guarantee amount, or otherwise limit the City's recourse to any remedy to which the City is otherwise entitled at law or in equity.

Section 17. Successors and Assignees

A. All the provisions, conditions, regulations and requirements herein contained shall be binding upon the successors, assigns, and independent contractors of the Grantee, and all rights and privileges, as well as all obligations and liabilities of the Grantee shall inure to its successors, assignees and contractors equally.

B. This Franchise shall not be leased, assigned or otherwise alienated without the express prior consent of the City by ordinance.

C. Grantee and any proposed assignee or transferee shall provide and certify the following to the City not less than sixty (60) days prior to the proposed date of transfer: (1) Complete information setting forth the nature, term and

conditions of the proposed assignment or transfer; (2) All information required by the City of an applicant for a Franchise with respect to the proposed assignee or transferee; and, (3) An application fee which shall be set by the City, plus any other costs actually and reasonably incurred by the City in processing, and investigating the proposed assignment or transfer.

D. Prior to the City's consideration of a request by Grantee to consent to a Franchise assignment or transfer, the proposed Assignee or Transferee shall file with the City a written promise to unconditionally accept all terms of the Franchise, effective upon such transfer or assignment of the Franchise. The City is under no obligation to undertake any investigation of the transferor's state of compliance and failure of the City to insist on full compliance prior to transfer does not waive any right to insist on full compliance thereafter.

E. Transactions between affiliated entities are not exempt from the required City approval. Grantee shall promptly notify the City in writing prior to any proposed change in, or transfer of, or acquisition by any other party of control of the Grantee's company. Notification shall include those items set out in subsection 17.C (1) through (3) herein above.

Section 18. Dispute Resolution

A. In the event of a dispute between the City and the Grantee arising by reason of this Agreement, the dispute shall first be referred to the operational officers or representatives designated by Grantor and Grantee to have oversight over the administration of this Agreement. The officers or representatives shall meet within thirty (30) calendar days of either party's request for a meeting, whichever request is first, and the parties shall make a good faith effort to achieve a resolution of the dispute.

B. If the parties fail to achieve a resolution of the dispute in this manner, either party may then pursue any available judicial remedies. This Franchise shall be governed by and construed in accordance with the laws of the State of Washington. In the event any suit, arbitration, or other proceeding is instituted to enforce any term of this Agreement, the parties specifically understand and agree that venue shall be exclusively in King County, Washington. The prevailing party in any such action shall be entitled to its attorneys' fees and costs of suit, which shall be fixed by the judge hearing the case, and such fees shall be included in the judgment.

Section 19. Enforcement and Remedies

A. If the Grantee shall willfully violate, or fail to comply with any of the provisions of this Franchise through negligence, or should it fail to heed or comply

with any notice given to Grantee under the provisions of this Agreement, the City may, at its discretion, provide Grantee with written notice to cure the breach within thirty (30) days of receipt of written notification. If the parties determine the breach cannot be cured within thirty days, the City may specify a longer cure period, and condition the extension of time on Grantee's submittal of a plan to cure the breach within the specified period, commencement of work within the original thirty-day cure period, and diligent prosecution of the work to completion. If the breach is not cured within the specified time, or the Grantee does not comply with the specified conditions, the City may, at its discretion, either (1) revoke the Franchise with no further notification (2) terminate Franchisee's use of the specific portion(s) of the ROW to which the default(s) pertains at the discretion of the City Engineer, or (3) claim damages of Two Hundred Fifty Dollars (\$250.00) per day against the bond or financial guarantee set forth in Section 16 for every day after the expiration of the cure period that the breach is not cured.

B. Should the City determine that Grantee is acting beyond the scope of permission granted herein for Grantee Facilities, and Grantee Services, the City reserves the right to cancel this Franchise and require the Grantee to apply for, obtain, and comply with all applicable City permits, franchises, or other City permissions for such actions, and if the Grantee's actions are not allowed under applicable federal and state or City laws, to compel Grantee to cease such actions.

Section 20. Compliance with Laws and Regulations

A. This Franchise is subject to, and the Grantee shall comply with all applicable federal and state or City laws, regulations and policies (including all applicable elements of the City's comprehensive plan), in conformance with federal laws and regulations, affecting performance under this Franchise (collectively, "Laws"). Furthermore, notwithstanding any other terms of this Agreement appearing to the contrary, the Grantee shall be subject to the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the general public in relation to the rights granted in the Franchise Area.

B. The City reserves the right at any time to amend this Franchise to conform to any hereafter enacted, amended, or adopted federal or state statute or regulation relating to the public health, safety, and welfare, or relating to roadway regulation, or a City Ordinance enacted pursuant to such federal or state statute or regulation upon providing Grantee with thirty (30) days written notice of its action setting forth the full text of the amendment and identifying the statute, regulation, or ordinance requiring the amendment. The amendment shall become automatically effective upon expiration of the notice period unless, before expiration of that period, the Grantee makes a written call for negotiations over the terms of the amendment. If the parties do not reach agreement as to the terms of the amendment within thirty (30) days or within such other timeframe as

determined by the City, of the call for negotiations, the City may enact the proposed amendment, by incorporating the Grantee's concerns to the maximum extent the City deems possible.

C. The City may terminate this Franchise upon thirty (30) days written notice to the Grantee, if the Grantee fails to comply with such amendment or modification. The City shall retract its notice of termination if the City determines that the Grantee is in compliance with the amendment or modification within such 30-day period. The City may grant longer than the 30-days to comply if the Grantee provides notice to the City of its intent to comply and can demonstrate good-faith efforts to reach compliance to the satisfaction of the City.

Section 21. License, Fees, Tax and Other Charges

Grantee shall pay promptly and before they become delinquent, all fees and charges for all applicable permits, licenses and construction approvals imposed by the City for Grantee's permitted use of the Grantee Facilities within the Rights-of-Way. This Franchise shall not exempt the Grantee from any future license, fee, tax, or charge, which the City may hereinafter adopt pursuant to authority granted to it under state or federal law for revenue or as reimbursement for use and occupancy of the Franchise Area.

Section 22. Consequential Damages Limitation

Notwithstanding any other provision of this Agreement, in no event shall either party be liable for any special, incidental, indirect, punitive, reliance, consequential or similar damages.

Section 23. Severability

If any portion of this Franchise is deemed invalid, the remainder portions shall remain in effect.

Section 24. Titles

The section titles are for reference only and should not be used for the purpose of interpreting this Franchise.

Section 25. Implementation.

The Mayor is authorized to implement such administrative procedures as may be necessary to carry out the directions of this Franchise.

Section 26. Effective date.

This Ordinance shall take effect and be in force five days from and after its passage, approval and publication as provided by law.

INTRODUCED: _____

PASSED: _____

APPROVED: _____

NANCY BACKUS, MAYOR

ATTEST:

Shawn Campbell, City Clerk

APPROVED AS TO FORM:

Steven L. Gross, City Attorney

Published: _____

