

ORDINANCE NO. 30-1999

AN ORDINANCE OF THE CITY OF ABILENE AMENDING CHAPTER 12, "FRANCHISES" OF THE ABILENE MUNICIPAL CODE; PROVIDING A SEVERABILITY CLAUSE, DECLARING A PENALTY AND CALLING A PUBLIC HEARING.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ABILENE, TEXAS:

PART 1: That Chapter 12, "Franchises," is hereby amended by reference as set forth in Exhibit "A". All right-of-way use for telecommunications accepted on or after June 24, 1999 shall be in conformance with the procedures and standards as set forth in Exhibit "A", attached hereto and made a part of this ordinance for all purposes.

PART 2: That if any provision or any section of this ordinance shall be held to be void or unconstitutional, such holding shall in no way affect the validity of the remaining provisions or sections of this ordinance, which shall remain in full force and effect.

PART 3: That any person, firm, or corporation violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine as delineated in Section 1.7 of Exhibit "A". Each day such a violation shall continue, or be permitted to continue, shall be deemed a separate offense. Said ordinance, being a penal ordinance, becomes effective ten (10) days after notice of its publication in the newspaper as provided by Section 19 of the City Charter of the City of Abilene.

PASSED ON FIRST READING this 11 day of Feb., A.D. 19 99.

A notice of the time and place, where and when said ordinance would be given a public hearing and considered for final passage, was published in the Abilene Reporter-News, a daily newspaper of general circulation in the City of Abilene, said publication being on the 7th day of June 1999, the same being more than twenty-four (24) hours prior to the time designated for said hearing. After such opportunity for the public to be heard, said ordinance was passed on second and final reading.

PASSED ON SECOND AND FINAL READING this 24 day of June, A.D. 19 99.

ATTEST:

Op Moore
City Secretary

Gady Bass
Mayor

APPROVED:

Spencer Hicks
City Attorney

EXHIBIT "A"

Amend: Chapter 12 by adding Article III. Right-of-Way Use for Telecommunications as specified below.

ARTICLE III. RIGHT-OF-WAY USE FOR TELECOMMUNICATIONS

SECTION 1 GENERAL

Section 1.1 – Purpose

The purpose and intent of this Ordinance is to:

- (a) establish clear local guidelines, standards and time frames for the exercise of local authority with respect to the use of City Property and Public Rights-of-Way to provide Telecommunications Service within the City;
- (b) permit and manage reasonable access to the property of the City and Public Rights-of-Way within the City on a non-discriminatory and competitively neutral basis;
- (c) conserve the limited physical capacity of the Public Rights-of-Way held in public trust by the City;
- (d) assure that the City's current and ongoing costs of granting and managing private access to and use of City Property and Public Rights-of-Way are fully paid by the Persons seeking such access and assigning such costs on a non-discriminatory and competitively neutral basis;
- (e) secure fair and reasonable compensation on a non-discriminatory and competitively neutral basis to the City and the residents of the City for use of City Property and Public Rights-of-Way;
- (f) assure that all Certificated Telecommunications Providers providing facilities or services within the City comply with the ordinances, rules and regulations of the City;
- (g) assure that the City can continue to fairly and responsibly protect the public health, safety and welfare;
- (h) enable the City to discharge its public trust consistent with rapidly evolving federal and State regulatory policies, industry competition and technological development.

Section 1.2 – Definitions

For the purpose of this Ordinance, and the interpretation and enforcement thereof, the following words and phrases shall have the following meanings, unless the context of the sentence in which they are used shall indicate otherwise:

- (a) “Acceptance” means written notification provided to the City Secretary, in a form acceptable to the City, of a Certificated Telecommunications Provider’s acknowledgement of the terms and conditions of the Ordinance.
- (b) “Access Lines”
 - (1) means, unless the PUC adopts a different definition under Section 283.003 of the Local Government Code, a unit of measure representing:
 - (i) each switched transmission path of the transmission media that is physically within a Public Right-of-Way extended to the end-use customer’s premises within the City, that allows the delivery of local exchange telephone services within the City, and that is provided by means of owned facilities, unbundled network elements or leased facilities, or resale;
 - (ii) each termination point or points of a nonswitched telephone or other circuit consisting of transmission media located within a Public Right-of-Way connecting specific locations identified by, and provided to, the end-use customer for delivery of nonswitched telecommunications services within the City; or
 - (iii) each switched transmission path within a Public Right-of-Way used to provide central office-based PBX-type services for systems of any number of stations within the municipality, and in that instance, one path shall be counted for every ten (10) stations served; and
 - (2) may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer’s premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service.
- (c) “Affiliate” means a Person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another Person.
- (d) “Cable Act” means the Cable Communications Policy Act of 1984, 47 U.S.C. §532, et seq., as now and hereafter amended.
- (e) “Cable Operator” means any Person or Persons who (1) provides Cable Service over a Cable System and directly or through one or more Affiliates owns a significant interest in such a Cable System, or (2) otherwise controls or is responsible for, through any arrangement, the management and operation of such a Cable System.

- (f) "Cable Service" means:
- (1) the one-way transmission to subscribers of (i) video programming, defined as programming provided by, or generally considered comparable to programming provided by, a television broadcast station, or (ii) other programming service, defined as information that a Cable Operator makes available to all subscribers generally, and
 - (2) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.
- (g) "Cable System" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (1) a facility that serves only to retransmit the television signals of one (1) or more television broadcast stations; (2) a facility that serves subscribers without using any Public Right-of-Way; (3) a facility of a common carrier subject, in whole or in part, to the provisions of subchapter II of Chapter V of Title 47, U.S.C., except that such facility shall be considered a Cable System (other than for purposes of section 541(c) of Title 47, U.S.C.) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (4) an open video system that complies with section 573 of Title 47, U.S.C.; or (5) any facilities of any electric utility used solely for operation its electric utility system.
- (h) "Certificated Telecommunications Provider" means a Person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the PUC to offer local exchange telephone service and who has provided written Acceptance of this Ordinance to the City.
- (i) "City" means the City of Abilene, Texas, in its present incorporated form or as it may be changed by annexation.
- (j) "City Property" means and includes all real property owned by the City, other than Public Rights-of-Way as that term is defined herein, and all property held in a proprietary capacity by the City.
- (k) "Excess Capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhole or other utility facility within the Public Rights-of-Way that is or will be available for use for additional Facilities.
- (l) "Facilities" means the plant, equipment and property, including but not limited to cables, wires, conduits, ducts, pedestals, poles, antennas, electronics and other appurtenances used or to be used to transmit, receive, distribute, provide or offer Telecommunications Service.

- (m) "FCC" or "Federal Communications Commission" means the Federal administrative agency, or lawful successor, authorized to regulate and oversee telecommunications and cable carriers, services and providers on a national level.
- (n) "Governing Body" means the Mayor and City Council of the City.
- (o) "Law" means any and all applicable laws, including but not limited to, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104 §110 Stat. 70, codified at 47 U.S.C. and subsequent amendments, and all orders, rules, tariffs, guidelines, and regulations issued by the Federal Communications Commission or the governing State authority pursuant thereto, as well as all applicable State and City law. The term Law encompasses statutory law, administrative regulations, and case law.
- (p) "Overhead Facilities" means utility poles, utility facilities and Facilities located above the surface of the ground, including the underground supports and foundations for such facilities.
- (q) "Person" means and includes corporations, companies, associations, organizations, joint stock companies or associations, firms, partnerships, limited liability companies and individuals and includes their lessors, trustees and receivers.
- (r) "Private Line Service" means a non-switched telephone circuit dedicated for use between specific locations identified by an end-user customer.
- (s) "Private Line Termination Point" means the physical end point or points of a Private Line Service within the City.
- (t) "Public Right-of-Way" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the City has an interest. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications.
- (u) "PUC" or "Public Utility Commission of Texas" means the State administrative agency, or lawful successor, authorized to regulate and oversee telecommunications and cable carriers, services and providers in the State.
- (v) "State" means the State of Texas.
- (w) "Surplus Space" means that portion of the Usable Space on a utility pole which has the necessary clearance from other pole users to allow its use for a pole attachment.
- (x) "Telecommunications Service" means the providing or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of, or of Facilities for the transmittal of, voice, data, image, graphics and other communications between or among points by wire, fiber optics or similar facilities, but does not

include the provision to the public of any “wireless service,” “long distance” or “toll” service, as defined by Law.

- (y) “Underground Facilities” means Facilities and utility facilities located under the surface of the ground, excluding the underground foundations or supports for Overhead Facilities.
- (z) “Usable Space” means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum necessary vertical clearance.

Section 1.3 – Registration

Except as otherwise provided herein, all Certificated Telecommunications Providers engaged in the business of providing, transmitting, supplying or furnishing of Telecommunications Service in the City, with the exception of those that already hold a current City telecommunications franchise, or Acceptance under this Ordinance, or have a pending application under this Ordinance on file with the City, shall register with the City pursuant to Section 2 of this Ordinance.

Section 1.4 – Acceptance of Right-of-Way Use Ordinance Required

Any Certificated Telecommunications Provider who desires to construct, install, control, operate, maintain, use, or otherwise locate Facilities in, under, over or across any City Property or Public Rights-of-Way for the purpose of providing Telecommunications Service within the City shall first file an Acceptance of this Ordinance as provided in Section 3.2.

Section 1.5 – Cable Franchise Required

Except as otherwise provided herein, any Certificated Telecommunications Provider who desires to operate a Cable System on City Property or in any Public Rights-of-Way within the City for the purpose of providing Cable Service to subscribers in the City as a Cable Operator shall first obtain a cable franchise from the City as provided in the City’s current cable franchise ordinances in effect at the time the cable franchise is sought.

Section 1.6 – Application to Existing Franchise Ordinances and Agreements

This Ordinance shall have no effect on a Certificated Telecommunications Provider subject to any existing franchise ordinance or franchise agreement until:

- (a) the expiration of said franchise ordinance or agreement;
- (b) an amendment is added to an unexpired franchise ordinance or franchise agreement, unless both parties agree to defer full compliance to a specific date not later than the present expiration date.

Section 1.7 – Penalties

Any Person found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Ordinance after receiving written notice of same from the City Manager or his or her designated representative shall be fined not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00) for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs or continues.

Section 1.8 – No Waiver for Non-Enforcement

No Certificated Telecommunications Provider shall be excused from complying with any of the terms and conditions of this Ordinance by any failure or omission of the City upon any one or more occasions to insist upon, enforce, or otherwise seek compliance with such terms and conditions.

Section 1.9 – Other Remedies

Nothing in this ordinance shall be construed as limiting any remedies that the City or a Certificated Telecommunications Provider may have at Law or in equity for enforcement of this Ordinance.

Section 1.10 – Severability

If any Section, Subsection, sentence, clause, phrase, or other portion of this Ordinance, or its application to any Person, is, for any reason, declared invalid, in whole or in part by any court or agency of competent jurisdiction, said decision shall not affect the validity of the remaining portions hereof.

Section 1.11 – Reservation of Rights

The City hereby reserves to itself all rights, privileges, and interests which it has or may hereafter acquire, and nothing in this Ordinance shall be construed otherwise unless it is specifically set forth in this Ordinance.

Section 1.12 – Amendment to Ordinance

The City shall have the right to amend this Ordinance, and any amendment pursuant to this right shall be fully incorporated into any Acceptance of this Ordinance. Such amendment shall not materially alter the terms of Acceptance without a Certificated Telecommunications Provider’s approval.

SECTION 2
REGISTRATION OF CERTIFICATED TELECOMMUNICATIONS PROVIDERS

Section 2.1 – Registration Required

All Certificated Telecommunications Providers that offer or provide any Telecommunications Service for a fee directly to the public within the City, with the exception of those Certificated Telecommunications Providers that already hold a current telecommunications franchise or an Acceptance under this Ordinance on file with the City, shall register with the City pursuant to this Section within thirty (30) days following the date of final adoption of this Ordinance, and shall thereafter register annually on or before January 30 of each calendar year. The annual registration shall include the following, or as allowed by PUC guidelines:

- (a) The identity and legal status of the registrant.
- (b) The name, address and telephone number of the officer, agent or employee responsible for the accuracy of the registration statement.
- (c) A general description, including location, of registrant's existing or proposed Telecommunications Facilities within the City.
- (d) A description of the Telecommunications Service that the registrant intends to offer or provide, or is currently offering or providing, to persons, firms, businesses or institutions within the City.
- (e) Information sufficient to determine whether the registrant is subject to the Acceptance requirements of this Ordinance.
- (f) Information indicating whether the registrant intends to provide Cable Service as a Cable Operator over a Cable System and sufficient information to determine whether such service is subject to a cable franchise.
- (f) Information sufficient to determine that the registrant has applied for and received any certificates of convenience and necessity, certificate of operating authority, service provider certificate of operating authority, construction permit, operating license or other approvals required by the PUC and/or the FCC to provide Telecommunications Service or Telecommunications Facilities within the City.
- (g) The number and type of Access Lines the registrant provides to end users in the City as of the end of the preceding calendar year, only when subject to PUC confidentiality protections.
- (h) Such other and further information as may reasonably be requested by the City Manager or his or her designee.

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Section 2.2 – Purpose of Registration

The purpose of registration under this Section is to:

- (a) provide the City with accurate and current information concerning the Certificated Telecommunications Providers who offer or provide Telecommunications Service within the City, or that own, control, or operate Telecommunications Facilities within the City;
- (b) assist the City in enforcement of this Ordinance;
- (c) assist the City in the collection and enforcement, on a non-discriminatory and competitively neutral basis, of any right-of-way use fees or other charges that may lawfully be due the City;
- (d) assist the City in monitoring compliance with applicable Law.

**SECTION 3
RIGHT-OF-WAY USE**

Section 3.1 – Right-of-Way Use Acceptance

Acceptance of the terms of this right-of-way use Ordinance shall be required of any Certificated Telecommunications Provider who desires to occupy City Property or Public Rights-of-Way for the purpose of providing Telecommunications Service to any person or area within the City.

Section 3.2 – Form and Content of Acceptance of Terms of Ordinance

Acceptance shall consist of written notification provided to the City Secretary, in a form acceptable to the City, of a Certificated Telecommunications Provider's acknowledgement of the terms and conditions of this Ordinance. All initial Acceptances shall be accompanied by the registration information described in Section 2.1.

Upon receipt of Acceptance by the City Secretary, the Certificated Telecommunications Provider shall be provided access to the Public Rights-of-Way within the City according to the terms and conditions of this Ordinance.

Section 3.3 – Nonexclusive Access to Public Right-of-Way

No Acceptance of this Ordinance shall confer any exclusive rights, privilege, license or franchise to occupy or use City Property or Public Rights-of-Way for delivery of Telecommunications Service or any other purposes.

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Section 3.4 – Term

Acceptance of this Ordinance shall be valid for a maximum term of three (3) years. In addition to the provisions of applicable Law, any Certificated Telecommunications Provider that desires to renew its Acceptance of this Ordinance shall, not more than 90 days nor less than 30 days before expiration of the current term, file written notification with the City for renewal of its term which shall include the information required pursuant to Section 3.2, as may be required by the City.

Section 3.5 – Rights Granted

No Acceptance of this Ordinance shall convey any right, title or interest in City Property or Public Rights-of-Way, but shall be deemed entry only to use and occupy City Property and Public Rights-of-Way. Further, no Acceptance of this Ordinance shall be construed as any warranty of title.

The City assumes no responsibility for securing any franchises, rights-of-way, permits, or easements that the City does not already own; but a Certificated Telecommunications Provider assumes the duty and responsibility for securing the same. The permission granted herein is subject to applicable Law and regulations now in force or which may be enacted or promulgated by any governmental body or agency having jurisdiction.

Section 3.6 – Compensation to City

Each Acceptance of this Ordinance is subject to the City’s right to fair and reasonable compensation, as specified in Section 4 herein, on a non-discriminatory and competitively neutral basis, for a Certificated Telecommunications Provider’s use and occupancy of City Property and Public Rights-of-Way as well as the City’s supervision and management of the same.

**SECTION 4
FEES AND COMPENSATION**

Section 4.1 – Purpose

It is the purpose of this Section to provide for reasonable and adequate compensation to the City for the use and occupancy of City Property and Public Rights-of-Way for the provisioning of Telecommunications Service, and to further provide for the payment and recovery of all direct and indirect costs and expenses of the City related to the enforcement and administration of this Ordinance.

Section 4.2 – Calculation of Base Amount

Effective September 1, 1999, pursuant to Sec. 283.053, Local Government Code, or as amended, the base amount shall be determined by the PUC.

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Section 4.3 - Compensation for Use of Public Rights-of-Way

Effective March 1, 2000, pursuant to Sec. 283.055, Local Government Code, or as amended, rates per access line by category for the use of the rights-of-way by the City shall be established by the PUC. Certificated Telecommunications Providers shall pay to the City a quarterly amount calculated monthly based on the access line rates established by the PUC. Payment terms, annual increases, and other conditions related to this payment shall be as specified in Sec. 283.055, Local Government Code, or as amended or specified by PUC regulation.

From the effective date of this Ordinance until the date PUC-established rates are implemented, if a Certificated Telecommunications Provider is subject to a franchise agreement or obligations under an Ordinance in the City, the term of which expires in this interim period, the affected Certificated Telecommunications Providers operating in the City shall continue paying municipal fees at the rates required under the terms of the expired agreement or Ordinance until the PUC's determination and the Certificated Telecommunications Provider's implementation of appropriate rates under this Section. The rates required shall include any rate escalation provisions that are or were in effect prior to and during this interim period.

From the effective date of this Ordinance until the date PUC-established rates are implemented, if a Certificated Telecommunications Provider is not subject to a franchise agreement or obligations under an Ordinance in the City and wants to construct facilities to offer telecommunications services in the City, the affected Certificated Telecommunications Provider shall pay right-of-way fees that are competitively neutral and non-discriminatory, consistent with the charges of the most recent franchise agreement or Ordinance between the City and the Certificated Telecommunications Provider serving the largest number of access lines within the City. The Certificated Telecommunications Provider shall pay those fees until the right-of-way fees established by PUC rule take effect.

Section 4.4 – Right to Initiate Legal Action for Compensation

Pursuant to Section 283.051(b), Local Government Code, or as amended, the City reserves the right to initiate legal action against a Certificated Telecommunications Provider that uses a Public Right-of-Way to provide local exchange telephone service within the City and has not compensated the City in accordance with this Section and Chapter 283 of the Local Government Code, or as amended.

**SECTION 5
CONDITIONS OF GRANT**

Section 5.1 – Location of Facilities

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All Facilities shall be constructed, installed and located in accordance with the following guidelines:

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- (a) A Certificated Telecommunications Provider shall install its Facilities within an existing underground duct or conduit whenever Excess Capacity exists within such utility facility, absent the submission by a Certificated Telecommunications Provider or an affected Person of satisfactory evidence to the City Manager or his or her designee that this requirement is not reasonable or feasible in any specific instance.
 - (b) A Certificated Telecommunications Provider with permission to install Overhead Facilities shall install its Facilities on pole attachments to existing utility poles only, provided Surplus Space is available. If the installation of a new pole or poles is necessary, the number, location and installation of same shall be as designated by the City.
 - (c) Whenever any existing electric utilities, cable facilities or telecommunications Facilities are located underground within a Public Right-of-Way of the City, a Certificated Telecommunications Provider with permission to occupy the same Public Right-of-Way must also locate its Facilities underground, absent a compelling demonstration by a Certificated Telecommunications Provider or an affected Person that this requirement is not reasonable or feasible in any specific instance.
 - (d) Whenever any new or existing electric utilities, cable facilities or telecommunications Facilities are located or relocated underground within a Public Right-of-Way, a Certificated Telecommunications Provider that currently occupies the same Public Right-of-Way shall relocate its Facilities underground when the Facilities' usefulness has expired and replacement of existing Facilities becomes necessary.
 - (e) In determining whether any requirement under this Section is unreasonable or infeasible, the City Manager or his or her designee shall consider, among other things, whether the requirement would subject Certificated Telecommunications Provider or other affected Person to an unreasonably increased risk of service interruption, or to an unreasonably increased liability for accidents, or to an unreasonable delay in construction or in the availability of its services, or to any other unreasonable technical or economic burden.

Section 5.2 – Construction Permits

Certificated Telecommunications Provider is required to obtain construction permits to the extent and in the manner required in Section 6 of this Ordinance.

Section 5.3 – Interference with the Public Rights-of-Way

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- (a) No Certificated Telecommunications Provider may locate or maintain its Facilities so as to unreasonably interfere with the use of City Property or Public Rights-of-Way by the City, by the general public or by other Persons authorized to use or be

present in or upon City Property or Public Rights-of-Way. In the event of unreasonable interference, such Facilities shall be moved by Certificated Telecommunications Provider, temporarily or permanently, as determined by the City Manager or his or her designee upon reasonable notice and opportunity to be heard.

- (b) If the temporary removal of Certificated Telecommunications Provider's Overhead Facilities is necessary to permit the moving of houses or other bulky structures, Certificated Telecommunications Provider shall be required to temporarily remove the same upon not less than forty-eight (48) hours advance notice by a party permitted to move a building, house or other bulky structure pursuant to Sections 8-701 through 8-709, Abilene Municipal Code. The expenses of such temporary relocation or removal of Overhead Facilities shall be paid by the party or parties requesting and benefiting from such temporary relocation or removal.
- (c) Certificated Telecommunications Provider shall have the authority to trim trees so as to prevent the branches of such trees from coming in contact with the Facilities of Certificated Telecommunications Provider. The City shall have the option to perform, supervise and direct such trimming. Any trimming shall be at the expense of Certificated Telecommunications Provider.

Section 5.4 – Damage to Property

Except as provided herein, no Certificated Telecommunications Provider nor any Person acting on Certificated Telecommunications Provider's behalf shall take any action or permit any action to be done which may impair or damage any City Property, Public Rights-of-Way, or other property located in, on or adjacent thereto.

Section 5.5 – Notice of Work

- (a) Unless otherwise provided in this Ordinance, no Certificated Telecommunications Provider nor any Person acting on a Certificated Telecommunications Provider's behalf shall commence any work involving disruption or damage to hard surface in or about City Property or Public Rights-of-Way without the provision of notice or permit to the City, as follows:
 - (1) A permit shall be required for asphalt or concrete cuts.
 - (2) Notification shall be required for all other hard surface cuts.
- (b) Within five (5) working days after submission of the permit request, the City Manager or his or her designee, if satisfied that the applications, plans and documents comply with all requirements of this Ordinance, shall issue a permit authorizing construction of the Facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as he or she may deem necessary or appropriate. The City Manager's approval, or that of his or her designee, will not be unreasonably withheld.

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- (c) A Certificated Telecommunications Provider or Person acting on a Certificated Telecommunications Provider's behalf shall receive a copy of the City's current excavation and surface restoration standards with each permit.

Section 5.6 – Maintenance of Facilities

All Certificated Telecommunications Providers shall maintain their Facilities in good and safe condition and in a manner that complies with all applicable Law.

Section 5.7 – Relocation or Removal of Facilities

- (a) Within one hundred twenty (120) days following written notice from the City and after an opportunity to be heard, a Certificated Telecommunications Provider shall, without claim for reimbursement or damages against the City, temporarily or permanently remove, relocate, change or alter the position of any Facilities on City Property or within the Public Rights-of-Way whenever the Governing Body shall have determined that such removal, relocation, change or alteration is reasonably necessary for the construction, repair, maintenance or installation of any City improvement.
 - (b) In any instance in which operation of Subsection (a) is deemed by a Certificated Telecommunications Provider to impose a financial hardship, the Certificated Telecommunications Provider shall have the right to present alternative proposals to the City, and the City shall give due consideration to any such alternative proposals.
 - (c) If the City requires a Certificated Telecommunications Provider to adopt or conform its Facilities to enable any other entity or Person, except the City, to use, or to use with greater convenience, Public Rights-of-Way or City Property, the Certificated Telecommunications Provider shall not be required to make any such changes until such other entity or Person shall reimburse or make arrangements satisfactory to the Certificated Telecommunications Provider to reimburse the Certificated Telecommunications Provider for any loss and expense caused by or arising out of such change; provided, however, that the City shall never be liable for such reimbursement.
 - (d) If after proper notice a Certificated Telecommunications Provider fails or refuses to remove or abate the Facilities in question, the City retains the rights and privilege to remove or abate any such Facilities on City Property or within the Public Rights-of-Way, at the sole cost and expense of the Certificated Telecommunications Provider. In performing or permitting such work to be done, the City shall not be liable to any Person for any damages to any Facilities on City Property or within the Public Rights-of-Way unless directly and proximately caused by the willful intentional or malicious act by the City, and shall not be liable in any event for any consequential damages relating to service interruptions.
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Section 5.8 – Removal of Unauthorized Facilities

Within sixty (60) days following written notice from the City, a Certificated Telecommunications Provider or other Person that owns, controls or maintains any unauthorized Facilities or related appurtenances on City Property or within the Public Rights-of-Way shall, at its own expense, remove such Facilities or appurtenances from City Property or the Public Rights-of-Way. Facilities are unauthorized and subject to removal in the following circumstances:

- (a) Upon abandonment of Facilities on City Property or within the Public Rights-of-Way.
- (b) If the Facilities were constructed or installed without the prior grant of a franchise or Acceptance under this Ordinance.
- (c) If the Facilities were constructed or installed without the prior issuance of a required construction permit.

If after proper notice the owner fails or refuses to remove or abate the Facilities in question, the City retains the rights and privilege to remove or abate any such Facilities on City Property or within the Public Rights-of-Way, at the sole cost and expense of the owner. In performing or permitting such work to be done, the City shall not be liable to any Person for any damages to any Facilities on City Property or within the Public Right-of-Way unless directly and proximately caused by the willful intentional or malicious act by the City, and shall not be liable in any event for any consequential damages relating to service interruptions.

Section 5.9 – Emergency Removal or Relocation of Facilities

The City retains the rights and privilege to cut or move any Facilities located on City Property or within the Public Rights-of-Way, as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency. The City shall cooperate to the extent possible with Certificated Telecommunications Provider in such instances to assure continuity of service, and to afford Certificated Telecommunications Provider the opportunity to make such relocation and/or removal itself where deemed reasonable, at the City's sole discretion.

Section 5.10 – No Waiver of Sovereign Immunity

Nothing in this article shall waive sovereign immunity as it relates to any part of this Ordinance.

Section 5.11 – Restoration of Public Rights-of-Way and City Property

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- (a) When a Certificated Telecommunications Provider, or any Person acting on its behalf, does any work in or affecting any Public Rights-of-Way, or City Property, it shall, at its own expense, promptly remove any obstructions therefrom and restore such Public Rights-of-Way or City Property to as good a condition as existed before

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the work was undertaken. The Certificated Telecommunications Provider, or any Person acting on its behalf, must complete all restoration work prior to vacating the job site.

- (b) If weather or other conditions do not permit the complete restoration required by this Subsection, the Certificated Telecommunications Provider shall temporarily restore the affected Public Rights-of-Way or City Property. Such temporary restoration shall be at Certificated Telecommunications Provider's sole expense and the Certificated Telecommunications Provider shall promptly undertake and complete the required permanent restoration within five (5) days after the weather or other conditions no longer prevent such permanent restoration.
- (c) A Certificated Telecommunications Provider or other Person acting in its behalf shall use suitable protective measures and devices consistent with the Uniform Manual of Traffic Control Devices, to prevent injury or damage to persons or property and to minimize disruptions to efficient pedestrian and vehicular traffic.
- (d) If, within one hundred and eighty (180) days of completion of construction, restoration of the Public Rights-of-Way or City Property is found not to meet the City's excavation and/or surface standards, written notice will be sent to Certificated Telecommunications Provider with information concerning the location and condition of the deficient restoration. Certificated Telecommunications Provider will then have thirty (30) days to remove the substandard restoration and restore the Public Rights-of-Way or City Property in compliance with City standards. If Certificated Telecommunications Provider has not complied within thirty (30) days, the City retains the rights and privilege to remove the substandard restoration and restore in compliance with City standards at the sole cost and expense of Certificated Telecommunications Provider.
- (e) Certificated Telecommunications Provider shall be responsible for all maintenance costs incurred as a result of any defects, impairments or other substandard condition in the Public Rights-of-Way caused by the construction, maintenance, or restoration work of Certificated Telecommunications Provider or any Person acting on Certificated Telecommunications Provider's behalf for a period of one (1) year from the date the surface of the Public Rights-of-Way is restored by Certificated Telecommunications Provider or Person acting on Certificated Telecommunications Provider's behalf.
- (f) No street, alley, highway or public place shall be encumbered for a longer period than shall be necessary to execute the work and restore the Public Rights-of-Way.

Section 5.12 – Facilities Maps

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- (a) A Certificated Telecommunications Provider shall maintain maps of all of Certificated Telecommunications Provider's Facilities located on City Property or within the Public Rights-of-Way. Such maps shall be made available for review by

the City, upon reasonable request. Certificated Telecommunications Provider shall also promptly locate any Underground Facilities at the City's request at no cost to the City.

- (b) A Certificated Telecommunications Provider shall coordinate with the City in the development of data for general purpose use to be linked to the City's Geographical Information System (GIS) to the mutual benefit of the City and the Certificated Telecommunications Provider. Such data will be provided on a voluntary basis and will be maintained by the Certificated Telecommunications Provider.

Section 5.13 – Duty to Provide Information

Within thirty (30) days of a written request from the City Manager or his or her representatives, Certificated Telecommunications Provider shall:

- (a) Furnish the City with information sufficient to demonstrate:
 - (1) That Certificated Telecommunications Provider has complied with all requirements of this Ordinance.
 - (2) That all municipal fees due the City in connection with the use of Public Rights-of-Way for Telecommunications Service and Facilities provided by Certificated Telecommunications Provider have been properly calculated and paid by Certificated Telecommunications Provider.
- (b) Make available all books, records, maps and other documents, maintained by Certificated Telecommunications Provider with respect to its Facilities on City Property or within the Public Rights-of-Way.
- (c) Make available to the City Attorney, upon written request specifying the documents sought, copies of notices of all initial petitions, applications, and reports submitted by Certificated Telecommunications Provider to the FCC, the PUC, the State Legislature or the Congress of the United States relating to any matters affecting both the use of Public Rights-of-Way and Telecommunications Service within the City.

Section 5.14 – Certificated Telecommunications Provider Insurance

- (a) General requirements: Certificated Telecommunications Provider must maintain the types and amounts of required insurance throughout the term of the Acceptance. Certificated Telecommunications Provider is solely responsible for providing a certificate of insurance or other evidence of financial responsibility evidencing the required coverage types and amounts.

Required insurance must be issued by a company or companies of sound and adequate financial responsibility and authorized to do business in the State of

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Texas. All policies are subject to examination and approval by the City’s Office of Risk Management for their adequacy as to content, form of protection, and providing company.

Required insurance naming the City as additional insured must be primary insurance and not contributing with any other insurance available to the City, including under any third party liability policy.

Before the Acceptance is effective, Certificated Telecommunications Provider must provide to the City Secretary an original certificate of insurance, a certified copy of the insurance policy, certificate of self-insurance, or other evidence of financial responsibility evidencing the required coverage. Thereafter, Certificated Telecommunications Provider must furnish new certificates or copies of the policy before any existing certificate expires.

(b) Additional requirements: The required liability coverages and their certificates must:

- (1) Name the City as an additional insured with respect to operations for which this Agreement is made.
- (2) Provide for thirty (30) days advance written notice of cancellation or material change.

(c) Required coverages and amounts:

<u>Type</u>	<u>Amount</u>
1. Workers’ Compensation Employers’ Liability	Statutory One Million Dollars (\$1,000,000) per occurrence
2. Commercial (Public) Liability including but not limited to: • Premises/Operations • Independent Contractors • Products/Completed Operations • Contractual Liability (Insuring above indemnity) And where the exposures exist: • Explosion, Collapse and Underground	One Million Dollars (\$1,000,000) combined single limit for bodily injury and property damage (per occurrence)
3. Business Automobile Liability to include coverage for: • Owned/Leased Autos • Non-Owned Autos • Hired Cars	One Million Dollars (\$1,000,000) combined single limit for bodily injury and property damage (per occurrence)

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- (d) Unless otherwise precluded by Law, Certificated Telecommunications Provider may satisfy one or more of the insurance requirements specified in (c) through self-insurance, provided, however, that no Certificated Telecommunications Provider may self-insure without the prior approval of the City. In no event shall a self-insurance proposal be approved absent a showing to the City's satisfaction that Certificated Telecommunications Provider is in a sound financial condition, and that Certificated Telecommunications Provider maintains a dedicated reserve in an amount sufficient to ensure that Certificated Telecommunications Provider's outstanding potential claims do not at any time exceed fifty percent (50%) of the value of the reserve, or as accepted by the City's Risk Manager.

Section 5.15 – General Indemnification

As specified in Sec. 283.057, Local Government Code, or as amended, when effective:

- (a) Certificated Telecommunications Providers shall indemnify and hold the City and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability, and suits of any kind and nature, including personal or bodily injury (including death), property damage, or other harm for which recovery of damages is sought that is found by a court of competent jurisdiction to be caused solely by the negligent act, error, or omission of the Certificated Telecommunications Provider, any agent, officer, director, representative, employee, affiliate, or subcontractor of the Certificated Telecommunications Provider, or their respective officers, agents, employees, directors, or representatives, while installing, repairing, or maintaining facilities in a Public Right-of-Way. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the City, its officers, employees, contractors, or subcontractors. If a Certificated Telecommunications Provider and the City are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the City under state Law and without waiving any defenses of the parties under state Law. This section is solely for the benefit of the City and Certificated Telecommunications Provider and does not create or grant any rights, contractual or otherwise, to any other person or entity.
- (b) A Certificated Telecommunications Provider or the City shall promptly advise the other in writing of any known claim or demand against the Certificated Telecommunications Provider or the City related to or arising out of the Certificated Telecommunications Provider's activities in a Public Right-of-Way.

Section 5.16 – Performance and Payment Bonds

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- (a) Performance and/or payment bonds may be required for any proposed construction activities by a Certificated Telecommunications Provider's contractors or

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subcontractors. Within thirty (30) days after the notification of a need for a performance and/or payment bond, the Certificated Telecommunications Provider's contractor or subcontractor shall obtain and maintain at its sole cost and expense, and file with the City Secretary, the appropriate bond in the amount to be specified to guarantee the timely construction and/or reconstruction and full activation of the Facilities and the safeguarding of damage to private property and restoration of damages incurred with other Persons in the Public Rights-of-Way.

- (b) If the value of the construction and/or reconstruction contemplated is below \$25,000, or as amended by Law, performance and payment bonds are not required.
- (c) If required under Subsection (a), the following will apply:
 - (1) If the value of the construction and/or reconstruction contemplated exceeds \$25,000, Certificated Telecommunications Provider must furnish a payment bond.
 - (2) If the value of the construction and/or reconstruction contemplated exceeds \$100,000, Certificated Telecommunications Provider must also furnish a performance bond prior to the start of the work and delivered to the City.
 - (3) The bonds, for the full construction amount, must be executed by a corporate surety company authorized to do business in the State and acceptable to the City.
 - (4) Bonds for projects using federal dollars must be underwritten by a surety named in the current list of "Surety Companies Acceptable on Federal Bonds" as published in the Federal Register by the Audit Staff Bureau of Accounts, U.S. Treasury Department.
- (d) The City may require additional security if the initial surety becomes insolvent, bankrupt, or otherwise financially unable to protect the City under the terms of this Ordinance. The City's requiring new or additional security relieves neither the original surety nor Certificated Telecommunications Provider of its obligations under this Ordinance.

Section 5.17 – Coordination of Construction Activities

All Certificated Telecommunications Providers are required to cooperate with the City and with each other.

- (a) A Certificated Telecommunications Provider shall provide the name and contact information for a single point-of-contact for all construction projects undertaken by the Certificated Telecommunications Provider or any Person acting on its behalf.
 - (b) A Certificated Telecommunications Provider shall meet with the City Manager or his or her designee, other Certificated Telecommunications Providers, and users of City Property and Public Rights-of-Way as determined by the City Manager or his or her designee, but in no case less than once a calendar year or more frequently
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than once per quarter, to schedule and coordinate construction on City Property and in the Public Rights-of-Way.

- (c) All construction locations, activities and schedules shall be coordinated, as ordered by the City Manager or his or her designee, to minimize public inconvenience, disruption or damages.

Section 5.18 – Assignments or Transfers of Franchise

Certificated Telecommunications Provider shall provide written notification of a transfer of ownership or control of Certificated Telecommunications Provider's business and new point of contact information, if point of contact changes, within a reasonable time, within ninety (90) days of the proposed date of transfer. Any new owner or controller agrees to comply with the terms and conditions of this Ordinance.

SECTION 6 CONSTRUCTION STANDARDS

Section 6.1 – General

No Person shall commence or continue with the construction, installation or operation of Facilities on City Property or within the Public Rights-of-Way except as provided in this Section.

Section 6.2 – Construction Codes

- (a) Facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, State and local codes, rules and regulations including the National Electrical Safety Code.
- (b) So as to minimize public inconvenience, disruption or damages, all excavations and other construction in the Public Rights-of-Way shall be performed with the use of trenchless technology whenever possible and economically feasible.
- (c) When trenchless technology can not be used or is not economically feasible, trenches shall be required to comply with OSHA standards.

Section 6.3 – Compliance with Permit

All construction practices and activities shall be in substantial compliance with the construction permit. The City Manager and his or her representatives shall be provided access to the work and such further information as he or she may require to ensure compliance with this Ordinance and any other City construction provisions.

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Section 6.4 – Display of Permit

The permittee shall maintain a copy of the construction permit and approved plans at the construction site, which shall be displayed and made available for inspection by the City Manager or his or her representatives at all times when construction work is occurring.

Section 6.5 – Noncomplying Work

Upon order of the City Manager or his or her designee, all work that does not comply with the permit or the requirements of this Ordinance, shall be removed and replaced substantially with conforming work. Removal and replacement of substandard work will be performed prior to advancing the construction to the next phase.

Section 6.6 – Completion of Construction

The permittee shall promptly complete all construction activities so as to minimize disruption of the Public Rights-of-Way and other public and private property. All construction work authorized by a permit within Public Rights-of-Way, including restoration, must be completed within one hundred and twenty (120) days of the date of issuance, or by such other date as may be agreed upon by the City Manager or his or her designee.

Section 6.7 – Restoration of Improvements

Upon completion of any construction work, the permittee shall promptly repair or restore any and all Public Rights-of-Way, including any and all public and private fixtures, structures and Facilities therein, and staging or stockpile areas, to as good or better a condition as before the start of construction and in compliance with City standards.

Section 6.8 – Landscape Restoration

- (a) All trees, landscaping and grounds removed, damaged or disturbed as a result of the construction, installation, maintenance, repair or replacement of Facilities, shall be replaced or restored as nearly as may be practicable, to at least as good condition than prior to performance of work.
- (b) All restoration work within the Public Rights-of-Way shall be done in accordance with landscape plans approved by the City Manager or his or her designee.

Section 6.9 – Construction Surety

Prior to issuance of a construction permit, the permittee shall provide a performance and/or payment bond, if required, as provided in Section 5.16 of this Ordinance.

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Section 6.10 – Responsibility of Owner

The owner of the Facilities to be constructed and, if different, the Certificated Telecommunications Provider, are responsible for performance of and compliance with all provisions of this Section.