

Ordinance Governing
TELECOMMUNICATIONS
in the
CITY OF ARLINGTON
TEXAS

Adopted by Ordinance No. 99-96
(August 10, 1999)

(Chapter Designator: TELECOMMUNICATIONS)

ORDINANCE HISTORY

<u>Number</u>	<u>Date of Adoption</u>	<u>Comments</u>
94-144	10/11/94	Adopt new "Telecommunications" Chapter of the Code of the City of Arlington.
98-67	05/26/98	Amending Ordinance No. 94-144 to clarify the intended scope of application of the ordinance by amending Section 1., Definitions , to add the definition of "Certificated Telecommunications Utility" and amend the definition of "Telecommunications Services" or "Telecommunications Service"; Amend Section 2., Grant of Franchise and Term , Subsection (A).
99-96	08/10/99	Amend Article V , to add new Section 41, Nonapplicability .

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ARTICLE I

GENERAL PROVISIONS

Section 1 Definitions

For the purpose of this ordinance, the following terms, phrases, words, abbreviations and their derivations shall have the meaning given herein unless more specifically defined within other sections of this ordinance. Unless inconsistent with the context, words used in the present tense include the future tense, words in the single number include the plural number. The word "shall" is always mandatory and not merely directory. Unless inconsistent with the context, noncapitalized words shall mean the same as those words capitalized below.

"Backbone" shall mean a network topology that includes a continuous fiber optic circuit connecting all nodes through which messages are routed and from which distribution service is provided.

"Certificated Telecommunications Utility" shall mean any person, partnership or other legal entity granted a certificate to provide local exchange services by the Public Utility Commission of Texas, including, but not limited to, a certificate of convenience and necessity, a certificate of authority, a service provider certificate of authority, or a successor certificate or other authorization. (Amend Ord 98-67, 5/26/98)

"City" shall mean the City of Arlington, Texas.

"City Manager" shall mean the present or succeeding chief executive officer of the City who is appointed by the City Council or any person designated by the City Manager to act in his or her behalf for the purpose of fulfilling the responsibilities imposed by this ordinance.

"Company" shall mean a GRANTEE.

"Council" or "City Council" shall mean the governing body of the City of Arlington, Texas.

"Customer" shall mean any person, firm, partnership, corporation, municipality, cooperative, organization, governmental agency or other form of legal entity provided with services by a GRANTEE.

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"Day or Days" shall mean calendar day or days.

"Depreciated Value" shall mean the original cost of all of the Company's tangible assets less all accumulated depreciation recorded on a GRANTEE's books and audited financial statements in accordance with generally accepted accounting principles, unless otherwise defined or regulated by federal, state or local statutes or regulations with specific application in effect at or on the date the City exercises its purchase option rights under this ordinance.

"Director" shall mean the Director of the Finance Department of the City or his designee.

"Federal Communications Commission or FCC" shall mean that federal agency as presently constituted by the Communications Act of 1934, as amended, or any successor agency.

"Fiber Optic Telecommunications Network" shall mean the Company's system of cables, wires, lines, towers, wave guides, optic fiber, microwave, laser beams and any associated equipment converters, whether backbone, loops or other configuration, or facilities designed and constructed for the purpose of producing, receiving, amplifying or distributing, by audio, video or other means, electronic signals to or from customers or locations within or outside the City. No portion of the Fiber Optic Telecommunications Network shall constitute all or any portion of a cable television system, as defined by City ordinances and Federal law as amended, except with the prior authorization of the City.

"Franchise" shall mean the nonexclusive right, whether an initial authorization or a renewal thereof, to construct and operate a Telecommunications System along the public ways in the City or within specified areas in the City. It is not intended to include or supersede or otherwise affect any license or permit required for the privilege of transacting and carrying on a business within the City, as may be required by other ordinances of the City.

"GRANTEE" or "COMPANY" shall mean any person, partnership, corporation or other legal entity granted a Franchise by the City Council under this ordinance and its lawful successor, transferee or assignee.

"GRANTOR" shall mean the City of Arlington, Texas.

"Gross Receipts" or "Gross Revenue" shall mean all revenues received, earned or accrued by GRANTEE for all communications and related operations and services, including any gross revenue attributable to GRANTEE's transacting business within the corporate limits of City, as well as any other revenue arising from the operation or possession of a Franchise. Gross revenues shall include, but not be limited to all Network, non-network and Telecommunications Service fees, connector rentals or sales and advertising revenue. Gross revenue shall not include refunds to subscribers by GRANTEE, or receipts from sales or use taxes or any other taxes that GRANTEE collects on behalf of any taxing authority. By way of example, but without limitation, "Gross Revenue" includes:

1. Receipts derived from cash sales, customer credit account sales, property of any kind or nature or from any service whatever received or accruing to GRANTEE directly or indirectly arising from or attributable to the sale or exchange of Telecommunications and/or Network Services by GRANTEE within the City from the operation of Company recorded and reported on a full accrual basis of accounting in accordance with generally accepted accounting principles;
2. All Telecommunications Service revenues charged on a flat rate basis;
3. All Telecommunications Services charged on a usage sensitive or mileage basis;
4. All revenues from installation service charges;
5. All revenues from connection or disconnection fees;
6. All revenues from penalties or charges to customers for checks returned from banks, net of bank costs paid;
7. All revenues from equipment sold or rented to customer upon customer premises;
8. All revenues from local service;
9. All revenues from authorized rental of conduit space;

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10. All revenues from charges for access to local and long distance networks;
11. All revenues from authorized rentals of any portion of Company's network, including plant, facilities or capacity leased to others;
12. All other revenues collected by Company from business pursued within the City;
13. All revenues from enhanced data service;
14. All interconnect revenues from interexchange carriers;
15. All revenues derived from co-location connection fees;
16. All revenues from subsidiary or affiliate entities or entities renting conduit space or any other part of the network derived from use of fiber optic network;
17. Receipts from the sale or lease of customer premise equipment, installation charges, access charges paid to the Company by other carriers, franchise fees and occupation taxes surcharged to customer, and the lease or re-sale of lines or circuit paths to third parties.
18. **"Gross Revenue from City"**

"Gross Revenue from City" In the case of revenues attributable to Customers due to GRANTEE's transacting business, gross revenue from City shall mean and shall be computed on a Customer-by-Customer basis as follows:

1. If all the locations of a given Customer receiving service from GRANTEE are in City, Gross Revenue from City shall include all revenues received from that Customer.
2. If some but not all of the locations of a given Customer receiving service from GRANTEE are in the City, the revenues attributable to the City shall be computed separately for each class of service taken by Customer. For each separate service taken, the revenues attributable to the City are

all revenues received from that service times a fraction whose numerator is the number of locations of the Customer within the City taking that service and whose denominator is all the Customer's locations taking that service.

3. If (such as with an interexchange carrier which contracts for capacity from GRANTEE, so as to connect with its customers through GRANTEE's network) a Customer uses GRANTEE's network to connect to third parties, such third parties shall be treated as Customers (or Customer locations, as the case may be) for purposes of this definition and revenue attribution thereunder.
4. Examples of computations under this section are shown below, including examples with locations in cities other than the City of Arlington.

Example 1

A Customer leases a 56 kbps data channel for \$5,000/month which serves/may be accessed by one (1) Customer location in Arlington and two (2) cities other than Arlington. \$1,666/month is Gross Revenue from City ($1/3$ times \$5,000).

Example 2

A Customer leases three (3) T-1 telephone lines at \$400 per month for each line to connect to MCI for a total of \$1,200.00. Gross Revenue from City is computed separately for each as follows:

The first connects a location in a city other than Arlington to an MCI Point of Presence in Arlington. \$200/month is the Gross Revenue from City for this service ($1/2$ times \$400).

The second connects a location in Arlington to the same MCI Point of Presence. All \$400 is Gross Revenue from City for this service.

The third connects a location in a city other than Arlington to a different MCI Point of Presence located in a city other than Arlington and may or may not be installed within the City of Arlington. There is no Gross Revenue from City for this service.

Example 3

Sprint, an interexchange (long distance) carrier, leases a large amount of capacity from GRANTEE for \$50,000/month, so that persons desiring to use its services may connect with it directly and not have to go through the local Southwestern Bell central office. Sixteen (16) customers take advantage of this service, comprising 42 locations, of which 28 locations are in Arlington. Sprint's Point of Presence is also in Arlington.

\$41,667 is Gross Revenue from City, computed as follows:

\$25,000 (half of the \$50,000) is included, because all the circuits (wherever the Customer is located) connect to the Point of Presence in Arlington, i.e., each Customer circuit is composed of two (2) locations (one at the customer, one at Sprint), one of which is in Arlington.

\$16,667 (28/42 of \$25,000), because the other half of the \$50,000 is attributable to the specific Customer locations being connected to Sprint, of which 28 out of 42 are in Arlington.

"Net Income" shall mean the balance remaining to stockholders, partners or owners after deducting from gross revenues all direct and indirect operating expenses associated with the operation of a telecommunications system, including the franchise fee, interest, depreciation, amortization and federal, state and local taxes determined, in accordance with generally accepted accounting principles.

"Network" shall mean **Fiber Optic Telecommunications Network.**

"Person" shall mean and extend to associations, firms, partnership and bodies political and corporate, as well as to individuals.

"Rights-of-Way" shall mean those streets, City rights-of-way and City easements within the corporate limits of the City set forth in this ordinance, as from time to time amended.

"State of the Art" shall mean a Network with technical performance, capacity, equipment, components and service equal to that which has been developed and demonstrated to be more modern than generally accepted and used in the

communications industry for comparable areas of equivalent population.

"Street" shall mean the entire width between the boundary lines or sections of every highway, alley, street, avenue, easement, public place or square, bridge, viaduct, tunnel and causeway in the City, dedicated, deeded, devoted or abandoned to public use. Boundary lines for a street will be the outermost curb lines or the outermost edges of any pavement.

"Telecommunications Services" or "Telecommunications Service" shall mean (1) services interconnecting interexchange carriers for the purpose of voice or data transmission; (2) services connecting interexchange carriers or competitive carriers to telephone companies providing local exchange services for the purpose of voice or data transmission; (3) services connecting interexchange carriers to any entity, other than another interexchange carrier, or telephone company providing local exchange services for the purpose of voice or data transmission; or (4) services providing private line point-to-point service for end users for voice, video and data transmission. Notwithstanding the above definitions, Telecommunications Services do not include (1) the provision of open video systems, enhance services related to open video, advanced video gateways, other related non-programming open video functions or similar types of services, gateways, platforms or functions; (2) the provision of video common carriage services; (3) "cable services", as that term may be defined from time to time under City ordinance, Texas law, the Communications Act of 1934, as amended, or applicable rulings of the courts or FCC; (4) leasing or subleasing poles, conduits or space on or in same to third parties, or overlashing wires or other facilities to the Fiber Optic Telecommunications Network; (5) switched local exchange service provided by a certificated telecommunications utility, or (6) personal communications service. (Amend Ord 98-67, 5/26/98)

Section 2 Grant of Franchise and Term

A. CITY may grant to a Company, its successors and assigns, subject to the reasonable and timely compliance by Company with the provisions contained herein, the nonexclusive right and privilege to have, acquire, construct, expand, reconstruct and maintain in, along, across, on, over, through, above and under the rights-of-way, a Fiber Optics Telecommunications Network to provide therewith Telecommunications

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Services to customers on or abutting such rights-of-way. This chapter does not apply to a Certificated Telecommunications Utility. (Amend Ord 98-67, 5/26/98)

- B. GRANTEE shall not provide services directly regulated by the Texas Public Utility Commission (hereafter referred to as the "PUC") under the Texas Public Utility Regulatory Act, unless authorized by the PUC. GRANTEE shall not provide cable services or operate a cable system, as defined in the Communications Act of 1934, as amended, 47 U.S.C.A., Section 521, et seq., or as recognized by the Federal Communications Commission (hereafter referred to as the "FCC") without first obtaining a separate cable franchise from the City. GRANTEE shall not provide video dial tone or Personal Communication Service (PCS) without first obtaining a separate franchise from the City.
- C. Any franchise is granted to GRANTEE solely for the purpose of directly serving its end-user customers and interexchange carriers.
- D. This ordinance does not permit or require GRANTEE to provide ubiquitous service throughout the entire City as a public service provider. However, GRANTEE is required to provide service on a non-discriminatory basis, at its standard rates, to any person on or abutting the authorized routes who desires service and is obligated to provide continuous service to its customers.
- E. Nothing herein contained shall ever be held or construed to confer upon GRANTEE, its successors and assigns, exclusive rights or privileges of any nature whatsoever. GRANTOR reserves the right, at its discretion, to grant franchises under such terms, as GRANTOR in its sole discretion may determine, to other telecommunications franchise Grantees.
- F. The service area for the network shall be the properties abutting the authorized routes set forth in this ordinance. GRANTOR and GRANTEE may agree to future extensions of GRANTEE's network, in accordance with this ordinance.
- G. GRANTEE hereby accepts a franchise and warrants and represents that it has examined all of the provisions of this ordinance and accepts and agrees to all of the provisions contained herein.

- H. GRANTEE agrees that it shall at all times during the term of a franchise be subject to all lawful exercise of the police power of GRANTOR and to the absolute right of GRANTOR to maintain control over its streets, rights-of-way, easements or other public ways, and to adopt such reasonable regulations relating to streets and public ways as the City and/or its departments may provide.
- I. GRANTEE, within thirty (30) days after receipt of GRANTOR's itemized statement, shall reimburse GRANTOR for its costs incurred in completing this ordinance, including without limitation, all costs for legal fees, outside consultants, customer surveys, needs assessments and publication costs.
- J. The decision or decisions of the City Council concerning the selection of GRANTEE and the award of a franchise is final, and GRANTEE shall agree as a condition of a franchise not to contest the Council's decision in any court of law or before the FCC or PUC or any other governmental entity.
- K. GRANTEE shall not apply for any waivers, exceptions or declaratory rulings from the FCC, the PUC or any other federal or state regulatory agency without informing the City Manager and providing copies of all filings with respect to any matters materially affecting construction, operation or regulation of a Telecommunications System or services provided through such a system. Copies of material responses or any other communications from any regulatory agency to GRANTEE shall likewise be provided immediately upon receipt to the City Manager.
- L. GRANTEE agrees, by the acceptance of a franchise, to accept the validity under present law of the terms and conditions of such franchise in its entirety, and that it will not, at any time, proceed against the City in any claim or proceeding under present law challenging any term or provision of such a franchise as unreasonable, arbitrary or void, or that the City did not have the authority to impose such term or condition.
- M. GRANTOR reserves the right to adopt and promulgate ordinances as it shall find reasonably necessary in the lawful exercise of its police powers.

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- N. It is explicitly understood that this ordinance may be amended or modified in any manner necessary to comply with any franchise or licensing requirements of the State of Texas or the requirements of federal law.
- O. GRANTOR reserves the right to exercise the power of eminent domain to acquire the property of GRANTEE's Telecommunications System and to purchase, own and/or operate the system so acquired consistent with local, state and federal law.
- P. Any Franchise is subject to the right of GRANTOR:
1. To revoke or cancel a franchise for failure to comply with the provisions of this ordinance or any other local, state or federal laws or FCC or PUC rules or regulations.
 2. To require proper and adequate Telecommunications Services and maintenance thereof at the highest reasonably practicable and commercially feasible standard of efficiency in accordance with law.
 3. To control and regulate the use of its public ways and public places. GRANTEE shall pay such part of the costs, fees, damages or expenses of any kind relating to improvement or maintenance of the public ways and public places, as shall arise from its use thereof, and shall protect, defend and save GRANTOR harmless from all damages arising from GRANTEE's use, provided that GRANTEE is given both timely written notice of claims for such damages and the right to fully defend against same.
 4. To install and maintain without charge its own equipment upon any GRANTEE poles or conduits, upon the condition that GRANTOR's equipment shall not interfere with the present or planned operations of GRANTEE, and that City's use of such equipment will be exclusively for noncommercial purposes only which do not compete with GRANTEE's business.
 5. Through its appropriately designated representatives, to inspect all construction or installation work performed, subject to the provisions of this ordinance, and make such inspections as it shall find necessary to ensure compliance with the terms

of this ordinance and other pertinent provisions of law.

6. Upon the expiration of the term of a Franchise or upon its termination or cancellation, as provided herein, to require GRANTEE to remove, at its own expense, any portions of the Network from the public ways within the City.

Section 3 Limits on GRANTEE's Recourse

- A. GRANTEE acknowledges that it has not been induced to accept a Franchise by any promise, oral or written, by or on behalf of the City or by any third person regarding any term or condition of this ordinance not expressed therein. GRANTEE further shall pledge that no promise or inducement, oral or written, has been made to any City employee or official regarding receipt of a Franchise.
- B. Nothing in this section or in the Communications Act of 1934, as amended, or in the Texas Public Utility Regulatory Act or other federal or state law shall be construed as creating or authorizing liability of any kind, under any law, for any action or failure to act relating to Telecommunications Services or the granting of a franchise by City or any official, member, employee or agent of such authority or entity.

Section 4 Reserved

Section 5 Conformance with Master Plan

- A. Before Company acquires any interest in real property for the installation or relocation of service lines, or any other Company equipment or facilities along or adjacent to any existing street or thoroughfare or any proposed street or thoroughfare, as reflected on the City's then current Thoroughfare Development Plan, Company shall give the City Manager written notice of such planned acquisition no later than thirty (30) days before the date of said acquisition. The City's Directors of Capital Improvements, Community Development, Planning, Transportation and Utilities will review the proposed acquisition to see that same does

not conflict or interfere with any proposed street, thoroughfare expansion or other capital improvements.

- B. If any of the above-mentioned directors determine that the proposed acquisition will conflict or interfere with the Thoroughfare Development Plan, that director will notify the Company of the potential conflict or interference. Thereafter, the City and the Company will endeavor in good faith to resolve the potential conflict or interference.

Section 6 Failure of City to Enforce Compliance

GRANTEE shall not be excused from complying with any of the terms and conditions of this ordinance by any failure of the City, upon any one or more occasions, to insist upon GRANTEE's performance or to seek GRANTEE's compliance with any one or more of such terms or conditions.

Section 7 Leasing or Dedication of Facilities

Company, without the written consent of the City, shall not lease any of the rights-of-way it uses, in connection with its system, to any non-Company entity. GRANTEE will not lease any conduit space in the system to any non-Company entity for the placement of any additional cable without the express prior written consent of the City.

Section 8 GRANTEE's Employment Practices

Equal opportunity in employment shall be afforded by GRANTEE to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin, age, disability or sex. GRANTEE shall establish, maintain and carry out a positive continuing program of specific practices designed to assure equal opportunity to every aspect of employment policy and practice.

Section 9 Time is of the Essence

Whenever this ordinance sets forth any time for any act to be performed by or on behalf of a GRANTEE, such time shall be deemed of the essence, and GRANTEE's failure to perform within the time allotted in all cases shall be

sufficient grounds for the City to invoke liquidated damages, injunctive relief, specific performance, default proceedings, revocation of a franchise or any other remedies provided herein or available at law or in equity.

Section 10 Unlawful Acts; Penalties

- A. It shall be unlawful for any person, firm or corporation to establish, operate or carry on the business of distributing to any persons in the City any Telecommunications Services unless a Franchise therefor has first been obtained, pursuant to the provisions of this ordinance, and unless such Franchise is in full force and effect.
- B. It shall be unlawful for any person, firm or corporation to construct, install or maintain within any public street in the City, or within any other public property of the City, or within any privately-owned area within the City which has not yet become a public street but is designated or delineated as a proposed public street on any tentative subdivision map approved by the City, any equipment or facilities for distributing any signals, unless a Franchise authorizing such use of such street or property or area has first been obtained and unless such Franchise is in full force and effect.
- C. It shall be unlawful for any person, firm or corporation to make any unauthorized connection, whether physically, electrically, acoustically, inductively or otherwise, with any part of a franchised Network within the City for the purpose of enabling himself or herself or others to receive any television signal, radio signal, picture, program or sound, without payment to the owner.
- D. It shall be unlawful for any person, firm or corporation, without the consent of the owner, to willfully tamper with, remove or injure any cables, wires, equipment or Network used for distribution of telecommunications signals.
- E. Any person, firm, corporation, agent or employee thereof who violates any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined an amount not to exceed **Five Hundred Dollars and No Cents (\$500.00)** for

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each offense. Each day that a violation is permitted to exist shall constitute a separate offense.

ARTICLE II

FRANCHISE CONDITIONS

Section 11 Compensation

- A. In consideration for the rights and privileges herein granted, a GRANTEE, its successors and assigns, agrees to pay City those fees set forth in this section.
- B. A GRANTEE shall pay City a one-time fee equal to the sum of One Dollar (\$1.00) per linear foot of the City's Rights-of-Way traversed by GRANTEE's Network including without limitation new installation, extensions or uses as shown on the written work description, the "as built" plans required by this ordinance, and the mapping requirement of this ordinance. The per linear foot rate required under this subsection has a base date of January 1, 1994, and shall be adjusted on a percentage basis on each October 1 during the term of this ordinance in an amount equal to the percentage increase or decrease in the City of Arlington's Certified Value Roll as provided by the Tarrant Appraisal District annually in July during the term of this ordinance. At no time during the term of the ordinance will the per linear foot rate be less than the base date per linear foot rate set as of January 1, 1994. GRANTEE shall contact City prior to making such payments to determine the current per-linear-foot fee.
1. Backbone Payment. The payment under Section 11.B. for the Backbone as the Backbone is indicated in the materials required by Section 25.A. must be made in no more than three (3) years time from the day the City Council approves a Franchise, in installments of not less than Twenty Five Thousand Dollars (\$25,000.00), except a final payment extinguishing the amount owed. (This provision is not intended to waive GRANTEE's duty for payment at the rate of One Dollar (\$1.00) per linear foot of the network for other than the backbone portion.) Respective installments shall be due and payable, no later than thirty (30) days from the day the City Council approves a Franchise, and each annual anniversary date thereafter until the entire amount of the total payment has been made for the Backbone.
 2. Network Payment Other Than Backbone. The payment under Section 11.B. for the portion of GRANTEE's network other than the backbone as required in Section 25.A. shall be made no later than thirty (30) days from the date a franchise is approved by the Arlington City Council.

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3. Network Payment After Acceptance of A Franchise. Any payments for the Network whether Backbone or any other portion due to network added after approval of a Franchise whether by amendment to the Franchise, extension of the Network, or due to written work description filing in accordance with Section 13 or any other new installation, extensions, uses or "as built" plans shall be made at the time of written work description filing in accordance with Section 13.
- c. In consideration of the granting of a Franchise to use the public ways for the operation of a Network and the provision of Telecommunications Services, GRANTEE shall pay monthly to the City's Director of Finance the sum of five percent (5%) of GRANTEE's Gross Revenue during the prior month. The five percent (5%) payment will be calculated for each calendar month ("calculation month") and will be due and payable on the last day of the month immediately after the calculation month. Any payment not made by the last day of the month following the calculation month will be late.
- D. In order to aid in determining the Gross Revenue GRANTEE agrees that on the same date that payments are made in accordance with 11.C., it will file with the Director a sworn report showing all revenue, detailed by category, received by the Company from the operations of Company's network within the City for the calendar month preceding the date of payment. The City may, if it sees fit, have the books and records of the Company audited by a representative of City to ascertain the correctness of the sworn reports agreed to be filed herein.
- E. GRANTEE shall pay to City the sum of \$0.765 per linear or lineal foot per year on or before each January 31, for installation of service or transmission cable(s) installed in public ways that do not provide service within or generate revenues from the Telecommunications System authorized by this ordinance. A cable shall mean each separate sheath containing several individual fiber optic pairs. If two (2) or more cables are installed at a given location, the per lineal foot rate applies to each separate cable.

The per linear or lineal rate required under this subsection has a base date of January 1, 1994, and shall be adjusted on each October 1 during the term of this ordinance in an amount equal to the percentage increase or decrease in the City of Arlington's Certified Value Roll as provided by the Tarrant Appraisal District annually in July during the term of

this ordinance. The per linear or lineal rate assessed shall be the rate in effect on the effective date a franchise is approved by the City Council. At no time during the term of this ordinance will the per linear or lineal foot rate be less than the base date per linear or lineal foot rate set as of January 1, 1994.

- F. In order to aid in determining the payments in accordance with Section 11.B. and Section 11.E., GRANTEE agrees that on the same date that payments are made, as provided herein, GRANTEE will file with the Director a sworn report showing all portions of the network as defined in this ordinance for the calendar year preceding the date of payment. GRANTEE at this same time, will make a true up payment to City of any amounts due under this Section 11 for portions of the network for which compensation or installments thereof have not previously been paid.
- G. Except as otherwise required by law, no portion of a franchise fee shall be noted separately on any bill to any customer for use of services or commodities furnished by a Company.
- H. Any transactions which have the effect of circumventing payment of required franchise fees and/or evasion of payment of franchise fees by non-collection or non-reporting of Gross Receipts, bartering, or any other means which evade the actual collection of revenues for business pursued by Company are prohibited.
- I. In the event any monthly payment is made after the due date, the Company shall pay a late payment penalty of the greater of \$100.00 or simple interest at ten percent (10%) annual percentage rate or the rate allowed by law of the total past due.

Section 12 City Use of Facilities

- A. The Company shall provide to the City without charge, and solely for City's communications purposes, space in all of the Company's ducted and conduit facilities within the City limits, with sufficient space for necessary joints. Additionally, the Company shall provide adequate space on all non-ducted facilities constructed on, over, or within Rights-of-Way, for the City to attach transmission media for the City's use.
- B. In the case of new construction of the network the Company, at its sole cost and expense, shall provide to the City two (2) sets of dark fiber pair (a total of four (4) fibers) throughout the portion of the Network used for transmission purposes and suitable for City's needs. In addition, the GRANTEE shall provide lateral lines (including drops) connecting the City's locations to the network as required by the City Manager or designee based on City usage and projected

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usage and need. If the City's location is at or within three hundred feet (300') of the GRANTEE's network, then the GRANTEE shall provide such lateral lines and connections at no cost to the City. If the City's location is greater than three hundred feet (300') from GRANTEE's network, GRANTEE will provide the required lateral lines to the City at a cost to the City not to exceed GRANTEE's cost.

- C. A GRANTEE will provide or insure a seamless interface through Southwestern Bell's tandem switching network to the Tarrant County Emergency Number District's 9-1-1 system to include compatibility for automatic number identification (ANI) and automatic location identification (ALI).
- D. Upon the written request of City, a GRANTEE will provide capability for an Intelligent Vehicle Highway System communication link with a transmission rate of 180 megabytes for video monitoring, traffic count and advance signal coordination equipment.

Section 13 Construction

- A. A GRANTEE shall lay, maintain, construct, operate and replace its Network so as to interfere as little as possible with traffic and existing or planned utilities in City Rights-of-Way. All of the Network will be underground unless otherwise authorized in accordance with this ordinance. All construction within Street Right-of-Way, within a five (5) mile radius of "The Ballpark in Arlington", shall be completed three (3) hours prior to the start time of an event. In addition, any traffic lanes closed shall be opened and functional. Also, any work that may impact any convention center event shall be coordinated to minimize traffic conflicts and street closures.
- B. Before a GRANTEE constructs, extends or replaces its Network, it shall file with the City Manager or other City officials that the City Manager may designate from time to time, a written work description, including traffic control/detour plans, and scale drawings showing the Network's location and exact depth of the facilities. GRANTEE shall submit a work area traffic control plan to the Department of Transportation. GRANTEE will provide network elevation data that is compatible with CITY horizontal and vertical control in accordance with CITY's geographic information system and global positioning system or any future comparable system CITY may utilize. The plans will be reviewed by the City Directors of Transportation, Community Development, Capital Improvements and Water Utilities. Any comments will be provided to the Company within ten (10) working days. City agrees to expedite its review when conditions warrant. Before Company repairs its existing Network the Company shall give notice to the City's Director of Transportation as to the time and location of the proposed repairs. Company will provide a thirty (30) day advanced schedule of planned work at the beginning of each month. Daily work schedules shall be provided to City by 8:30 a.m. of each work day. When an emergency occurs, repairs shall be per-

formed by the Company and notice shall be given to the Director of Transportation within twenty-four (24) hours following emergency repairs.

- C. All work in rights-of-way and other surfaces will be performed in accordance with the City's ordinances, the *Standard Specifications for Public Works Construction* as issued by the North Central Texas Council of Governments (COG Specs) and the City Standard Specifications for Waterworks and Sewerage Improvements, as they may be amended from time to time. Also, GRANTEE will notify and coordinate as required by the Texas Department of Transportation, Railroad companies, Texas Utilities Electric Company and any other utilities or entities with any type of facility in or near the location of GRANTEE's network. The City may inspect any and all street repairs. CITY inspections, if any, do not relieve GRANTEE of the duty and responsibility for making proper repairs. All work done in connection with the laying, maintenance, construction, reconstruction, operation, expansion, repair and replacement of Company's network shall be in compliance with all other applicable laws, rules and regulations of the City, the State of Texas and the United States. GRANTEE shall obtain a street cut permit from the Capital Improvements Department prior to any work. Except in an emergency, GRANTEE shall not excavate any pavement in any public alley or street or significant amounts of any unpaved public Right-of-Way without first securing written permission of the Director of Capital Improvements and the Director of Transportation or Utilities, but such permission shall be given if the proposed excavation is in accordance with the terms of this ordinance. The Director of Capital Improvements shall be notified as soon as practicable regarding work performed under emergency conditions; and GRANTEE shall comply with the director's reasonable requirements for restoration of any disturbed public property.
- D. All excavations and other construction in the public streets, alleys and Rights-of-Way shall be carried on to interfere as little as practicable with the use of public and private property and in accordance with any direction given by City under the police and regulatory powers of the City.
- E. When GRANTEE performs or causes the performance of any work on any Right-of-Way or other public place, or so closely adjacent to such places as to create hazards for the public or themselves, the Company, its employees or contractor shall provide construction and maintenance signs and sufficient barricades at work sites to protect the public, equipment and workmen. Such devices shall conform to the City of Arlington's *Work Area Traffic Control Manual*. All excavations and other construction in the Streets, alleys and Rights-of-Way shall be carried on to interfere as little as practicable with the use of public and private property and in accordance with any direction given by the City under the police and regulatory powers of the City. The application of traffic control devices shall be consistent with the standards and provisions of the latest addition to the Texas Manual on Uniform Traffic Control Devices. Appropriate warning lights shall be used at all construction and maintenance zones where one or more traffic lanes are being obstructed during nighttime conditions. GRANTEE shall promptly restore the public streets and Rights-of-

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Way to their condition prior to GRANTEE's construction, maintenance or excavation, to the satisfaction of the Director of Capital Improvements. GRANTEE shall excavate only for the construction, installation, expansion, repair, removal and maintenance of all or a portion of its network.

- F. GRANTEE shall repair, clean up and restore all Rights-of-Way and other surfaces disturbed during the construction and repair of its Network and shall warrant the repairs and restoration of such rights-of-way and other surfaces for a period of two (2) years from the date of completion of same. Such repairs, clean up and restoration shall return the Rights-of-Way and other disturbed surfaces to substantially the same condition they were in before the Company's work began. The determination that the Rights-of-Way and other surfaces have been returned to substantially the same condition shall be made by the Director of Transportation and Capital Improvements or their designee.
- G. Within thirty (30) days of completion of each segment of GRANTEE's Network, GRANTEE shall supply the City with a complete set of "as built" drawings for that segment in such form as the Director of Capital Improvements may require. This may include submitting a computer file of the drawings in drawing exchange format (DXF) and/or a format compatible with the City Geographic Information System (GIS), Computer Aided Drafting and Design (CADD), AUTOCADD, ARC/INFO and any future language or system utilized by City. Further, after each replacement, relocation, reconstruction or removal GRANTEE shall promptly notify the City of the exact changes made and shall provide a new set of "as built" drawings and/or computer files in DXF format for each modification to the Director of Capital Improvements. GRANTEE shall provide annually a complete set of as-built drawings incorporating these changes.
- H. Before a GRANTEE constructs new network facilities or extends existing network facilities, or before it uses network facilities that were in existence in the City prior to the effective date of a Franchise any GRANTEE shall provide to the City's Directors of Transportation and Capital Improvements Company's fiber optics location data in conformance with City's standards. Such data shall adhere to City's leveling standards and pen assignments. City shall provide electronic base data to allow for accurate matching of street names and rights-of-way lines in drawing exchange format (DXF) on 4mm D.A.T. or QIC80 Mini Tape Media. The data shall be returned to City in the same format in which it was provided.
- I. City shall have the power at any time to order and require a Company to remove or abate any facility that is dangerous to life or property as determined by the City Manager or his designee and in the event Company, after notice, fails or refuses to comply, the City shall have the power to remove or abate same at the expense of Company, all without compensation and with GRANTEE liability for damages.
- J. A GRANTEE may elect or may be required by the City to attach portions of the Network to poles or to share conduit, duct trench space, maintained by other persons or entities, or to permit the wires or equipment of any other person or entity franchised by the City to be attached to the facilities owned and maintained by a

GRANTEE, upon reasonable, non-discriminatory terms and at fair market value. A GRANTEE may require any such person or entity to furnish evidence of adequate insurance covering GRANTEE and adequate bonds covering the performance of the person or entity attaching to GRANTEE'S facilities as a condition precedent to granting permission to any such person or entity to attach wires or equipment to GRANTEE'S facilities; provided GRANTEE'S requirements for such insurance shall be reasonable.

Section 14 Relocation of Network

- A. Company, at its own cost and expense, and at City's request (without claim for reimbursement or damages against the City), shall lower, relocate or relay existing network facilities located in City Rights-of-Way where necessary due to street construction or street reconstruction by or on behalf of the City, or due to the construction or relocation of City utility lines, including but not limited to water, sanitary sewer, storm drains, street lights and traffic signal conduits, or due to any other work in, over, through or under the City rights-of-way.
- B. If City requires Company to lower, relocate or relay its existing facilities pursuant to subsection A above, Company shall make the changes promptly upon receiving a written directive from City to do so. In the event Company fails to comply with the directive, the City shall have the right to lower, relay or relocate or cause to be lowered, relayed or relocated the affected parts of Company's network and Company shall reimburse City for all its costs, within thirty (30) days of receipt of written notice to GRANTEE from CITY.

Section 15 Removal of Obsolete Facilities

- A. When Company opens a trench, accesses a conduit or boring, or is working on aerial locations, it shall remove all obsolete network facilities it owns from such locations.
- B. When Company opens a trench or access to borings, it shall notify all other franchisees in advance of such work, so that they may remove their obsolete facilities from such locations. Company shall cooperate with such franchisees in their removal activities.
- C. When Company receives notification from another franchisee that it is opening a trench or access to borings, Company shall remove all of its obsolete facilities from such location while they are open.
- D. In the event a Franchise is terminated or expires without being renewed, the City may require the Company to remove its facilities from the Rights-of-Way within a reasonable period of time.
- E. Whenever a Company intends to discontinue using any Network facility within the Right-of-Way, Company shall submit to the Director of Transportation, Community Development and Capital Improvements for approval a completed application describing the facility and the date on which the Company intends to discontinue using the facility. Company may remove the facility or request

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that the City permit it to remain in place. Notwithstanding the Company's request that any such facility remain in place, the City may require the Company to remove the facility from the right-of-way or modify the facility in order to protect the public health and safety or otherwise serve the public interest.

- F. City may require a Company to perform a combination of modification and removal of the facility. Company shall complete such removal or modification in accordance with a reasonable schedule set by the City, if necessary to protect public health, safety or otherwise serve the public interest. Until such time as a Company removes or modifies the affected facility as directed by the City, or until the rights to and responsibility for the affected facility are accepted by another person or corporation having authority to construct and maintain such facilities, Company shall be responsible for all necessary repairs, relocations of the facility, and maintenance of the Right-of-Way in the same manner and degree as if the facility were in active use, and Company shall retain all liability.

Section 16 Use of Rights-of-Way by Others

- A. The City reserves the right to permit to be laid and repaired, sewer, gas, water and other pipelines, cables, conduits, and other similar facilities in, along, over or under any Rights-of-Way occupied by Company. The City further reserves the right to permit soil borings into and the installation of monitoring wells in or under any rights-of-way occupied by a Company.
- B. In permitting such work to be done, the City shall not be liable to a Company for any damages so caused, nor shall the City be liable to a Company for any damages arising out of the performance of said work by the City's contractors, licensees, invitees, franchisees or other City related entity; provided, however, nothing herein shall relieve any other person or corporation from liability for damage to a Company's network.
- C. If City requires a Company to remove, alter, change, adapt or conform its network to enable any other person, except the City or any person franchised by the City prior to the enactment of this ordinance, to use, or to use with greater convenience, the Rights-of-Way, a Company shall be obligated to make such changes to its network only if said person undertakes with solvent bond to reimburse Company for any loss and expense which will be caused by or which will arise out of such changes to a Company's network. The City shall not be liable for any reimbursement, loss or expense which is caused by or which arises out of such changes to Company's network.

Section 17 Liability for Damages and Indemnification

- A. The City shall not at any time be liable for injury or damage occurring to any person or property from any cause whatsoever arising out of the construction, maintenance, repair, use, operation, condition or dismantling of a GRANTEE's Telecommunication System and due to the act or

omission of any person or entity other than the City or those persons or entities for which the City is legally liable as a matter of law.

- B. GRANTEE shall pay all damages, liability and penalties which the City may legally be required to pay as a result of granting a Franchise. All damages, liabilities, penalties and expenses incurred as a result of actions brought against GRANTOR arising from or relating to a franchise ordinance shall be borne by GRANTEE unless otherwise provided by settlement between City and Company. GRANTEE shall pay all expenses incurred by the City in defending itself with regard to all liability, damages and penalties mentioned above. These expenses shall include all out-of-pocket expenses such as attorney fees and shall also include the reasonable value of any services rendered by the City Attorney or his assistants and/or any representative of the City.
- C. A GRANTEE shall, at its sole cost and expense, indemnify, defend and hold harmless the City, all associated, affiliated, allied and subsidiary entities of the City, now existing or hereinafter created, and their respective officers, boards, commissions, employees, agents, attorneys and contractors (hereinafter referred to as "Indemnitees"), from and against:
1. Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any act or omission of the GRANTEE, its personnel, employees, agents, contractors or subcontractors, resulting in personal injury, bodily injury, sickness, disease or death to any person or damage to, loss of or destruction of tangible or intangible property, libel, slander, invasion of privacy and unauthorized use of any trademark, tradename, copyright, patent, service mark or any other right of any person, firm or corporation, which may arise out of or be in any way connected with the construction, installation, operation, maintenance or condition of the network or a GRANTEE's failure to comply with any Federal, State or local statute, ordinance or regulation.
 2. Any and all liabilities, obligations, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and other consultants), which is imposed upon, incurred by or asserted against the Indemnitees by reason of any claim or lien arising out of work, labor, materials or supplies provided or supplied to a GRANTEE, its contractors or subcontractors, for the installation, construction, operation or maintenance of the network and, upon the written request of the City shall cause such claim or lien to be discharged or bonded within fifteen (15) days following such request.

3. Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnities by reason of any financing or securities offering by GRANTEE or its Affiliates for violations of the common law or any laws, statutes, or regulations of the State of Texas or United States, including those of the Federal Securities and Exchange Commission, whether by the GRANTEE or otherwise.
- D. No recovery by the City of any sum by reason of the Letter of Credit required in this ordinance shall be any limitation upon the liability of a GRANTEE to the City under the terms of this section.
 - E. A GRANTEE undertakes and assumes for its officers, agents, contractors, subcontractors and employees, all risk of dangerous conditions, if any, on or about any City owned or controlled property, including public Rights-of-Way, and a GRANTEE hereby agrees to indemnify and hold harmless the Indemnitees against and from any claim asserted or liability imposed upon the Indemnitees for personal injury or property damage to any person arising out of the installation, operation, maintenance or condition of the network or a GRANTEE's failure to comply with any federal, state or local statute, ordinance or regulation.
 - F. In the event any action or proceeding shall be brought against the Indemnitees by reason of any matter for which the Indemnitees are indemnified hereunder, a GRANTEE shall, upon notice from any of the Indemnitees, at a GRANTEE's sole cost and expenses, resist and defend the same with legal counsel selected by the City; provided further, however, that a GRANTEE shall not admit liability in any such matter on behalf of the Indemnitees without the written consent of the City.
 - G. The City shall give a GRANTEE prompt written notice of the making of any claim or the commencement of any action, suit or other proceeding covered by the provisions of this ordinance. In all instances in which GRANTEE is required under this ordinance to indemnify City, such indemnification obligations shall be expressly conditioned upon prompt written notice of claims and upon GRANTEE having the right to investigate, compromise and defend against any such claims. City shall cooperate with GRANTEE in the defense of any litigation by furnishing such available information and assistance in the disposition of such matter as may be reasonably requested by GRANTEE. The GRANTEE shall pay all expenses incurred by the City with regard to a defense of any such actions, suits or proceedings. These expenses shall include all out-of-pocket expenses such as attorney fees and shall also include the reasonable value of any services rendered by or on behalf of the City Attorney, if such service is

determined necessary and appropriate by the City, and the actual expenses of the City's agents, employees or expert witnesses, and disbursements and liabilities assumed by the City in connection with such suits, actions or proceedings. No recovery by the City of any sum under the Letter of Credit shall be any limitation upon the liability of a GRANTEE to the City under the terms of this Section, except that any sum so received by the City shall be deducted from any recovery which the City might have against the GRANTEE under the terms of this Section.

Section 18 Insurance

A Company shall maintain the following insurance coverages and the respective policies thereof shall cover all risks related to the use and occupancy of the right-of-way and all other risks associated with, relating to or arising from a franchise:

A. Description of Insurance Coverages and Limits

1. Commercial General Liability Insurance - \$5,000,000 each occurrence. Coverage shall include but not be limited to independent contractors, products/completed operations, personal injury, contractual liability, explosion/collapse/underground property damage. Insurance shall be provided on an occurrence basis, be as comprehensive as the current Insurance Services Office (ISO) policy and have no standard coverages excluded by endorsement.
2. Pollution Liability Insurance - \$1,000,000 each occurrence. Coverage shall be provided for bodily injury and property damage resulting from pollutants which are discharged suddenly and accidentally. Also, the insurance will provide coverage for clean-up costs.
3. Workers' Compensation Insurance - Statutory Limits. Employer's Liability - minimum \$500,000 for each accident/disease - each employee/disease-policy limit.
4. Automobile liability insurance covering all owned, hired and nonowned vehicles in use by the GRANTEE, its employees and agents, with personal protection insurance and property protection insurance to comply with the provisions of the Texas Law, including liability insurance with minimum limits of Two Million Dollars (\$2,000,000) as the combined single limit for each occurrence for bodily injury and property damage.
5. All policies other than those for Pollution Liability shall be written on an occurrence and not on a claims made basis. Should Pollution Liability be provided on a claims made form, this policy must be maintained for a period of four (4) years after the expiration of any Franchise granted in accordance with this ordinance or extended reporting or "tail" coverage shall be provided.

B. Other Insurance Provisions:

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1. The City, its officers, agents, employees, representatives and volunteers shall be named as an additional insured on the Commercial General Liability and Automobile Liability Insurance policies. These insurance policies shall contain the appropriate additional insured endorsement signed by a person authorized by that insurer to bind coverage on its behalf.
2. Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days prior written notice has been provided to the City.
3. Insurance is to be placed with insurers with a Best rating of A VII or higher. The company must also be duly authorized to transact business in the State of Texas.
4. Workers' Compensation and Employers' Liability Coverage: The insurer shall agree to waive all rights of subrogation against the City, its officials, employees and volunteers for losses arising from the activities under franchise.
5. Not more frequently than once during each franchise year during the Term of a franchise, the City may review the insurance coverages to be carried by the GRANTEE. If the City determines that additional or other insurance is necessary to protect the interests of the City or the Additional Insureds, a GRANTEE shall be so notified and shall obtain the additional types and limits of insurance, at its sole cost and expense.
6. All insurance policies may be written with deductions and exceptions comparable for businesses of like character and size, if consistent herewith and approved by the City. A GRANTEE agrees to indemnify and save harmless the City, the Indemnitees and Additional Insureds from and against the payment of any deductible and from the payment of any premium on any insurance policy required to be furnished by this Agreement.
7. GRANTEE shall require that each and every one of its contractors and their subcontractors carry, in full force and effect, workers' compensation, comprehensive general liability, pollution liability and automobile liability insurance coverages of the type which a GRANTEE is required to obtain under the terms of this Section with appropriate limits of insurance.
8. Certificates of Insurance and endorsements reflecting coverage shall be forwarded to:

Risk Manager
City of Arlington
Post Office Box 231
Arlington, Texas 76004-0231

Section 19 Performance and Payment Bonds

- A. Within thirty (30) days after the award or renewal of a franchise, GRANTEE shall file with the City Secretary and Risk Manager a performance and payment bond each in the amount of Five Hundred Thousand Dollars (\$500,000.00) in favor of the City. The corporate surety on each bond will be authorized to do business in Texas and acceptable to the City Attorney. Bonds shall be maintained throughout any construction and any reconstruction period and until such time as determined by the City Council.
- B. In the event GRANTEE fails to comply with any law, ordinance or regulation governing a franchise, or fails to well and truly observe, fulfill and perform GRANTEE's proposal for Telecommunications Services, there shall be recoverable, jointly and severally, from the principal and surety of the bond, any damages or loss suffered by the City as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of GRANTEE, plus a reasonable allowance for attorney fees, including the City's legal staff, and costs, up to the full amount of the bond. This section shall be an additional remedy for any and all violations outlined regarding the letter of credit.
- C. The City may, upon completion of construction or reconstruction of the network as approved by the City Council, waive or reduce the requirement of GRANTEE to maintain bonds. However, the City may require a performance and payment bond to be posted by GRANTEE for any construction subsequent to the completion of the initial service areas, in a reasonable amount and upon such terms as determined by the City Council.
- D. The bond shall contain the following endorsement: "It is hereby understood and agreed that this bond may not be cancelled by the surety nor the intention not to renew be stated by the surety until thirty (30) days after receipt by the City Attorney, by registered mail, a written notice of such intent to cancel or not to renew."

Section 20 Letter of Credit

- A. Within thirty (30) days after the award or renewal of a franchise, a GRANTEE shall deposit with the City's Director of Finance an irrevocable letter of credit in a form satisfactory to the City's Director of Finance and the City Attorney. The amount of the letter of credit shall be one hundred thousand dollars (\$100,000.00) issued by a federally insured commercial lending institution with a credit rating of BAA or BBB+ or higher. The federally insured commercial institution on which the letter of credit is to be drawn shall be acceptable to the City. The letter of credit shall be used:

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1. To insure a GRANTEE's compliance with the terms and conditions of this ordinance; and
 2. To insure a GRANTEE's payment of any liabilities arising out of the construction, operation or maintenance of GRANTEE's telecommunications system, including the cost of removal or abandonment of any property of GRANTEE.
- B. The letter of credit shall contain the following endorsement: "At least sixty (60) days' prior written notice shall be given to the City by the financial institution or a GRANTEE of any such intention to cancel, replace, fail or renew, or materially alter this letter of credit. Such notice shall be given by certified mail to the City's Director of Finance and City Attorney."
- C. The letter of credit may be drawn upon by the City after providing GRANTEE thirty (30) days advance written notice of the amounts due and owing and GRANTEE's failure to pay such amounts by presentation of a draft at sight on the lending institution, accompanied by a written certificate signed by the City Manager certifying that a GRANTEE has failed to comply with this ordinance, its franchise or any other order, permit or direction of the City relating to this ordinance or a franchise stating the specific reasons therefor, and stating the basis for the amount being drawn. Examples of a basis for drawing upon the letter of credit include, but are not limited to, the following:
1. Failure of GRANTEE to pay to the City any franchise fees or taxes or other payment after ten (10) working days' written notice of delinquency;
 2. Failure of GRANTEE to pay to the City, within ten (10) working days after written notice, any amounts due and owing to the City by reason of the indemnity provisions of this ordinance;
 3. Failure of GRANTEE to pay to the City any liquidated damages due and owing to the City pursuant to this ordinance; and
 4. Failure by GRANTEE to pay to the City within thirty (30) working days any amounts due to the City costs in completing this ordinance.
- D. GRANTEE shall structure the letter of credit in such a manner so that if City draws upon the letter of credit and reduces the amount of available credit to a sum below seventy-five thousand dollars (\$75,000.00), the GRANTEE shall replenish the letter of credit to a minimum of seventy-five thousand dollars (\$75,000.00), within five (5) calendar days. The intent of this subsection is to ensure that the credit available to the City shall at no time fall below seventy-five thousand dollars (\$75,000.00). GRANTEE further agrees

that the letter of credit will be replenished to one hundred thousand dollars (\$100,000.00) within sixty (60) days from the date the City draws against the letter of credit.

- E. The letter of credit shall become the property of the City in the event that a franchise is cancelled by reason of default or partial default of GRANTEE. The letter of credit shall be retained by the City and returned to GRANTEE at the expiration of a franchise provided there is no outstanding default, unpaid franchise fees, ad valorem taxes or debts of any kind to the City on the part of GRANTEE or GRANTEE's creditors.
- F. The rights reserved to the City with respect to the letter of credit are in addition to all other rights of the City, whether reserved by this ordinance, a franchise or otherwise authorized by law, and no action, proceeding or right with respect to the letter of credit shall affect any other right the City has or may have.

Section 21 Liquidated Damages

- A. A GRANTEE understands and agrees that failure to comply with any time or performance requirements as written in this ordinance will result in damage to the GRANTOR, and that it is and will be impracticable to determine the actual amount of such damage whether in the event of delay or nonperformance; therefore, the parties hereby agree to the liquidated damages specified below. It is expressly understood and agreed that the following liquidated damage amounts are not to be considered a penalty, but shall be deemed, taken and treated as reasonable liquidated damages. It is also expressly understood and agreed that City's remedies in the event of GRANTEE default, breach or any noncompliance with this ordinance are not limited to the items stated in this section. The following amounts may be chargeable to the letter of credit for the following concerns:
 - 1. Failure to provide, upon written request, data, documents, reports or information, a GRANTEE shall pay Fifty Dollars (\$50.00) per day for each day, or part thereof, that each violation occurs or continues;
 - 2. Failure to provide bonds, insurance or a letter of credit, a GRANTEE shall pay Two Hundred Dollars (\$200.00) per day for each day, or part thereof, that the noncompliance continues.
 - 3. Failure to provide in a continuing manner the types of services set forth in this ordinance, unless the City Council specifically approves a delay or change or the GRANTEE has obtained modification of its obligation, a GRANTEE shall pay Two Hundred Dollars (\$200.00)

per day for each day, or part thereof, that the noncompliance continues.

- B. If the City Manager, following thirty (30) days' written notice to GRANTEE to cure any problem that might result in liquidated damages, concludes that a GRANTEE is in fact liable for liquidated damages pursuant to this section, he shall issue to the GRANTEE by registered or certified mail a Notice of Intention to Assess Liquidated Damages. The Notice of Intention to Assess shall set forth the basis of the assessment and shall inform the GRANTEE that liquidated damages will be assessed from the date of the Notice of Intention to Assess unless the assessment notice is appealed for hearing before the Council and the Council rules (1) that the violation has been corrected, or (2) that an extension of time or other relief should be granted. If GRANTEE desires a hearing before the Council then GRANTEE shall send a written Notice of Appeal by registered or certified mail to the City Manager within ten (10) days of the date of the Notice of Intention to Assess Liquidated Damages. The hearing on the GRANTEE's appeal shall be held within thirty (30) days of the date of the Notice of Intention to Assess Liquidated Damages. After the hearing, if the Council sustains in whole or in part the City Manager's assessment of liquidated damages, the City Manager may at any time thereafter draw upon the letter of credit. Unless the Council indicates to the contrary, the liquidated damages shall be assessed beginning on the date of the Notice of Intention to Assess and continuing thereafter until such time as the violation ceases, as determined by the City Manager in his sole discretion.

ARTICLE III
CUSTOMER RATES

Section 22 Customer Fees, Rates or Charges

- A. A GRANTEE shall furnish reasonably adequate service to Customers at reasonable rates and charges as may be prescribed from time to time by appropriate federal, state and local authorities.
- B. A GRANTEE shall not give unreasonable preference or advantage as to rates or services to anyone within a service classification; nor shall GRANTEE discriminate against anyone in the furnishing of service under a franchise, or the charges therefor, on account of race, color, religion, age, sex, disability or national origin.
- C. City reserves the right and power to regulate a GRANTEE's fees, rates or other charges if and when cities are granted such authority by law.
 - 1. The City will follow FCC and PUC Rate Regulations, if applicable, in regulation of the rates, charges or fees of a GRANTEE operating in City, notwithstanding any different or inconsistent provisions in this ordinance.
 - 2. In connection with such regulation, the City will ensure a reasonable opportunity for consideration of the views of interested parties.
 - 3. The City Manager or his designee is authorized to execute on behalf of the City and file with the FCC or PUC as necessary such certification forms or other instruments as are now or may hereafter be required by FCC or PUC Rate Regulations in order to enable the City to regulate fees, rates or charges.
 - 4. GRANTEE shall pay City's reasonable rate case expenses.

Section 23 Books and Records

- A. A GRANTEE shall, within thirty (30) days following the effective date of this ordinance, furnish and keep current with the City Secretary a list of its shareholders holding ten (10) percent or more of the outstanding stock or equivalent ownership interest as well as a roster of its principals or officers and directors and their addresses.
- B. A GRANTEE shall maintain an office in the City for so long as it continues to operate a system or any portion thereof and shall designate such office as the place where all notices, directions, orders, and requests may be served or delivered under this ordinance. The City Manager shall be notified of the location of such office or any change thereof.
- C. A GRANTEE shall keep a complete and accurate set of books of accounts and records of its business and operations in accordance with generally accepted accounting principles, and in accordance with this ordinance. All books and records shall be made available at a GRANTEE's office in the City for a period of at least three (3) years.
- D. The City Manager or his designee (City's independent certified public accounting firm, City Auditor, Director of Finance, etc.) shall have reasonable access to all books of accounts and records of GRANTEE for the purpose of ascertaining the accuracy of any and all reports required under this ordinance and shall be given reasonable access to all other records of a GRANTEE relevant to the enforcement of this ordinance.
- E. Any false entry in the books of account or records of a GRANTEE or false statement in the reports to the City Manager as to a material fact, knowingly made by a GRANTEE shall constitute the breach of a material provision of this ordinance.

Section 24 Fiscal Reports

- A. A GRANTEE shall file with the City's Director of Finance, within thirty (30) days after the end of each of the GRANTEE's fiscal quarters, a financial statement reporting gross revenues earned during the current fiscal quarter and gross revenues earned for the fiscal

year to date by a GRANTEE and GRANTEE's parent company or companies. A GRANTEE shall also file an annual audited financial statement prepared by an independent certified public accountant or accounting firm. In addition, the independent certified public accountant or accounting firm shall submit a certified statement that a GRANTEE's total gross revenues as herein defined were fairly stated and that the franchise fees were calculated in accordance with this ordinance. In the event that additional franchise fees are due to the City, the GRANTEE will submit a check for payment of these fees on or before the date the audited financial statements are due to be submitted to the City's Director of Finance.

- B. In addition to the audited financial statements, GRANTEE shall also provide a schedule of its properties and equipment devoted to telecommunications operations, by category including its investment in such properties and equipment, and the original cost less accumulated depreciation of the properties and equipment. The audited financial statements and the report on property and equipment shall be submitted along with any other reasonable information the City may request with respect to a GRANTEE's properties and expenses related to its telecommunications operations within the City. A GRANTEE shall also file an updated map as required by Section 25 and a report with the City Manager relating to its telecommunications operations that includes the following information specific to the City: number of cable miles, number of cable linear feet, number of cable lineal feet specifically delineating each separate sheath containing several individual fiber optic parts as described in the Compensation Section of this ordinance, number of customers for each revenue source attributable to the GRANTEE's operation within the City. This report shall be certified as being correct by a responsible officer of the company. All proprietary information submitted pursuant to this section shall be treated as confidential to the extent permitted by law.

ARTICLE IV

SYSTEM OPERATIONS

Section 25 Franchise Routes and Extensions

- A. GRANTEE shall furnish to the City prior to making the first payment under Section 11.B.1., a written description and map of suitable scale showing the Backbone and Network other than Backbone, all streets and public buildings and indicating the initial Rights-of-Way along which GRANTEE's network is proposed to be constructed. Upon approval by the City Manager such Network will be GRANTEE's authorized routes.
- B. GRANTEE may extend and make Telecommunication Services available to additional authorized routes after compliance with the construction section of this ordinance and any other relevant sections and after furnishing the City with an updated written description and map as required in Section 25.A. and obtaining the approval required therein.

Section 26 Reserved

Section 27 Operating Procedures

- A. GRANTEE shall construct, operate and maintain its system subject to the supervision of the City and in full compliance with the rules and regulations, including applicable amendments of the FCC, PUC and all other applicable federal, state or city laws and regulations, including the latest editions of the National Electrical Safety Code and the National Electric Code as adopted by the National Fire Protection Association. The Network and all its parts shall be subject to inspection by the City.
- B. The system shall not endanger or interfere with the safety of persons or property in a Franchise area or other areas where GRANTEE may have equipment located.

Section 28 Performance

- A. GRANTEE shall continue, through the term of any franchise, to maintain state of the art technical, operational and maintenance standards. Should the City Council find by resolution, that a GRANTEE has failed to maintain these standards and quality of Telecommunications Service, and should it, by resolution, specifically enumerate reasonable improvements to be made, GRANTEE shall make such improvements. Failure to make such improvements within thirty (30) days of adoption of such resolution will constitute a breach of condition for which the remedies of this ordinance are applicable.
- B. City shall have the right to employ consultants if necessary or desirable to assist in the administration of this or any other section of this ordinance and, by acceptance of a Franchise, GRANTEE agrees to pay half of all reasonably incurred costs associated therewith, in no case will GRANTEE's cost under this section exceed Seven Thousand Five Hundred Dollars (\$7,500.00) in any consecutive three (3) year period.

Section 29 Customer Protection

- A. Customers or potential Customers situated on GRANTEE's authorized routes and willing to pay GRANTEE's reasonable rates shall not be denied service, access, or otherwise discriminated against regarding the availability of service or rates, terms or conditions of Telecommunications Services on the basis of race, color, creed, religion, ancestry, national origin, sex, disability or age. GRANTEE shall comply at all times with all applicable federal, state and local laws and regulations relating to nondiscrimination. GRANTEE shall not deny or discriminate against any group of actual or potential customers in City on access to or the rates, terms and conditions of Telecommunications Services because of the income level of the local area in which such group may be located.
- B. GRANTEE shall use reasonable efforts to inform all persons in advance of the date and approximate time its employees or agents shall enter onto such person's property for the purpose of equipment installation, and where practical, for service or maintenance of the network. Each such representative and other employees entering upon private property shall be required to wear an employee identification card issued by GRANTEE and bearing a picture of said representative. Each GRANTEE representative entering customer's homes or places of business shall be bonded.

- C. GRANTEE shall provide all prospective Customers with written information concerning the Telecommunications Services provided and rates charged GRANTEE prior to the consummation of any agreement for service. GRANTEE shall also annually provide all Customers and shall provide all prospective Customers with information respecting GRANTEE's billing and collection procedures, procedures for changes in or termination of services, and refund policies. In addition, each Customer shall be informed of applicable privacy requirements as set forth in this Agreement or otherwise provided for in federal or state law or regulation.
- D. Neither GRANTEE nor its agents shall tap or monitor, or arrange for the tapping or monitoring, or permit any other person to tap or monitor, any cable, line, signal, input device, or Customer facility for any purpose, without the written authorization of the affected Customer. Such authorization shall be revokable at any time by the Customer without penalty by delivering a written notice of revocation to GRANTEE; provided, however, that GRANTEE may conduct systemwide or individually addressed "sweeps" solely for the purpose of verifying system integrity, checking for illegal taps or billing.
- E. GRANTEE shall report to the affected parties, City and other appropriate authorities, any instances of monitoring or tapping of the network, or any part thereof, of which it has knowledge, whether or not such activity has been authorized by GRANTEE. GRANTEE shall not record or retain any information transmitted between a customer and any third party. GRANTEE shall destroy all Customer information of a personally-identifiable nature after a reasonable period of time except as authorized not to do so by the affected customer.
- F. GRANTEE shall maintain in City at least one office to serve the purpose of receiving and resolving customer complaints regarding Telecommunications Services, equipment malfunctions, billing and collection disputes, and similar matters. GRANTEE shall have a local telephone number as a special repair service telephone number for use by Customers twenty-four (24) hours per day, seven (7) days per week. The local office of the GRANTEE shall be open to receive inquiries or complaints in person or by telephone during normal business hours Monday through Friday excluding legal

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holidays observed by the City. GRANTEE shall provide the means to accept service complaint calls twenty-four (24) hours a day, seven (7) days a week.

- G. Annually, and as Customers are connected or reconnected to the network, GRANTEE shall, by means such as a card or brochure, furnish information to Customers concerning the procedures for making inquiries or complaints, including the address and local telephone number of GRANTEE's office to which such inquiries or complaints are to be addressed.
- H. GRANTEE shall keep a service complaint log which will indicate the nature of each complaint, the date and time it was received, the disposition of said complaint and the time and date thereof. The service complaint log shall be made available upon request for periodic inspection by City. Records of service and non-service related complaints shall be maintained by GRANTEE for a period of at least three (3) years.

ARTICLE V

MISCELLANEOUS PROVISIONS

Section 30 Notice

Any notice or communication required in the administration of this ordinance shall be sent as follows:

City Manager
City of Arlington
P. O. Box 231
Arlington, Texas 76004-0231

Notice to GRANTEE will be as indicated on the **Acceptance of Franchise** section of this ordinance as well as the acceptance instrument required by that section.

Section 31 Management of Network

GRANTEE shall personally manage the network as required by the terms and conditions of a Franchise. It shall not without the prior consent of the City Council obtained pursuant to Section 33, directly or indirectly contract for, subcontract or assign in whole or in part, the management of the Network, or the provision of Telecommunications Services (collectively "subcontract") except where the following conditions are satisfied: (1) the subcontracting is to persons that control, are controlled by, or are under common control of GRANTEE at the time a franchise is awarded in accordance with Section 33, and (2) GRANTEE provides the City Manager with sixty (60) days advance written notice of such subcontracting.

Section 32 Termination

- A. The City Council shall have the option to declare a franchise terminated at any time for:
1. Failure of a Company to comply with any material term, condition or provision of this agreement;
 2. Any false statement or misrepresentation as to a material fact in a Company's application for a Franchise; or

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3. Company's loss of or failure to obtain all necessary Federal and State licenses, permits and other permissions required in the provision of Telecommunications Services.
- B. If a Company continues to violate or fails to comply with the terms and provisions of this ordinance for a period of thirty (30) days after a Company shall have been notified in writing by the City to cure such specific alleged violation or failure to comply, then the City may pursue the procedures set forth below to declare that the Company has terminated all rights and privileges consented to in this ordinance
 - C. A termination shall be declared only by a written decision of the City Council after an appropriate public proceeding before the City Council, which shall accord a Company due process and full opportunity to be heard and to respond to any notice of grounds to terminate. All notice requirements shall be met by providing the Company at least fifteen (15) days' prior written notice of any public hearing concerning the proposed termination of a Franchise. Such notice shall state the grounds for termination alleged by City.
 - D. The City Council, after full public hearing and upon finding the existence of grounds to terminate, may either declare any Franchise terminated or excuse such grounds upon a showing by the Company of mitigating circumstances or good cause for the existence of such grounds.
 - E. Neither a Company's acceptance of a Franchise, Company's appearance before the City Council at any public hearing concerning proposed termination of this agreement nor any action taken by the City Council as a result of any such public hearing, including a declaration of termination or a finding of grounds to terminate, shall be construed to waive or otherwise affect a Company's right to seek a judicial determination of the rights and responsibilities of the parties under this agreement.
 - F. A Company shall not be excused from complying with any of the terms and conditions of this agreement by the previous failure of the City to insist upon or to seek compliance with such terms or conditions.

Section 33 Transfer of Franchise

- A. A franchise granted under this ordinance shall be a privilege to be held in personal trust by GRANTEE. It shall not be assigned, transferred, sold or disposed of, in whole or in part, by voluntary sale, merger, consolidation or otherwise or by forced or involuntary sale, without the prior consent of the Council expressed by ordinance, and then only on such conditions as may therein be prescribed by the Council. There shall be no change in, transfer of or acquisition of control of the GRANTEE, including no change for which City Council consent is required under Section 31 of this ordinance, without the prior consent of the Council expressed by ordinance, and then only on such conditions as may therein be prescribed by the Council. For the purposes of this ordinance, any such change for which Council consent is required under the preceding three (3) sentences is collectively referred to as a "Transfer". GRANTEE shall send advance notice of any proposed Transfer to the City Manager by certified letter. The Council shall not withhold its prior consent to any transfer under this Section unreasonably, provided, however, among other things (1) the proposed assignee, transferee or other named entity (collectively "Transferee") agrees to comply with all provisions of this ordinance and such additional conditions as the Council may prescribe, (2) the Transferee is able to provide assurances reasonably satisfactory to the Council of its qualifications, character, the effect of the Transfer and such other matters as the Council deems relevant.
- B. For the purpose of determining whether it shall consent to any transfer, the City Council may request from the GRANTEE and proposed Transferee (and the GRANTEE and Transferee shall provide) information and documents reasonably related to the matters set forth in Section 33.A. and such further reasonable information and documents as the City may request. In the event that the City Council denies giving its consent and such transfer has been affected, the City Council may cancel a franchise unless the transfer is reversed and the GRANTEE is restored to its status prior to the change, or to a status acceptable to the City Council. In any event, if the City Council does not take action within one hundred twenty (120) days of certified letter notice to the City Manager as set out at Section 33.A., then the transfer will be deemed approved unless the

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information requested under Section 33.B. was in any way materially inaccurate and/or incomplete.

- C. The City is hereby empowered to take legal or equitable action to set aside, annul, revoke or cancel a Franchise or the transfer of a Franchise, if such transfer is not made according to the procedures set forth in this ordinance, or is not in the best interest of the City or the public.
- D. Any Transfer shall be made by a bill of sale or other appropriate document, an executed copy of which shall be filed in the office of the City Manager, within thirty (30) days after any such sale, transfer or assignment.
- E. For the purposes of this ordinance "... change in, transfer of or acquisition of control of the GRANTEE..." shall mean any change in the identity of the individuals or group which directly or indirectly directs, or has the power to direct, the management or policies of the GRANTEE, whether through the ownership of voting securities or other equity interest, by contract or otherwise. Without limiting the generality of the foregoing, such a change shall be deemed to have occurred when there is (1) a change in the effective shareholder voting control of the GRANTEE, its parent or controlling entities, in whatever manner effectuated; (2) an agreement of the holders of voting stock of the GRANTEE which vests or assigns policy or decision making in any person or entity other than the GRANTEE; or (3) a merger or consolidation of the GRANTEE or its parent or controlling entities, such as by contributing all or a portion of their assets to a joint venture or otherwise. However, such a change shall not be deemed to have occurred upon the departure or arrival of management personnel or other employees of GRANTEE. A rebuttable presumption that a transfer of control has occurred shall arise upon (a) the acquisition or accumulation by any person or group of persons of ten percent (10%) of the voting shares of GRANTEE (or its parent or controlling entities) if as of the date of the award of a franchise to GRANTEE such person or group of persons does not already own ten percent (10%) of the voting shares of GRANTEE (or its parent or controlling entities) or (b) if more than ten percent (10%) of the capacity in GRANTEE's lit fibers is leased to a provider of telecommunications type or cable type services. Every change, transfer, or

acquisition of control of the GRANTEE shall make a Franchise subject to cancellation unless and until the City shall have consented thereto, which consent will not be unreasonably withheld.

- F. The consent of the Council to any sale, transfer, lease, trust, mortgage or other instrument of hypothecation shall not constitute a waiver or release of any of the rights of the City under this ordinance or any Franchise.
- G. Nothing herein shall require approval for GRANTEE'S assigning a franchise to or selling its stock to wholly owned subsidiaries or to affiliates under the same ultimate control and ownership as existed prior to the assignment.
- H. GRANTEE shall pay and/or reimburse the City for any costs incurred by the City of Arlington due to any proposed transfer including whether such transfer is approved, approved with conditions or denied.

Section 34 Foreclosure

Upon the foreclosure or other judicial sale of all or a substantial part of a GRANTEE'S system or upon the termination of any lease covering all or a substantial part of a GRANTEE'S system, GRANTEE shall notify the City Manager of such fact, and such notification shall be treated as a notification that a change in control of a GRANTEE has taken place, and the provisions of this ordinance, governing the consent of the City to such change in control of a GRANTEE shall apply.

Section 35 City's Rights Upon Expiration

Upon the expiration of a Franchise, the City shall have the right, at its election, to:

- A. Renew or extend a Franchise, in accordance with applicable law;
- B. Invite additional proposals and award a Franchise to another entity or person;
- C. Terminate a Franchise without further action; or,

D. Take such further action as the City deems appropriate.

Until such time as the City exercises its rights under this section the Company's rights and responsibilities within the City shall be controlled by the terms of a Franchise.

Section 36 Controlling Laws

This ordinance and a Franchise granted in accordance with this ordinance are subject to the applicable provisions of the Constitution, the laws of the United States and of the State of Texas, the Charter of the City of Arlington, and the Arlington City Code. All obligations of the parties hereunder are performable in Tarrant County, Texas. In the event that any legal proceeding is brought to enforce the terms of a Franchise, the same shall be brought in Tarrant County, Texas.

Section 37 Cumulative

That this ordinance shall be cumulative of all provisions of the Code of the City of Arlington, as amended, except in those instances where the provisions of this ordinance are in direct conflict with the provisions of such Code, in which instances the provisions of this ordinance shall supersede the conflicting provisions of such Code as they apply to a GRANTEE.

Section 38 Severability

That it is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses and phrases of this ordinance are severable, and, if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared void, ineffective or unconstitutional by the valid judgment or final decree of a court of competent jurisdiction, such voidness, ineffectiveness or unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance since the same would have been enacted by the City Council without the incorporation herein of any such void, ineffective or unconstitutional phrase, clause, sentence, paragraph or section.

Section 39 Effective Date

That this ordinance shall be in full force and effect from and after its passage.

Section 40 Acceptance of Franchise

As a condition subsequent to the effectiveness of a Franchise, GRANTEE accepts and agrees to the terms, conditions and provisions of this ordinance the same as if it were a contract between City and GRANTEE upon acceptance as set out below. A GRANTEE shall, within thirty (30) days after the passage of a Franchise, file in the office of the City Secretary a written instrument accepting this ordinance and all terms and conditions thereof, signed and acknowledged by its proper officers in a form acceptable to the City. This written instrument will also indicate a name, title and address of the official(s) of GRANTEE that will receive any notice in accordance with this ordinance. GRANTEE shall not commence construction, operation or activation of its Network until providing City with the required insurance, bonds, letter of credit and acceptance. (Amend Ord 94-144, 10/11/94)

Section 41 Nonapplicability

On or after August 15, 1999, the provisions of this Chapter do not apply to a telecommunications provider not currently franchised under this Chapter that is certificated by the Public Utility Commission of Texas. Providers currently holding a franchise under this Chapter will hold their franchise subject to the provisions of Chapter 283 of the Texas Local Government Code, as applicable. (Amend Ord 99-96, 8/10/99)