

ORDINANCE NO. ____-2016

AN ORDINANCE CREATING AND ESTABLISHING FOR BID A NON-EXCLUSIVE TELECOMMUNICATIONS (OR RELATED NON-CABLE) FRANCHISE FOR THE PLACEMENT OF FACILITIES FOR THE GENERATION, TRANSMISSION, DISTRIBUTION AND SALE OF TELECOMMUNICATIONS OR RELATED NON-CABLE SERVICES WITHIN THE PUBLIC RIGHTS-OF-WAY OF FAYETTE COUNTY FOR AN INITIAL TEN (10) YEAR DURATION, WITH AN ADDITIONAL EXTENSION OF UP TO TEN (10) YEARS; AND PROVIDING FOR COMPLIANCE WITH OTHER RELEVANT LAWS, REGULATIONS, STANDARDS, AND ORDINANCES; DEFINITIONS; WORK, MATERIALS AND CONSTRUCTION STANDARDS; WIRE MOVING AND TREE TRIMMING; PERFORMANCE BONDS; INDEMNIFICATION; INSURANCE; ACCESS TO PROPERTY AND INSPECTIONS; NOTICE OF FILINGS WITH THE PUBLIC SERVICE COMMISSION; NO VESTED RIGHTS; LIMITED ASSIGNMENT; NOTICE OF FORECLOSURE AND BANKRUPTCY; CANCELLATION OR TERMINATION; VIOLATIONS AND PENALTIES; PERMITTING AND INSPECTION FEES; ADDITIONAL PERMITTING AND OTHER REQUIREMENTS FOR SUBSTANTIAL NEW CONSTRUCTION; AND BID REQUIREMENTS; ALL EFFECTIVE ON DATE OF PASSAGE.

BE IT ORDAINED BY THE COUNCIL OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT:

Section 1 - Creation of Franchise.

There is hereby created a non-exclusive franchise granting to the purchaser thereof whose bid may be accepted, the discretionary right to construct, erect, operate and maintain upon, through, along, under and over the streets, alleys, avenues, public roads, highways, bridges, viaducts, sidewalks and other public ways of Fayette County, a Telecommunications System (or a related system which is not otherwise a Cable System) embracing underground conduits, manholes, telephone poles, cables, boxes, wires, fixtures, fiber, electrical conductors and other apparatus, equipment and facilities necessary, essential, used or useful to and in the operation of any type of Telecommunications System, subject to all of the provisions of this Ordinance. This franchise does not excuse the franchisee from complying with any and all applicable existing and future local laws and ordinances, as may be adopted or amended in the future, and their pursuant regulations.

Section 2 - Existing Legislation.

The Government has already adopted legislation and regulations pertaining to, and including but not limited to, permitting, construction, street project and other related activities by franchisees and others in its Rights-of-way. Therefore, the following are incorporated herein by reference, and shall apply as if fully set forth herein:

- (a) The terms and provisions of Chapter 17, of the Code of Ordinances, Lexington-Fayette Urban County Government (the "Code"), and as it may be amended in the future, pertaining to utilities or Right-of-way construction;
- (b) The terms and provisions of Chapters 17B and 17C of the Code, and as they may be amended in the future and more specifically Section 17C-19 of the Code; and

- (c) The terms and provisions of the Lexington-Fayette Urban County Government Zoning Ordinance (the “Zoning Ordinance”), and as it may be amended in the future.

Section 3 - Definitions.

The definitions and terminology of any terms contained in this Ordinance which are not specifically defined in this section shall be contained in the applicable provisions of the Code (as they may be amended in the future) which are hereby incorporated herein by reference.

- (a) “Applicant” means a person or party which is applying for a franchise.
- (b) “Application” shall refer to the list of documents and information set forth in Section 4 required from new entrants, including any written responses provided on Government forms or written correspondence provided in response to Government inquiries and investigations. Applications must comply with the requirements of this Ordinance in its entirety.
- (c) “Cable Service” shall have the meaning in this Ordinance as it is defined in Section 602(6) of the Communications Act of 1934, as amended as it may be amended (hereinafter cited as 47 U.S.C. § 522(6)).
- (d) “Cable System” shall have the meaning in this Ordinance as it is defined in Section 602(7) of the Communications Act of 1934, as it may be amended (47 U.S.C. § 522(7)).
- (e) “Council” means the Lexington-Fayette Urban County Council.
- (f) “Communications Act” means the Communications Act of 1934, as amended from time to time (47 U.S.C. § 151 et seq.).
- (g) “Customer” means a person located within the territorial limits of the Government who is legally receiving Telecommunications Service from the Grantee.
- (h) "Duct" means a single enclosed raceway for power or communication lines, conductors, optical fiber, wire or other cable.
- (i) “Equipment” or “Apparatus” means any manholes, underground conduits, Ducts, nodes, electronic devices, poles, cables, boxes, wires, fixtures, conductors, or other facilities necessary, essential, used or useful to and operated by the System.
- (j) "Facility" means any tangible component of Grantee's Telecommunications System.
- (k) “FCC” means the Federal Communications Commission, or its lawful successor.
- (l) “Franchise Fee” means for the purposes of this Ordinance any fee that may be imposed by the Government on Grantee as compensation for Grantee’s use of public rights-of-way and roads. Use of this definition in this Ordinance is without prejudice to any rights Grantee or Government may have under Federal and Kentucky law as they may be amended.
- (m) “Government” means (unless otherwise specified) the Lexington-Fayette Urban County Government, an urban county government created pursuant to the Kentucky Revised Statutes, as it now exists in its present territorial limits, or may hereafter be extended or reduced, and its elected and appointed officials,

employees, agents, boards, consultants, assigns, volunteers and successors in interest.

- (n) "Grantee" means a party to which a franchise under this Ordinance is granted by the Council, or its successors and assigns.
- (o) "Gross Revenue" means after adjustment for the net write-off of uncollectible accounts, any and all revenues derived by Grantee within Fayette County from Grantee's Telecommunications System, including, but not limited to: revenues from the sale of and use of Telecommunications Services originating or terminating in Fayette County; revenues charged to or attributable to a circuit location in Fayette County, regardless of where the circuit is billed or paid; revenues from the use, rental, or lease of Grantee's operating Facilities within Fayette County, revenues from the provision of any and all products, services, or charges (including installation, maintenance and service charges) and revenues from any leases or Indefeasible Right of Use interests ("IRU") of any portion of Grantee's Telecommunications System within Fayette County. "IRU" or "Indefeasible Right of Use" means any form of acquired capital interest in Grantee's Telecommunications System in which the holder possesses a right to use the Telecommunications System but not the right to control, maintain, construct or revise the Telecommunications System.
- (p) "Minimum Annual Franchise Fee" means \$15,000 in the first year of the Grantee's franchise, and shall increase by \$1,000 annually.
- (q) "PSC" means the Kentucky Public Service Commission or its lawful successor.
- (r) "Person" or "Party" is any person, firm, partnership, association, corporation, company, governmental entity or organization of any kind.
- (s) "Road" or "Street" or "Right-of-way" shall mean the surface of and the space above and below any public road, street, highway, freeway, lane, path, public way or place, sidewalk, alley, court, boulevard, parkway, drive or easement now or hereafter held by the Government for the purpose of public travel and shall include other easements or rights-of-way as shall be now held or hereafter held by the Government which shall, within their proper use and meaning entitle the Government and its Grantee to the use thereof for the purposes of installing or transmitting Telecommunications System transmissions over poles, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to a Telecommunications System.
- (t) "Shall" is mandatory, not merely directive.
- (u) "Telecommunications Service" or "Service" means any service provided for consideration for the purpose of provision, transmission, conveyance, or routing of information including, but not limited to, voice, video, images data, or any other information signals without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself and whether or not the transmission medium is wireline. By way of example, and not limitation, Telecommunications Service includes, but is not limited to the following:
 1. telecommunications service (as defined by 47 USC §153(53) (as such term is now, or may in the future be, defined under federal law);
 2. telephone exchange service (as defined by 47 USC §153(54) (as such term is now, or may in the future be, defined under federal law);

3. exchange access (as defined by 47 USC §153 (20) (as such term is now, or may in the future be, defined under federal law);
4. mobile service (as defined by 47 USC §153(33) (as such term is now, or may in the future be, defined under federal law);
5. advanced communications services (as defined by 47 USC §153(1) (as such term is now, or may in the future be, defined under federal law);
6. long distance, inter-exchange and inter-LATA services, which may include MTS, WATS, 800, operator services, directory assistance and travel card services;
7. private line point to point service for end users of voice and data transmission; nonentertainment video, videoconferencing, or point to point private line service; and
8. any other intrastate or interstate telecommunications services which the Kentucky Public Service Commission or the FCC has authorized or services provided by radio common carrier.

(v) "Telecommunications System" or "System" means all fiber optics, wires, cables, Ducts, conduits, vaults, poles, anchors, nodes, antennas, cabinets, fixtures, transformers, Equipment and apparatus and other necessary facilities owned or used by Grantee for the purpose of providing Telecommunications Services and located in, above or below the Streets.

(w) "Transfer" means any sale, lease, mortgage, assignment, merger or other form of transfer of this Ordinance or of the rights and privileges granted or authorized by this Ordinance.

Section 4 - Applications.

All applications received by the Government from Applicants shall become the sole property of the Government.

- (a) The Government reserves the right to reject any and all applications and waive informalities, and/or technicalities where the best interest of the Government may be served.
- (b) All questions regarding the meaning or intent of the Ordinance or application documents shall be submitted to the Government in writing. Replies will be issued by Addenda mailed or delivered to all parties recorded by the Government as having received the application documents. The Government reserves the right to make extensions of time for receiving applications as it deems necessary. Only replies to questions by written Addenda will be binding. All applications must contain an acknowledgment of receipt of all Addenda.
- (c) Applications must be submitted at the time and place indicated in the application documents. Applications may be modified at any time prior to the opening of the applications, provided that any modifications must be duly executed in the manner that the Applicant's application must be executed.
- (d) Before submitting its application, each Applicant must (i) examine the Ordinance and the application documents thoroughly, (ii) familiarize itself with local conditions that may in any manner affect performance under this Ordinance, and (iii) familiarize itself with federal, state and local laws, Ordinances, rules and regulations affecting performance under the franchise.

- (e) The Government may make such investigations as it deems necessary to determine the ability of the Applicant to perform under the franchise, and the Applicant shall furnish to the Government all such information and data for this purpose as the Government may request. The Government reserves the right to reject any application if the evidence submitted by, or investigation of, such Applicant fails to satisfy the Government that such Applicant is properly qualified to carry out the obligations of the franchise and to complete the work contemplated therein. Conditional applications will not be accepted.
- (f) All applications received by the Government from the Applicants will become the sole property of the Government. Applicants shall submit all requested information as provided by the terms of this Ordinance. The following information must be complete and verified as true by the Applicant:
1. *Name and address of Applicant.* The Applicant's name, address, e-mail address and telephone and facsimile numbers; date of application and signature of Applicant or appropriate corporate officer(s); the name, address and e-mail address, and telephone and facsimile numbers of a local representative who shall be available at all times; and information regarding how to contact the local representative in an emergency.
 2. *Description of proposed system.* A description of the Applicant's proposed system design.
 3. *Services.* A statement setting forth a description of all the types of Telecommunications Services proposed.
 4. *Applicant organization.* The Applicant shall be a corporation or limited liability company authorized to do business in the Commonwealth of Kentucky, as certified by the Secretary of State. Applicant must fully disclose the ownership of the Facilities to be used in rendering the service.
 5. *Technical description.* Applicant shall provide a technical description of the type of system proposed by the Applicant and Applicant's plan for the installation of the system. System designs are to be submitted in bullet format detailing equipment start point, routes and end point location accompanied by network routing maps(s). The following information shall be included in the application:
 6. If the Applicant is proposing an underground installation in existing ducts or conduits within the rights-of-way, information in sufficient detail to identify the location of the existing ducts or conduits to be occupied.
 7. If Applicant is proposing an underground installation within new ducts or conduits to be constructed within the rights-of-way:
 - a. The location, depth, size and quantity of proposed new ducts or conduits;
 8. A preliminary installation schedule and completion date.
 9. *Engineering statement.* A statement from the Applicant's senior technical staff member, or consultant, advising that the Applicant's planned system and operations thereof would meet all the requirements set forth herein.

10. *Additional requirements.*

a. Supplementary, additional or other information that the Applicant deems reasonable for consideration may be submitted at the same time as its application but must be separately bound and submitted with the above number of copies. The Government may, at its discretion, consider such additional information as part of the application.

11. A copy of the Applicant's certificate of authority from the PSC where the Applicant is lawfully required to have such certificate from the PSC.

12. A copy of all insurance policies or certificates required under this Ordinance and Chapter 17 of the Code.

13. A statement signed by the Applicant that the Applicant agrees to be bound by all provisions of this Ordinance and its franchise and agrees to obtain all applicable permits and authorizations prior to constructing, installing, or operating a system in the right-of-way.

(g) The information provided by Applicant shall be certified as true and correct and Applicant shall be responsible to certify to the Government any material changes to the information provided in the completed application during the term of any franchise.

(h) *Supplementation to applications.* The Government reserves the right to require such supplementary, additional or other information that it deems reasonably necessary for its determinations.

(i) *The Government's rights reserved.* The Government reserves the right to waive all formalities and/or technicalities where the best interest of the Government may be served.

Section 5 - Rights under Franchise.

(a) The Grantee shall have the non-exclusive right and privilege of constructing, erecting, operating and maintaining a Telecommunications System upon, through, along, under and over the Rights-of-way within Fayette County as they now exist or may hereafter be extended; subject to the provisions hereof and to all powers (including police power) inherent in, conferred upon or reserved to the Government, including but not limited to those contained in the Code. The Government reserves the right to grant similar franchises to more than one Grantee.

(b) This Ordinance does not give the Grantee, the right nor the privilege of attaching its Telecommunications System to any buildings, poles, street lights, Equipment and apparatus, or Facilities owned by the Government. Additionally this Ordinance does not give the Grantee the right nor the privilege of constructing, erecting, operating and maintaining a Telecommunications System upon, through, along, under and over real property owned by the Government (other than Rights-of-way.) If Grantee desires to attach its Telecommunications System to any buildings, poles, street lights, Equipment and apparatus, or Facilities owned by the Government or construct, erect, operate and maintain a

Telecommunications System upon, through, along, under and over real property owned by the Government, the Grantee shall be required to enter into separate agreements with the Government.

- (c) This Ordinance does not include the right or privilege to provide Cable Service or open video system (as defined by 47 CFR 76.1500 (a)), which shall be subject to separate franchising requirements, and also does not apply to (1) private communications system services provided without using the public rights of way; (2) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (3) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996.

Section 6 - Standards.

The Grantee shall conform to at least the minimum standards or requirements in federal and state law or regulation in the operation of its system pursuant to this Ordinance. In addition to complying with other applicable law, the Grantee agrees that:

- (a) All working Facilities and conditions used during construction, installation and maintenance of Facilities (including clearance of wires and cables above the Rights-of-way and placement of any underground facilities) shall comply with the standards of the Occupational Safety and Health Administration, the National Electric Safety Code, and the National Electric Code. In the operation of system, the Grantee shall conform to all standards required by applicable state or federal law or regulation;
- (b) All materials and equipment used or installed in construction shall be of first class quality, and any defect in the work, materials or equipment, whether latent or patent, will be remedied by the Grantee at its cost;
- (c) Construction, reconstruction, maintenance, or removal of any Facilities, shall be performed with due regard for the rights of the Government and others, and shall not unnecessarily interfere with, or in any way injure the property of the Government or others under, on, or above the ground, or otherwise unduly interfere with the public use of the Rights-of-way;
- (d) Placement of lights, danger signals or warning signs shall be undertaken by the Grantee in compliance with applicable law;
- (e) Unless exempted by the Government, Facilities shall be installed underground at any location where all other utilities' Facilities that are used to provide customer service are then being installed underground, or when otherwise required under the Code, and shall be in conformance with the applicable requirements of this Ordinance and those set forth in the Code, the Zoning Ordinance, or any other applicable local law or regulation. The Grantee assumes all responsibility for damage or injury resulting from its placement or maintenance of any above-ground Facilities;
- (f) Grantee shall identify all of its Facilities, new and existing, by tagging or marking its Facilities with the Grantee's name and telephone number. Additionally, Grantee shall provide the Government annually with an electronic map which contains the location of all of its Facilities;

- (g) The Government, through its Mayor or his or her designee, or through such assistants as the Government may employ or designate, may, at all times and under reasonable conditions with prior notice, have reasonable access to all or any of the property or used in part or in whole by the Grantee in its operating and maintaining the System under this Ordinance and located within the Rights-of-way; and
- (h) The Grantee agrees to provide to the Government and/or its Council with information pertaining to its provision of services pursuant to this Ordinance upon reasonable request. This shall include, but is not necessarily limited to, attending public meeting(s) at which some or all of the Council members are in attendance (in order to provide such information upon reasonable advance notice) and providing an annual update to the Council upon its request.

Section 7 - Moving Permits and Tree Trimming.

- (a) The Grantee shall, at the request of any person holding a moving permit issued by the Government, temporarily raise or lower its wires to permit the moving of buildings or other structures. The expense of such temporary removal or raising or lowering of wires shall be paid by the person requesting the same, and the Grantee shall have the authority to require such payment in advance. The Grantee shall be given not less than five (5) days advance notice to arrange for such temporary wire changes.
- (b) The Grantee shall have the authority to trim trees upon the overhanging Rights-of-way so as to prevent the branches of such trees from coming in contact with the wires or cables of the Grantee. Any trimming, removal or other disturbance of trees shall conform to all applicable laws or regulations.

Section 8 - Bonds.

In addition to any performance bond(s) required pursuant to Section 17C-23 of the Code, the Grantee may, with respect to aspects of those significant projects in excess of one hundred thousand dollars (\$100,000.00) which are not addressed in Section 17C-23 of the Code but which do involve the Rights-of-way, be required to post an additional project performance bond(s). This bond (or bonds) shall be set in an amount and duration to be determined by the Government upon discussing and verifying the scope of such a project with the Grantee, and shall be in favor of the Government to be issued by an entity subject to jurisdiction and venue in Fayette County, Kentucky. In no event shall the total cumulative amount of such bonds exceed one million dollars (\$1,000,000.00) per year, and as an alternative, the Grantee may choose to post one such bond to cover all of its projects on an ongoing basis.

Section 9 - Indemnification.

The Grantee shall defend, indemnify, and hold harmless the Government consistent with the indemnification and hold harmless provisions as set forth in Section 17C-17 of the Code, and as it may be amended in the future.

Section 10 - Insurance.

The Grantee shall maintain in full force and effect a commercial general liability insurance policy consistent with the insurance provisions set forth in Section 17C-16 of the Code, and as it may be amended in the future.

Section 11 - Non-discrimination and Affirmative Action.

The Grantee shall comply with all applicable federal, state or local non-discrimination and affirmative action requirements of any laws, regulations and executive directives, and shall not discriminate in its employment practices against any employee or Applicant for employment because of race, color, religion, national origin, sex, age or disability.

Section 12 - Transfer of Control & General Rate Cases.

- (a) In the event that the Grantee files for a Transfer of the Grantee, or a general rate case with the PSC, it will furnish the Mayor or his designee with timely notice of such filing. In the event the Government should choose to intervene in such PSC action, the Grantee shall not oppose such intervention.
- (b) No Transfer shall take place, whether by forced or voluntary sale, lease, mortgage, assignment, encumbrance or any other form of disposition, without prior notice to and approval by the Council which shall not be unreasonably refused, withheld, or delayed. The notice shall include full identifying particulars of the proposed transaction, and the council shall act by resolution. The Council shall have one hundred twenty (120) days within which to approve or disapprove a transfer of control or assignment, if no action is taken within such one hundred twenty (120) days; approval shall be deemed to have been given.
- (c) Section 12(b) is not intended to apply to assignments to a parent, subsidiary or affiliate of the Company, or in those instances in which the Company has filed for a transfer of control before the PSC. Such inter-corporate transfers or transfers subject to the jurisdiction of the PSC shall require notice to the Government as provided in Section 12(a).
- (d) In making a determination on whether to grant an application for a Transfer, the Council may consider the financial, technical and other qualifications of the transferee (assignee) to operate the system; whether the incumbent Grantee is in compliance with this Ordinance and, if not, the proposed transferee's (assignee's) commitment to cure such noncompliance and any other criteria allowed by applicable law.
- (e) The consent or approval of the Council to any Transfer of the Grantee shall not constitute a waiver or release of the rights of the Government in and to the streets.

Section 13 - Franchise Duration.

- (a) The franchise hereby created shall be for an initial period of ten (10) years from the date of acceptance by the Council.
- (b) This franchise may be renewed for an additional term not to exceed ten (10) years upon the request of the Grantee and the approval of the request by the Council. The request for a renewal shall be made in writing to the Mayor at least one hundred eighty (180) days, but no earlier than one (1) year, in advance of the termination date of the Grantee's franchise agreement. The ultimate decision of whether to grant an additional franchise term shall solely be that of the Government. A

decision not to grant an additional franchise term shall be based on the Grantee's noncompliance with the terms of this Ordinance, Chapter 17C of the Code, or other local, federal or state laws and/or regulations.

- (c) In addition, the term of the franchise may be extended up to twelve (12) months by agreement of the parties in order to provide for the good faith negotiation of a new franchise.
- (d) All franchises awarded pursuant to this Ordinance are intended to terminate at the same time. Therefore any Grantee awarded a franchise pursuant to this Ordinance shall only be awarded a franchise that is equal in duration to the remaining term of the initial franchise(s).
- (e) The franchise created by this Ordinance creates no vested rights in the Grantee other than those provided by this Ordinance or at law, and any installation or placement of Facilities by the Grantee in the Rights-of-way is at the Grantee's risk.

Section 14 - Penalties.

- (a) If, after the Grantee is provided the opportunity to appear and present evidence before the Mayor or his or her designee, the Mayor finds that the Grantee has violated any of the following provisions of this Ordinance, the following penalties shall be recoverable. The decision of the Mayor or his or her designee shall be the final administrative decision and shall be in writing and provide the basis for the decision. The decision may be appealed to a court of competent jurisdiction.
 - (1) For failure to complete or remove any construction project by no later than the ending term of any franchise awarded pursuant to this Ordinance or any extension thereof, the Grantee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues; in lieu of a penalty, the Grantee may post a performance bond, letter of credit or other surety acceptable to the Government in an amount sufficient to complete such construction projects. This section shall not apply to any projects for which performance bonds or other surety is already pledged.
 - (2) For failure to provide data and reports requested by the Government and as required by this Ordinance the Grantee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues.
 - (3) For failure to pay a permit fee or franchise fee when due pursuant to local law, the Grantee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues.
- (b) If the Grantee fails to comply within thirty (30) days of any Council resolution directing compliance with any other provisions of this Ordinance, the Grantee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues. The decision of the Council may be appealed to a court of competent jurisdiction.
- (c) The Grantee shall not be excused from complying with any of the terms and conditions of this Ordinance by any failure of the Government, upon any one or more occasions, to insist upon the Grantee's performance or to seek the Grantee's compliance with any one or more of such terms or conditions.

Payment of penalties shall not excuse non-performance under this Ordinance. The right of the Government to seek and collect penalties as set forth in this section is in addition to its right to terminate and cancel as set forth in Section 16 of this Ordinance.

Section 15 - Maintenance of Service.

The Grantee shall maintain its System in reasonable operating condition at all normal times during the term of its Franchise. An exception to this is automatically in effect when service furnished by the Grantee is interrupted, impaired or prevented by fires, strikes, riots or other occurrences beyond the control of the Grantee, or by storms, floods or other casualties, in any of which events the Grantee shall do all things reasonably within its power to restore normal service within a reasonable period of time. If applicable, the Grantee will maintain normal business hours at its headquarters located in Lexington, Kentucky, to receive customer inquiries in accordance with any relevant PSC order(s).

Section 16 - Right to Terminate and Cancel the Franchise.

- (a) In addition to all other rights and powers pertaining to the Government by virtue of this Ordinance or otherwise, the Government, by and through its Council, reserves the right to terminate and cancel the franchise and all rights and privileges of the Grantee hereunder in the event that the Grantee:
 - (1) Willfully violates any provision of this Ordinance, the franchise or any material rule, order, or determination of the Government made pursuant to the franchise, except where such violation is without fault or through excusable neglect or due to a force majeure act;
 - (2) Willfully attempts to evade any provision of this Ordinance or the franchise or practices any fraud or deceit upon the Government;
 - (3) Fails to begin or complete construction as provided under this Ordinance or the franchise;
 - (4) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of the franchise; or
 - (5) Entry of a final and non-appealable order by the Public Service Commission of Kentucky which revokes any authority of the Grantee to provide service in Fayette County, Kentucky.
- (b) The Government may make a written demand that the Grantee do or comply with any such provision, rule, order or determination. The Grantee will be provided the opportunity to appear and present evidence before the Mayor or his or her designee, whose decision shall be the final administrative decision, and shall be in writing and provide the basis for the decision. If the violation by the Grantee continues for a period of thirty (30) days following such a decision by the Mayor or his or her designee without written proof that the corrective action has been taken or is being actively and expeditiously pursued by the Grantee, the Government may place its request for termination of the franchise as early as the next regular Council meeting agenda. The Government shall cause to be served upon Grantee, at least ten (10) days prior to the date of such Council meeting, a written notice of intent to request such termination and the time and place of the meeting and shall publicly notice the same.

- (1) It shall be a defense to any attempt to terminate and cancel the franchise that the Grantee was relying on federal law, state law, or a valid tariff in acting or not acting on the issue in dispute.
- (2) The Council shall consider the request of the Government and shall hear any person interested therein, and shall determine in its discretion, whether or not any violation by the Grantee was with just cause.
- (3) If such violation by the Grantee is found to have been with just cause, the Council shall direct the Grantee to comply therewith within such time and manner and upon such terms and conditions as are just and reasonable within the Government's lawful authority.
- (4) If the Council determines such violation by the Grantee was without just cause, then the Council may, by resolution, declare that the franchise of the Grantee shall be terminated and forfeited unless there is compliance by the Grantee within such reasonable period as the Council may fix. Any such determination by the Council is a final appealable action to a court of competent jurisdiction.

Section 17 - Foreclosure or Other Judicial Sale.

The Grantee shall provide the Government, in the form and manner required by the appropriate court or judicial body, at least thirty (30) days advance written notice, if at all possible, of the foreclosure or other judicial sale of all or a substantial part of the Grantee's Facilities within Fayette County, or upon the termination of any lease covering all or a substantial part of its Facilities, and such notification shall be treated as a notification that a transfer or assignment of the franchise has taken place.

Section 18 - Government's Rights After the Appointment of a Receiver or Trustee.

The Council shall have the right to cancel a Grantee's franchise thirty (30) days after the appointment of a receiver, or trustee, to take over and conduct the business of the Grantee, whether in receivership, reorganization, bankruptcy, or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said thirty (30) days, unless:

- (a) Within thirty (30) days after his election of appointment, such receiver or trustee shall have fully complied with all the provisions of this Ordinance and remedied all defaults thereunder; and,
- (b) Such receiver or trustee, within said thirty (30) days shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Ordinance and the franchise granted to the Grantee.

Section 19 - Advertising for Bids.

It shall be the duty of the Mayor or his designee to offer the terms of this Ordinance to the public. In the event that additional interested bidders are identified or express an interest in obtaining a franchise after this initial offering, the additional offering and advertisement to accommodate such bidders is hereby authorized. Said franchise and privilege shall be sold to the highest and best bidder or bidders at a time and place fixed

by the Mayor or his designee after due notice thereof by advertisement or publication as required by law.

Section 20 - Bid Process.

- (a) Bids and proposals for the purchase and acquisition of the franchise hereby created shall be in writing and shall be delivered to the Mayor or his designee upon the date(s) and at the time(s) fixed by him or her in said advertisement(s) for receiving same. Thereafter, the Mayor shall report and submit to the Council, at the time of its next regular meeting or as soon as practicable thereafter, said bids and proposals for its approval.
- (b) The Council reserves the right, for and on behalf of the Government, to reject any and all bids for said franchise; and, in case the bids reported by the Mayor shall be rejected by the Council, it may direct said franchise and privilege to be again offered for sale, from time to time, until a satisfactory bid therefore shall be received and approved.
- (c) Each bid made by a corporation or person not already owning Facilities within the territorial limits of Fayette County sufficient to render the service required by this Ordinance, shall be accompanied by cash or a certified check drawn on a bank of the Commonwealth of Kentucky, or a national bank, equal to five percent (5%) of the fair estimated cost of the system required to render the service, which check or cash shall be forfeited to the Government in case the bid should be accepted and the bidder should fail, for thirty (30) days after the confirmation of the sale, to pay the price and to give a good and sufficient performance bond in favor of the Government in a sum equal to one-fourth (1/4) of the fair estimated cost of the system to be erected, conditioned that it shall be enforceable in case the Grantee should fail, within one hundred eighty (180) days, to establish and begin rendering the service in the manner set forth in this Ordinance. Upon rendering the initial service, this bond may be replaced by the performance bond required by Section 23(b), if applicable.
- (d) Bids shall include such documentation as is necessary to support the bidder's determination of the fair estimated cost of the system required to render the service and compliance with all applicable state, federal and local statutes, ordinances and regulations. The Government reserves the right to review any of bidder's supporting documentation which justifies bidder's determination of the estimated cost and compliance with laws and regulations. In addition, each bid shall be accompanied by a non-refundable payment to the Government in the amount of two thousand dollars (\$2,000.00) to cover the Government's cost of advertising and other administrative expenses incurred. In the event that the total amount submitted by all bidders exceeds the Government's actual costs, it will refund the overcharge to each Grantee on a pro rata basis within thirty (30) days.

Section 21 - Compensation.

- (a) The Government is currently precluded from collecting Franchise Fees from a Grantee that is paying Telecommunications Excise Taxes to the Commonwealth of Kentucky pursuant to KRS 136.600, et seq. However, any Grantee not paying Telecommunications Excise Taxes to the Commonwealth of Kentucky pursuant to KRS 136.600, et seq. shall be required to pay Franchise Fees to the Government pursuant to this Section 21.

- (b) The Telecommunications Excise Tax distribution from the state is not a payment in lieu of any tax, fee or other assessment except as specifically provided in this Ordinance, or as required by applicable law. By way of example, and not limitation, permit fees and business license taxes are not waived and remain applicable as provided by law to the extent they are not Franchise Fees. Additionally, the Government may at any time impose any fees or taxes consistent with state or federal law, including, but not limited to property taxes, and occupational license fees.
- (c) If at any time Kentucky law is changed to allow the Government to assess Franchise Fees on a Grantee that is currently paying Telecommunications Excise Taxes to the Commonwealth of Kentucky, Grantee shall pay an annual fee to the Government, which must be the greater of either:
- (i.) The Minimum Annual Franchise Fee; or
 - (ii.) An amount equal to five percent (5%) of Grantee's Gross Revenues. In the event that an amount equal to five percent (5%) of Grantee's Gross Revenues does not represent a reasonable calculation of encroachment and use of the public Rights-of-way by Grantee, the Government reserves the right to impose a per linear foot or similar charge for those facilities owned or operated by Grantee that are located in the public Rights-of-way.
- (d) Grantee's first Minimum Annual Franchise Fee payable under this shall be paid to the Government forty-five (45) days after the law is changed to allow the collection of Franchise Fees on Telecommunications Services. Such payment will be prorated for the remaining calendar year (rounded to the nearest month) through December 31. Thereafter, Grantee shall pay each Minimum Annual Franchise Fee on or before April 15, and Grantee's Minimum Annual Franchise Fee payment will apply to the current calendar year (January 1 through December 31). Any Minimum Annual Franchise Fee paid to the Government will be credited towards Grantee's Franchise Fee for that calendar year. In order to avoid penalization, the Government will notify the Grantee in writing at such time as it believes that it is allowed to assess franchise fees due to a change in the law. If the Government fails to notify the Grantee, the Grantee shall be relieved of its obligation to any applicable penalty but shall still be obligated to pay any outstanding franchise fees.
- (e) Gross Revenue based Franchise fee payments to the Government shall be computed based on Grantee's Gross Revenues from each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October. 1 through December 31) and paid on or before the forty-fifth (45th) day following each calendar quarter period during the term of a franchise created under this Ordinance.
- (f) Facilities based Franchise Fee payments to the Government shall be computed based on Grantee's lineal foot of Facilities in Fayette County as of January 1 of each calendar year and paid on or before

April 15th of calendar year during the term of a franchise created under this Ordinance.

- (g) Payment not received by the Government by the due date shall be assessed interest equal to one percent (1%) per month. Interest shall be compounded daily. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the Government receives the payment.
- (h) Prior to making each payment to the Government, Grantee shall file with the Government a written report containing an accurate statement in summarized form, as well as in detail, of its calculation of the amount of the payment, verified by an officer or other authorized representative of Grantee, setting forth its Gross Revenues according to their accounting subdivisions, and any deductions claimed for the period upon which the payment is computed. Such reports shall be in form satisfactory to the Government.
- (i) If any Franchise Fee is owed to the Government, upon reasonable notice, the Government shall have the right to inspect the Grantee's income records, the right to audit and to re-compute any amounts determined to be payable under this agreement; provided, however, that such audit shall take place within twelve (12) months following the close of each of the Grantee's fiscal years. If, as a result of such audit or review, the Government determines that Grantee has underpaid its fees to the Government in any twelve (12) month period by ten percent (10%) or more, then, in addition to making full payment of the relevant obligation, Grantee shall reimburse the Government for all expenses incurred as a result of an audit or review and such payments shall be paid within the thirty (30) days following written notice to the Grantee by the Government, which notice shall include a copy of the audit report and copies of all invoices for which the Government seeks reimbursement.
- (j) If any Franchise Fee is owed to the Government, in the event that any Franchise Fee payment or recomputed amount is not made to the Government on or before the applicable dates heretofore specified, interest shall be charged from such date at the annual rate of 2% over prime interest rate.
- (k) The Government reserves the right to require the Grantee to collect any consumer or other tax or other fee that may be imposed by the Government, the Commonwealth of Kentucky, or the federal government on Telecommunications Services.
- (l) Notwithstanding the above, the Grantee shall be required to pay the Government an amount intended to adequately compensate it for its permitting and inspection of the Grantee's construction activities in the Rights-of-way pursuant to Chapter 17C of the Code as required by said ordinance. The Grantee may seek tariff approval from the Kentucky Public Service Commission for the recovery of such payment, and may elect to pay for its permit fees upon application for each respective permit, if approved by the Government. These permitting fees are subject to change during the term of the franchise based upon an audit of the actual cost of permitting for the

Government or a change in the amount of the respective permitting fees found in Section 17C-22 of the Code, as may be amended. In the event of such a change, the Grantee shall be provided at least sixty (60) days advance written notice.

Section 22 - Additional Requirements.

In addition to all other requirements, and except to the extent prohibited by law, any Grantee not already owning Facilities within the Rights-of-way sufficient to render Telecommunications Services within Fayette County, or any Grantee that is required pursuant to law to file for a certificate of convenience and necessity from the Kentucky Public Service Commission in order to replace or significantly upgrade or expand a substantial portion of its existing Facilities within the Rights-of-way, shall also be required to perform the following requirements during the construction, replacement, upgrade or expansion of its network system unless the Council determines that any or all of such requirements are not necessary to adequately protect the interests of the Government:

- (a) In addition to obtaining any and all permits required pursuant to the Code, the Grantee shall submit for the Government's approval a comprehensive schedule of construction of its Facilities system network no later than one (1) month after the Government's acceptance of the Grantee's bid. The schedule shall include sufficient detail for Government to determine the time and locations of construction activities and shall also depict the anticipated time frame of identifiable tasks required for construction purposes, as delineated by the Government. No construction related activities may be conducted in the Rights-of-way until the schedule is approved by the Government. In addition, at thirty (30) day intervals during construction, the Grantee shall provide the Government with a plan of construction activities setting forth a general description of the activities to be undertaken during the following thirty (30) days and designating the geographical area of Fayette County that will be affected. Approval by the Government of these plans shall constitute a condition which must be met prior to undertaking any construction activities.
- (b) The Grantee shall furnish traffic control plans, including site-specific hours of construction, to the Government no later than seven (7) days prior to the commencement of any construction activities. Such plans are subject to approval or modification by the Government. No construction related activities may be conducted in the Rights-of-way without an approved traffic control plan.
- (c) The Grantee shall provide the Government a local telephone contact number, staffed twenty-four (24) hours per day, to enable the Government to report any concerns regarding construction of the system network. In the event that the Government reports any concerns to the Grantee, the Grantee shall respond within a reasonable time as specified by Government or as specified elsewhere in this Ordinance. The Grantee shall perform the required repair or correct any adverse impact to Government's use or operations or the use or operations of a third party caused by the Grantee's construction activities in the Rights-of-way at no cost to the Government.
- (d) Fourteen (14) days prior to commencement of construction, and every thirty (30) days thereafter during construction the Grantee shall publish, at its sole cost, a notice containing a map depicting where construction will occur in the

Lexington Herald-Leader. Additionally, such notice shall provide a general description of construction activities and a telephone number to be called by citizens with questions concerning construction activities. A copy of said notice(s) shall be provided to the Government.

- (e) The Grantee shall provide at least fourteen (14) days notice to other utilities in Fayette County of its interest in seeking construction permits to open the street before it applies for any street cut permit. The Government shall provide the Grantee with a listing of all such utilities and their points of contact upon request. Such notice shall inform the other utility companies of the Grantee's intent to undertake construction in the affected areas and state that the other utility companies must notify the Government and the Grantee within seven (7) days of receipt of such notice of their desire to simultaneously lay conduit, or other Facilities, in any trench opened by the Grantee.
- (f) Failure to comply with the above provisions, or the Code may, in the sole discretion of the Government:
 - (1) Be the basis for the Government to reasonably require that the Grantee perform more extensive restoration work than otherwise anticipated by a permit; and
 - (2) May result in the Grantee being assessed an additional premium on any permit fee to recoup any additional costs or expenses reasonably associated with the Grantee's failure.
- (g) Unless otherwise provided an extension by the Council, the Grantee must make telecommunications services available within Fayette County within one hundred eighty (180) days from the date of the award of the franchise. This requirement shall not apply to a Grantee that does not provide, or has no intention of providing, any services to Fayette County Customers.
- (h) The Grantee shall maintain accurate network design drawings, maps and improvement plans of the network system, in a form acceptable to the Government, in a manner consistent with industry construction standards. The Grantee shall furnish the Government, without charge, with a complete set of "as-built" drawings within sixty (60) days of completion of construction of the network system. Such maps and improvement plans shall also be furnished to Government in digital form and shall be provided pursuant to a lawful protective agreement.

Section 23 - Letter of Credit and Performance Bond.

In addition to all other requirements, and except to the extent prohibited by law, any Grantee not already owning Facilities within the Rights-of-way sufficient to render Telecommunications Services within Fayette County, shall also be required to perform the following requirements during the construction of its network system unless the Council determines that any or all of such requirements are not necessary to adequately protect the interest of the Government:

- (a) Within ten (10) days after the award of a franchise pursuant to this Ordinance, the Grantee shall deposit with the Government's Division of Revenue a one-year irrevocable renewable letter of credit from a Fayette County financial institution in the amount of fifty thousand dollars (\$50,000.00). The form and content of such letter of credit shall be

approved by the Government. The letter of credit shall be used to insure the faithful performance by the Grantee of all provisions of this Ordinance ; and compliance with all orders, permits and directions of any agency, commission, board, department, division or office of the Government having jurisdiction over its acts or defaults under this Ordinance, and the payment by the Grantee of any claims, liens and taxes due the Government which arise by reason of the construction, operation or maintenance of the system network.

- (1) The letter of credit shall be maintained at fifty thousand dollars (\$50,000.00) during the entire term of Grantee's franchise, even if amounts have to be withdrawn pursuant to this section.
 - (2) If the Grantee fails to pay to the Government any compensation within the time fixed herein; or, fails, after ten (10) days' notice to pay to the Government any taxes due and unpaid; or, fails to repay the Government, within such ten (10) days, any damages, costs or expenses which the Government is compelled to pay by reason of any act or default of the Grantee in connection with its franchise; or, fails, after three (3) days' notice of such failure by the Government to comply with any provision of its franchise which the Government reasonably determines can be remedied by demand on the letter of credit, the Government may immediately request payment of the amount thereof, with interest and any penalties, from the letter of credit. Upon such request for payment, the Government shall notify the Grantee of the amount and date thereof.
 - (3) The rights reserved to the Government with respect to the letter of credit are in addition to all other rights of the Government and no action, proceeding or exercise of a right with respect to such letter of credit shall affect any other right the Government may have.
 - (4) The letter of credit shall contain the following endorsement:
"It is hereby understood and agreed that this letter of credit 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 Government, by registered mail, a written notice of such intention to cancel or not to renew."
- (b) If necessary, after the initial service requirement is met and the bonds required by Section 8 of Section 20 of this Ordinance no longer protect the Government, the Government may require the Grantee to file with the Government a Performance Bond in the amount of Five Hundred Thousand Dollars (\$500,000.00) in favor of the Government. This bond shall be maintained throughout the construction period. In lieu of the above-mentioned performance bond, the Grantee may deposit with the Government's Department of Revenue an irrevocable letter of credit from a Fayette County financial institution in the amount of Five Hundred Thousand Dollars (\$500,000.00). The form and content of such letter shall be approved by the Government.
- (1) In the event the Grantee fails to comply with the Code or any law, Ordinance or regulation governing the franchise, or fails to well and truly observe, fulfill and perform each term and condition of this

Ordinance or the franchise, including the Grantee's application (as required in Section 4), there shall be immediately recoverable, jointly and severally, from the principal and surety of the bond or the letter of credit, any damages or loss suffered by the Government as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of the Grantee, plus a reasonable allowance for attorney's fees, including the Government legal staff, and costs, up to the full amount of the bond.

- (2) Upon completion of construction the Grantee's initial service area the requirement of this additional performance bond shall be waived.
- (3) The bond or letter of credit shall contain the following endorsement:
"It is hereby understood and agreed that this bond [letter of credit] 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 Government, registered mail, a written notice of such intent to cancel or not to renew."
- (4) The rights reserved to the Government with respect to the performance bond or letter of credit are in addition to all other rights of the Government, and no action, proceeding or exercise of a right with respect to such performance bond or letter of credit shall affect any other right the Government may have.

Section 24 - Discontinuing Use of Facilities.

- (a) If Grantee decides to discontinue use of Facilities within all or a portion of the Streets and does not intend to use those Facilities again in the future, the Government may direct Grantee to remove the Facilities or may permit the Facilities to be left in place as abandoned, which permission shall not be unreasonably withheld or delayed. If Grantee is permitted to abandon its Facilities in place, upon written consent of the Government, the ownership of Facilities in the Government's Streets shall transfer to the Government and Grantee shall have no further obligation therefor. Notwithstanding Grantee's request that any such Facility remain in place, the Government may require Grantee to remove the Facility from the street area or modify the Facility in order to protect the public health and safety or otherwise serve the public interest. The Government may require Grantee to perform a combination of modification and removal of the Facility. Grantee shall complete such removal or modification in accordance with a reasonable schedule set by the Government. Until such time as Grantee removes or modifies the Facility as directed by the Government, or until the rights to and responsibility for the Facility are accepted by another Person having authority to construct and maintain such Facility, Grantee shall be responsible for all necessary repairs and relocations of the Facility, as well as restoration of the Street, in the same manner and degree as if the Facility were in active use, and Grantee shall retain all liability for such Facility.

Section 25 - Offers of Payment.

Bids offered for purchase of a franchise pursuant to this Ordinance shall state the bidder's acceptance of the conditions set forth in this Ordinance. If any bid shall include an offer of payment over and above the terms of the franchise, then a certified check for

said amount, payable to the Lexington-Fayette Urban County Government, shall be deposited with the Government. This amount shall be in addition to the provision for any payments contained in Sections 20 and/or 21 of this Ordinance. Any check deposited pursuant to this section by an unsuccessful bidder shall be returned when the Council shall have accepted the bid or bids which in its judgment is or are the highest and best.

Section 26 - Forfeiture.

Any violation by the Grantee or successor or authorized Grantee representative of the provisions of this Ordinance or any material portions thereof, or the failure promptly to perform any of the provisions thereof, shall be cause for the forfeiture of its franchise and all rights hereunder after written notice to the Grantee and continuation of such violations, failure or default, as set forth herein.

Section 27 - Governing Law.

This Ordinance and any franchise awarded pursuant to it shall be governed by the laws of the Commonwealth of Kentucky, both as to interpretation and performance. The venue for any litigation related to this Ordinance or any franchise shall be in the court of competent jurisdiction in Fayette County, Kentucky.

Section 28 - Non-enforcement by the Government.

Grantee shall not be relieved of its obligations to comply with any of the provisions of this Ordinance by reason of any failure of the Government to enforce prompt compliance, nor does the Government waive or limit any of its rights under this Ordinance by reason of such failure or neglect.

Section 29 - Agent.

The Grantee shall designate in writing a local agent to oversee and manage all activities required pursuant to this Ordinance and Chapters 17 and 17C of the Code and to accept service of any legal proceeding initiated by the Government.

Section 30 - Third Parties.

This Ordinance and any franchise awarded pursuant to it does not create a contractual relationship with or right of action in favor of a third party against either the Government or the Grantee.

Section 31 - Severability.

If any section, sentence, clause or phrase of the Ordinance is held unconstitutional or otherwise invalid, such infirmity shall not affect the validity of the Ordinance.

Section 32 - Effective Date.

The franchise created by this Ordinance shall become effective when the bid for it is accepted by the Council.

Section 33 - This Ordinance shall become effective on the date of its passage.

PASSED URBAN COUNTY COUNCIL:

MAYOR

ATTEST:

CLERK OF URBAN COUNTY COUNCIL

DJB_X:\Cases\GENERAL\16-LE0001\LEG\00530030.DOCX

Published: