

## PART 10: PUBLIC RIGHTS-OF-WAY FOR TELECOMMUNICATIONS SERVICES

### § 13-4-10-1 PURPOSE.

The purpose of this Part 10 is to establish a competitively neutral policy for use of the Public Rights-of-Way for the provision of Telecommunications Services and enable the City to:

(A) Permit competitively neutral and non-discriminatory access to the Public Rights-of-Way for providers of Telecommunications services; and

(B) Manage the Public Rights-of-Way in order to minimize the impact and cost to the citizens of the placement of telecommunications facilities within the Public Rights-of-Way; and

(C) Promote competition among telecommunications service providers and encourage the universal availability of Telecommunications Service to residents and businesses of the City; and

(D) Obtain fair and reasonable compensation for the rental and use of Public Rights-of-Way through collection of fees and charges; and

(E) Minimize the congestion, inconvenience, visual impact, and other adverse effects on the City's Public Rights-of-Way; and

(F) To the extent permitted by state and federal law, exercise such other powers as the City may have to protect the public health, safety, and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(Ord. 20-1997)

§ 13-4-10-2 DEFINITIONS.

(A) **AFFILIATE.** Each Person who falls into one or more of the following categories: (i) each Person having directly or indirectly, a controlling interest in a provider; (ii) each Person in which a Provider has, directly or indirectly, a controlling interest; (iii) each officer, director, general partner, limited partner holding an interest of five percent (5%) or more, joint venturer, or joint venture partner of a Provider; and (iv) each Person, directly or indirectly, controlling, controlled by, or under common control with the Provider—provided that **AFFILIATE** shall in no event mean any limited partner holding an interest of less than five percent (5%) of such Provider, or any creditor of such Provider solely by virtue of its status as a creditor and which is not otherwise an **AFFILIATE** by reason of owning a controlling interest in, being owned by, or being under common ownership, common management, or common control with such Provider.

(B) **APPLICANT.** Any Person who files an application with the City under § 13-4-10-3 in order to obtain the necessary permission to use the Public Rights-of-Way to provide Telecommunications Service within the City.

(C) **CITY.** The City of Albuquerque, New Mexico, a home rule municipal corporation, or as appropriate, any board, bureau, authority, agency, commission, department or any other entity of the City of Albuquerque, or any authorized officer, official, employee, or agent thereof.

(D) **CITY CLERK.** City Clerk of the City of Albuquerque or a designated representative.

(E) **CITY REQUIREMENTS.** All laws, rules, regulations, policies, and directives of general application of the City of Albuquerque in effect at present or to be adopted in the future by the City Council or the City.

(F) **COUNCIL.** The legislative body of the City of Albuquerque, sometimes referred to as **CITY COUNCIL**.

(G) **DIRECTOR OF PUBLIC WORKS** or **DIRECTOR.** The Director of the Public Works Department of the City or his or her designee, charged with the administration of the Public Rights-of-Way.

(H) **EMERGENCY.** Repair, restoration, or replacement of an existing structure made necessary because of a sudden unexpected event which has created a condition which is an immediate and continuing threat to the safety of property or persons or the operations of a Provider.

(I) **GROSS REVENUE.**

(1) Includes all revenues derived directly or indirectly by a Provider from or in connection with the Telecommunications Services set forth in individual Municipal Authority and/or Franchise Contracts offered within the City through or by means of a Telecommunications Network within the City, exclusive of any Municipal Authority or Franchise Fee or tax passed through to consumers on behalf of governmental agencies, received by the Provider for services provided to customers through use of the Network. **GROSS REVENUE** shall include any revenue received by a Provider or any Affiliate through any means which is intended to have the effect of evading the payment of compensation that would otherwise be paid to the City for a Municipal Authority or Franchise Contract granted pursuant to this ordinance.

(2) **GROSS REVENUE** shall not include (i) proceeds from the sale of bonds, mortgages, or other evidence of indebtedness, securities, or stocks; or (ii) gross receipts taxes, bad debt write-offs, and customer credits; or (iii) revenue of any Affiliate or Provider from long distance service, commercial mobile radio service, cellular, personal communications service, other wireless communications service, or directory advertising—provided that, unless otherwise provided in a Municipal Authority or Franchise Contract, **GROSS REVENUE** may include revenues

received by a Provider or an Affiliate from (a) access fees, interconnection fees, or any other fees relating to or arising out of the wireless use of the Telecommunications Network (including the facilities and equipment of such Network) by any Person providing commercial mobile radio service, cellular, personal communications service, other wireless communications service; and (b) any services listed on Appendix "A." Each of the above are not included in the definition of GROSS REVENUE and, therefore, are not included in the calculation of any fee due under a Municipal Authority.

(3) GROSS REVENUE shall not include the wholesale revenue of any Provider to the extent that the Person providing such wholesale revenue to the Provider pays to the City, pursuant to an agreement with the City, an annual Municipal Authority Fee under § 13-4-10-4 of this ordinance, or an amount equivalent thereto, calculated on the basis of such Person's GROSS REVENUE (as defined in this ordinance) from the provision of Telecommunications Service in the City.

(4) GROSS REVENUE shall be measured and monitored periodically.

(J) MUNICIPAL AUTHORITY or FRANCHISE CONTRACT. The right granted by the City to rent and use Public Rights-of-Way to provide Telecommunications Service within the City, to the public, or to other Providers, as specified by the terms of such Municipal Authority or Franchise Contract.

(K) PERSON. An individual, corporation, association, partnership, joint venture, or other legally recognized entity, whether for profit or not for profit, but shall not mean the City.

(L) PROVIDER.

(1) Any Person who provides any Telecommunications Service within the City by means of: (i) a Telecommunications Network owned by such

Person or its Affiliate; (ii) specifically identifiable facilities of a Telecommunications Network reserved or made available for the use of such Person or its Affiliate under a lease or any other arrangement for a term longer than 120 days; or (iii) facilities of a Telecommunications Network not owned by such Person or its Affiliate and not specifically identifiable but obtained from another Person (including another Provider) if the use of such facilities is continuing and substantial. A Person owning or operating telecommunications facilities that merely pass through the City and such Person and facilities do not offer Telecommunications Service to subscribers within the City shall not be subject to this ordinance, provided that Person has received other appropriate authorization from the City to rent or occupy the Public Rights-of-Way.

(2) Except to the extent that a PROVIDER or a Person uses the Public Rights-of-Way, a PROVIDER or any Person which provides commercial mobile radio service, cellular, personal communications service, or other wireless communications service shall not be subject to this ordinance with respect to such service.

(M) **PUBLIC RIGHTS-OF-WAY.** Present and future surface, air space above the surface (but not including air space used by wireless carriers for the transmission of telecommunications services), and area below the surface of any public street, highway, lane, path, alley, sidewalk, boulevard, drive, bridge, tunnel, easement, or similar public property in which the City holds any property interest or exercises any rights of management or control and which, consistent with the purposes for which it was acquired or dedicated, may be used for the installation, maintenance, and operation of a Telecommunications Network.

(N) **PUBLIC STRUCTURES.** Any building or structure owned by the City.

(O) **SYSTEM or TELECOMMUNICATIONS SYSTEM.** The TELECOMMUNICATIONS SYSTEM which is to be constructed, operated, and maintained by a Provider, pursuant to this ordinance and an agreement between the City and the Provider, including without limitation all real property and interests in real property, all tangible and intangible personal property, buildings,

offices, furniture, customer lists, cable, wires, optical fibers, and amplifiers, and all other electronic devices, equipment, and facilities used in connection therewith, and all rights, contracts, and understandings with regard to any matter related thereto.

(P) **TELECOMMUNICATIONS NETWORK or NETWORK.** Any System which includes facilities and/or equipment placed in the Public Rights-of-Way and used to provide any Telecommunications Service.

(Q) **TELECOMMUNICATIONS.**

(1) All transmissions between or among points specified by the user of information of the user's choosing (whether voice, video, or data), without change in the form or content of the information as sent and received, where such transmissions are accomplished by means of a Telecommunications Network.

(2) **TELECOMMUNICATIONS** shall not include cable services as defined in Title 47, Chapter 5, Subchapter V-A of the United States Code, as amended (47 USC § 521 et seq.) and shall not include telecommunications services provided and used by a public utility as that term is defined at § 62-3-3(G) NMSA 1978, or successor statute, for (i) its internal system communication needs; and (ii) provided directly or indirectly to its customers, including but not limited to electronic meter reading, load control, demand side management, power quality monitoring, and other activities related to the delivery of electricity or natural gas.

(R) **TELECOMMUNICATIONS SERVICE.** The offering of Telecommunications within the City for a fee directly to the public, or to such classes of users as to be effectively available directly to the public. Examples of **TELECOMMUNICATIONS SERVICE** are attached in Appendix "A."

(Ord. 20-1997)

### § 13-4-10-3 APPLICATION TO PROVIDE SERVICES.

(A) Application required. Any Person who proposes to be a Provider shall submit an application to the Director of Public Works. The application, in a form prescribed by the Director, shall describe all services Applicant wishes to provide, Applicant's proposed Network, and its impact on the Public Rights-of-Way and contain such other information as the Director may lawfully specify or require.

(B) City Council action. All Municipal Authorities granted under this Chapter shall incorporate each applicable provision of this Chapter. The act of granting, amending, denying, or terminating Municipal Authorities is a legislative function within the sound discretion of the City Council. Any Person who is denied a Municipal Authority or whose Municipal Authority is terminated must petition the City Council for reconsideration before seeking judicial remedies. The City Council shall have 30 days from the date of the petition to reconsider such denial or termination.

(C) Authority of Director. The Director shall have the duty to review applications submitted under this Chapter. The Director shall negotiate the terms of Municipal Authorities (to the extent not prescribed in this Chapter) for adoption by the City Council. The Director shall administrate and enforce compliance with respect to all Municipal Authorities granted under this Chapter.

(D) Authority granted. A Municipal Authority granted under this Chapter shall authorize an Applicant to use Public Rights-of-Way to provide Telecommunications Service. Any Person proposing to provide cable service, as defined in 47 USC § 522(b), shall obtain a separate franchise from the City for the provision of cable service.

(E) Annual list of wholesale services. Within six months after the effective date of a Municipal Authority and annually thereafter on each January 15, each Provider shall submit to the City a list of all Persons to which a Provider sells any Telecommunications Service on a wholesale basis. If a Provider believes that any Person on such list falls within the meaning of § 13-4-10-2(L) of this

ordinance and has not been granted a Municipal Authority pursuant to the terms of this ordinance, the Provider shall identify that Person and shall submit a written explanation of the reasons that the Provider believes such Person falls within § 13-4-10-2(L).

(Ord. 20-1997)

§ 13-4-10-4 COMPENSATION AND CHARGES.

(A) Fees and charges.

(1) Municipal Authority fee. As partial compensation for the use of the Public Rights-of-Way, each Provider shall be subject to an annual fee of three percent (3%) of Gross Revenue obtained from the provision of the various Telecommunications Service. Nothing contained in this ordinance shall prohibit or otherwise prevent a Provider or other Person from passing through any Municipal Authority or Franchise Fee to the ultimate end user of Tele-communications Service.

(2) Filing fee. Each Applicant shall submit a \$2,500 non-refundable application for each Municipal Authority or Franchise request.

(3) Non-monetary consideration. Upon mutual agreement between the City and Provider, each Provider shall furnish to the City, or certain communities within the City, non-monetary consideration in the form of Network capacity, conduit, equipment, or other infrastructure or services. This consideration shall be negotiated with each Provider taking into account the unique characteristics of each, and said consideration shall be valued in a nondiscriminatory manner. Further, any nonmonetary consideration furnished to the City shall be for the City's internal and noncommercial purposes, not for resale, and for the City's sole and exclusive use.

(4) Permit, inspection, and review/location charges. Each Provider

shall furnish all permit and inspection charges related to a Provider's construction in the Public Rights-of-Way, as assessed by the Director of Public Works in accordance with City Requirements.

(B) Fee on gross revenue in lieu of fee on wholesale revenue. Any Provider or Person electing to pay to the City, pursuant to an agreement with the City, an annual Municipal Authority fee under § 13-4-10-4 calculated on the basis of such Person's Gross Revenue from the provision of Telecommunications Service, shall expressly acknowledge in such agreement or Municipal Authority that that Person's Network and Systems are placed in and using the Public Rights-of-Way and used to provide any Telecommunications Service.

(C) Payment of Municipal Authority fee.

(1) Commencing the month following the month any Municipal Authority or Franchise Contract becomes effective, the fee shall be paid monthly on the 25th day of each month; such fee shall be for Gross Revenues received by the Provider for the preceding month. The Provider shall furnish to the City with each payment of compensation required by this section a detailed written statement showing the amount of Gross Revenue received by the Provider within the City limit, broken out by Provider's revenue code, for the period covered by the payment. Within such reasonable time as he/she may require, the Treasurer shall determine the accuracy of the amounts reported. However, neither payment of the fee nor failure to make such investigation shall estop the City in any way or prevent subsequent investigation, collection, or return of any amount properly due.

(2) In the event that it is claimed by the City that the amount of the fee paid for any calendar year is insufficient, or in the event that the Provider claims that the amount is excessive, and the parties cannot agree, the City and the Provider shall attempt to informally negotiate a resolution. In the event that negotiations fail, the dispute shall, before any other remedies are invoked, be submitted to binding mediation with the assistance of the City's ADR (Alternative Dispute Resolution) Coordinator.

(3) In the event that the fee set forth in any Municipal Authority is declared illegal, unconstitutional, or void for any reason by any court or proper authority, the Provider shall be contractually bound to pay the City, at the same times and in the same manner as provided for herein, an aggregate amount equal to the amount which would have been paid as a fee for the remainder of the City's current fiscal year. This section, however, shall not constitute a waiver of any claim the Provider may assert against the City.

(4) Acceptance by the City of any payment due under a Municipal Authority shall not be deemed to be a waiver by the City of any breach of the Municipal Authority occurring prior thereto, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due, or from collecting any balance due to the City.

(5) (a) In consideration of the rights and privileges granted by any Municipal Authority, the City shall have and Provider shall grant to it the right and privilege at the City's expense to suspend and maintain wires and necessary control boxes on poles placed by the Provider in the Public Right-of-Way if space therein is available, wires which the City may require for fire, police, emergency, or other municipal purposes. All such wires shall be placed on the poles or in the conduits so as not to interfere with the service of the Provider and shall not pose a danger to the Provider's facilities, customers, or customer's property. However, nothing in the Municipal Authority or Franchise Contract shall limit the Provider's right to reserve conduit space and/or pole space which in its sole discretion it retains for purposes of assuring the safety of or servicing of its facilities. City agrees, in consideration of the establishment of this service and the furnishing of such facilities, to hold the Provider free and harmless from all claims or liability for damage which may arise out of the City's operation of such wires and control boxes. In no event shall the City be required to pay any pole attachment fees in connection with the exercise of the City's rights under this section.

(b) As further consideration of the rights and privileges granted by any Municipal Authority, and upon reasonable request by the City and to the extent the Provider can reasonably do so, pursuant to its leases and agreements with other right-of-way providers, the Provider will grant joint use of Rights-of-Way which it now, or in the future, has an interest in, to the City for purposes,

including but not limited to parks, drainage facilities, bikeways, traffic conduits, mass transit corridors, sanitary sewer lines, pedestrian area parking, open spaces, and electric, cable, natural gas, and water service distribution, provided that the Provider shall not be required to make such an offer in any circumstance where such offer would unreasonably interfere with the Provider's use of the Public Rights-of-Way. If the City's joint use is accepted by the Provider, then any improvements deemed appropriate by the City shall be made by the City at its sole expense.

(6) To facilitate the City's annual budget process, on or before the 1st of November and each succeeding 1st of November thereafter during the term of any Municipal Authority granted under this Chapter, the Provider will provide the City with an estimate of the Gross Revenue and resultant fee for the following calendar year. Nothing herein shall preclude the Provider and the City from agreeing to a revised payment schedule.

(D) City's right to audit.

(1) Providers shall keep complete and accurate books of accounts and records of their business and operations pursuant to any Municipal Authority granted hereunder in accordance with generally accepted accounting principles. If required by the FCC, Providers shall use the system of accounts and the forms of books, accounts, records, and memoranda prescribed by the FCC in 47 CFR Part 32 or its successor, and as may be further described herein. The Director may require the keeping of additional records or accounts which are reasonably necessary for purposes of identifying, accounting for, and reporting Gross Revenue and uncollectibles for purposes of any Municipal Authority. Providers shall keep their books of account and records in such a way that identification of revenues by type of service within the City are available.

(2) (a) The City shall have the right to review or audit the Provider's books and records in accordance with regularly accepted accounting and audit standards regarding any amounts which may be owed under a Municipal Authority. This right includes the right to review and audit all books and records of revenue not included in the calculation of the fee paid. The City shall give

written notice to the Provider of any additional amount claimed to be due to the City as a result of the City's review.

(b) If the Provider disputes the additional amount allegedly due to the City, if any, the dispute shall be determined by binding arbitration pursuant to the rules of the American Arbitration Association, with arbitration to be held in the City. The party that substantially prevails should be awarded attorneys' fees and costs for expenses incurred in resolving any dispute arising from this section.

(3) In the event of an audit, the Provider shall provide City-specific books, records, contracts, account codes, documents, and papers for its operations within the City.

(4) All such books, records, and accounts of the Provider shall be retained by the Provider for a period of six years, in accordance with § 37-1-3 NMSA 1978, or its successor. The Provider shall make such records as are necessary for the City to complete its audit and be available for inspection by the City upon 30 days notice from the City.

(5) All audits will take place on Provider premises within the City of Albuquerque. The City's auditors may review all directly relevant materials and may make copies of any materials with the approval of the Provider. Such approval will not be unreasonably withheld.

(6) Providers shall report to the City such other information relating to the Municipal Authority as the Director may reasonably require and shall comply with the City's reasonable determination of forms for reports, the time for reports, the frequency with which any reports are to be made, and if reports are to be made under oath.

(7) The Director may, at any time, make inquiries pertaining to Providers' performance under the terms and conditions of a Municipal Authority. Providers shall respond to such inquiries on a timely basis.

(8) Providers shall furnish the City:

(a) On a monthly basis, copies of any application or petition filed by Provider with the State Corporation Commission or successor agency, as well as copies of show cause orders filed by that agency; and

(b) Annually, reports filed with the Securities and Exchange Commission and relating to any matters affecting the use of City streets, alleys, and Public Rights-of-Way and/or the Telecommunications Services authorized pursuant to a Municipal Authority granted under this Chapter.

(9) The City will maintain confidentiality of information provided by Providers to the maximum extent permitted by law when Providers have notified the City of the confidential nature of the information.

(Ord. 20-1997)

§ 13-4-10-5 TRANSFERS OF MUNICIPAL AUTHORITIES.

(A) (1) No Municipal Authority granted under this Chapter, the assets held by Providers for use under such Municipal Authority which are in the Public Rights-of-Way, or any rights or privileges of Providers under a Municipal Authority, either separately or collectively, shall be sold, resold, assigned, transferred, leased, or conveyed by Providers to any other Person, without notice to the City within 30 days of such proposed sale, transfer, or conveyance. Provider shall submit all information reasonably requested by the City relating to the financial, technical, and operational qualifications of the transferee. Prior to consummation of such sale, transfer, or conveyance, transferee shall affirmatively, and in writing, assume all obligations, rights, and liabilities of Provider as specified in any Municipal Authority or Franchise Contract.

(2) Any change of control of a Provider shall constitute a transfer under this section. A mortgage or other pledge of assets to a bank or lending institution in a bona fide lending transaction shall not be considered an assignment.

(B) In order that the City might share in the value any Authority or Franchise adds to the Provider's operation, any such transfer or assignment of any rights under this section by the Provider, subject to the exceptions listed in division (A) above, shall be subject to the condition that the transferee promptly pay the City one percent (1%) of any and all fees paid to the City, including the Municipal Authority fee paid to the City in the previous calendar year, not to exceed \$10,000, which amount the Provider and the City agree is reasonable. Such transfer fee shall not be recovered from the City or from City residents or property owners through rates or surcharges of the Provider.

(Ord. 20-1997)

§ 13-4-10-6 OBLIGATIONS OF PROVIDERS REGARDING THE PUBLIC RIGHTS-OF-WAY.

(A) Compliance with law. Providers are explicitly subject to the police powers of the City, any other governmental powers, and the City's rights as a property owner under state and federal laws. This ordinance is governed by and construed and enforced in accordance with the laws of the State of New Mexico.

(B) Construction plans and drawings.

(1) Before the Provider may conduct underground work involving excavation, new construction, or major relocation work in any Public Rights-of-Way:

(a) The Provider shall first notify the City through the acquisition of an Excavation and/or Barricade Permit and shall comply with any special

conditions relating to location, scheduling, coordination, and public safety; and

(b) The Provider shall file maps and/or drawings with the Director showing the location of any construction or extension of its facilities and services in any Public Rights-of-Way of the City. For multi-conduit duct banks, maps and drawings shall show overall size, material, and configuration of the duct bank. Upon request from the City, the Provider shall provide City with updates of the maps and drawings showing the location of any new construction, extension, or relocation of its facilities or line spot such facilities. All materials provided pursuant to this section shall be kept confidential to the fullest extent possible under the law.

(2) Proposed construction work to be done by the Provider shall be performed in a safe manner subject to the approval of the Director and in accordance with applicable federal and state laws and City Requirements now or hereinafter existing, including the street excavation ordinance, as that ordinance may be amended from time to time (which ordinance requires a Sidewalk, Drivepad, Curb, and Gutter Bond, a bond securing payment of permit fees, and evidence of at least \$1,000,000 in the requisite insurance coverage(s) or provision for self-insurance.)

(3) Prior to initiating any construction or extension of the Network and contemporaneous with the filing of maps and drawings, Provider shall tender a review/location fee, in addition to the franchise fee, with the Director. Such preconstruction review/location fee shall be \$1.50 per linear foot as diagramed and mapped; however, in no event shall such fee exceed \$30,000 on an annual basis. The review/location fee shall be imposed for all subsequent additions or extensions of the Provider's Network as may be proposed from time to time and shall be due each 15th day of January, the due date for updated maps.

(C) Installations, excavations, and restorations.

(1) (a) Pursuant to any Municipal Authority granted under this Chapter, the Provider shall have the right to excavate in, occupy, and use any and all Public Rights-of-Way for the purpose of installing, erecting, constructing,

repairing, maintaining, removing, relocating, and operating its facilities after obtaining any and all appropriate permits from the City, provided, however, that:

1. The Provider shall not place any of its facilities on, over, under, or within any City park, duly designated as such by the City, but nothing herein contained shall preclude the City from granting a revocable permit therefor;

2. The Provider shall not place any of its facilities on, over, or within the median portion of any boulevard or parkway, except for perpendicular crossings, without first having obtained the written permission of the City;

3. Where appropriate and as may be required by the City through any permitting process, installation, excavations, and restorations affecting street and/or lane closures shall be approved by the City and in accordance with current City policies and ordinances;

4. The City reserves the right to assist in the coordination and scheduling of any Provider projects where such project may be reasonably coordinated with the placement of other franchisee or Provider facilities. Otherwise, and subject to City permitting processes and approvals, it is recognized that, notwithstanding the foregoing, the Provider retains discretion over the timing of the Provider's proposed projects; and

5. The Provider shall, to the extent feasible, employ “trenchless” technology in the placement of its facilities.

(b) Except in an emergency, not less than two working days prior to the commencement of any work by the Provider which involves excavation in any Public Rights-of-Way, the Provider shall notify the Director through the barricade and excavation permit process, including payment of any and all fees. Provider shall comply with the street excavation ordinance as it now or may exist in the future.

(2) Whenever work is performed in any Public Rights-of-Way, the Provider shall take all reasonable precautions to minimize interruption to traffic flow, damage to property, or creation of a hazardous condition.

(3) After any excavation shall be made and after work is completed, the Provider, at Provider expense, shall as soon as practicable but not longer than one day, weather permitting, remove all surplus material in compliance with specifications, requirements, and regulations of the City in effect at the time of such restoration and restore the portion of the Public Rights-of-Way in a manner consistent with the normal specifications and requirements of the City. If the Provider fails to restore promptly the affected portion of the Public Rights-of-Way, including reseeded, following written notice to Provider, and reasonable opportunity to cure, the City may make the restoration in a manner satisfactory to City, and all costs incurred for such restoration, whether done with City work forces and equipment or otherwise shall be paid by the Provider, including the cost of any inspectors the City may assign to the project.

(4) The Provider shall be responsible for the maintenance of its own equipment, facilities, and appurtenances placed upon, over, or under the Public Right-of-Way, including the removal of all graffiti therefrom. If after notice from the City such graffiti has not been removed, it will be removed by the City at Provider's sole cost.

(5) The Provider shall ensure its public facilities in Public Rights-of-Way are located and constructed in a manner such that access is not impaired in compliance with the Americans with Disabilities Act (ADA). Following notice by the City of an ADA construction problem, the Provider shall have 30 days or other reasonable time to remedy the problem. In the event that the City and the Provider cannot agree that a problem exists, any dispute shall be submitted to non-binding mediation, with the assistance and through the City's Alternative Dispute Resolution (ADR) Coordinator.

(6) Execution of any Municipal Authority or Franchise Contract requires the Provider to become a member of a local utility coordinating committee, or a Provider may provide a similar service pursuant to a Municipal

Authority or Franchise Contract, which service would be governed by state law. If the Provider elects to become a member of the local utility coordinating committee, the Provider further agrees to participate in such organization(s) and abide by their articles of incorporation, by-laws, and other requirements.

(D) Location and relocation of facilities.

(1) All facilities of the Provider shall be placed so that they do not interfere with the use of Public Rights-of-Way by the City and shall only be placed after approval of the location by the Director and in accordance with any reasonable specifications adopted by the City governing the location of facilities. The City reserves the right to construct, install, maintain, and operate any public improvement, work, or facility, do any work that the City may find desirable on, over, or under any Public Rights-of-Way, and vacate, alter, or close any Public Rights-of-Way subject to Provider's rights set out at § 13-4-10-6E(3). All such work shall be done, if possible, in such a manner as not to obstruct, injure, or prevent use and operation of the Provider's Network or other facilities. Pursuant to any Municipal Authority, Provider agrees to obtain the City's express written approval before placing any poles in Public Rights-of-Way that do not currently exist in Public Rights-of-Way.

(2) (a) After notice to the Provider, where relocation cannot reasonably be avoided and where the City and the Provider agree that no alternative exists, the City may require the removal or relocation of facilities used by the Provider in any Public Rights-of-Way as may reasonably be required by the or caused or occasioned by any City project, including but not limited to the installation of water, sanitary sewer, storm drainage, or traffic signal facilities, road reconstruction, or other Public Right-of-Way construction. The Provider shall remove and relocate such facilities within 60 days following notice to do so from the City. Projects requiring, in the opinion of the Provider, in excess of 60 days to complete shall be completed in a time frame determined on a project specific basis. Prior to any such relocation, the City agrees to provide for a suitable location for such relocated facilities sufficient to maintain service. The cost of any removal or relocation of its facilities shall be paid by the Provider. Notwithstanding the foregoing, the Provider shall not be required by the City to relocate its facilities to accommodate another franchisee or Provider in the City. The costs of any

relocations occasioned by another franchisee of the City in no event shall be the responsibility of the City.

(b) The Provider shall reconstruct, replace, or restore any street, alley, or public way or place in a timely fashion and any water, sewer, sanitary sewer, storm drainage, traffic signalization facilities, or other facility of the City disturbed by the Provider, without cost to the City, to a condition acceptable to the City consistent with reasonable standards of safety and appearance. Any facility so disturbed by the Provider shall be reconstructed, replaced, or restored only under the supervision of City personnel.

(c) Subject to the provisions of this section and upon notice to the City, the Provider may remove or relocate facilities maintained by the Provider on its own initiative.

(3) Where the City, acting through itself, an agent, contractor, or permit holder, proposes to improve a street, which requires the relocation of an existing aerial facility within the Public Rights-of-Way under its jurisdiction or control, the Provider shall replace such overhead distribution facilities as are then within the affected right-of-way with underground facilities. All such relocations shall be at Provider expense. The conversion from overhead to underground shall be conditioned upon the City requiring the undergrounding in the area in which both the existing and new facilities are and will be located. Such replacement of overhead with underground distribution facilities shall be paid for by the Provider.

(E) Public works and improvements.

(1) The City reserves the right to construct, install, maintain, and operate any public improvement, work, or facility and do any work that the City may find desirable on, over, or under any Public Rights-of-Way. All such work shall be done, if possible, in such manner as not to obstruct, injure, or prevent free use and operation of the Provider's Facilities.

(2) Whenever the City shall excavate or perform any work in any present and/or future Public Rights-of-Way of the City, or shall contract, for such excavation or work, where such excavation or work may disturb but not require removal or relocation of Provider's facilities, the City shall notify the Provider sufficiently in advance of such contemplated excavation or work to enable the Provider to take such measures as may be deemed necessary to protect and support such facilities from damage and possible inconvenience or injury to the public or the City's Public Rights-of-Way. If the Provider cannot take such measures, the Provider shall be required to relocate its facilities in accordance with this Chapter. In such case, the Provider upon request shall furnish field markings to the City or contractor, as the case may be, showing the location of all its facilities in the area involved in such proposed excavation or other work.

(3) Whenever the City shall vacate any Public Rights-of-Way for the convenience or benefit of any person or governmental agency or instrumentality, the Provider's rights shall be preserved as to any of its facilities then existing in such Public Rights-of-Way.

(F) Provider offices. Within one year of the effective date of any Municipal Authority or Franchise Contract or upon commencement of operation and throughout the duration of the Municipal Authority or Franchise Contract or any extension thereto, Provider shall be required to establish and maintain offices within the City, for operational and maintenance purposes, or as may be required by the City by agreement.

(G) Moving of buildings. Whenever it becomes necessary to temporarily rearrange, remove, lower, or raise the aerial cables or wires or other apparatus of the Provider to permit the passage of any building, machinery, or other object, the Provider shall perform such rearrangement upon the receipt of written notice from the person or persons desiring to move said building, machinery, or other objects. The written notice shall detail the route of movement of the building, machinery, or other object. The costs incurred by the Provider in making such rearrangements of its aerial plant will be borne, excepting the City, by the person or persons seeking such rearrangement, unless the aerial plant is placed or maintained in violation of the applicable rules of any local, state, or federal

regulatory agency and thereby interferes with the movement.

(H) Safety standards. The facilities of the Provider shall at all times be constructed, operated, and maintained so as to protect and safeguard the health and safety of the public, and to this end Provider shall observe all rules pertaining thereto prescribed by any local, state, or federal regulatory authority.

(I) Joint use agreements. The Provider is authorized to enter into joint-use agreements with any person or entity franchised by the City with respect to the placement of facilities. The Provider may require any such person or entity to furnish evidence of adequate insurance covering the Provider and adequate bonds covering the performance of the person or entity attaching to the Provider's facilities as a condition precedent to granting permission to any such person or entity to attach facilities to the Provider's facilities, provided that the Provider's requirements for such insurance shall be reasonable.

(J) Interference. The Provider shall not be required to attach its facilities to the facilities of any other person or entity or to permit the facilities of any other person or entity to be attached to the Provider's facilities if it can be shown satisfactorily to the City that the Provider will be subjected to increased risks of interruption of service or to increased liability for accidents, or if the facilities of such other person or entity are not of the character, design, and construction required by, or are not being maintained in accordance with industry standards or practice.

(K) Supplying maps. Provider shall maintain on file all available maps, operational data, and reports pertaining to its operations in the City. The City may inspect the maps, data, and reports at any time during business hours. Upon request of the City, the Provider shall furnish to the City, as soon as practicable without charge, current maps, either in a "hard copy" printed form or in the City's AGIS format or compatible data base, showing the location and dimension of any facilities, but not other proprietary information, used in operating the Provider's facilities within the City of Albuquerque.

(L) Limitation on privileges. All rights, authority, and grants contained or conferred are also conditioned upon the understanding and agreement that these privileges in the Public Rights-of-Way of the City are not to operate in any way so as to be an enhancement of the Provider's properties or values or to be an asset or item of ownership in any appraisal thereof in the event of a City acquisition, by purchase or otherwise. In the event that the City shall at any time hereafter acquire the property of the Provider, by purchase or otherwise, the value of any Municipal Authority shall be fixed and determined at \$1.

(Ord. 20-1997)

#### § 13-4-10-7 INSURANCE REQUIREMENTS.

(A) Providers shall obtain and maintain in full force and effect throughout the term of a Municipal Authority granted under this Chapter insurance with an insurance provider licensed to do business in the State of New Mexico and acceptable to the City or shall provide evidence that it is a qualified self-insured. All insurance providers will be required to be rated A-VI or better by A.M. Best or A or better by Standard and Poors. Providers shall furnish the City with proof of such insurance so required at the time of the filing of the acceptance of a Municipal Authority. The City reserves the right to review these insurance requirements during the effective period of any Municipal Authority and to reasonably adjust insurance coverage and its limits when deemed necessary and prudent by the City's Risk Manager, based upon changes in statutory law, court decisions, or the claims history of the industry or the insurance provider.

(B) Subject to Providers' right to maintain reasonable deductibles in such amounts as are approved by the Director, Providers shall obtain and maintain in full force and effect for the duration of any Municipal Authority, at Providers' sole expense, insurance coverage in the type and minimum amounts as may be required by the City.

(C) The Director shall be entitled, upon request and without expense, to receive copies of certificates of insurance evidencing the coverage required

above. The Director may make any reasonable requests for deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon either City or a Provider, or upon the underwriter for any of such policies. Upon request for deletion, revision, or modification by the Director, Providers shall exercise reasonable efforts to accomplish the changes and shall pay the cost thereof.

(D) Providers shall agree that with respect to the above-required insurance, all insurance certificates will contain the following required provisions:

(1) Name the City of Albuquerque and its officers, employees, board members, and elected representatives as additional insureds (as the interests of each insured may appear) as to all applicable coverage;

(2) Provide for 30 days notice to the City for cancellation, non-renewal, or material change;

(3) Provide for notice to both the Director and the Office of Risk Management by certified mail; and

(4) Provide that all provisions of this Chapter and the Municipal Authority, as amended, concerning liability, duty, and standard of care, including the indemnity section, shall be underwritten by contractual coverage sufficient to include such obligations within applicable policies, subject to policy terms and conditions.

(E) The insurance certificates obtained by Providers in compliance with this section shall be subject to approval by the City, and such proof of insurance shall be filed and maintained with the Director and the Office of Risk Management during the term of a Municipal Authority, or any extension or renewal thereof, and may be changed from time to time to reflect changing liability limits, as required by the City. Providers shall immediately advise the City Attorney of any actual or potential litigation that may develop that would affect insurance

coverage related to any Municipal Authority.

(F) Insurers shall have no right of recovery against the City, it being the intention that the insurance policies shall protect Providers and the City and shall be primary coverage for all losses covered by the policies.

(G) Companies issuing the insurance policies shall have no recourse against the City of Albuquerque for payment of any premiums or assessments, which all are set at the sole risk of the Providers. Insurance policies obtained by Provider shall provide that the issuing company waives all right of recovery by way of subrogation against the City in connection with any damage covered by these policies.

(Ord. 20-1997)

§ 13-4-10-8 TERM OF MUNICIPAL AUTHORITIES.

The term of each Municipal Authority granted under this Chapter shall be subject to negotiation with Applicants but in no event shall exceed 10 years.

(Ord. 20-1997)

§ 13-4-10-9 RATES.

The rates to be charged by the Provider for Telecommunication Service shall comply with the appropriate regulatory authority, or any other governmental official, commission, or body having jurisdiction.

(Ord. 20-1997)

#### § 13-4-10-10 INDEMNITY.

Each Municipal Authority granted under this Chapter shall contain provisions whereby the Provider agrees to defend, indemnify, and hold harmless the City and its officials, agents, and employees from and against any and all claims, actions, suits, or proceedings of any kind brought against said parties because of any injury or damage received or sustained by any person, persons, or property arising out of or resulting from the Authority granted to Provider or by reason of any asserted act or omission, neglect, or misconduct of the Provider, or Provider's agents or employees, or any subcontractor or its agents or employees. The indemnity required hereunder shall not be limited by reason of the specification of any particular insurance coverage.

(Ord. 20-1997)

#### § 13-4-10-11 VIOLATIONS AND PENALTIES.

(A) Failure of a Provider to abide by the requirements of § 13-4-10-6, regarding the Public Rights-of-Way: \$50 per day for each day such violation occurs.

(B) Failure of a Provider to abide by the requirements of § 13-4-10-4, regarding compensation for use of the Public Rights-of-Way, and the City's right to perform audits: \$50 per day for each day such violation occurs.

(C) Default and termination of Municipal Authorities:

(1) The Provider agrees that an Event of Default shall include but shall not be limited to any of the following acts or failure to act by the Provider:

(a) Failure to obtain any applicable permits from the City pursuant to this Chapter or the Municipal Authority or Franchise Contract.

(b) Failure to comply with the assignment of or transfer of control provisions of this Chapter or the Municipal Authority or Franchise Contract.

(c) Failure to supply any required non-monetary consideration.

(d) Failure to supply bonds as may be required by the City to assure the proper completion of any construction performed.

(e) Failure to make any of the payments set forth in this Chapter or as required in any Municipal Authority or Franchise Contract.

(f) Failure to pay any permit fees, or failure to comply with any rules, regulations, orders, or directives of the City as set forth in this Chapter or any Municipal Authority or Franchise Contract.

(2) Upon the occurrence of an Event of Default, in accordance with the procedures provided for in this Chapter or any Municipal Authority or Franchise Contract, the City may:

(a) Require the Provider to take such actions as the City deems are appropriate; or

(b) Seek money damages from the Provider as compensation for such Event of Default; or

(c) Accelerate the expiration of the term of any Municipal Authority or Franchise Contract by decreasing the term of the Municipal Authority or Franchise Contract. The extent of such acceleration shall be determined by the City and may include any period of time, but not less than six

months, provided that six months remain under the Municipal Authority; or

(d) As a last measure only, terminate the Municipal Authority or Franchise Contract.

(3) The City shall exercise the rights set forth in this section in accordance with the following procedures:

(a) The Director shall notify the Provider, in writing, of an alleged Event of Default. This written notice shall set forth with reasonable specificity the facts the City believes are the basis for declaring that an Event of Default has occurred. The Provider shall within 30 calendar days of the date the notice is postmarked, or such additional time as the Director may specify in the notice, cure the alleged Event of Default, or in writing present for review by the Director a reasonable time frame and method to cure the Event of Default. The Provider, in lieu of the cure of the Event of Default as set forth herein, may in writing present facts and arguments as to why the Provider disagrees that an Event of Default has occurred.

(b) If the Provider presents a written response that challenges whether an Event of Default has occurred, the Director shall within ten days review the submitted materials and determine again whether an Event of Default has occurred. If the Director reaffirms that an Event of Default has occurred, the Provider shall be notified in writing of this decision and shall, within 30 calendar days, cure the alleged Event of Default. The period to cure is tolled in the event one party demands mediation until such time as mediation is completed.

(c) If the Provider fails to cure the Event of Default so declared pursuant to this section within the time permitted by the Director, the Director shall prepare a written report to the Council and recommend action to be taken. If the Council, after consideration of this report and hearing, agrees that an Event of Default has occurred, it may order an appropriate remedy as set forth herein.

(4) In addition to the rights under this section, the City, upon any termination, may, at its sole discretion, direct the Provider to remove, at the Provider's sole cost and expense, any or all of the facilities from all Public Rights-of-Way within the City, subject to the following:

(a) The City may determine that removal of facilities is not necessary;

(b) In removing any part of the facilities, the Provider shall refill and compact, at its own expense, any excavation that shall be made by it and shall leave all Public Rights-of-Way in as good a condition as that prevailing prior to the Provider's removal of the facilities;

(c) The City shall have the right to inspect and approve the conditions of Public Rights-of-Way after removal has occurred;

(d) The removal shall commence within 30 days of an order to remove being issued by the Director at the discretion of the Council;

(e) The Provider shall be responsible for all necessary removals of the facilities and maintenance of the street area in the same manner and degree as if the facilities were in active use, and the Provider shall retain all liability associated with such removals.

(f) As an alternative to removal, the Provider may, subject to the City's approval, abandon its facilities in place and transfer ownership of the installed facilities to the City. Nothing herein shall cause the City to incur any costs related to the removal of the Provider's facilities or the transfer of ownership of said facilities to the City.

(D) Remedies and penalties not exclusive. All remedies and penalties granted pursuant to this Chapter and any Municipal Authority or Franchise Contract are cumulative and not exclusive, and the recovery or enforcement by one

available remedy or imposition of any penalty is not a bar to recovery or enforcement by any other such remedy or imposition of any other penalty. The City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition, or obligation imposed upon the Provider by or pursuant to this ordinance or any Municipal Authority. A specific waiver of a particular breach of any term, condition, or obligation imposed upon the Provider by or pursuant to this ordinance or any Municipal Authority shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition, or obligation, or a waiver of the term, condition, or obligation itself.

(Ord. 20-1997)

§ 13-4-10-12 UNAUTHORIZED USE OF PUBLIC RIGHTS-OF-WAY UNLAWFUL.

(A) It shall be unlawful for any person to use the Public Rights-of-Way to provide Telecommunications Service that have not been authorized by the City in accordance with the terms of this Chapter.

(B) It shall be unlawful for any person to place facilities on Public Structures or utility infrastructure to provide Telecommunications Service not allowed under the terms of a Municipal Authority.

(C) Each unauthorized Telecommunications Service or use shall be deemed to be a distinct and separate offense. Each day a violation of this Chapter continues shall constitute a distinct and separate offense.

(D) The violation of any provision of this Chapter shall be unlawful and a misdemeanor offense. The penalty for any violation of this Chapter shall be as provided in the Revised Ordinances of Albuquerque, 1994.

(Ord. 20-1997)

§ 13-4-10-13 SEVERABILITY CLAUSE.

If any section, subsection, sentence, clause, phrase, term, provision, condition, covenant, or portion of this ordinance is for any reason held invalid, unenforceable, or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity or enforceability of the remaining portions of this ordinance. The Council hereby declares that it would have passed this ordinance and each portion thereof irrespective of any provision being declared unconstitutional or otherwise invalid.

(Ord. 20-1997)

§ 13-4-10-14 PUBLIC PURPOSE.

All of the requirements provided in this ordinance are hereby declared to be for a public purpose and the health, safety, and welfare of the general public and to ensure proper management of the Public Rights-of-Way. Any member of the governing body or City official or employee charged with the enforcement of this ordinance, acting for the City in the discharge of his duties, shall not thereby render himself personally liable, and he is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his said duties. Neither the City nor any Provider waives its right to seek all appropriate legal and equitable remedies as allowed by law upon violation of the terms of this Chapter or any Municipal Authority, including seeking injunctive relief in a court of competent jurisdiction. Such right to injunctive relief is expressly reserved and all terms and provisions hereof shall be enforceable through injunctive relief.

(Ord. 20-1997)

## § 13-4-10-15 PUBLIC MEETING.

It is hereby officially found and determined that the meeting at which this ordinance is passed is open to the public as required by law and that public notice of time, place, and purpose of said meeting was given as required.

(Ord. 20-1997)

Editor's note: The following franchise ordinances have been approved granting Municipal Authority to rent, use and occupy public rights-of-way to provide telecommunications services: Ord. 37-1997, approved November 10, 1997, granted to US West Communications, Inc.; Ord. 38-1997, approved November 10, 1997, granted to GST Telcom New Mexico, Inc.; Ord. 52-2000, approved December 28, 2000, granted to McLeodUSA Telecommunications Services, Inc.; and Ord. O-2008-017, approved May 12, 2008, granted to CityLink Fiber Holdings of Albuquerque, LLC.