ORDINANCE NO. 1682

AN ORDINANCE OF THE CITY OF DES MOINES granting a non-exclusive Franchise to construct, install, operate, maintain, repair, or remove telecommunications facilities within the public ways of the City of Des Moines ("City") to MCImetro Access Transmission Services Corp. d/b/a Verizon Access Transmission Services ("Grantee"). Grantee's telecommunications facilities shall not include antennas and support structures specifically for attaching antennas that are used for personal wireless communications services. The City and Grantee are sometimes hereinafter collectively referred to individually as a "party" and collectively as the "parties."

WHEREAS, MCImetro Access Transmission Services Corp. d/b/a Verizon Access Transmission Services, a corporation organized and existing under the laws of the State of Delaware is a competitive telecommunications company providing telecommunication services, including voice, internet and data services, which desires to occupy the City of Des Moines rights-of-ways to install, construct, operate, and maintain its telecommunications facilities and network for the purpose of providing services to its customers at locations within the City, and

WHEREAS, the Grantee, MCImetro Access Transmission Services Corp. d/b/a Verizon Access Transmission Services, has represented to the City that it provides a telephone business as defined by RCW 82.16.010 or acts as a service provider as such term is defined in RCW Section 35.99.010, and

WHEREAS, Grantee has applied to the City for a non-exclusive telecommunications service franchise to enter, occupy, and use public ways to construct, install, operate, maintain, and repair telecommunications facilities to offer and provide telecommunications service for hire, sale, or resale in the City, and

WHEREAS, the City is authorized by applicable law to grant one or more nonexclusive franchises within the boundaries of the City, and

WHEREAS, the 1934 Communications Act, as amended relating to telecommunications providers recognizes and provides local government authority to manage the public rights-of-way and to

require fair and reasonable compensation on a competitively neutral and nondiscriminatory basis, and

WHEREAS, a franchise does not include, and is not a substitute for any other permit, agreement, or other authorization required by the City, including without limitation, permits required in connection with construction activities in public ways which must be administratively approved by the City after review of specific plans, and

WHEREAS, Grantee shall be responsible for its actual costs in using, occupying and repairing public ways, and

WHEREAS, the City and Grantee desire to effectuate good coordination of the use of the rights-of-way, and

WHEREAS, the City Council finds that the franchise terms and conditions contained in this Ordinance are in the public interest; now therefore,

THE CITY COUNCIL OF THE CITY OF DES MOINES ORDAINS AS FOLLOWS:

Sec. 1. Definitions.

(1) **Use of words and phrases.** For the purposes of this Franchise, the following terms, phrases, words, and their derivations will have the meanings given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined will have the meaning ascribed to those words in the Des Moines City Code (DMMC), or in the Federal Communications Act of 1934 as amended, unless inconsistent herewith. The headings contained in this Franchise are to facilitate reference only, do not form a part of this Franchise, and shall not in any way affect the construction or interpretation hereof. The words "shall," "will," and "must" are mandatory, and the word "may" is permissive or directory.

(2) "Abandonment" means the disconnection by the Grantee of specific Facilities from the telecommunications system.

(3) "Affiliate" means any Person who owns or controls, is owned by or controlled by, or is under common ownership or control with Grantee.

(4) "Cable Act" means the Cable Communications Policy Act of 1984 as amended and as may be amended from time to time during the term of this Franchise (47 U.S.C. § 521 et seq., as amended).

(5) "Cable service" means the one-way transmission to subscribers of video programming or other programming service and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

(6) "City Council" means the governing body of the City.

(7) "Communications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(8) "Communications applications fees and charges" includes fees and charges connected to right-of-way management, construction permit, permit design fee, building permit, encroachment permit, inspections and pavement restoration.

(9) "Communications service" means the offering of communications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(10) "Communications system" or "system" means only those facilities necessary for Grantee to provide Communications services.

(11) "Conduit" means optical cable housing, jackets, or casing, and pipes, tubes, or tiles used for receiving and protecting wires, lines, cables, and communication and signal lines.

(12) "Costs" means costs, expenses, and other financial obligations of any kind whatsoever.

(13) "Dark fiber" means properly functioning optical cable which is not used or available for use by Grantee or the general public, but may be made available for use under lease to third parties.

(14) "Effective date" means five days following the publication of this Franchise or a summary thereof occurs in an official newspaper of the City as provided by law.

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

(16) "Facilities" means, collectively, any and all telecommunications transmission systems and appurtenances owned by Grantee, now and in the future, in the Franchise Area, including, but not limited to, wire, radio, optical cable, electromagnetic or other similar types of equipment and related appurtenances in any way comprising part of the System.

(17) "FCC or Federal Communications Commission" means the agency as presently constituted by the United States Congress or any successor agency with jurisdiction over telecommunications service matters.

(18) "Fiber optic" means a transmission medium of optical fiber cable, along with all associated optronics and equipment, capable of carrying telecommunication service by means of electric light-wave impulses.

(19) "Franchise area" means the area within the jurisdictional boundaries of the City, including any annexed areas, to be served by Grantee as specified in this Franchise.

(20) "Gross Revenues" means all gross revenues received by Grantee or its affiliates from the provision of intrastate telephone business activities in the City of Des Moines, as described in Utility Tax below.

(21) "Incremental costs" means the actual and necessary costs incurred which exceed costs which would have otherwise been incurred.

(22) "Optical cable" means wires, lines, cables and communication and signal lines used to convey communications by fiber optics.

(23) "Open Video System" means a facility consisting of a set of transmission paths and associated signal generation, reception and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple subscribers within a community, provided that the Federal Communications Commission has certified that such system complies with 47 CFR 76.1500 et seq.

(24) "Person" means any individual, firm, partnership, association, joint stock company, trust, corporation, company, governmental entity.

(25) "Public ways or rights-of-way" includes the surface, the air space above the surface, and the area below the surface of any public street, highway, parkway, circle, lane, alley, sidewalk, boulevard, drive, bridge, tunnel, easement or similar 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, repair, and maintenance of a Telecommunication System. No reference in this Franchise to a public right-of-way shall be deemed to be a representation or guarantee by the City that its interests or other rights in such property are sufficient to permit its use for the installation, repair, and maintenance of a Telecommunication System, and the Grantee shall be deemed to gain only those rights which the City has the undisputed right and power to give. For this Franchise, public ways and rights-of-way are limited to the areas above the ordinary high water mark of Puget Sound.

(26) "Route map" means a geographic representation of the Grantee's Telecommunication System as it exists within the public right-of-way and within private easements in the Franchise area.

(27) "Subscriber" means any Person who or which purchases, leases, rents, obtains or subscribes to Telecommunications Service provided by Grantee by means of or in connection with the Grantee's Telecommunications System.

(28) "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(29) "Telecommunications applications fees and charges" includes fees and charges connected to right-of-way management, construction permit, permit design fee, building permit, encroachment permit, inspections and pavement restoration.

(30) "Telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. Telecommunications service shall also include offering Internet access, private line service, front- and back-haul transport and/or leasing dark fiber directly to the public or third parties.

(31) "Telecommunications system" or "system" means only those facilities necessary for Grantee to provide Telecommunications service.

(32) "Underground facilities" means facilities located under the surface of the ground, other than underground foundations or supports for overhead facilities.

(33) "Utility poles" means poles, and crossarms, devices, and attachments directly affixed to such poles which are used for the transmission and distribution of electrical energy, signals, or other methods of communication.

(34) "Wireless Communications Facilities" means the site, wireless communications support structures, antennas, accessory equipment structures, and appurtenances used to transmit, receive, distribute, provide or offer personal wireless communications services. Wireless communications facilities include, but are not limited to antennas, poles, towers, cables, wires, conduits,

ducts, pedestals, vaults, buildings, and electronic switching equipment.

Sec. 2. Franchise - Grant of authority.

(1) **Use of public rights-of-way.** There is hereby granted to Grantee the right and privilege, to have, acquire, construct, reconstruct, upgrade, repair, maintain, use, and operate in the City a Telecommunications System, and to have, acquire, construct, reconstruct, repair, maintain, use, and operate in, over, under, and along the present and future Public rights-of-way of the City all necessary or Facilities, including without limitation, desirable wires, cables, electronic conductors, underground conduits, vaults, and other structures and appurtenances necessary for the construction, maintenance, and operation of Grantee's Telecommunications system in the Franchise Area. Grantee or Affiliates shall not install or construct facilities within the City's Public Rights-of-Way which are not authorized by this Franchise or lawfully allowed by applicable local, state, or federal law.

(2) **Additional services/compensation.** By granting this Franchise, the City does not waive and specifically retains any right to regulate and receive compensation as allowed by law for services offered over the Telecommunication system which are not Telecommunication services. Upon request, Grantee shall inform City of any non-Telecommunication and/or Telecommunication services offered over the Telecommunication system of which Grantee or its Affiliates are aware. By accepting this Franchise, Grantee does not waive any right it has under law to challenge the City's requirement for authorization to provide non-Telecommunication Services.

(3) **Responsibility for costs.** Except as expressly provided otherwise, any act that Grantee is required to perform under this Franchise shall be performed at Grantee's cost. If Grantee fails to perform work that it is required to perform within the time provided for performance or a cure period, the City may perform the work and bill the Grantee for documented costs. The Grantee shall pay the amounts billed within thirty (30) days. The parties agree that any amounts paid pursuant to this Section are not Franchise fees and fall within one or more of the exceptions to the definition of Franchise fee under federal law.

Nothing in this section is intended to affect in any way (by expansion or contraction) Grantee's rights under applicable law governing the ability to impose any costs, including but not limited to the rates charged.

(4) **Publication costs.** Any and all costs of publication related to this Franchise which may be required by law or action of City Council shall be borne by Grantee. Any payments made by the City under this provision are to be reimbursed to the City within thirty (30) days of Grantee's receipt of the invoice.

(5) **Franchise non-exclusive.** The rights, privileges of any franchise granted pursuant to chapter 20.04 of the Des Moines Municipal Code (DMMC) shall be nonexclusive. This Franchise shall not be construed as any limitation upon the right of the City, through its proper officers, to grant to other persons or corporations, including itself, rights, privileges or authority the same as, similar to or different from the rights, privileges or authority herein set forth, in the same or other streets and public ways by Franchise, permit or otherwise. The City shall not authorize or permit any Person providing Communication services to enter into the Public rights-of-way in any part of the City on terms or conditions that, when viewed collectively, are generally more favorable or less burdensome to such Person than those applied to the Grantee pursuant to this Franchise.

(6) Nothing in this Franchise excuses Grantee of its obligation to identify its facilities and proposed facilities and their location or proposed location in the public ways and to obtain use and/or development authorization and permits from the City before entering, occupying, or using public ways to construct, install, operate, maintain, repair, or remove such facilities.

(7) Nothing in this Franchise excuses Grantee of its obligation to comply with applicable codes, rules, regulations, and standards subject to verification by the City of such compliance.

(8) Nothing in this Franchise shall be construed to limit taxing authority or other lawful authority to impose charges or fees, or to excuse Grantee of any obligation to pay lawfully imposed charges or fees. Notwithstanding any other provision of

this Franchise, nothing in this Franchise is intended to alter, amend, modify or expand the taxes and fees that may lawfully be assessed on Franchisee's business activities under this Franchise under applicable law.

(9) Nothing in this Franchise grants authority to Grantee to impair or damage any City property, public way, other ways or other property, whether publicly or privately owned.

(10) Nothing in this Franchise shall be construed to create a duty upon the City to be responsible for construction of facilities or to modify public ways to accommodate Grantee's facilities.

(11) Nothing in this Franchise shall be construed to create, expand, or extend any liability of the City to any third party user of Grantee's facilities or to otherwise recognize or create third party beneficiaries to this Franchise.

(12) Nothing in this Franchise shall be construed to permit Grantee to unlawfully enter or construct improvements upon the property or premises of another.

(13) Nothing in this Franchise grants authority to Grantee to enter, occupy or use City property, nor to install or construct facilities within the City's Public rights-of-way which are not authorized by this Franchise or lawfully allowed by applicable local, state, or federal law.

(14) Nothing in this Franchise grants authority to Grantee to provide or offer cable service as cable service is defined in 47 U.S.C. § 522(6), Open Video System services. This Franchise does not relieve Grantee of any obligation it may have to obtain from the City separate authorization to provide Cable or Open Video System services, or relieve Grantee of its obligation to comply with any such authorizations that may be lawfully required.

(15) Grantee may use its facilities authorized by this Franchise to provide telecommunications service only as expressly provided in this Franchise.

Sec. 3. Term evaluation, and renewal.

(1) This Franchise shall run for a period of ten (10) years unless extended or terminated sooner as hereinafter provided. This Franchise shall commence after the effective date of this Franchise and in accordance with the written acceptance requirements herein.

(2) Should the Parties fail to formally renew this Franchise prior to the expiration of the ten (10) year renewal period, the Franchise shall automatically continue on a month to month period until renewed or either party gives written notice at least one hundred and eighty (180) days in advance of intent not to renew the Franchise.

(3) On the fifth (5th) anniversary of this Franchise, if either party identifies one or more specific issues that the party believes may require a reevaluation of one or more of the material terms of this Franchise, the Parties agree to discuss such issues diligently and in good faith. Notwithstanding the foregoing, either party may at any time during the term of this Franchise, request a clarification of a term, or seek an amendment to, this Franchise.

Sec. 4. Compliance with City, state, and federal laws.

(1) **Compliance with applicable laws.** Grantee shall at all times comply with all laws, rules, and regulations of the City, state and federal governments and any administrative agencies thereof which are applicable to all businesses in the City and/or all users of the Public rights-of-way. The express provisions of this Franchise constitute a valid and enforceable contract between the parties.

(2) **Other ordinances.** This Franchise and all rights and privileges granted hereunder are subject to, and the Grantee must exercise all rights in accordance with, applicable law, as amended over the Franchise term. However, this Franchise is a contract, subject only to the City's exercise of its police powers and applicable law, and in case of any conflict between the express terms of this Franchise and any ordinance enacted by the City, this Franchise shall govern, except where such ordinance would result in a competitor to Grantee having more favorable franchise

terms than Grantee in which case City will notify Grantee and offer Grantee the opportunity to amend this Franchise consistent with such terms. This Franchise does not confer rights or immunities upon the Grantee other than as expressly provided herein. The Grantee reserves the right to challenge provisions of any ordinance that conflicts with its contractual rights, and does not waive its right to challenge the lawfulness of a particular enactment, including on the grounds that a particular action is an unconstitutional impairment of contractual rights.

(3) **Police power of the City.** Construction, maintenance, and operation of Grantee's Telecommunication system and all property of Grantee subject to the provisions of this Franchise shall be subject to all lawful police powers, rules, and regulations of the City. The Grantee shall be subject to the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the general public in relation to the rights granted in the Franchise area. The City reserves the right to use, occupy and enjoy any Public rights-of-way or other public places for any purpose, including without limitation, the construction of any water, sewer or storm drainage system, installation of traffic signal systems, intelligent transportation systems, street lights, trees, landscaping, bicycle paths and lanes, equestrian trails, sidewalks, other pedestrian amenities, other City services, or uses not limited to the enumerated items as listed herein, and other public street improvement projects. The City shall have the power at any time to order and require Grantee to remove or abate any pole, line, tower, wire, cable, guy, conduit, electric conductor, or any other structure or facility that is dangerous to life or property. In the event Grantee, after written notice, and the unencumbered ability to comply, fails or refuses to act within fifteen (15) days of such written notice, City shall have the power to remove or abate the same at the expense of Grantee, all without compensation or liability for damages to Grantee except in instances when the damage is caused by negligence or willful misconduct of the City or its agents. Any conflict between the terms or conditions of this Franchise and any other present or future exercise of the City's police powers will be resolved in favor of the exercise of the City's police power.

(4) **Notification in the event of preemptive law.** Grantee shall use its best efforts to notify the City of any change in

law that materially affects Grantee's rights or obligations under this Franchise.

(5) **Amending franchise to conform to subsequent law.** The City reserves the right at any time to amend this Franchise to conform to any hereafter enacted, amended, or adopted federal or state statute or regulation relating to the public health, safety, and welfare, or relating to roadway regulation, or a City Ordinance enacted pursuant to such federal or state statute or regulation upon providing Grantee with thirty (30) days written notice of its action setting forth the full text of the amendment and identifying the statute, regulation, or ordinance requiring the amendment. Said amendment shall become automatically effective upon expiration of the notice period unless, before expiration of that period, the Grantee makes a written call for negotiations over the terms of the amendment. If the parties do not reach agreement as to the terms of the amendment within thirty (30) days of the call for negotiations, the City may enact the proposed amendment, by incorporating the Grantee's concerns to the maximum extent the City deems possible.

Sec. 5. Conditions of public rights-of-way occupancy.

(1) **Use permits and/or development authorization.** Grantee shall obtain use, right-of-way construction, and/or development authorization and required permits from the City and all other appropriate regulatory authorities prior to constructing or installing facilities or performing other work in the franchise area. Grantee shall provide the following information for all facilities that it proposes to construct or install:

(a) Engineering plans, specifications and a network map of the proposed facilities and their relation to existing facilities, in a format and media requested by the City in sufficient detail to identify:

(i) The location and route of the proposed facilities;

(ii) When requested by the City, the location of all overhead and underground public utility, communication, cable, water, sewer, drainage and other facilities in the public way along the proposed route;

(iii) When requested by the City, the location(s), if any, for interconnection with the communication facilities of others;

(iv) The specific trees, structures, improvements, facilities and obstructions, if any, that Grantee proposes to temporarily or permanently alter, remove or relocate.

(b) If Grantee is proposing to install overhead facilities, the Grantee shall provide evidence that the proposed overhead installation is in compliance with all applicable provisions of the Des Moines Municipal Code. The Grantee shall also provide evidence of Grantee's authorization to use each utility pole along the proposed route together with any conditions of use imposed by the pole owner(s) for each pole, and written acknowledgement by the Grantee that if the overhead facilities are subsequently relocated underground, the Grantee shall relocate underground at no cost to the City, except as otherwise provided in RCW Section 35.99.060.

(c) If Grantee is proposing to install underground facilities in existing ducts or conduits within the public ways, information in sufficient detail to identify:

(i) Evidence of ownership or authorization to use such ducts or conduits;

(ii) Conditions of use imposed by the owner(s) of the ducts or conduits;

(iii) If known to Grantee or reasonably ascertainable to Grantee, the total capacity of such ducts or conduits; and

(iv) If known to Grantee or reasonably ascertainable to Grantee, the amount of the total capacity within such ducts or conduits which will be occupied by Grantee's facilities.

(d) If Grantee is proposing to install underground facilities in new ducts or conduits within the public ways:

(i) The location proposed for new ducts or conduits;

(ii) The total capacity of such ducts or conduits; and

(iii) The initial listing of co-located facilities located within Grantee constructed or installed ducts or conduits.

(e) A preliminary construction schedule and completion date together with a traffic control plan in compliance with the Manual on Uniform Traffic Control Devices (MUTCD) for any construction.

(f) Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the facilities.

(g) Such other documentation and information regarding the facilities requested by the City.

(h) The requirements of this section do not apply to installation of optical cable necessary to connect a customer of Grantee to a previously approved facility; provided that neither excavation nor trenching in the public right-of-way is required; that the optical cable does not cross a distance of more than eighty (80) feet from its point of connection to the approved facility and the point where it exits the public right-of-way; that the optical cable connection meets or exceeds all applicable technical standards required by law; that the optical cable connection is durable and installed in accordance with good engineering, construction, and installation practices and does not interfere with the public use of the public ways, or adversely affect public health, safety or welfare; that the optical cable connection is constructed and installed to conform to all applicable federal, state, local, and industry codes, rules, regulations, and standards; and that the optical cable connection does not damage or impair the City's public way or property.

(i) The requirements of this section do not apply to repair or maintenance of a previously approved overhead facility; provided that the location and size of the previously

approved facility is not materially changed; that no additional new facilities are constructed or installed; that the repair or maintenance activities are conducted in accordance with good engineering, repair, and maintenance practices and do not interfere with the public use of the public ways, or adversely affect public health, safety, or welfare; that maintenance or repair activities conform to all federal, state, local, and industry codes, rules, regulations, and standards; and that the repair or maintenance activities comply with the City Code.

(2) **Construction and installation requirements.**

(a) Grantee's System shall be constructed and maintained in such manner as not to interfere with in-place sewers, water pipes or any other property of City, or with any other pipes, wires, conduits, pedestals, structures or other facilities that may have been placed in rights-of-way by, or under, City's authority.

(b) All facilities shall be constructed and installed in such manner and at such points so as not to inconvenience City or public use of the public ways or to adversely affect the public health, safety or welfare and in conformity with plans approved by the City, except in instances in which deviation may be allowed by the City.

(c) Interference with use of streets. When installing, locating, constructing or maintaining Facilities, the Grantee shall not interfere with the use of any street to any greater extent than is necessary, and shall leave the surface and subsurface of any such street in as good condition as it was prior to performance by the Grantee of such work, to the satisfaction of the City.

(d) The Grantee shall apply for, obtain, and comply with the terms of all permits required under Des Moines Municipal Code sections regulating construction and maintenance within the right-of-way for any work done upon Grantee Facilities. Grantee shall comply with all applicable City, State, and Federal codes, rules, regulations, and orders in undertaking such work, which shall be done in a thorough and proficient manner. Grantee shall have the sole responsibility for obtaining, at its own cost and expense, all permits, licenses, or other forms of approval or

authorization necessary to construct, operate, maintain or repair or expand the System, and to construct, maintain and repair any part thereof.

(e) The Telecommunications system constructed, maintained and operated by virtue of this Franchise, shall be so constructed, maintained and operated in accordance with all applicable engineering codes adopted or approved by the City, State of Washington, federal government and/or engineering profession and in accordance with any applicable Statutes of the State of Washington, rules and regulations of the applicable Washington regulatory authority, Ordinances of the City or of any other governmental regulatory commission, board or agency having jurisdiction over Grantee.

(f) The construction plans and Grantee's operations shall conform to all federal, state, local, and industry codes, rules, regulations, standards and laws. Grantee must cease work immediately if the City determines that Grantee is not in compliance with such codes, rules, regulations, or standards, and may not begin or resume work until the City determines that Grantee is in compliance. The City shall not be liable for any costs arising out of delays occurring as a result of such work stoppage.

(g) Neither approval of plans by the City nor any action or inaction by the City shall relieve Grantee of any duty, obligation, or responsibility for the competent design, construction, and installation of its facilities. Grantee is solely responsible for the supervision, condition, and quality of the work done, whether it is performed by itself or by its contractors, agents, or assigns.

(h) Except as to emergency repairs, Grantee shall, prior to excavating within any street, alley or other public place, and installing any conduit, overhead cable or equipment therein, file with the City Manager or designee plans and specifications thereof showing the work to be done, the location and nature of the installation to be made, repaired or maintained, and a schedule showing the times of beginning and completion and shall secure a permit from the City before proceeding with any such work. The Grantee shall conform to all applicable requirements of the City Code, as it currently exists or as it may be amended.

(i) All construction and/or maintenance work as provided herein shall be performed in conformity with the plans and specifications filed with the City and with the permit or permits issued, except in instances in which deviation may be allowed thereafter in writing pursuant to an application by the Grantee.

(j) Excavation work requiring a permit from the City shall only commence upon the issuance of applicable permits by the City, which permits shall not be unreasonably withheld or delayed. However, in the event of an emergency requiring immediate action by Grantee for the protection of the Facilities, City property or other persons or property, Grantee may proceed without first obtaining the normally required permits. In such event Grantee must (1) take all necessary and prudent steps to protect, support, and keep safe from harm the Facilities, or any part thereof; City property; or other persons or property, and to protect the public welfare, health and safety; and (2) as soon as possible thereafter, must obtain the required permits and comply with any mitigation requirements or other conditions in the after-the-fact permit.

(k) In the event of an emergency, the Grantee may commence such repair and emergency response work as required under the circumstances, provided that the Grantee shall notify the City Manager or designee in writing as promptly as possible, before such repair or emergency work commences, or as soon thereafter as possible, if advance notice is not practical. The City may act, at any time, without prior written notice in the case of emergency, but shall notify the Grantee in writing as promptly as possible under the circumstances.

(l) Unless such condition or regulation is in conflict with a federal or state requirement, the City may condition the granting of any permit or other approval that is required under this Franchise, in any manner reasonably necessary for the safe use and management of the public right-of-way or the City's property including, by way of example and not limitation, maintaining proper distance from other utilities, protecting the continuity of pedestrian and vehicular traffic and rights-of-way improvements, private facilities and public safety.

(m) New facilities shall be constructed in accordance with the following terms and conditions:

(i) Facilities shall be installed within the Grantee's existing underground duct or conduit whenever excess capacity exists.

(ii) Overhead facilities shall be installed on pole attachments to existing utility poles only, and then only if space is available.

(iii) Whenever all existing telephone and electric utilities are located underground within public ways, the Grantee must also locate its facilities underground.

(iv) Whenever all new or existing telephone and electric utilities are located or relocated underground within public ways, the Grantee that currently occupies the same public ways shall concurrently relocate its Facilities underground at its own expense, except as otherwise provided in RCW Section 35.99.060.

(n) Display of right-of-way permit. The Grantee shall maintain a copy of the construction permit and approved plans at the construction site, which shall be displayed and made available for inspection by the City Manager or designee at all times when construction work is occurring.

(o) Construction schedule. The Grantee shall submit a written construction schedule to the City Manager or designee prior to commencing any work in or about the public ways in accordance with City regulations.

(p) Locator service compliance. The Grantee, before commencing any construction in the public ways, shall call for location in accordance with RCW 19.122.

(q) Placement. All facilities, and structures shall be located and placed in accordance with a valid permit so as to cause minimum interference with the rights and reasonable convenience of adjacent property owners. All facilities shall be maintained in a safe condition, and in good order and repair. Suitable barricades, flags, lights, flares, or other devices shall be used during construction activities at such times and places as

are reasonably required for the safety of the public. Any poles or other fixtures placed in any street by the Grantee shall be placed in such manner as not to interfere with the usual travel on such public way. Exact placement within the right-of-way shall be coordinated with the City and other utilities in order to provide for maintenance and future expansion, as well as, for the safety of the public. The City reserves the reasonable right as to final placement.

(r) Completion of construction. The Grantee shall promptly complete all construction activities so as to minimize disruption of the public ways and other public and private property. All construction work authorized by a permit within public ways, including restoration, must be completed within 90 calendar days of the date of issuance or at such other interval as the City may specify in writing upon issuance of the permit.

(s) Non-complying work. Upon order of the City Manager or designee, all work which does not comply with the provisions of this Franchise shall be brought into compliance with this Franchise.

(t) The City reserves the right to install, and permit to be installed, sewer, electric, phone, gas, water and other pipelines, cables, conduits and related appurtenances and to do, or permit to be done, any underground or overhead work in, across, along, over or under a public way or other public place occupied by Grantee. The City also reserves the right to construct new streets and public utilities and to alter the design of existing streets and public utilities. In performing such work, the City shall not be liable to Grantee for any damage, except in the event of the contributory negligence or willful misconduct of the City or its contractors, but nothing herein shall relieve any other person or entity from the responsibility for damages to Grantee's Facilities. The City will use its best efforts to provide Grantee with reasonable advance notice of plans by other persons to open the public ways.

(3) **Coordination of construction and installation activities.**

(a) Grantee shall coordinate its construction and installation activities and other work with the City and all other

users of the public ways, including utilities located within the franchise area.

(b) All construction or installation locations, activities and schedules shall be coordinated, as ordered by the City, to minimize public inconvenience, disruption or damages.

(c) At least forty-eight (48) hours prior to entering a public way to perform construction and installation activities or other work, Grantee shall give notice, at its cost, to owners and occupiers of property adjacent to such public ways indicating the nature and location of the work to be performed. Such notice shall be physically posted by door hanger. Grantee shall make a good faith effort to comply with the property owner or occupier's preferences, if any, on location or placement of underground facilities, consistent with sound engineering practices.

(d) The City shall give reasonable advance notice to Grantee of plans to open public ways for construction or installation of facilities; provided, however, the City shall not be liable for damages for failure to provide such notice, except in the event of the contributory negligence or willful misconduct of the City or its contractors. When such notice has been given, Grantee shall provide information requested by the City regarding Grantee's future plans for use of the public way to be opened. When notice has been given, Grantee may only construct or install facilities during such period that the City has opened the public way for construction or installation.

(4) **Relocation.** Grantee shall relocate its facilities as ordered by the City Manager or designee at no expense or liability to the City, except as otherwise provided in RCW Section 35.99.060, when there is construction, alteration, repair or improvement of a public way. Grantee shall complete the relocation by the date specified by the City. Grantee agrees to protect and save harmless the City from any customer or third-party claims for service interruption or other losses in connection with any such change or relocation. Grantee shall relocate its facilities at its own expense except where the Grantee had paid for the relocation costs of the same facilities at the request of the City within the past five (5) years, the Grantee's share of the cost of

relocation will be paid by the City if it requested the subsequent relocation or as otherwise provided in RCW Section 35.99.060.

(5) **Temporary removal, adjustment or alteration of facilities.**

(a) Grantee shall temporarily remove, adjust or alter the position of its facilities at its cost, except as otherwise provided in RCW Section 35.99.060, at the request of the City for public projects, events, or other public operations or purposes.

(b) Grantee shall locate the precise horizontal and vertical location of its underground facilities by excavating upon request of the City. If the City's request is in support of a City project, the Grantee shall complete this service within 14 days at no cost to the City, except as otherwise provided in RCW Section 35.99.060,. If the City's request is in support of a third party's project, the Grantee shall be entitled to recover its cost from the project sponsor as set forth in RCW Section 35.99.060.

(c) If any person requests permission from the City to use a public way for the moving or removal of any building or other object, the City shall, prior to granting such permission, require such person or entity to make any necessary arrangements with Grantee for the temporary removal, adjustment or alteration of Grantee's facilities to accommodate the moving or removal of said building or other object. In such event, Grantee shall, at the cost of the person desiring to move or remove such building or other object, remove, adjust or alter the position of its facilities which may obstruct the moving or removal of such building or other object, provided that:

(i) The moving or removal of such building or other object which necessitates the temporary removal, adjustment or alteration of facilities shall be done at a reasonable time and in a reasonable manner so as to not unreasonably interfere with Grantee's business, consistent with the maintenance of proper service to Grantee's customers;

(ii) Where more than one route is available for the moving or removal of such building or other object, such

building or other object shall be moved or removed along the route which causes the least interference with the operations of Grantee, in the sole discretion of the City;

(iii) The person obtaining such permission from the City to move or remove such building or other object may be required to indemnify and save Grantee harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of or in conjunction with the moving or removal of such building or other object, to the extent such injury or damage is caused by the negligence or willful misconduct of the person moving or removing such building or other object or the negligence or willful misconduct of the agents or employees of the person moving or removing such building or other object; and

(iv) Completion of notification requirements by a person who has obtained permission from the City to use a public way for the moving or removal of any building or other object shall be deemed to be notification by the City.

(d) The City may require Grantee to temporarily remove, adjust or alter the position of Grantee's facilities as the City may reasonably determine to be necessary at no cost to the City, except as otherwise provided in RCW Section 35.99.060, for work deemed needed by the City in the Rights-of-Way. The City shall not be liable to Grantee or any other party for any direct (except as a result of the negligence or willful misconduct of the City or its contractors), indirect, consequential, punitive, special or other damages suffered as a direct or indirect result of the City's actions.

(e) The temporary removal, adjustment or alteration of the position of Grantee's facilities shall not be considered relocation for any purpose whatsoever, except as otherwise provided in RCW Section 35.99.060.

(6) **Tree trimming.** The Grantee shall have the authority to trim trees or other natural growth on public property or which overhang streets, alleys, sidewalks and public ways of the City so as to prevent the branches of such trees from coming in contact with the Grantee’s wires, cables or other equipment that may be damaged due to continued contact. Grantee takes full

responsibility for removing debris when the work is complete. All trimming is to be done at the sole expense and responsibility of Grantee.

Trimming of trees and shrubbery within or overhanging the public ways to prevent contact with Grantee's Facilities shall be done in such a manner to cause the minimum amount of damage to trees and shrubs. If in the City's determination, trees are excessively damaged as a result of the work undertaken by or on behalf of Grantee, Grantee shall pay the City, within 30 days of submission of a statement by the City, the reasonable cost of any treatment required to preserve a tree or shrub or the cost for removal and replacement of the tree or shrub with landscaping of equal value or the value of the tree or shrub prior to the damage or removal, as determined by the City Manager or designee.

Any trimming or removal of trees or shrubs shall be done in full compliance with the City's Ordinances and all other laws or regulations of the City.

(7) **Underground installation.**

(a) The parties agree that this Franchise does not limit the City's authority under federal law, state law, or local ordinance, to require the undergrounding of utilities, provided such requirement is applied on a non-discriminatory basis as required under applicable state or federal law.

(b) Whenever the City requires the undergrounding of aerial utilities in the Franchise Area, the Grantee shall underground the Grantee Facilities in the manner specified by the City Manager or designee at no expense or liability to the City, except as otherwise provided in RCW Section 35.99.060,. Where other utilities are present and involved in the undergrounding project, Grantee shall only be required to pay its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergrounding of Grantee Facilities. Common costs shall include necessary costs for common trench excavation, backfill, and restoration, and utility vaults. Fair share shall be determined in comparison to the total number and size of all other utility facilities being undergrounded.

(c) Grantee will maintain membership in good standing with the Utility Coordinating Council One Call Center, or other similar or successor organization designated to coordinate underground equipment locations and installations. Grantee shall abide by chapter 19.122 RCW (Washington State's "Underground Utilities" statutes) and will further comply with and adhere to local procedures, customs and practices relating to the one call locator service program.

(8) **Ducts and conduits.**

(a) If the Grantee is constructing underground conduit for its own use, the City may require the Grantee to construct excess conduit capacity in the public ways, provided that the City enters into a contract with the Grantee consistent with RCW 80.36.150. The contract rates to be charged should recover the incremental costs of the Grantee, (calculated as the difference between what the Grantee would have paid for the construction of its conduit and the additional cost only of construction of the excess conduit). If the City makes the additional conduit available to any other entity for the purposes of providing telecommunications service or cable service for hire, sale, or resale to the general public, the rates to be charged, as set forth in the contract with the Grantee shall recover at least the fully allocated costs of the Grantee. The Grantee shall state both contract rates in the contract. The City shall inform the Grantee of the use, and any change in use, of the requested conduit and related access structures, if any, to determine the applicable rate to be paid by the City.

(b) The City shall not require that the additional conduit space be connected to the access structure and vaults of the Grantee.

(c) Except as expressly provided in this section, Grantee shall not charge the City for any costs, of any kind whatsoever, for facilities provided by Grantee in accordance with this section.

(d) The provisions of this section shall conform to the requirements of RCW 35.99.070.

(9) **Location of Grantee facilities.**

(a) From time to time, the City, or its representatives, may request identification of the specific location of Grantee System facilities. The Grantee agrees to respond to such request within forty-eight (48) hours of the receipt of the request, excluding delays due to weather or other conditions. In the event that Grantee cannot locate such information within forty-eight (48) hours, Grantee shall notify the City. If Grantee fails to notify the City of its facilities locations within forty eight (48) hours, and damage is caused to Grantee's facilities as a direct result, the Grantee shall hold the City harmless from all liability, damage, cost or expense resulting from the City's actions in this regard unless such damage was caused by the negligence or willful misconduct of the City or its agents.

(b) Report of underground facilities. From time to time the City may require to design or construct right-of-way improvements in a specific area, the City or its designee may require the Grantee to submit a report of existing underground system facilities for a specific area of the City that will be impacted as a result of a planned right-of-way improvement. Within thirty (30) days after receipt by the Grantee of a request from the City or its designee, the Grantee shall submit a report of underground system facilities that shall comply with the following provisions:

(i) Certification by an engineer licensed in the State of Washington employed by the Grantee that the report accurately depicts the location of all system facilities, including drop service lines to individual subscribers, if any. The accuracy of this report shall be noted based upon the capability of the locating equipment used.

(ii) The accurate depth of the underground facility, as may be available based upon the capability of the locating device used. The accuracy of this information shall be noted.

(iii) Submittals shall be provided in hardcopy, and if available, electronically as an AutoCAD or ArcView file.

(iv) The City and Grantee recognize the importance of making best efforts to communicate during the planning and construction phases of right-of-way improvement projects. To that end, the City and Grantee agree to work cooperatively and to be reasonable and timely in requesting and providing necessary information. In the event the City reasonably determines that more precise information is needed for a specific aspect of a right-of-way project, the Grantee agrees to take the necessary steps to provide such precise information within thirty (30) days of receipt of request. If it is necessary for the Grantee to pot-hole or excavate and restore portions of the right-of-way to respond to the City's information request, the Grantee agrees to take such steps at its expense, , except as otherwise provided in RCW Section 35.99.060,and the City agrees to waive all permitting and inspection fees therefore.

(c) Within sixty (60) days of the effective date of this Franchise, Grantee shall provide the City with a current route map of the Telecommunication System located within the City. Upon City request, but no more often than once each year during the term of this Franchise, the Grantee shall provide the City with an updated route map showing the changes that have occurred in the Telecommunication System.

(d) Grantee agrees to obtain facilities location information from other users of the Public rights-of-way prior to Grantee's construction, reconstruction, maintenance, operations and repair of the Grantee's System facilities.

(10) **Removal and abandonment of facilities.** In the event that the use of any part of the Grantee's system is discontinued for any reason for a continuous period of twelve (12) months, or in the event such system equipment or facilities have been installed in any public ways or rights-of-way without complying with the requirements of this Franchise or other City ordinances, or the Franchise has been terminated or has expired, upon receiving ten (10) business days prior written demand from the City, the Grantee shall promptly remove, at its expense, such affected equipment or Facilities, other than any which the City may permit to be abandoned in place, from the public ways of rights-of-way. Said removal shall be completed within one-hundred eighty (180) days from receipt of the City's written demand. In the event of

such removal, the Grantee shall promptly restore the public ways or rights-of-way from which such property has been removed to a condition satisfactory to the City. Any affected equipment or facilities of the Grantee remaining in place one-hundred eighty-one (181) days after the termination or expiration of the Franchise, and upon written notice from the City, shall be considered permanently abandoned. The City may extend such time not to exceed an additional ninety (90) days with prior written request from the Grantee, and such request shall not be unreasonably withheld. Any equipment or facilities of the Grantee that the City allows to be abandoned in place shall be abandoned in such manner as the City shall prescribe. Upon permanent abandonment of the equipment or facilities of the Grantee in place, the equipment or Facilities shall become that of the City, and the Grantee shall submit to the City Clerk an instrument in writing, to be approved by the City Attorney, transferring to the City the ownership of such equipment or facilities. None of the foregoing affects or limits the Grantee's rights to compensation for an involuntary abandonment of its equipment or facilities under state or federal law.

(11) **Safety and maintenance requirements.**

(a) All work authorized and required under this Franchise will be performed in a safe, thorough, and workmanlike manner.

(b) Grantee, in accordance with applicable federal, state, and local safety requirements shall, at all times, employ ordinary care and shall use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injury, or nuisance to occur. All facilities, wherever situated or located, shall at all times be kept in a good, safe, and suitable condition. If a violation of a safety code or other applicable regulation is found to exist by the City, the City may, after discussions with Grantee, establish a reasonable time for Grantee to make necessary repairs. If the repairs are not made within the established time frame, the City may make the repairs itself at the cost of the Grantee or have them made at the cost of Grantee.

(c) If Grantee fails to commence, pursue or complete any work required by law, this Franchise or any applicable

permit to be done in any public way within the time prescribed and to the satisfaction of the City, the City may at its discretion cause the work to be done. Grantee shall pay to the City the reasonable costs of the work in an itemized report provided by the City to Grantee within 30 days after receipt of such report.

(d) Grantee, and any person acting on its behalf, shall provide a traffic control plan that conforms to the latest edition of the Manual of Uniform Traffic Control Devices (MUTCD). Said plan shall use suitable barricades, flags, flagmen, lights, flares, and other measures as required for the safety of all members of the general public during the performance of work, of any kind whatsoever, in public ways to prevent injury or damage to any person, vehicle, or property. Grantee shall implement and comply with its approved traffic control plan during execution of its work. The traffic control plan shall be developed and kept on site in Grantee's possession for all work impacting vehicular and pedestrian traffic. Traffic control plans may be modified as necessary by the Grantee to achieve effective and safe traffic control. All road closures requested by Grantee require a detour plan submitted at least 48 hours in advance and prior City approval unless there is an emergency.

(e) Grantee shall maintain its facilities in proper working order. Grantee shall restore its facilities to proper working order upon receipt of notice from the City that facilities are not in proper working order. The City may, after discussions with Grantee, establish a reasonable time for Grantee to restore its facilities to proper working order. If the facilities are not restored to proper working order within the established time frame, the City may restore the facilities to proper working order or have them restored at the cost of Grantee.

(f) The City shall have the right to inspect all construction and installation work performed by Grantee pursuant to this Franchise to the extent necessary to ensure compliance by Grantee. On an ongoing basis, Grantee shall certify to the City that Grantee's work is being performed and completed in a satisfactory manner.

(g) On notice from the City that any work is being performed contrary to the provisions herein, or in an unsafe or dangerous manner or in violation of the terms of any applicable

permit, laws, regulations, ordinances or standards, the City may issue a stop work order and Grantee shall stop the work immediately. The City shall issue a stop work order in writing, unless given verbally in the case of an emergency, and provide the order to the individual doing work or post it on the work site. A copy of the order shall be sent to Grantee, and the order must indicate the nature of the alleged violation or unsafe condition and the conditions under which Grantee may resume work.

(12) **Removal of unauthorized facilities.** Within thirty (30) days following written notice from the City, Grantee shall, at its expense, remove unauthorized facilities and restore public rights-of-way and other property to as good a condition as existed prior to construction or installation of its facilities. Any plan for removal of said facilities must be approved by the City prior to such work. Facilities are unauthorized and subject to removal in the following circumstances:

(a) Upon expiration, termination, or cancellation of this Franchise;

(b) Upon abandonment of the facilities. Facilities shall be deemed abandoned if they are unused by Grantee as described in Section 5(10);

(c) If the facilities were constructed or installed prior to the effective date of this Franchise; unless such facilities were constructed or installed upon the condition of subsequent approval of this Franchise with the consent of the City;

(d) If the facilities were constructed, installed, operated, maintained, or repaired without the prior issuance of required use and/or development authorization and permits;

(e) If the facilities were constructed or installed or are operated, maintained or repaired in violation of the terms or conditions of this Franchise; or

(f) If the facilities are unauthorized for any reason whatsoever.

(13) **Restoration of public ways and other property.**

(a) Whenever necessary, after construction or maintaining any of Grantee's Facilities within the Rights-of-Way, the Grantee shall, without delay, and at Grantee's sole expense, except as otherwise provided in RCW Section 35.99.060, remove all debris and restore the surface and subsurface disturbed by Grantee as nearly as possible to as good or better condition as it was in before the work began. Grantee shall replace any property corner monuments, survey reference or equipment that were disturbed or destroyed during Grantee's work in the rights-of-way. Such restoration shall be done in a manner consistent with applicable codes and laws and to the City's satisfaction and specifications where applicable. Grantee agrees to pay all costs and expenditures required on the rights-of-ray as a result of settling, subsidence, or any other need for repairs or maintenance resulting from excavations made by Grantee for necessary trench patch maintenance, for a period of ten years from the date such maintenance was performed, normal wear and tear excepted. Favorable weather conditions permitting, Grantee agrees to repair rights-of-way as a result of settling, subsidence, or other needed repairs or maintenance resulting from excavations made by the Grantee upon forty-eight (48) hours' notice excluding weekends and holidays. If Grantee fails to undertake such repairs as herein provided, the City may perform the repairs at Grantee's expense.

(b) Landscape restoration. All trees, landscaping and grounds removed, damaged or disturbed as a result of the construction, installation, maintenance, operation, repair or replacement of the Grantee's facilities, shall be replaced or restored, at the Grantee's expense to the condition existing prior to performance of the work, except as otherwise provided in RCW Section 35.99.06.

(14) **Poles, structures, and property owned by others.** If and when the Grantee is authorized to install communication facilities aerially in accordance with chapter 12.48 of the Des Moines Municipal Code (DMMC), Grantee must obtain written approval from the owners of utility poles, structures and property not owned by Grantee prior to attaching to or otherwise using such poles, structures or property, and provide proof of such approval to the City. The City makes no representation and assumes no responsibility for the availability of utility poles, structures,

and property owned by third parties for the installation of Grantee's facilities. The City shall not be liable for the unavailability of utility poles, structures, and property owned by the City or third parties for any reason whatsoever. The installation of facilities by Grantee on or in the poles, structures, or property owned by others shall be subject to and limited by the owner's authority to enter, occupy, and use public ways. In the event that the authority of the owner of poles, structures, or property to enter, occupy, and use the public ways either expires, terminates, or is cancelled, the authority of Grantee to construct, install, operate, maintain, and repair Grantee's facilities at such locations may be immediately cancelled at the sole option of the City. The City shall not be liable for the costs for removal of facilities arising from expiration, termination, or cancellation of any pole owner's authority to enter, occupy, or use public ways for any reason whatsoever.

Sec. 6. Indemnification and liability and assumption of risk.

(1) Indemnification / Hold Harmless. The Grantee shall defend, indemnify and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with activities or operations performed by the Grantee or on the Grantee's behalf under this Franchise agreement, except for injuries and damages caused by the contributory negligence or willful misconduct of the City.

(2) The City shall give the Grantee written notice of any claim or of the commencement of any action, suit or other proceeding covered by this section. If a claim or action arises, the City or any other indemnified party shall then tender the defense of the claim to Grantee, which defense shall be at Grantee's expense. However, the failure of the City to provide such notice in writing to Grantee shall not relieve Grantee of its duties and obligations under this Section, provided that Grantee is given sufficient advance notice to perform its duties under this Section. It is further specifically and expressly understood that the indemnification provided herein constitutes the Grantee's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for

the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

(3) Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Contractor and the City, its officers, officials, employees, and volunteers, the Contractor's liability hereunder shall be only to the extent of the Contractor's negligence. The provisions of this section shall survive the expiration or termination of this Agreement.

(4) **Damages and penalties.** By acceptance of this Franchise, Grantee specifically agrees that it will pay, all damages or penalties which the City, its officers, agents, employees, or contractors may legally be required to pay as a result of damages arising out of copyright infringements and all other damages arising out of Grantee's or Grantee's agents' installation, maintenance, or operation of the telecommunications System, except as specifically referenced elsewhere in this Franchise, whether or not any act or omission complained of is authorized, allowed, or prohibited by this Franchise, subject to Section 635A of the Cable Act and applicable law.

(5) **Expenses.** If any action or proceeding is brought against the City or any of its officers, agents, or employees for claims for damages or penalties described in this Section, the Grantee, upon written notice from the City, shall assume the investigation of defense and fully control any resolution or compromise thereof, including the employment of counsel and the payment of all expenses including the reasonable value of any services rendered by any officers, agents, employees or contractors of the City which are not unreasonably duplicative of services provided by Grantee and its representatives. The City shall fully cooperate with the Grantee.

(6) **Separate counsel.** The City shall have the right to employ separate counsel in any action or proceeding and to participate in the investigation and defense thereof, and the Grantee shall pay the reasonable fees and expenses of such separate counsel if representation of both the Grantee and the City by the

same attorney would be inconsistent with accepted canons of professional ethics and if separate counsel is employed with the approval and consent of the Grantee, which shall not be unreasonably withheld.

(7) **Assumption of risk.** Grantee assumes the risk of damage to its facilities located in the City's public ways from activities conducted by third parties or the City, its elected officials, officers, employees, agents, or representatives, except in the event of the negligence or willful misconduct of any one or more of the above persons. Grantee releases and waives any and all claims against the City, its elected officials, officers, employees, agents, and representatives for damage to or destruction of the Grantee's facilities except to the extent any such damage or destruction is caused by or arises from the negligence or willful misconduct of the City. Grantee bears sole responsibility to insure its property. Grantee shall ensure that its insurance contracts waive subrogation claims against the City, its elected officials, officers, employees, agents, and representatives, and Grantee shall indemnify, defend and hold harmless the City, its elected officials, officers, employees, agents, and representatives against any and all subrogation claims if it fails to do so.

Sec. 7. Insurance.

(1) Grantee shall procure and maintain for the duration of the Franchise, insurance against claims for injuries to Persons or damage to property which may arise from or in connection with this Franchise by the Grantee, their agents, representatives, employees or subcontractors.

(a) Amounts of Insurance. In accordance with applicable law, the Grantee shall maintain throughout the term of this Franchise the following insurance limits:

(i) Automobile Liability. Commercial automobile liability insurance policy in the amount of than Five Million Dollars ($5,000,000) combined single limit each accident for bodily injury and property damage covering all owned, hired, and non-owned vehicles).

(ii) Commercial General Liability. A commercial general liability insurance policy issued by a company duly authorized to do business in the State of Washington insuring the Grantee with respect to the installation, maintenance, and operation of Grantee's Telecommunication System in the amount of Five Million Dollars ($5,000,000) per occurrence for bodily injury and property damage and Five Million Dollars ($5,000,000) general aggregate. The City shall be included as an additional insured as their interest may appear under this Agreement under Grantee's Commercial General Liability insurance policy.

(iii) Excess General Liability. Excess or Umbrella Liability coverage at limits of One Million Dollars ($1,000,000) per occurrence and annual aggregate providing coverage above the primary Commercial General, Commercial automobile liability and employer's liability insurance.

(iv) Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington. This requirement may be satisfied instead through the Grantee's primary Commercial General and Automobile Liability coverage, or any combination thereof.

(b) Other Insurance Provisions. The insurance policies are to contain the following provisions for Automobile Liability and Commercial General Liability insurance:

(i) The Grantee's insurance coverage shall be primary insurance as respect the City. Any Insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of the Grantee's insurance and shall not contribute with it.

(ii) Upon receipt of notice from it insurer(s) Grantee shall endeavor to provide Grantor with thirty (30) days prior written notice of cancellation

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

(d) Verification of Coverage. Upon acceptance of the Franchise, Grantee shall furnish the City with original

certificates and blanket additional insured endorsement, evidencing the insurance requirements of the Grantee.

(e) Subcontractors. Grantee shall require any contractor or subcontractor to obtain and maintain substantially the same insurance with substantially the same limits as required of Grantee.

(2) Endorsements. Grantee agrees that with respect to the insurance requirements contained above, all insurance certificates will contain the following required provisions:

(a) Include the City and its officers, employees, and elected representatives as an additional insured as their interest may appear under this Agreement.

(c) Shall be on an occurrence basis and shall be primary coverage of all losses resulting from Grantee's operations covered by the policies.

(3) **Insurance term.** The insurance required above shall be kept in full force and effect by Grantee during this Franchise and thereafter until after the removal of all poles, wires, cables, underground conduits, manholes, and other conductors and fixtures incident to the maintenance and operation of Grantee's Telecommunication System, should such removal be required by City Council or undertaken by Grantee.

(4) **Issuing companies.** Companies issuing the insurance policies shall have no recourse against the City for payment of any premiums or assessments which all are set at the sole risk of the Grantee.

(5) **No limit on liability.** Grantee's maintenance of insurance as required by this Franchise shall not be construed to limit the liability of Grantee to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy to which the City is otherwise entitled at law or in equity.

Sec. 8. Performance bond and security fund.

(1) **Amount.** The Grantee shall provide the City with a financial guarantee in the amount of One Hundred Thousand Dollars ($100,000) running for, or renewable for, the duration of the construction of Grantee's facilities in the City, in a form and substance acceptable to the City. This Franchise performance bond shall be separate and distinct from any other bond or deposit required.

(2) **Damages.** In the event Grantee shall fail to substantially comply with any one or more of the provisions of this Franchise, then there shall be recovered jointly and severally from the principal and any surety of such financial guarantee any damages suffered by City as a result thereof, including but not limited to staff time, material and equipment costs, compensation or indemnification of third parties, and the cost of removal or abandonment of facilities hereinabove described.

(a) Before any draws are made on the Franchise performance bond, the City Manager or designee shall give written notice to the Grantee:

(i) Describing the act, default or failure to be remedied, or the damages, cost or expenses which the City has incurred by reason of the Grantee's act or default;

(ii) Providing a reasonable opportunity for the Grantee to first remedy the existing or ongoing default or failure, if applicable;

(iii) Providing a reasonable opportunity for the Grantee to pay any moneys due the City before the City draws on the Franchise performance bond, if applicable;

(iv) That the Grantee will be given an opportunity to review the act, default or failure described in the notice with the City Manager or designee.

(b) The Grantee shall replace the Franchise performance bond within fourteen (14) days after written notice

from the City Manager or designee that there is a deficiency in the amount of the Franchise performance bond.

(3) **Security fund.** In addition to the performance bond, Grantee shall establish and maintain a security fund in the amount of twenty-five thousand dollars ($25,000), at its cost, with the City by depositing such monies, letters of credit, or other instruments in such form and amount acceptable to the City within 30 calendar days of the effective date of this Franchise. No sums may be withdrawn from the fund by Grantee without consent of the City. The security fund shall be maintained at the sole expense of Grantee so long as any of the Grantee's facilities occupy a public way.

(a) The fund shall serve as security for the performance of this Franchise, including any claims, costs, damages, judgments, awards, attorneys' fees or liability, of any kind whatsoever, the City pays or incurs, including civil penalties, because of any failure attributable to Grantee to comply with the provisions of this Franchise or the codes, ordinances, rules, regulations, standards, or permits of the City.

(b) Before any sums are withdrawn from the security fund, the City shall give written notice to Grantee:

(i) Describing the act, default or failure to be remedied, or the claims, costs, damages, judgments, awards, attorneys' fees or liability which the City has incurred or may pay by reason of Grantee's act or default;

(ii) Providing a reasonable opportunity for Grantee to first remedy the existing or ongoing default or failure, if applicable;

(iii) Providing a reasonable opportunity for Grantee to pay any monies due the City before the City withdraws the amount thereof from the security fund, if applicable; and

(iv) Grantee will be given an opportunity to review the act, default or failure described in the notice with the City or his or her designee.

(c) Grantee shall replenish the security fund within fourteen (14) days after written notice from the City that there is a deficiency in the amount of the fund.

(d) Insufficiency of the security fund shall not release or relieve Grantee of any obligation or financial responsibility.

Sec. 9. Taxes, charges, and fees.

(1) **Franchise fee.** RCW 35.21.860 currently prohibits a municipal franchise fee for permission to use the right of way for telephone business purposes. Based on the representations of Grantee, it is the City's understanding that Grantee will use the right of way for telephone business purposes as defined by RCW 82.16.010 or as a service provider as such term is defined in RCW Section 35.99.010 for the provision of telecommunications services. If this prohibition is removed or does not apply to future services, Grantee understands the City may assess a reasonable franchise fee in accordance with the City Code, so long as local, State or federal law does not otherwise prohibit such fee.

(2) **Utility tax.** The parties further understand that RCW 35.21.870 currently limits the rate of City tax upon telephone business activities to six percent (6%) of Gross Receipts, unless a higher rate is approved by vote of the people. The parties agree, however, that nothing in this Franchise shall limit or expand the City's power of taxation, as now or may hereafter exist. Grantee understands that some of its business activities in the City of Des Moines as identified herein may be taxable activities subject to the six percent (6%) gross receipts tax rate, as imposed under the City's telephone business tax, adopted in Des Moines Municipal Code Chapter 3.68, subject to such activities being deemed taxable under applicable state and federal laws. This provision does not limit the City's power to amend Des Moines Municipal Code Chapter 3.68 as may be permitted by law, including increases to the tax rate. Notwithstanding any other provision of this Franchise, nothing in this Franchise is intended to alter, amend, modify or expand the taxes and fees that may lawfully be assessed on Franchisee's business activities under this Franchise under applicable law.

(3) **Permit and administrative fees.** Grantee shall also pay and be responsible for all charges and fees (authorized under applicable law) imposed to recover actual administrative expenses incurred by the City that are directly related to receiving and approving this Franchise, any use and/or development authorizations which may be required, or any permit which may be required, to inspecting plans and construction, or to the preparation of a detailed statement. Regular application and processing charges and fees imposed by the City shall be deemed to be attributable to actual administrative expenses incurred by the City but shall not excuse Grantee from paying and being responsible for other actual administrative expenses incurred by the City.

(a) Grantee shall pay a franchise processing fee of $5,000 within 30 calendar days of the effective date of this Franchise.

(b) Grantee shall pay fees according to applicable sections of the City Code.

(4) Grantee shall pay and be responsible for taxes permitted by law.

(5) In addition to penalties and other remedies for which Grantee may be subjected, the City reserves the right to impose site-specific charges (authorized under applicable law) for placement of structures used to provide telecommunications services. Unless otherwise agreed by the parties, such charges shall be an amount equal to at least fifty percent (50%) of the costs of construction or installation of such structures.

Sec. 10. Access to facilities and universal service.

(1) Grantee shall provide access to its facilities by hire, sale, or resale on a nondiscriminatory basis. Grantee shall make its telecommunications services available to any customer within its franchise area who shall request such service whenever feasible, without discrimination as to the terms, conditions, rates or charges for the Grantee's services; provided, however, that nothing in this section shall prohibit Grantee from making any reasonable classifications among differently situated customers.

(2) Grantee shall provide Internet access to users of City property, at locations requested by the City, if it is practicable, upon Grantee's then-current market rates for such service and pursuant to a separate services agreement. Grantee and the City may enter into a separate agreement or agreements regarding the allocation of costs to construct, install, operate, maintain, repair, and remove facilities needed to provide such access; provided, however, that nothing herein shall require the City to accept construction or installation of facilities on City property.

Sec. 11. Acquisition of facilities. Upon Grantee's acquisition of any facilities in the public way, or upon any addition or annexation to the City of any area in which Grantee has facilities, such facilities shall immediately be subject to the terms of this Franchise without further action of the City or Grantee.

Sec. 12. Vacation of public ways. The City reserves the right to vacate any public way which is subject to rights, privileges, and authority granted by this Franchise. If Grantee has facilities in such public way, the City shall reserve an easement for Grantee, if requested by Grantee.

Sec. 13. Duty to provide information. Grantee's obligations under this section are in addition to those provided elsewhere in this Franchise. Within fifteen (15) days of a written request from the City, Grantee shall furnish the City with all requested information sufficient to demonstrate:

(1) That Grantee has complied with all requirements of this Franchise;

(2) That taxes, fees, charges, or other costs owed or payable by Grantee have been properly collected and paid; and

(3) The names of the users of Grantee's facilities and the services and products those users are providing to the public.

Sec. 14. Records.

(1) Grantee will manage all of its operations in accordance with a policy of keeping its documents and records open

and accessible to the City. The City will have access to, and the right to inspect, any documents and records of Grantee and its affiliates that are reasonably necessary for the enforcement of this Franchise or to verify Grantee's compliance with terms or conditions of this Franchise. Grantee will not deny the City access to any of Grantee's records on the basis that Grantee's documents or records are under the control of any affiliate or a third party.

(2) All documents and records maintained by Grantee shall be made available for inspection by the City at reasonable times and intervals; provided, however, that nothing in this section shall be construed to require Grantee to violate state or federal law regarding subscriber privacy, nor shall this section be construed to require Grantee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature.

(3) One copy of documents and records requested by the City will be furnished to the City at the cost of Grantee. If the requested documents and records are too voluminous or for security reasons cannot be copied or removed, then Grantee may request, in writing within ten (10) days of the City's request, that the City inspect them at Grantee's local office. If any documents or records of Grantee are not kept in a local office and/or are not made available in copies to the City, and if the City determines that an examination of such documents or records is necessary or appropriate for the enforcement of this Franchise, or to verify Grantee's compliance with terms or conditions of this Franchise, then all reasonable travel and related costs incurred in making such examination shall be paid by Grantee.

(4) At the request of the city, Grantee shall provide the City with an annual report on the number of feet of right-of-way Grantee occupies in the City and the services Grantee is providing in the City. Grantee may request all or a portion of such information be protected from disclosure under the Washington Public Records Act (RCW 42.56).

Sec. 15. Assignment or transfer. Grantee's rights, privileges, and authority under this Franchise, and ownership or working control of facilities constructed or installed pursuant to this Franchise, may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or

other act of Grantee, by operation of law or otherwise, except as provided herein, or without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. Any transfer, assignment or disposal of Grantee's rights, privileges, and authority under this Franchise, or ownership or working control of facilities constructed or installed pursuant to this Franchise, may be subject to reasonable conditions as may be prescribed by the City.

(1) No rights, privileges, or authority under this Franchise shall be assigned, transferred, or disposed of in any manner within twelve (12) months after the effective date of this Franchise.

(2) Absent extraordinary and unforeseeable circumstances, no facility shall be assigned, transferred, or disposed of before construction of the facility has been completed and restoration has been performed to the satisfaction of the City.

(3) Grantee and the proposed assignee or transferee shall provide and certify the following information to the City not less than one hundred and fifty (150) days prior to the proposed date of assignment, transfer, or disposal:

(a) Complete information setting forth the nature, terms and conditions of the proposed assignment, transfer, or disposal;

(b) Any other information reasonably required by the City; and

(c) A transfer application fee in an amount to be determined by the City to recover actual administrative costs directly related to receiving and approving the proposed assignment, transfer, or disposal.

(3) No assignment, transfer, or disposal may be made or shall be approved unless the assignee or transferee has the legal, technical, financial, and other requisite qualifications to operate, maintain, repair, and remove facilities constructed or installed pursuant to this Franchise and to comply with the terms and conditions of this Franchise.

(4) Any transfer, assignment, or disposal of rights, privileges, and authority under this Franchise or ownership or working control of facilities constructed or installed pursuant to this Franchise, without prior written approval of the City pursuant to this section, shall be void and is cause for termination of this Franchise.

(5) Any transactions which singularly or collectively result in a change of fifty percent (50%) or more of the ownership or working control (regardless of the percentage) of the Grantee or affiliated entities having fifty percent (50%) or more of the ownership or actual working control (regardless of the percentage) of Grantee, or of control of the telecommunications capacity or bandwidth of Grantee, shall be considered an assignment or transfer requiring City approval. Transactions between affiliated entities are exempt from City approval; provided that, Grantee shall promptly notify the City prior to any proposed change in, or transfer of, or acquisition by any other party of control of Grantee. Every change, transfer, or acquisition of control of Grantee shall cause a review of the proposed transfer. City approval shall not be required for mortgaging purposes or if said transfer is from Grantee to another person controlled by Grantee.

(6) All terms and conditions of this Franchise shall be binding upon all permitted successors and assigns of Grantee and all persons who obtain ownership or working control of any facility constructed or installed pursuant to this Franchise.

Sec. 16. Violations, noncompliance, and other grounds for termination or cancellation.

(1) This Franchise, and any right, privilege or authority of Grantee to enter, occupy or use public ways may be terminated or cancelled by the City for the following reasons:

(a) Violation of or noncompliance with any term or condition of this Franchise by Grantee;

(b) Violation of or noncompliance with the material terms of any use and/or development authorization or required permit by Grantee;

(c) Construction, installation, operation, maintenance, or repair of facilities on, in, under, over, across, or within any public way without Grantee first obtaining use and/or development authorization and required permits from the City and all other appropriate regulatory authorities;

(d) Unauthorized construction, installation, operation, maintenance, or repair of facilities on City property;

(e) Misrepresentation or lack of candor by or on behalf of Grantee in any application or written or oral statement upon which the City relies in making the decision to grant, review or amend any right, privilege or authority to Grantee;

(f) Abandonment of facilities;

(g) Failure of Grantee to pay taxes, fees, charges or costs when and as due, unless subject to a proper and timely legal protest; or

(h) Insolvency or bankruptcy of Grantee.

(2) In the event that the City believes that grounds exist for termination or cancellation of this Franchise or any right, privilege or authority of Grantee to enter, occupy or use public ways, Grantee shall be given written notice and a reasonable period of time not exceeding thirty (30) days to furnish evidence:

(a) That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation, noncompliance, or other grounds for termination or cancellation;

(b) That rebuts the alleged violation, noncompliance, or other grounds for termination or cancellation; or

(c) That it would be in the public interest to impose some penalty or sanction less than termination or cancellation.

(3) In the event that Grantee fails to provide evidence reasonably satisfactory to the City as provided in subsection (2) of this section, the City shall refer the apparent violation,

noncompliance, or other grounds for termination or cancellation to the City Council. The City Council shall provide the Grantee with notice and a reasonable opportunity to be heard concerning the matter.

(4) If the City Council determines that the violation, noncompliance, or other grounds above for termination or cancellation exist, then, Grantee shall, at the election of the City Council, forfeit all rights, privileges and authority conferred under this Franchise or any use and/or development authorization or permit granted by the City, and this Franchise and any such use and/or development authorization or permit may be terminated or cancelled by the City Council. The City Council may elect, in lieu of the foregoing and without any prejudice to any of its other legal rights and remedies, to pursue other remedies, including obtaining an order compelling Grantee into compliance or to take corrective action, or to recover damages and costs incurred by the City by reason of Grantee's actions or omissions. The City Council shall utilize the following factors in analyzing the nature, circumstances, extent, and gravity of the actions or omissions of Grantee:

(a) Whether the misconduct was egregious;

(b) Whether substantial harm resulted;

(c) Whether the violation was intentional;

(d) Whether there is a history of prior violations of the same or other requirements;

(e) Whether there is a history of overall compliance; and

(f) Whether the violation was voluntarily disclosed, admitted or cured.

(5) The City Council's choice of remedy shall not excuse Grantee from compliance with any term or condition of this Franchise or the material terms of any use and/or development authorization or required permit. Grantee shall have a continuing duty to remedy any violation, noncompliance, or other grounds for termination or cancellation. Further, nothing herein shall be

construed as limiting any remedies that the City may have, at law or in equity, or the Grantee may have at law or in equity, for enforcement of this Franchise and any use and/or development authorization or permit granted to Grantee.

Sec. 17. Notices.

(1) Any regular notice or information required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

CITY:

City Manager
City of Des Moines
21630 11th Ave. S., Ave A
Des Moines, WA 98198

GRANTEE:

MCIMETRO ACCESS TRANSMISSION SERVICES CORP. D/B/A VERIZON ACCESS TRANSMISSION SERVICES
Attn: Franchise Manager
600 Hidden Ridge
Mailcode: HQE02G295
Irving, TX 75038NAME

with a copy (except for invoices) to:

Verizon Business Services
1320 N. Courthouse Road, Suite 900
Arlington, VA, USA 22201
Attn: Vice President and Deputy General Counsel, Network and Technology

(2) Grantee shall additionally provide a phone number and designated responsible officials to respond to emergencies. After being notified of an emergency, Grantee shall cooperate with the City and make its best efforts to immediately respond to minimize damage, protect the welfare, health and safety of the public and repair facilities to restore them to proper working order. Annually, on request of the City, Grantee will meet with City emergency response personnel to coordinate emergency management

operations and, at least once a year, at the request of the City, actively participate in emergency preparations.

Sec. 18. Non-waiver. The failure of either party to exercise any rights or remedies under this Franchise or to insist upon compliance with any terms or conditions of this Franchise shall not be a waiver of any such rights, remedies, terms or conditions of this Franchise by the party and shall not prevent the party from demanding compliance with such terms or conditions at any future time or pursuing its rights or remedies.

Sec. 19. Eminent domain. This Franchise is subject to the power of eminent domain and the right of the City Council to repeal, amend or modify the Franchise in the interest of the public. In any proceeding under eminent domain, the Franchise itself shall have no value.

Sec. 20. Limitation of liability. Except as otherwise set forth in this Franchise, administration of this Franchise may not be construed to create the basis for any liability on the part of the City, its elected officials, officers, employees, agents, and representatives for any injury or damage; or by reason of any schedule or specification review, inspection, notice and order, permission, or other approval or consent by the City; for any action or inaction thereof authorized or done in connection with the implementation or enforcement of this Franchise by the City; or for the accuracy of plans submitted to the City.

Sec. 21. Damage to facilities. Except as otherwise set forth herein, unless directly and proximately caused by the active sole negligence of the City, the City shall not be liable for any damage to or loss of any facilities as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind on, in, under, over, across, or within a public way done by or on behalf of the City.

Sec. 22. Competitive neutrality. In order to maintain a level playing field among all similarly situated grantees of the City, upon the grant or renewal of another franchise in the rights-of-way where material terms or conditions of this Franchise conflict with a change in the City Code, or the provisions of this Franchise provide a material competitive advantage over another

similarly situated provider (such that it negatively impacts the City's ability to effectively manage the rights-of-way), then the City may elect to renegotiate with the Grantee in good faith to modify the terms and provisions of this Franchise to obtain material terms and conditions that, as a whole, are competitively neutral among similarly situated grantees.

Sec. 23. Resolution of disputes and governing law.

(1) **Alternative dispute resolution.** If a dispute arises from or relates to this Contract or the breach thereof and if the dispute cannot be resolved through direct discussions, the parties agree to endeavor first to settle the dispute in an amicable manner by mediation administered by a mediator under JAMS Alternative Dispute Resolution service rules or policies before resorting to arbitration. The mediator may be selected by agreement of the parties or through JAMS. Following mediation, or upon written contract of the parties to waive mediation, any unresolved controversy or claim arising from or relating to this Franchise or breach thereof shall be settled through arbitration which shall be conducted under JAMS rules or policies. The arbitrator may be selected by agreement of the parties or through JAMS. All fees and expenses for mediation or arbitration shall be borne by the parties equally. However, each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of evidence.

(2) **Applicable law and jurisdiction.** This Franchise shall be governed by the laws of the State of Washington. Although the agreed to and designated primary dispute resolution method as set forth above, in the event any claim, dispute or action arising from or relating to this Franchise cannot be submitted to arbitration, then it shall be commenced exclusively in the King County Superior Court or the United States District Court, Western District of Washington as appropriate. In any claim or lawsuit for damages arising from the parties' performance of this Franchise, each party shall pay its own legal costs and attorneys' fees incurred in defending or bringing such claim or lawsuit, in addition to any other recovery or award provided by law; provided, however, nothing in this paragraph shall be construed to limit the City's right to indemnification under Section XVII of this Contract.

Sec. 24. Severability. If any section, sentence, clause or phrase of this Franchise or its application to any person or entity should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality will not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Franchise or its application to any other person or entity.

Sec. 25. Miscellaneous.

(1) **Equal employment and nondiscrimination.** Throughout the term of this Franchise, Grantee will fully comply with all applicable equal employment and nondiscrimination provisions and requirements of federal, state, and local laws, and in particular, FCC rules and regulations relating thereto.

(2) **Local employment efforts.** Grantee will use reasonable efforts to utilize qualified local contractors, including minority business enterprises and woman business enterprises, whenever the Grantee employs contractors to perform work under this Franchise.

(3) **Descriptive headings.** The headings and titles of the sections and subsections of this Franchise are for reference purposes only and do not affect the meaning or interpretation of the text herein.

(4) **Force majeure.** Grantee shall not be required to perform any covenant or obligation in this Franchise, or be liable in damages to the City, so long as the performance or non-performance of the covenant or obligation is delayed, caused or prevented by an act of God or force majeure. An "act of God" or "force majeure" is defined for purposes of this Franchise as strikes, lockouts, sit-downs, material or labor restrictions by any governmental authority, unusual transportation delays, riots, floods, washouts, explosions, earthquakes, fire, storms, weather (including inclement weather which prevents construction), acts of the public enemy, wars, terrorism, insurrections, and/or any other cause not reasonably within the control of Grantee.

(5) **No joint venture.** Nothing herein will be deemed to create a joint venture or principal-agent relationship between the

parties, and neither party is authorized to, nor shall either party act toward third persons or the public in any manner that would indicate any such relationship with the other.

(6) **Actions of the City or Grantee.** In performing their respective obligations under this Franchise, the City and Grantee will act in a reasonable, expeditious, and timely manner. Whenever this Franchise sets forth a time for any act to be performed by Grantee, such time shall be deemed to be of the essence, and any failure of Grantee to perform within the allotted time may be considered a material breach of this Franchise, and sufficient grounds for the City to invoke any relevant remedy.

(7) **Counterparts.** This Franchise may be executed in one or more counterparts, and each originally executed duplicate counterpart of this Franchise shall be deemed to possess the full force and effect of the original.

(8) **Entire agreement.** This Franchise represents the entire understanding and agreement between the parties with respect to the subject matter and supersedes all prior oral and written negotiations between the parties.

(9) **Modification.** The parties may alter, amend or modify the terms and conditions of this Franchise upon written agreement of both parties to such alteration, amendment or modification.

(10) **Rights granted.** This Franchise does not convey any right, title or interest in public ways, but shall be deemed only as authorization to enter, occupy, or use public ways for the limited purposes and terms stated in this Franchise. Further, this Franchise shall not be construed as any warranty of title.

(10) **Contractors and subcontractors.** Grantee's contractors and subcontractors must be licensed and bonded in accordance with the City's ordinances, rules, and regulations. Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by Grantee.

Sec. 26. Publication. The City Clerk is authorized and directed to publish a summary hereof.

Sec. 27. Effective date. This Ordinance shall be in full force and effect five days from and after its passage, approval and publication as required by law, but if, and only if, the Grantee has endorsed this Ordinance and accepted the terms and conditions thereof.

PASSED BY the City Council of the City of Des Moines this 8th day of June, 2017 and signed in authentication thereof this 8th day of June, 2017.

M A Y O R

APPROVED AS TO FORM:

City Attorney

ATTEST:

City Clerk

I, Bonnie Wilkins, City Clerk, do hereby certify that the foregoing is a true and correct copy of the original instrument on file and of record in my office in Des Moines, Washington 98198

Published: June 13, 2017

ACCEPTANCE:

By accepting the Franchise, the Grantee: (1) acknowledges and accepts the City's legal right to issue and enforce the Franchise; (2) agrees that it will not oppose the City's intervening, to the extent that the City is legally entitled to do so, in any legal or regulatory proceeding affecting the Telecommunication System; (3) accepts and agrees to comply with each and every provision of this Franchise; and (4) agrees that the Franchise was granted pursuant to processes and procedures consistent with applicable law, and that it will not raise any claim to the contrary.

MCImetro Access Transmission Services Corp. d/b/a Verizon Access Transmission Services

By: _____

Printed Name: Robert McGee

Date: 6/19/2017

Title: Executive Director

LEGAL NOTICE

SUMMARY OF ADOPTED ORDINANCE

CITY OF DES MOINES

ORDINANCE NO. 1682, Adopted June 8, 2017.

DESCRIPTION OF MAIN POINTS OF THE ORDINANCE:

This Ordinance grants a non-exclusive Franchise to construct, install, operate, maintain, repair, or remove telecommunications facilities within the public ways of the City of Des Moines ("City") to MCImetro Access Transmission Services Corp. d/b/a Verizon Access Transmission Services ("Grantee"). Grantee's telecommunications facilities shall not include antennas and support structures specifically for attaching antennas that are used for personal wireless communications services. The City and Grantee are sometimes hereinafter collectively referred to individually as a "party" and collectively as the "parties."

The full text of the Ordinance will be mailed without cost upon request.

Bonnie Wilkins, CMC
City Clerk

Published: June 13, 2017