

ORDINANCE NO. **BG2019 - 6**

ORDINANCE CREATING FRANCHISE RELATING TO
TELECOMMUNICATIONS SYSTEM

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

WHEREAS, the City of Bowling Green is aware of interest in providing telecommunication services
in the City; and,

WHEREAS, the City has determined that it is in the best interest of the City to create a non-
exclusive franchise for the use of the public rights-of-way for the operation and maintenance of a
telecommunications system; and,

WHEREAS, the City is required to publicly bid all franchises for the use of its rights-of-way.

NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of the City of Bowling
Green, Kentucky as follows:

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Section 1 - Creation of Franchise.

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

Section 2 - Existing Legislation.

The Government has already adopted legislation and regulations pertaining to, and including but not limited to, permitting, construction, street project and other related activities by Grantees and franchisees in its Rights-of-way. Therefore, the terms and provisions of the City of Bowling Green existing ordinances, (the "Ordinances"), and as it may be amended in the future is incorporated herein by reference, and shall apply as if fully set forth herein.

Section 3 - Definitions.

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

"Applicant" means a Person which is applying for a franchise.

"Application" shall refer to the list of documents and information set forth in Section 4 required from new entrants, including any written responses provided on Government forms or written

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correspondence provided in response to Government inquiries and investigations. Applications must comply with the requirements of this Ordinance in its entirety.

“Cable Service” shall have the meaning in this Ordinance as it is defined in Section 602(6) of the Communications Act of 1934, as amended as it may be amended (hereinafter cited as 47 U.S.C. § 522(6)).

“Cable System” shall have the meaning in this Ordinance as it is defined in Section 602(7) of the Communications Act of 1934, as it may be amended (47 U.S.C. § 522(7)).

“Board of Commissioners” means the City of Bowling Green Board of Commissioners.

“Communications Act” means the Communications Act of 1934, as amended from time to time (47 U.S.C. § 151 et seq.).

“Customer” means a person located within the territorial limits of the Government who is legally receiving Telecommunications Service from the Grantee.

“End-User” means the retail residential or business Customer of a Cable Service or Telecommunications Service provided by Grantee to an end-point in the City of Bowling Green. For purposes of clarity, an End User is not an individual or entity who resells the service(s) received from Grantee (e.g., reseller, wholesaler, interexchange carrier, IRU customer, etc.).

“Equipment and apparatus” means any manholes, underground conduits, ducts, nodes, electronic devices, poles, cables, boxes, wires, fixtures, conductors, or other facilities necessary, essential, used or useful to and operated by the Telecommunications System.

“Facility” means any tangible component of Grantee's Telecommunication System within the City of Bowling Green.

“FCC” means the Federal Communications Commission, or its lawful successor.

“Franchise Fee” means for the purposes of this Ordinance any fee that may be imposed by the Government on Grantee as compensation for Grantee's use of public rights-of-way and roads. Use of this definition in this Ordinance is without prejudice to any rights Grantee or Government may have under Federal and Kentucky law as they may be amended.

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“Government” means (unless otherwise specified) the City of Bowling Green, a city created pursuant to the Kentucky Revised Statutes, as it now exists in its present territorial limits, or may hereafter be extended or reduced, and its elected and appointed officials, employees, agents, boards, consultants, assigns, volunteers and successors in interest.

“Grantee” means a Person to which a franchise under this Ordinance is granted by the Board of Commissioners, or its successors and assigns.

“Gross Revenue” means after adjustment for the net write-off of uncollectible accounts, any and all revenues derived by Grantee within the City of Bowling Green from Grantee's Telecommunications System, including, but not limited to: revenues from the sale of and use of Telecommunications Services originating or terminating in the City of Bowling Green.

"Minimum Annual Franchise Fee" means \$2,500 in the first year Grantee has two-hundred and fifty (250) end users.

“PSC” means the Kentucky Public Service Commission or its lawful successor.

“Person” is any person, firm, partnership, association, corporation, company, governmental entity or organization of any kind.

“Road” or “Street” or “Right-of-way” shall mean the surface of and the space above and below any public road, street, highway, freeway, lane, path, public way or place, sidewalk, alley, court, boulevard, parkway, drive or easement now or hereafter held by the Government for the purpose of public travel and shall include other easements or rights-of-way as shall be now held or hereafter held by the Government which shall, within their proper use and meaning entitle the Government and its Grantee to the use thereof for the purposes of installing or transmitting Telecommunication System transmissions over poles, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to a Telecommunication System.

“Shall” is mandatory, not merely directive.

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“Telecommunications Service” means any service provided by Grantee to an End-User customer of Grantee for consideration for the purpose of provision, transmission, conveyance, or routing of information including, but not limited to, voice, video, images data, or any other information signals without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself and whether or not the transmission medium is wireline. By way of example, and not limitation, Telecommunications Service includes, but is not limited to the following services to the extent provided by Grantee to an End-User:

1. telecommunications service (as defined by 47 USC §153(53) (as such term is now, or may in the future be, defined under federal law);
2. telephone exchange service (as defined by 47 USC §153(54) (as such term is now, or may in the future be, defined under federal law);
3. exchange access (as defined by 47 USC §153 (20) (as such term is now, or may in the future be, defined under federal law);
4. mobile service (as defined by 47 USC §153(33) (as such term is now, or may in the future be, defined under federal law);
5. advanced communications services (as defined by 47 USC §153(1) (as such term is now, or may in the future be, defined under federal law);
6. long distance, inter-exchange and inter-LATA services, which may include MTS, WATS, 800, operator services, directory assistance and travel card services;
7. private line point to point service for end users of voice and data transmission; non-entertainment video, videoconferencing, or point to point private line service; and,
8. any other intrastate or interstate telecommunication services which the Kentucky Public Service Commission or the FCC has authorized or services provided by radio common carrier.

"Telecommunications System" means all fiber optics, wires, cables, ducts, conduits, vaults, poles, anchors, nodes, antennas, cabinets, fixtures, transformers, Equipment and apparatus and other necessary

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facilities owned or used by Grantee for the purpose of providing Telecommunications Service and located in, above or below the Streets.

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

Section 4 - Applications.

All applications received by the Government from Applicants shall become the sole property of the Government. Applications shall be accompanied by a non-refundable application fee of six thousand dollars (\$6,000) payable to the Government. Said application fee shall defray in whole or part the Government’s costs to process any application filed under this Ordinance and negotiate, award and administer any franchise. Said application fee shall not be considered franchise fee payments.

(a) The Government reserves the right to reject any and all applications that fail to comply with the application requirements of this Ordinance and waive informalities, and/or technicalities where the best interest of the Government may be served.

(b) All questions regarding the meaning or intent of the Ordinance or application documents shall be submitted to the Government in writing. Replies will be issued by Addenda mailed or delivered to all parties recorded by the Government as having received the application documents. The Government reserves the right to make extensions of time for receiving applications as it deems necessary. Only replies to questions by written Addenda will be binding. All applications must contain an acknowledgment of receipt of all Addenda.

(c) Applications must be submitted at the time and place indicated in the application documents. Applications may be modified at any time prior to the opening of the applications, provided that any modifications must be duly executed in the manner that the Applicant’s application must be executed.

(d) Before submitting its application, each Applicant must (i) examine the Ordinance and the application documents thoroughly, (ii) familiarize itself with local conditions that may in any manner

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affect performance under this Ordinance, and (iii) familiarize itself with federal, state and local laws, Ordinances, rules and regulations affecting performance under the franchise.

(e) Applicant shall furnish to the Government information and data as is reasonably required to determine the ability of the Applicant to perform under the franchise. The Government reserves the right to reject any application if the evidence submitted by, or investigation of, such Applicant indicates the Applicant is unqualified to carry out the obligations of the franchise and to complete the work contemplated therein. Conditional applications will not be accepted.

(f) All applications received by the Government from the Applicants will become the sole property of the Government. Applicants shall submit all requested information as provided by the terms of this Ordinance. The following information must be complete and verified as true by the Applicant:

1. *Name and address of Applicant.* The Applicant's name, address, e-mail address and telephone and facsimile numbers; date of application and signature of Applicant or appropriate corporate officer(s); the name, address and e-mail address, and telephone and facsimile numbers of a local representative who shall be available at all times; and information regarding how to contact the local representative in an emergency.

2. *Description of proposed Telecommunications System.* A description of the Applicant's proposed Telecommunications System design.

3. *Services.* A statement setting forth a description of all the types of Telecommunications Services proposed.

4. *Applicant organization.* The Applicant shall be a corporation or limited liability company authorized to do business in the Commonwealth of Kentucky, as certified by the Secretary of State. Applicant must fully disclose the ownership of the Facilities to be used in rendering the Telecommunications Service.

5. *Application Requirements.* A statement of the Applicant's legal, technical, and financial qualifications setting forth its ability to comply with the terms of this Ordinance.

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6. *Technical description.* Applicant shall provide a technical description of the type of Telecommunication System proposed by the Applicant and Applicant's plan for the installation of the Telecommunications System. Telecommunications System designs are to be submitted in bullet format detailing equipment start point, routes and end point location accompanied by network routing maps(s). The following information shall be included in the application:

- a. If the Applicant is proposing an underground installation in existing ducts or conduits within the rights-of-way, information in sufficient detail to identify the location of the existing ducts or conduits to be occupied.
- b. If the Applicant is proposing an underground installation within new ducts or conduits to be constructed within the rights-of-way;
- c. The location, depth, size and quantity of proposed new ducts or conduits;
- d. A preliminary installation schedule and completion date.

7. *Engineering statement.* A statement from the Applicant's senior technical staff member, or consultant, advising that the Applicant's planned Telecommunications System and operations thereof would meet all the requirements set forth herein.

8. *Additional requirements.*

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

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

10. A copy of all insurance policies or certificates required under this Ordinance.

11. A statement signed by the Applicant that the Applicant agrees to be bound by all provisions of this Ordinance and its franchise and agrees to obtain all applicable permits and authorizations prior to

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constructing, installing, or operating a system in the right-of-way.

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

(e) *Supplementation to applications.* The Government reserves the right to require such supplementary, additional or other information that it deems reasonably necessary for its determinations related to a grant of a Franchise pursuant to this Ordinance.

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

Section 5 - Rights under Franchise.

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

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

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

Section 6 - Standards.

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

(a) All working Facilities and conditions used during construction, installation and maintenance of Facilities (including clearance of wires and cables above the Rights-of-way and placement of any underground facilities) shall comply with the standards of the Occupational Safety and Health Administration, the National Electric Safety Code, and the National Electric Code. In the operation of its Telecommunications System, the Grantee shall conform to all standards required by applicable state or federal law or regulation;

(b) All materials and equipment used or installed in construction shall be industry standard, and any defect in the work, materials or equipment, whether latent or patent, will be remedied by the Grantee at its cost;

(c) Construction, reconstruction, maintenance, or removal of any Facilities, shall be performed with due regard for the rights of the Government and others, and shall not unnecessarily interfere with, or in any way injure the property of the Government or others under, on, or above the ground, or otherwise unduly interfere with the public use of the Rights-of-way;

(d) Placement of lights, danger signals or warning signs shall be undertaken by the Grantee in compliance with applicable law;

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(e) Unless exempted by the Government, Facilities shall be installed underground at any location where all other utilities' Facilities that are used to provide customer service are then being installed underground, or when otherwise required under the Ordinances, and shall be in conformance with the applicable requirements of this Ordinance and those set forth in the Code, the Zoning Ordinance, or any other applicable local law or regulation. The Grantee assumes all responsibility for damage or injury resulting from its placement or maintenance of any above-ground Facilities;

(f) Grantee shall identify all of its Facilities, new and existing, by tagging or marking its Facilities with the Grantee's name and telephone number. Additionally, Grantee shall provide the Government annually with a map in a format agreed to by the Grantee and Government which contains the location of all of its Facilities;

(g) The Government, through its Mayor or his or her designee, or through such assistants as the Government may employ or designate, may, at all times and under reasonable conditions with prior notice, have reasonable access for purposes of safety and health inspections to all or any of the property or used in part or in whole by the Grantee in its operating and maintaining the Telecommunications System under this Ordinance and located within the Rights-of-way; and

(h) The Grantee agrees to provide to the Government and/or its Board of Commissioners with information pertaining to its provision of Telecommunications Services pursuant to this Ordinance upon reasonable request. This shall include, but is not necessarily limited to, attending public meeting(s), at a time mutually agreed upon by Grantee and the Government, at which some or all of the Board of Commissioners members are in attendance (in order to provide such information upon reasonable advance notice) and providing an annual update to the Board of Commissioners upon its request, at a time mutually agreed upon by Grantee and the Government.

Section 7 - Moving Permits and Tree Trimming.

(a) The Grantee shall, at the request of any Person holding a moving permit issued by the

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Government, temporarily raise or lower its wires to permit the moving of buildings or other structures. The expense of such temporary removal or raising or lowering of wires shall be paid by the Person requesting the same, and the Grantee shall have the authority to require such payment in advance. The Grantee shall be given not less than five (5) days advance notice to arrange for such temporary wire changes.

(b) The Grantee shall have the authority to trim trees upon the overhanging Rights-of-way so as to prevent the branches of such trees from coming in contact with the wires or cables of the Grantee. Any trimming, removal or other disturbance of trees shall conform to all applicable laws or regulations and the customary industry practices.

Section 8 - Indemnification.

The Grantee agrees to indemnify, hold harmless, and defend the Government from any and all losses or claims of whatever kind to the extent that they arise from or are alleged to have arisen from the performance or breach of this franchise by Grantee, its employees, agents, servants, owners, principals, lessees, contractors and subcontractors, excluding negligence and misconduct on the part of the Government. This indemnity agreement shall in no way be limited by any financial responsibility, insurance, or loss control requirements below and shall survive to the extent permitted by the applicable statute of limitations.

For purposes of this Indemnity provision:

(1) The word “defend” includes, but is not limited to, investigating, handling, responding to, resisting, providing a defense for, and defending claims, at Grantee’s expense, using an attorney selected by the Grantee and approved in writing by the Government which approval shall not be unreasonably withheld.

(2) The word “claims” includes, but is not limited to, claims, demands, liens, suits, and other causes of action of whatever kind.

(3) The word “losses” includes, but is not limited to: attorneys’ fees and expenses; costs of

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litigation; court or administrative agency costs; judgments; fines; penalties; interest, all environmental cleanup and redemption costs of whatever kind; and any liability arising from death, injury or damage of any kind to any Person, including employees and agents of Grantee, its servants, owners, principals, licensees, vendees, lessees, contractors and subcontractors or the Government, and damage to or destruction of any property.

Section 9 – Insurance.

(a) The Grantee shall procure and maintain for the duration of the franchise the following insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance hereunder by the Grantee:

(1) Commercial General Liability Insurance with:

- A. Limits of not less than \$5,000,000.00 for property damage.
- B. \$5,000,000.00 for personal bodily injury or death to any one person.
- C. \$5,000,000.00 for bodily injury or death aggregate per single accident or occurrence.
- D. Products-Completed Operations coverage.
- E. Personal and Advertising Injury coverage.
- F. Explosion, collapse & underground coverage.
- G. Grantee's certificate of insurance will list as additional insureds, "the City of Bowling Green, its elected and appointed officials, employees, and, to the extent they have an insurable interest, its agents, boards, consultants, assigns, volunteers and successors in interest."
- H. Additionally, such insurance shall contain endorsement that Grantee's insurance coverage shall be primary insurance with respect to the Government. Any insurance or self-insurance maintained by the Government shall be in excess of the Grantee's insurance and shall not contribute to it.

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(2) Comprehensive Automobile Liability Insurance providing limits of not less than \$5,000,000.00.

(3) Workers' Compensation Insurance as required by the Kentucky Revised Statutes and Employers Liability Coverage equal to \$1,000,000 with endorsement that insurer shall agree to waive all rights of subrogation against Government for losses arising from work performed by the Grantee for Government.

(4) The Grantee shall abide by all local, state, and federal insurance regulations.

(b) Acceptability of Insurers. Insurance is to be placed with insurers qualified to do business in the Commonwealth of Kentucky.

(c) Evidence of Insurance. The Government is to be furnished Certificates of Insurance reflecting the above coverage's, and Grantee agrees to provide the Government, the following:

(1) Signed renewal Certificates for expiring policies;

(2) New Certificates of Insurance if policies or carriers change during terms of this franchise, showing compliance with the above Insurance requirements; and

(3) Copies of Insurance policies upon request.

(d) Right to Review, Audit and Inspect. If Grantee fails to provide any of the documents specified in Section 9(c) upon reasonable request of the Government, Grantee understands and agrees that the Government may review, audit, and inspect any and all of Grantee's relevant records and operations to insure compliance with these Insurance requirements.

(e) Safety and Loss Control. Grantee agrees to adhere to and comply with all Federal, State and Local safety and environmental laws, regulations and Ordinances. The Grantee shall provide all safeguards, safety devices and protective equipment necessary as required by applicable Federal, State and local law.

(f) Maintenance of Insurance. The insurance required in this Section 9 shall not be suspended, voided, canceled by the Grantee, reduced in coverage or in limits except after thirty (30) days prior written

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notice by certified mail, return receipt requested to the Government.

(g) Definition of Default. Grantee understands and agrees that the failure to comply with any of these insurance, safety or loss control provisions (including with, among other things, Section 9(f)) within ten (10) business days after notice from the Government that the Grantee is not in compliance shall constitute a default under this Ordinance. The Government may elect, at its option, any single remedy or any combination of remedies, as available, including but not limited to, purchasing insurance and charging Grantee for any such insurance premiums purchased, or terminating the Grantee's franchise. The date of default with respect to Section 9(f) shall relate back to the date of breach, without regard to the date on which notice is provided by the Government.

Section 10 - Non-discrimination and Affirmative Action.

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

Section 11 - Transfer of Control & General Rate Cases.

(a) In the event that the Grantee files for a Transfer of the Grantee, or a general rate case with the PSC, it will furnish the Mayor or her designee with timely notice of such filing. In the event the Government should choose to intervene in such PSC action, the Grantee shall not oppose such intervention.

(b) No Transfer shall take place, whether by forced or voluntary sale, lease, mortgage, assignment, encumbrance or any other form of disposition, without prior notice to and approval by the Government which shall not be unreasonably refused, withheld, or delayed. The notice shall include full identifying particulars of the proposed transaction, and the Board of Commissioners shall act by resolution. The Government shall have one hundred twenty (120) days within which to approve or disapprove a transfer of

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control or assignment, if no action is taken within such one hundred twenty (120) days; approval shall be deemed to have been given.

(c) Section 11(b) is not intended to apply to assignments to a parent, subsidiary or affiliate of the Grantee, or in those instances in which the Grantee has filed for a transfer of control before the PSC. Such inter-corporate transfers or transfers subject to the jurisdiction of the PSC shall require notice to the Government as provided in Section 11(a).

(d) In making a determination on whether to grant an application for a Transfer, the Government may consider the financial, technical and other qualifications of the transferee (assignee) to operate the Telecommunication System; whether the incumbent Grantee is in compliance with this Ordinance and, if not, the proposed transferee's (assignee's) commitment to cure such noncompliance and any other criteria allowed by applicable law.

(e) The consent or approval of the Government to any Transfer of the Grantee shall not constitute a waiver or release of the rights of the Government in and to the streets.

Section 12 - Franchise Duration.

(a) The franchise hereby created shall be for a period of ten (10) years from the date of acceptance by the Government.

(b) The franchise created by this Ordinance creates no vested rights in the Grantee other than those provided by this Ordinance or at law, and any installation or placement of Facilities by the Grantee in the Rights-of-way is at the Grantee's risk.

Section 13 - Penalties.

(a) If, after the Grantee is provided the opportunity to appear and present evidence before the Mayor or his or her designee, the Mayor finds that the Grantee has violated any of the following provisions of this Ordinance following the grant of a Franchise pursuant to this Ordinance, the following penalties shall be recoverable. The decision of the Mayor or his or her designee shall be the final administrative

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decision and shall be in writing and provide the basis for the decision. The decision may be appealed to a court of competent jurisdiction.

(1) For failure to complete or remove any construction project within a reasonable period of time after the ending term of any franchise awarded pursuant to this Ordinance or any extension thereof, the Grantee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues; in lieu of a penalty, the Grantee may post a performance bond, letter of credit or other surety acceptable to the Government in an amount sufficient to complete such construction projects. This section shall not apply to any projects for which performance bonds or other surety is already pledged.

(2) For failure to provide data and reports requested by the Government and as required by this Ordinance the Grantee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues.

(3) For failure to pay a permit fee or franchise fee when due pursuant to local law, the Grantee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues.

(b) If the Grantee fails to comply within thirty (30) days of any Board of Commissioners resolution directing compliance with any other provisions of this Ordinance, the Grantee shall forfeit five hundred dollars (\$500.00) per day or part thereof that the violation continues. The decision of the Board of Commissioners may be appealed to a court of competent jurisdiction.

(c) The Grantee shall not be excused from complying with any of the terms and conditions of this Ordinance by any failure of the Government, upon any one or more occasions, to insist upon the Grantee's performance or to seek the Grantee's compliance with any one or more of such terms or conditions. Payment of penalties shall not excuse non-performance under this Ordinance. The right of the Government to seek and collect penalties as set forth in this section is in addition to its right to terminate and cancel as set forth in Section 15 of this Ordinance.

Section 14 - Maintenance of Telecommunication System.

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The Grantee shall maintain its Telecommunication System in reasonable operating condition at all normal times during the term of its Franchise. An exception to this is automatically in effect when Telecommunications Service furnished by the Grantee is interrupted, impaired or prevented by fires, strikes, riots or other occurrences beyond the control of the Grantee, or by storms, floods or other casualties, in any of which events the Grantee shall do all things reasonably within its power to restore normal Telecommunications Service within a reasonable period of time.

Section 15 - Right to Terminate and Cancel the Franchise.

(a) In addition to all other rights and powers pertaining to the Government by virtue of this Ordinance or otherwise, the Government, by and through its Board of Commissioners, reserves the right to terminate and cancel the franchise and all rights and privileges of the Grantee hereunder in the event that the Grantee:

(1) Within thirty (30) days of being provided the Government's written demand described in subsection (b) below, willfully violates any provision of this Ordinance, the franchise or any material rule, order, or determination of the Government made pursuant to the franchise, except where such violation is without fault or through excusable neglect or due to a force majeure act;

(2) Willfully attempts to evade any provision of this Ordinance or the franchise or practices any fraud or deceit upon the Government;

(3) Fails reasonably to begin or complete construction as provided under this Ordinance or the franchise;

(4) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of the franchise; or

(5) Entry of a final and non-appealable order by the Public Service Commission of Kentucky which revokes any authority of the Grantee to provide Telecommunications Service in the City of Bowling Green, Kentucky.

(b) The Government may make a written demand that the Grantee do or comply with any such

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provision, rule, order or determination. The Grantee will be provided the opportunity to appear and present evidence before the Mayor or his or her designee, whose decision shall be the final administrative decision, and shall be in writing and provide the basis for the decision. If the violation by the Grantee continues for a period of thirty (30) days following such a decision by the Mayor or his or her designee without written proof that the corrective action has been taken or is being actively and expeditiously pursued by the Grantee, the Government may place its request for termination of the franchise as early as the next regular Board of Commissioners meeting agenda. The Government shall cause to be served upon Grantee, at least ten (10) days prior to the date of such Board of Commissioners meeting, a written notice of intent to request such termination and the time and place of the meeting and shall publicly notice the same.

(1) It shall be a defense to any attempt to terminate and cancel the franchise that the Grantee was relying on federal law, state law, or a valid tariff in acting or not acting on the issue in dispute.

(2) The Board of Commissioners shall consider the request of the Government and shall hear any Person interested therein, and shall determine in its discretion, whether or not any violation by the Grantee was with just cause.

(3) If such violation by the Grantee is found to have been with just cause, the Board of Commissioners shall direct the Grantee to comply therewith within such time and manner and upon such terms and conditions as are just and reasonable within the Government's lawful authority.

(4) If the Board of Commissioners determines such violation by the Grantee was without just cause, then the Board of Commissioners may, by resolution, declare that the franchise of the Grantee shall be terminated and forfeited unless there is compliance by the Grantee within such reasonable period as the Board of Commissioners may fix. Any such determination by the Board of Commissioners is a final appealable action to a court of competent jurisdiction.

Section 16 - Foreclosure or Other Judicial Sale.

The Grantee shall provide the Government, in the form and manner required by the appropriate court or judicial body, at least thirty (30) days advance written notice, if at all possible, of the

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foreclosure or other judicial sale of all or a substantial part of the Grantee's Facilities within the City of Bowling Green, and such notification shall be treated as a notification that a transfer or assignment of the franchise has taken place.

Section 17 - Government's Rights After the Appointment of a Receiver or Trustee.

Grantee shall notify the Board of Commissioners of the appointment of a receiver, or trustee, to take over and conduct the business of the Grantee, whether through receivership, reorganization, bankruptcy, or other action or proceeding.

Section 18 - Advertising for Bids.

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

Section 19 - Bid Process.

(a) Bids and proposals for the purchase and acquisition of the franchise hereby created shall be in writing and shall be delivered to the City Manager or his designee upon the date(s) and at the time(s) fixed by him or her in said advertisement(s) for receiving same. Thereafter, the City Manager shall report and submit to the Board of Commissioners, at the time of its next regular meeting or as soon as practicable thereafter, said bids and proposals for its approval.

(b) The Board of Commissioners reserves the right, for and on behalf of the Government, to reject any and all bids for said franchise; and, in case the bids reported by the City Manager shall be rejected by the Board of Commissioners, it may direct said franchise and privilege to be again offered for sale, from time to time, until a satisfactory bid therefore shall be received and approved.

Section 20 - Compensation.

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(a) During any period of time during which the Government opts to forego collecting a Franchise Fee in lieu of participating in the Multichannel Video Programming and Service Tax scheme under KRS 136.600 et seq., Franchisee shall not be required to pay Franchise Fees. If at any time the Government opts to exercise its constitutional right to collect Franchise Fees, the Government shall provide written notice of its election to exercise its constitutional right to collect Franchise Fees pursuant to the provisions outlined in this ordinance at least forty-five (45) days prior to the beginning of the quarter for which the Franchise Fee will first be payable.

(b) Any Telecommunications Excise Tax distribution from the state or Franchise Fee is not a payment in lieu of any tax, fee or other assessment except as specifically provided in this Ordinance, or as required by applicable law. By way of example, and not limitation, permit fees and business license taxes are not waived and remain applicable as provided by law to the extent they are not Franchise Fees. Additionally, the Government may at any time impose any fees or taxes consistent with state or federal law, including, but not limited to property taxes, and occupational license fees.

(c) If at any time the Government opts to exercise its constitutional right to collect Franchise Fees, Grantee shall pay an annual fee to the Government, which must be the greater of either: (a) the Minimum Annual Franchise Fee; or (b) an amount equal to either (i) five percent (5%) of Grantee's Gross Revenues, which shall be payable quarterly and may be passed through to Grantee's customers, if Grantee provides Telecommunications Service to Customers within the City of Bowling Green ("Gross Revenue-based Franchise Fee"), or (ii) an amount equal to two dollars (\$2.00) per lineal foot of Facilities plus fifteen hundred dollars (\$1,500) per antenna or small cell if Grantee does not provide Telecommunications Service to End-Users within the City of Bowling Green ("Facilities-Based Franchise Fee").

(d) If at any time the Government opts to exercise its constitutional right to collect Franchise Fees, Grantee's first Minimum Annual Franchise Fee payable under this Ordinance shall be paid to the Government forty-five (45) days after the Government gives notice to the Grantee that the

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Government has exercised its constitutional right to collect Franchise Fees. Such payment will be prorated for the remaining calendar year (rounded to the nearest month) through December 31. Thereafter, Grantee shall pay each Minimum Annual Franchise Fee on or before April 15, and Grantee's Minimum Annual Franchise Fee payment will apply to the current calendar year (January 1 through December 31). Any Minimum Annual Franchise Fee paid to the Government will be credited towards Grantee's Franchise Fee for that calendar year.

(e) Gross Revenue-Based Franchise Fee payments to the Government shall be computed based on Grantee's Gross Revenues from each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) and paid on or before the forty-fifth (45th) day following each calendar quarter period during the term of a franchise created under this Ordinance.

(f) Facilities-Based Franchise Fee payments to the Government shall be computed based on Grantee's lineal foot of Facilities in the City of Bowling Green as of January 1 of each calendar year and paid on or before April 15th of calendar year during the term of a franchise created under this Ordinance.

(g) Payment not received by the Government by the due date shall be assessed interest equal to the lesser of one percent (1%) per month, or the highest rate permitted by law. Interest shall be compounded annually. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the Government receives the payment.

(h) Simultaneously with its payment, Grantee shall file with the Government a written report containing an accurate statement in summarized form, as well as in detail, of its calculation of the amount of the payment, verified by an officer or other authorized representative of Grantee, setting forth its Gross Revenues according to their accounting subdivisions, and any deductions claimed for the period upon which the payment is computed. Such reports shall be in form satisfactory to the Government.

(i) If any Franchise Fee is owed to the Government, upon reasonable notice, the

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Government shall have the right to inspect the Grantee's income records, the right to audit and to recompute any amounts determined to be payable under this agreement; provided, however, that such audit shall take place within twelve (12) months following the close of each of the Grantee's fiscal years. If, as a result of such audit or review, the Government determines that Grantee has underpaid its fees to the Government in any twelve (12) month period by ten percent (10%) or more, then, in addition to making full payment of the relevant obligation, Grantee shall reimburse the Government for all expenses incurred as a result of an audit or review and such payments shall be paid within the thirty (30) days following written notice to the Grantee by the Government, which notice shall include a copy of the audit report and copies of all invoices for which the Government seeks reimbursement.

(j) If any Franchise Fee is owed to the Government, in the event that any recomputed Franchise Fee amount is not made to the Government on or before the applicable dates heretofore specified, interest shall be charged from such date as defined in this Ordinance.

(k) The Government reserves the right to require the Grantee to collect any consumer or other tax or other fee that may be imposed by the Government, the Commonwealth of Kentucky, or the federal government on Telecommunications Services.

Section 21 - Additional Requirements.

1. Operation of Telecommunications System; Excavation of Public Right-of-Way

(a) The Telecommunications System shall, at all times, be installed operated and maintained in good working condition as will enable the Grantee to furnish adequate and continuous service to all of its residential, commercial, and industrial customers. The Telecommunications System shall be designed installed, constructed, and replaced in locations and at depths which comply with all applicable federal and state laws and regulations regarding minimum safety standards for design, construction, maintenance, and operation of a Telecommunications System.

(b) The Grantee shall have the right to disturb, break, and excavate in the public right-of-way of the Government as may be reasonable and necessary to provide the service authorized

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by the Franchise subject to the provisions of this Ordinance and the provisions of the applicable City Code of Ordinances.

(c) Pursuant to the provisions of Chapter 21-4 of the City's Code of Ordinances, Grantee agrees to give prior notification to the City's Department of Public Works of any construction work by Grantee on or in any public right-of-way (including streets, sidewalks, curbs, gutters, drainage facilities, or other street installations) that will necessarily involve the cutting of any blacktop or concrete on a public right-of-way, or any other excavation or work in public right-of-way that is reasonably expected to interrupt the flow of traffic on the public right-of-way. In the event a street, sidewalk, curb or gutter is to be cut, the Grantee agrees to obtain the applicable permit from the City.

Nothing in the above provisions is intended to require Grantee to give a notification for any routine maintenance or repair work not involving the cutting of a public street, sidewalk, curb, or gutter or not involving an interruption of traffic flow on a City street. Nothing in the above is intended to impose on Grantee any obligation to give notification or obtain a City permit for work on customers' service lines, unless such work extends into the public right-of-way. However, Grantee shall be required to give advance notification to the Department of Public Works of the installation of a new service line within the City limits and provide a copy of the plans for the new service line.

(d) To the extent reasonably practicable, Grantee agrees to notify the City and to schedule and coordinate installation, construction, maintenance, replacement, or repairs of its Telecommunications System with proposed improvements to the public right-of-way that have been designated (and which Grantee has been specifically advised of) for improvement, resurfacing, or repair prior to the commencement thereof. In the event Grantee develops a written program for the replacement or repair of its Telecommunications System located in the public rights-of-way, Grantee shall provide a copy of that written program to the City's Public Works Department. Any replacement or repair program shall, to the extent reasonably practical, be developed to coincide with the City's pavement program.

(e) When a situation arises that requires immediate attention, Grantee is authorized to disturb or cut the public right-of-way without first obtaining the required permit provided that notification is provided and the appropriate permit obtained as soon thereafter as is reasonably practicable under the circumstances. Any restoration of disturbed or excavated public right-of-way shall be completed in accordance with this Ordinance and the applicable City Ordinances.

(f) The Grantee agrees to provide the City and other emergency response officials on an annual basis the names, addresses, and phone numbers of emergency 24-hour on-call personnel. After being notified of an emergency by the City, the Grantee shall cooperate with the City and make every effort to respond as quickly as possible with actions to minimize damage and to protect the health and safety of the public and property.

2. Degradation/Restoration of Public Right-of-Way

(a) In the event Grantee enters upon any public right-of-way for the purposes of constructing, erecting, installing, operating, maintaining, repairing and/or removing any part of its Telecommunication System, it shall promptly and diligently prosecute the work to completion at its sole expense and shall repave, cover, and restore all trenches and exposed areas as quickly as circumstances permit and shall leave all public rights-of-way in as good a condition as existed when Grantee entered upon them. Grantee agrees to perform such restoration work in compliance with all applicable City standards. Any repairs to public right-of-way necessitated by reason of Grantee's failure to comply with City standards shall be performed by Grantee, at its expense, for a twelve (12) month period following the date Grantee completed the particular restoration work. However, notwithstanding the foregoing requirements, Grantee shall upon the request of the City and at its sole expense, repave all street pavement located within an entire street block if Grantee, its employees, contractors, or agents undertook an authorized excavation of street right-of-way that has been repaved within two (2) years of the excavation where Grantee knew or should have known that it would need to excavate the pavement within two (2) years of the City notifying Franchisee of the streets that will be repaved. The above provisions shall not apply to the extent the excavation was necessitated by an act of the City or by an act of

God or by an act of a third party with whom Grantee is not in privity or contract or over whom Grantee has no control or, in order to fix or repair a potentially or actual dangerous condition or to accommodate a request for service by a new customer. In the event Grantee is required to repave an entire street block of pavement or right-of-way and the work by the Grantee is determined to be in compliance with the applicable City requirements, the City shall assume responsibility for the maintenance of the improved right-of-way. All restorations or repairs of public right-of-way shall be performed in compliance with applicable City requirements and may be subject to inspection by the City at any time. In the event Grantee fails, refuses, or neglects to comply with the applicable City provisions, to repair or restore the affected public right-of-way and the costs and expenses incurred by the City shall be paid to the City by the Grantee within ten (10) days from the date on which an itemized bill is submitted to the Grantee.

(b) In the construction, installation, maintenance, repair, or removal of any of its Telecommunications System, or any part thereof, Grantee shall exercise due regard for the rights of the City, pedestrians, and motorists and shall not unreasonably or unnecessarily interfere with or injure City property or the private property of others. Grantee shall comply with all applicable laws with respect to signalization, placement of lights, danger signals, or warning signs. All work performed by Franchisee shall be done in a workmanlike manner and shall not unnecessarily interfere with the public use of the City's rights-of-way or property.

(c) Grantee shall, upon request by the City, remove, move, modify, relocate, reconstruct, or adjust any of its Telecommunications System located within public right-of-way, at its own expense, if the City, in its sole discretion, constructs, reconstructs, widens, alters, excavates, repairs, changes, or improves any public right-of-way as part of any public improvement project and such work requested by the City shall be accomplished by Grantee within thirty (30) days after notice by the City; provided, however, if the work requested of Grantee cannot be reasonably completed within that time period, Grantee shall have such additional time to complete its work as may mutually agreed upon between Grantee and the City.

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(d) If the City requires the Grantee to adapt or conform its Telecommunications System or to in any way construct, reconstruct, remove, alter, relocate, adjust, or its Telecommunications System to enable any other person, firm, corporation, entity, whether public or private, other than the City, to utilize public right-of-way, Grantee shall be reimbursed for all costs incurred by the Grantee from the person, firm, Grantee, corporation, or entity requesting or required by the City to perform such change, construction, removal, repair, maintenance, alteration, or relocation.

Section 23 - Discontinuing Use of Facilities.

Upon the expiration or termination of any franchise awarded pursuant to this Ordinance, the Grantee shall remove its Telecommunications System from the Roads of the City at its own cost and expense and shall restore the right-of-way to as good a condition as before removal. Should Grantee fail or refuse to remove the system upon sixty (60) calendar day's written notice to do so, the system may be removed by the City at the sole expense of the Grantee. Any underground cable or conduit which is not removed within a reasonable period of time shall be deemed abandoned and title shall vest in the City.

Section 24 - Offers of Payment.

Bids offered for purchase of a franchise pursuant to this Ordinance shall state the bidder's acceptance of the conditions set forth in this Ordinance. If any bid shall include an offer of payment over and above the terms of the franchise, then a certified check for said amount, payable to the City of Bowling Green, shall be deposited with the Government. This amount shall be in addition to the provision for any payments contained in Sections 19 and/or 20 of this Ordinance. Any check deposited pursuant to this section by an unsuccessful bidder shall be returned when the Board of Commissioners shall have accepted the bid or bids which in its judgment is or are the highest and best.

Section 25 - Forfeiture.

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

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Grantee and continuation of such violations, failure or default for a period of thirty (30) days following the receipt of written notice by the Grantee, as set forth herein.

Section 26 - Governing Law.

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

Section 27 - Non-enforcement by the Government.

Grantee shall not be relieved of its obligations to comply with any of the provisions of this Ordinance by reason of any failure of the Government to enforce prompt compliance, nor does the Government waive or limit any of its rights under this Ordinance by reason of such failure or neglect. Notwithstanding the foregoing, a written waiver or limitation of any rights under this Ordinance by the Government is enforceable as a waiver or limitation of the Government's rights hereunder.

Section 28 - Agent.

The Grantee shall notify the Government in writing of its designated agent receipt of service of any legal proceeding initiated by the Government.

Section 29 - Third Parties.

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

Section 30 - Severability.

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

Section 31 - Effective Date of Franchise.

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

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NOW, THEREFORE, BE IT ORDAINED by the City of Bowling Green, Kentucky as follows:

1. The Joint Franchise Agreement which shall be executed with respect to the non-exclusive franchise to use the public rights-of-way of the City shall substantially be in the form as the language in this ordinance.
2. The franchise created by this Ordinance shall be bid in accordance with the requirements of the Constitution of the Commonwealth of Kentucky, KRS Chapter 424, and applicable City Ordinances.
3. The franchise created by this Ordinance shall be awarded to the responsible and best bidders as shall be determined by and within the discretion of the City.
4. All prior Municipal Orders or Ordinances or parts of any Municipal Orders or Ordinances in conflict herewith are repealed.
5. This Ordinance is adopted by the Board of Commissioners of the City of Bowling Green, Kentucky pursuant to KRS 83A.060 in that it was introduced on March 19, 2019, and given final reading on April 16, 2019, and said Ordinance shall be in full force and effect upon signature, recordation and publication in summary pursuant to KRS Chapter 424.

ADOPTED: April 16, 2019

APPROVED: Brian Wickham
Mayor, Chairman of Board of Commissioners

ATTEST: Ashley Jackson
City Clerk

SPONSORED BY: Jeffery B. Meisel, City Manager, 03/11/2019, 1:45 p.m.