

INTRODUCED: December 12, 2016

AN ORDINANCE No. 2016-309

To authorize the Chief Administrative Officer, for and on behalf of the City of Richmond, to execute a Telecommunications Franchise Agreement by and between the City of Richmond and Windstream Communications, LLC, for the purpose of installing telecommunications equipment within the City’s public right-of-way.

Patron – Mayor Jones (By Request)

Approved as to form and legality
by the City Attorney

PUBLIC HEARING: JAN 9 2017 AT 6 P.M.

§ 1. That the Chief Administrative Officer, for and on behalf of the City of Richmond, be and is hereby authorized to execute a Telecommunications Franchise Agreement by and between the City of Richmond and Windstream Communications, LLC, for the purpose of installing telecommunications equipment within the City’s public right-of-way. The Telecommunications Franchise Agreement shall be approved as to form by the City Attorney and shall be substantially in the form of the document attached to this ordinance.

§ 2. This ordinance shall be in force and effect upon adoption.

AYES: 9 NOES: 0 ABSTAIN: _____

ADOPTED: JAN 23 2017 REJECTED: _____ STRICKEN: _____



CITY OF RICHMOND

INTRACITY CORRESPONDENCE

O & R REQUEST

DEC 8 2016

Chief Administration Office
City of Richmond

4-6040

O&R REQUEST

DATE: December 8, 2016 **EDITION:** 1

TO: The Honorable Members of City Council

THROUGH: Dwight C. Jones, Mayor (By Request) *D Jones*

THROUGH: Selena Cuffee-Glenn, Chief Administrative Officer

THROUGH: John J. Buturla, Interim Deputy Chief Administrative Officer *JB*

THROUGH: Emmanuel Adediran, Director Department of Public Works *EAD*

THROUGH: M.S. Khara, P.E., City Engineer Department of Public Works *MSK*

FROM: Brian Copple, Right of Way Manager Department of Public Works *BC*

RECEIVED

DEC 12 2016

OFFICE OF CITY ATTORNEY

RE: ACCEPTANCE OF A FRANCHISE AGREEMENT BETWEEN THE CITY OF RICHMOND AND WINDSTREAM COMMUNICATIONS, LLC.

ORD. OR RES No. _____

PURPOSE: To authorize the Chief Administrative Officer on behalf of the City of Richmond to execute a franchise agreement between the City of Richmond and Windstream Communications, LLC (Windstream) to use and occupy the streets, alleys and public right-of-ways for the purpose of providing Telecommunications Services.

REASON: "Telecommunications Franchise Request" by Windstream Communications, LLC under the Telecommunications Act of 1996 and VA State Code sections 56-458 through 56-468.2.

RECOMMENDATIONS: The Department of Public Works offers no objections to the proposed franchise agreement. All terms and conditions are noted within the agreement itself.

BACKGROUND: Windstream provides fiber based services including data, broadband and IP services in the Mid-Atlantic region. Windstream offers approximately 121,000 fiber route miles across the nation. Windstream has been present in the Richmond metropolitan area for over 15 years and plan to expand their network by installation of fixed wireless sites either aerial or underground.

State Law requires that telecommunications companies obtain a franchise agreement from incorporated cities within the Commonwealth of Virginia (Commonwealth) in order to occupy public right-of-ways for their infrastructure. Dominion Virginia Power, Verizon, Comcast, and Lumos currently have franchise agreements with the City. This agreement would be consistent with these existing franchise agreements.

Revenue will be provided to the City from the Commonwealth based on Right of Way Usage fees collected from the telecommunications providers by the Commonwealth. A portion of these fees collected are returned to localities based on a calculation performed by the Commonwealth per State Code. The amount is based on the number of access lines the telecom companies have and the revenue they receive from the users.

FISCAL IMPACT: None anticipated.

FISCAL IMPLICATIONS: None anticipated.

COST TO THE CITY: None anticipated

BUDGET AMENDMENT NECESSARY: No amendment necessary at this time.

REVENUE TO CITY: Unknown at this time. Revenue will be provided to the City from the Commonwealth based on Right of Way Usage fees collected from the telecommunications providers by the Commonwealth. A portion of fees collected are returned to localities based on a calculation performed by the State per State Code. The amount is based on the numbers of access lines the telecom companies have and the revenue they receive from the users.

DESIRED EFFECTIVE DATE: Upon Adoption.

REQUESTED INTRODUCTION DATE: December 12, 2016

CITY COUNCIL PUBLIC HEARING DATE: January 9, 2017

REQUESTED AGENDA: Consent Agenda.

RECOMMENDED COUNCIL COMMITTEE: Land Use Housing and Transportation Standing Committee – December 20, 2016

CONSIDERATION BY OTHER GOVERNMENTAL ENTITIES: None

AFFECTED AGENCIES: Public Works, Law Department, Parks and Recreation, Planning and Development Review, Economic and Community Development, Public Utilities, Finance Department, Assessor, Budget and Strategic Planning.

RELATIONSHIP TO EXISTING ORD. OR RES.: None

REQUIRED CHANGES TO WORK PROGRAM(S): None.

ATTACHMENTS: Proposed Windstream Communications franchise agreement

STAFF:

Prepared for Emmanuel Adediran
Prepared by Brian Copple
Department of Public Works
646-3639

TELECOMMUNICATIONS FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT ("Agreement"), entered into this _____ day of _____ 201____, by and between the City of Richmond, Virginia (a municipal corporation and a political subdivision of the Commonwealth of Virginia) ("City") and Windstream Communications, LLC, a Delaware Limited Liability Company, and its Affiliates (to the extent they conduct operations subject to this agreement) ("Grantee").

WHEREAS, the City has authority to grant franchises and other authorizations for the use and occupancy of the Streets (as hereinafter defined);

WHEREAS, the Streets are a valuable public resource that has required and will continue to require substantial investment by the City;

WHEREAS the City desires to structure and implement a fair and orderly process for the grant and removal of franchises and other authorizations to occupy and use the streets, alleys, and public right-of-ways to construct, operate and maintain a telecommunications system in the City, including the negotiation of terms and conditions consistent with applicable law, including the Communications Act of 1934, as amended by the Telecommunication Act of 1996 (the "1996 Act"); and sections 56-458 through 56-468.2 of the Code of Virginia (Va. Code Ann. Sections 56-458 – 56-468.2 (1998))("State ROW Law");

WHEREAS, consistent with applicable law, the City desires to minimize inconvenience and disruption to the public, provide for the orderly and efficient use to the streets, alleys and public right-of-ways now and in the future, and preserve adequate capacity for existing and future uses of the Streets;

WHEREAS, the Grantee desires to obtain a franchise to use and occupy the streets, alleys and public right-of-ways for the purpose of providing Telecommunications Services (as hereinafter defined); and

WHEREAS, the City intends to exercise, consistent with applicable law and the needs and interests of the City, its authority with respect to the regulation of the occupation and use of the streets, alleys and public right-of-ways in connection with the provision of Telecommunications Services over the Equipment.

NOW, THEREFORE, the City hereby grants a telecommunications franchise to Grantee subject to the following terms and conditions and the parties hereby agree to the following terms and conditions:

ARTICLE I.

DEFINITIONS

1. **Definitions.** The following terms, as used in this Agreement, have the following meanings, with all terms defined in this Article I in the singular to have the correlative meaning when used in the plural, and vice versa:
 - a. "Abandonment" means the cessation, by act or failure to act, of the Grantee or any Affiliated Person, of the provision of Telecommunications Services over the Equipment for one hundred twenty (120) or more consecutive days, with no intent to use the Equipment in the future for the purposes permitted under this Agreement, except if

such cessation is due to an event beyond the control of the Grantee or Affiliated Person as set forth in Section 66 hereof.

- b. **"Affiliate and Affiliated Person"** means each Person who falls into one or more of the following categories: (i) each Person having, directly or indirectly, a Controlling Interest in the Grantee; (ii) each Person in which the Grantee has, directly or indirectly, a Controlling Interest; (iii) each joint venture or joint venture partner, of the Grantee; and (iv) each Person, directly or indirectly, controlling, controlled by, or under common Control with, the Grantee; provided that "Affiliated Person" shall in no event mean the City or any creditor of the Grantee solely by virtue of its status as a creditor and which is not otherwise an Affiliated Person by reason of owning a Controlling Interest in, being owned by, or being under common ownership, common management or common Control with, the Grantee.
- c. **"Cable Services"** means "cable services" as defined in Section 602(6) of the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984, the Act of 1996 and as may be further amended from time to time (the "Cable Act"). In the event that "cable services" is no longer defined in the Cable Act or the definition in the Cable Act otherwise becomes inapplicable, the parties shall negotiate in good faith to develop a mutually agreeable definition of "Cable Services."
- d. **"City"** means the City of Richmond, Virginia.
- e. **"Control" or "Controlling Interest"** means (i) the acquisition of twenty-five percent (25%) or more of the voting stock of the Grantee, or (ii) the actual exercise of any substantial influence over the policies and actions of the Grantee. "Control" or "Controlling Interest" as used herein may be held simultaneously by more than one Person or group of Persons. The definition of "Control" or "Controlling Interest" shall be interpreted in a manner consistent with Virginia state law and decisions of the Virginia State Corporation Commission.
- f. **"Customer"** means any Person who uses the Telecommunications Services of the Grantee in the corporate limits of the City.
- g. **"Effective Date"** means thirty (30) days from and after the execution of this Agreement.
- h. **"Emergency"** means an "emergency" as defined under Section 56-265.15 of the Code of Virginia.
- i. **"Equipment"** means the poles, wires, fiber, ducts, conduits, subways, manholes, fixtures, appliances and appurtenances of the Grantee in the Streets that are used to provide Telecommunications Services. The term "Equipment" may also refer to the poles, wires, fiber, ducts, conduits, subways, manholes, fixtures, appliances and appurtenances of other Persons in the Streets that are used to provide Telecommunications Services when such term is preceded or followed by an appropriate modifier.
- j. **"Facility" or "Facilities"** means any tangible component of the Telecommunications System.
- k. **"FCC"** means the Federal Communications Commission.
- l. **"Franchise"** has the meaning set forth in Section 2 of this Agreement.
- m. **"Grantee"** means Windstream Communications, LLC, a Delaware corporation, & Affiliates.

- n. "Agreement" means this Telecommunications Franchise Agreement, as amended, modified or supplemented from time to time.
- o. "Performance Bond/Security Fund" has the meaning set forth in Section 40 of this Agreement.
- p. "Person" means an individual, a corporation, a partnership, and association, a trust or any other entity or organization, including a governmental or political subdivision or an agency or instrumentality thereof.
- q. "Streets" means the streets, avenues, boulevards, highways, roads, alleys, courts, lanes, viaducts, bridges and the approaches thereto and public thoroughfares in the City and shall mean the entire width thereof between abutting property lines.
- r. "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.
- s. "Telecommunications Services" 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. The term "Telecommunications Services" shall not include Cable Services or "commercial mobile service" as defined in 47 U.S.C. § 332(d)(1).
- t. "Telecommunications System" means the plant, equipment, real property (including interests in real property), tangible and intangible personal property, cable, wires, optical fibers, amplifier, antenna, and all other electronic devices, Equipment and facilities of Grantee in the City, all of which are used to provide Telecommunications Services.
- u. "Term" has the meaning set forth in Section 3 of this Agreement.

**ARTICLE II.
GRANT OF AUTHORITY**

2. **Grant of Franchise.** The City grants the Grantee a franchise (the "Franchise") to occupy and use the streets, alleys and City right-of-way to install, operate, upgrade, repair and remove Equipment used to provide Telecommunications Services, subject to the conditions of this Agreement. Except as may be required by state or federal law or as permitted by the City in writing, the Grantee is not authorized to sublicense or sublease to any Person the right to occupy or use the streets, alleys, and City right-of-way to install, upgrade, repair or remove Equipment or any other facilities for any purpose. Nothing in this Section 2 is intended to prevent the Grantee from leasing its Equipment to any Person, provided that such Person is otherwise authorized under applicable federal, state and local law to engage in the activities in the Streets for which such Person is leasing the Equipment.

The Grantee shall have the right to remove, trim, cut and keep clear of its Equipment the trees in the streets, alleys, and public right-of-ways, but in the exercise of such right the Grantee shall not cut or otherwise injure these trees to any greater extent than is reasonably necessary for the erection, installation, maintenance and use of the Equipment. The Grantee shall not trim, cut or remove any tree from any street or City right-of-ways unless prior written application of its intention so to do is given to the

department or agency of the City as shall be designated by the City Department of Public Works and permission in writing so to do is granted by this department or agency, except in cases of emergency or when this requirement is waived by this department or agency. Any trimming, cutting or removal of trees by the Grantee shall be done in accordance with industry standards in urban forestry.

3. **Term of Franchise.** The Franchise commences on the Effective Date and expires on (15 years from the Effective Date) unless the Franchise is renewed as provided in Section 5 of this Agreement or the Franchise is terminated as provided in Section 56 of this Agreement. The period of time that the Franchise is in effect is referred to as the "Term."
4. **Nonexclusive Franchise.** Nothing in this Agreement affects the right of the City to grant any Person a franchise to occupy and use the Streets to install, operate, upgrade repair and remove such Person's Equipment for the purpose of providing any Telecommunications Services of service, or to engage in any other activity in the Streets, as permitted by applicable law. Nothing in this Agreement affects the right, if any, of the City to occupy and use the Streets to install, operate, upgrade, repair and remove the City's Equipment for the purpose of providing any Telecommunications Services or service, or to engage in any other activity in the Streets, as permitted by applicable law.
5. **Renewal.** The Grantee may submit a written petition to the City to renew the Franchise not later than six (6) months or more that twelve (12) months before the end of the Term. The City reserves the right to grant or deny renewal of this Agreement and the Franchise in accordance with applicable law. The City may condition renewal on the Grantee's agreement to comply fully with all amendments or other modifications to the Agreement as the City may specify, consistent with applicable law. Nothing in this Agreement shall be construed as a presumption in favor of a renewal of this Agreement or the Franchise. The Grantee and the City may enter into an extension of this Agreement to permit the parties to complete negotiation of the renewal agreement, provided that the Grantee is proceeding to negotiate in good faith to complete a renewal agreement.
6. **Public Works and Public Improvements.** Nothing in this Agreement abrogates the right of the City to perform any public works or public improvements. If Equipment significantly interferes with the construction, operation, maintenance, repair or removal of such public works or public improvements, the Grantee, at its own expense, within ninety (90) days after notice by the City (or such period of time as may be agreed upon by the City and the Grantee), shall protect, alter, remove or relocate Equipment, as directed by the City. In the event the Grantee must relocate Equipment pursuant to this Section, the City shall provide, at no cost to Grantee, permits and alternative space in the streets, alleys, and right-of-ways for such relocation of Equipment, provided that (a) such alternative space need not be in the exact same street, alleys, or right-of-ways but shall be in reasonable proximity to the previous location; and (b) such space shall be reasonably economically and technologically feasible for the relocation of such Equipment. If the Grantee refuses or neglects to so protect, alter, remove or relocate Equipment within (10) days after a second notice to the Grantee by the City, the City may break through, remove, alter or relocate Equipment without any liability to the Grantee, and the Grantee shall pay to the City the costs incurred in connection with such breaking through, removal, alteration or relocation. After the expiration of the ten (10) day period after the second notice to the Grantee, as provided in

the preceding sentence, the City and its officers, employees, agents, attorneys, consultants and independent contractors shall not have any liability to the Grantee for any damage as a result of or in connection with such public works or public improvements, provided that reasonable efforts shall be used to minimize damage to Equipment. The City shall reimburse the Grantee for the cost of alteration, relocation, removal or break through of Equipment authorized by Section 6 only to the extent required by Section 56-468.2 of the Code of Virginia or as otherwise agreed by the parties. To the extent the City is not required by Section 56-468.2 of the Code of Virginia to reimburse Grantee, Grantee shall bear such cost without reimbursement or contribution by the City. Grantee shall also reimburse the City for or bear any additional cost actually incurred by the City that the City would not otherwise have incurred if Grantee had not refused or failed to comply with the City's request to protect, alter or remove Equipment under this Section 6, provided that the City has provided the notice and cure period required by this Section 6, and provided further that Grantee's liability to the City under Section 6 shall be limited to the reimbursement of costs as set forth in this Section 6.

7. **Regulatory Approvals.** The Grantee shall obtain all necessary approvals from the appropriate federal and state authorities to offer Telecommunications Services through the Equipment, and shall upon the City's request, submit evidence of such approvals to the City.
8. **Submission of Work Plans and coordination of work.** Per City Code Section 24-433 Submission of work plans and coordination of work, the Grantee, on the first City work day of each April and October, the Grantee shall submit to the Director, in a format prescribed by the Director, a plan detailing all work involving excavation that such Grantee anticipates performing or causing to be performed in any public rights-of-way during the three-year period immediately following each submission. The Grantee may add, change or delete any item of work in its three-year plan but shall notify the Director of such addition, change or deletion upon doing so. If the Grantee does not propose work during the three-year period, the Grantee shall submit in lieu of the plan of work required by this section a statement in a form prescribed by the Director that no work is anticipated. Once he has filed such a statement, the owner shall immediately notify the Director of any planned work, along with other information on street condition and use, as soon as such work becomes reasonably foreseeable.
9. **Street Closings.** Nothing in this Agreement waives or releases the rights of the City in and to the Streets. If all or part of the Streets are eliminated, discontinued, closed or demapped in accordance with applicable law, the Franchise shall cease with respect to such Streets upon the later to occur of (a) the effective date that such Streets become eliminated, discontinued, closed or demapped and any conditions specified by the City are met; or (b) in the case of any transfer of title to such Streets to a private Person, the closing date of such transfer. If the elimination, discontinuance, closing or demapping of all or part of the Streets is undertaken for the benefit of any private Person, the City shall condition its consent to the elimination, discontinuance, closing or demapping on the agreement of the private Person on (i) granting the Grantee the right to continue to occupy and use the Streets or (ii) reimbursing the Grantee for the reasonable costs of relocating the affected Equipment, provided however, if the elimination, discontinuance, closing or demapping of all or part of the Streets

was done in connection with a public purpose or a project serving a public purpose, the Grantee shall share equally in the cost of relocating the affected Equipment.

10. Franchise Fee; Compensation.

Grantee currently operates a "Telecommunications System," as defined within, in the rights-of-way of the City. As compensation to the City, Grantee currently pays and will continue to pay to City for the term of this Agreement a Right of Way Use Fee in accordance with Section 56-468.1 of the Code of Virginia. During the term of this Agreement Grantee shall be obligated to remit the Right of Way Use Fee so long as such fee is collected from similarly situated companies and is not eliminated, discontinued, preempted, or otherwise declared invalid by the Commonwealth of Virginia, or by a court or agency of competent jurisdiction after final appeal.

ARTICLE III.

CONSTRUCTION REQUIREMENTS

- 11. Permits.** Grantee shall obtain a Work In Street Permit from the Director of Public Works for work that will be done in the City's right-of-way. Issuance of the Permit shall be based upon the City's review and approval of work to be done. Grantee agrees to comply with all provisions and requirements imposed by the City's Department of Public Works Right-Of-Way Excavation and Restoration Manual and by the conditions as may be set forth by the project permit. Grantee further agrees to comply with any time limits imposed on the work, the payment of any necessary inspection charges, and local ordinances, including but not limited to, street restoration fees and permit surcharges required by the City and allowed by law. Grantee agrees to comply with the provisions of the Virginia Underground Utility Damage Prevention Action, Chapter 10.3 of Title 56, §§ 56-265.14 through 56-265.32, of the Code of Virginia (1950), as amended. Grantee shall maintain accurate as-built plans and profiles of all work and make such records available to the City upon request. Grantee shall provide the City with an emergency contact telephone number. Underground installations shall be at a minimum depth of forty-two inches (42"). All underground installations shall be constructed of conduits not greater than six inches (6") in diameter, unless otherwise authorized by any Permit issued pursuant this Section. Grantee shall not be permitted to work in the City's right-of-way on holidays specified in the Permit. Grantee shall provide the city with a Certificate of Insurance (COI) as specified in Section 35.
- 12. Quality.** All work involved in the installation, operation upgrade, repair and removal of Equipment shall be performed in a safe, thorough and reliable manner using materials of good and durable quality. If, at any time, it is determined by the City or any other agency or authority of competent jurisdiction that any Equipment violates any health or safety law or regulation, then the Grantee shall, at its own cost and expense, promptly correct all such conditions.

In the event Grantee shall, in the construction or repair of its fiber optic infrastructure or facilities, damage any City-owned property, Grantee shall promptly, but temporarily, stabilize the damage to enable the City to make immediate, permanent repairs. The City shall promptly submit an invoice to the Grantee for costs incurred in making such repairs. Grantee agrees to promptly reimburse the City for repairs to City-owned property necessitated by the damage caused by Grantee. Grantee reserves its right to challenge any invoice for repairs to City-owned property submitted to Grantee by the City.

13. **Liability Limitation/Notice.** Neither the City nor its officers, employees or agents shall be responsible to the Grantee for any liability as a result of or in connection with the protection, breaking through, movement, removal, alteration, or relocation of any Equipment by or on behalf of the Grantee or the City in connection with any Emergency, public work, public improvement, alteration of any municipal structure, any change in the grad or line of any Street, or the elimination, discontinuation, and closing of any Street, as provided in this Agreement, provided that, with respect to any action by or on behalf of the City, except in case of Emergency, (i) the City has provided such notice to Grantee as may be required by this agreement; (ii) the City has followed the notice and other requirements imposed by Section 56-265.17 of the Code of Virginia; and (iii) for those actions described in Section 6 of this Agreement, the requirements of Section 6 shall apply.
14. **New Grades or Lines.** If the grades or lines of any Street are changed at any time during the Term, then the Grantee shall, at its own cost and expense and upon the request of the City, protect or promptly alter or relocate Equipment so as to conform with such new grades or lines. If the Grantee refuses or neglects to so protect, alter, or relocate Equipment within ninety (90) days (or such other period of time as may be agreed upon by the City and the Grantee) after notice to the Grantee by the City, the City shall have the right to break through, remove, alter, or relocate such Equipment. The City shall reimburse the Grantee for the cost of alteration, relocation, removal or break through of Equipment authorized by this Section 11 only to the extent required by Section 56-468.2 of the Code of Virginia or as otherwise agreed by the parties. To the extent the City is not required by Section 56-468.2 of the Code of Virginia to reimburse Grantee, Grantee shall bear such cost without reimbursement or contribution by the City. Grantee shall also reimburse the City for or bear any additional cost actually incurred by the City that the City would not otherwise have incurred if Grantee had not refused or failed to comply with the City's request to protect, alter or remove Equipment under this Section 11, provided that the City has provided the notice and cure period required by this Section 11.
15. **Protection of Streets.** In connection with the installation, operation, upgrade, repair or removal of Equipment by Grantee, the Grantee shall, at its own cost and expense, protect the Streets and any City-owned structures thereon, thereunder or thereover, and shall obtain the prior approval of the City, pursuant to Section 12 hereof, before altering the Streets or any such structures. Any such alteration shall be made by the Grantee, at its sole cost and expense, in a manner prescribed by the City to protect the Streets and any City-owned structures thereon. The Grantee shall be liable, at its own cost and expense, to replace or repair, in a manner as may be reasonably specified by the City, any Street or City-owned structure thereon, thereunder or thereover that may become disturbed or damaged as a

- result of the installation, operation, upgrade, repair or removal of Equipment. The Grantee shall warrant for one (1) year, commencing on the date the work is approved by the City, that any such replacement or repair (excluding trees, grass and other plantings) conforms to written City specifications and requirements made available to the Grantee. If the Grantee does not commence such replacement or repair after thirty (30) days notice, the City may make such replacement or repair and the Grantee shall pay the reasonable cost of the same.
16. **No Obstruction.** Except in cases of Emergency, in connection with the installation, operation, upgrade, repair or removal of Equipment, the Grantee shall not obstruct the sidewalks, streets, subways, railways, rivers or other traffic within the corporate limits of the City without the prior consent of the City. Equipment shall be located so as to cause minimum interference with the use of the Streets and adjoining property.
 17. **No Interference.** In the provision of Telecommunications Services, the Grantee shall comply with federal and state law governing interference with the technical operation of any other telecommunications system within the corporate limits of the City.
 18. **Underground Utilities.** The Grantee shall comply with any current or future City ordinances requiring the placement of equipment underground.
 19. **Moving Equipment.** Upon receipt of a request from any Person holding a permit to move any structure, the Grantee and such Person shall negotiate, in accordance with the Grantee's tariffs, reasonable terms and conditions and a time that is reasonable under the circumstances to move any Equipment to permit the moving of said structure. The Grantee may impose a charge in accordance with state and federal law, or if such law is not applicable, a reasonable charge on any Person other than the City for any such movement of its Equipment, or such charge as may be otherwise agreed to by the parties.
 20. **Safety Precautions.** The Grantee shall, at its own cost and expense, undertake all efforts required by applicable law to prevent accidents at its work sites, including the placing and maintenance of proper guards, fences, barricades, watchmen and suitable and sufficient lighting.
 21. **Moving Equipment in Case of Emergency.** The City may, at any time, in case of fire, disaster, or other Emergency, cut or move Equipment, in which event the City shall not incur any liability to the Grantee, and Affiliated Person or any other Person. If circumstances permit, the Grantee shall be consulted at its Regional Office, phone number (Jerry Richardson: 804-422-4258; Glen Esenwein: 610-404-6239; after hours Network Operations Center: 888.662.5700), prior to any such cutting or movement of Equipment and be given the opportunity to perform such work itself. If circumstances do not permit the Grantee to be consulted prior to any such cutting or movement of Equipment, the City shall provide notice to the Grantee at its Regional office at the phone number above, promptly after any action taken by the City pursuant to this Section 18. All costs to repair or replace such Equipment damaged or destroyed by the reasonable action of the City shall be borne by the Grantee. Notwithstanding the foregoing, the City shall be responsible for the actual costs for the relocation of Grantee's Equipment that was placed at such location pursuant to a "prior rights" arrangement. The City shall only be responsible for the relocation of the actual or similar Equipment in question and the Grantee shall not be entitled to any betterment as a result of the need for such relocation. The Grantee shall furnish the City with written evidence of such "prior rights" arrangement.

22. **Submission of Maps and Drawings.** The general purposes of this Section 19 are to enable the City to coordinate construction and other work in the Streets in an efficient manner; reschedule paving and repair of Streets that may be subject to imminent construction by telecommunications providers; minimize disruption to the public; and otherwise manage the Streets in a more efficient and effective manner.
23. **New Installations of Equipment.** For any Equipment installed in the Streets, the Grantee shall submit to the City pole line and conduit "as built" maps within sixty (60) days of such installation. Such maps shall show a plan view and a profile view of all overhead and underground utilities and right-of-way infrastructure within the installation area, including number and size of any conduits, manholes, hand holes, utility poles and guy wires that were either installed or used for the installation of the new equipment and distances from the right-of-way lines as well as distance from nearest cross street right-of-way line, and a diagram of various standards (trenching, conduit structure, etc.) in the required format listed below. The maps and drawings described under this Section 20 shall be submitted in AutoCAD 2015 or ArcMap GIS Version 10.1. a
- a. All maps and drawings required for new installations shall be drawn to scale and referenced to a physical City benchmark to the extent the physical benchmark is within reasonable proximity to Grantee's installation.
 - b. The Grantee agrees to participate in the cooperative efforts with the City and other persons who own facilities and Equipment that will assist the Grantee in complying with the map and drawing requirements of this Section 20. The maps and drawings submitted pursuant to this Section 20 are intended for use by the City in connection with public rights-of-way management and shall not be made available to the public except as may be required by law.

ARTICLE IV.

PUBLIC BENEFITS

24. **Equal Employment Opportunity.** The Grantee, at its own cost and expense, shall comply in all respects with all applicable laws regarding equal employment opportunity for the recruitment, employment and promotion of all qualified individuals employed by, or seeking employment with, the Grantee.
25. **Employment Discrimination Ban.** The Grantee shall comply in all respects with all applicable federal, state and local employment discrimination laws and requirements during the Term.
26. **Pole Space and Conduit Space.** The Grantee and the city may enter into agreements from time to time for the reciprocal use of the poles of each by the other; provided such use by the Grantee for its purpose or in the exercise of its rights granted to it by this Franchise; and provided such use by the Grantee of the City's poles shall not interfere with the proper use thereof by the City upon terms and conditions mutually acceptable to the parties.

ARTICLE V.

OVERSIGHT AND REGULATION

27. **City's Right of Oversight.** The City has the right to oversee, regulate and inspect the installation, upgrade, repair and removal of Equipment in the Streets in accordance with the provisions of this Agreement and applicable law. The City reserves the right to adopt or issue such rules, regulations, orders or other directives governing the Grantee of Equipment as is shall find necessary or appropriate in the lawful exercise of its police power, and such other lawful orders as the City shall find necessary or appropriate pursuant to and in furtherance of the purposes of this Agreement. No rule, regulation, order or other directive issued pursuant to this Section 24 shall constitute an amendment to this Agreement.
28. **Taxes.** The Grantee shall remit to the appropriate taxing authorities, all taxes and/or other fees and charges that it may be required to pay pursuant to federal, state, or local laws.
29. **Standards and Procedures.** The Grantee shall establish and maintain standards, procedures, records and controls to enable the Grantee to be, at all times throughout the Term, in compliance with each term and condition of this Agreement and to ascertain promptly any failure to be in compliance with each such term or condition.
30. **Reports.** At the request of the City, the Grantee shall make available to the City, within a reasonable period of time, such information as the City may reasonably request regarding the Grantee necessary to verify compliance with any lawful term or condition of this Agreement.
31. **Books and Records.** To the extent necessary to determine the Grantee's compliance with this Agreement or to carry out the City's authority to manage the Streets, or for any other lawful purpose related to the enforcement of this Agreement or the City's authority to manage the Streets, throughout the Term, the Grantee shall make available to the City for inspection, examination and/or audit within (30) business days' notice to the Grantee, such complete and accurate books of account, records, document and other information as the City may reasonably need with respect to the Telecommunications System and the Equipment, including, without limitation, books of account, records, documents and other information adequate to enable the Grantee to demonstrate, at all times throughout the Term that it is, and has been, in compliance with each term and condition of this Agreement. If such books, records, documents and other information are located outside the corporate limits of the City, the Grantee shall provide copies of the necessary books, records, documents and other information for inspection at a Grantee location. All such documents that pertain to financial matters that may be the subject of an audit by the City shall be retained by the Grantee for such record retention time periods as may be applicable under federal and state tax laws. Such inspection, examination and/or audit must take place within twelve (12) months following the close of the Grantee's fiscal years, and shall not take place more than once every twelve (12) months.
32. **Treatment of Proprietary Information.** Access by the City to any of the documents, records or other information covered by this Agreement shall not be denied by the Grantee on the grounds that such documents, records or information are alleged by the Grantee to contain Proprietary Information. For purposes of this Agreement, "Proprietary Information" means that portion of documents, records or other information which is in the possession of the Grantee which is not generally available to the public and which the Grantee desires to protect against unrestricted disclosure or competitive use. If the Grantee claims that documents, records or other information requested by the City contain Proprietary

Information, the City agrees to review the Proprietary Information at the Grantee's premises and, in connection with such review, to limit access to the Proprietary Information to those individuals who require the Information in the exercise of the City's rights under this Agreement. The City will not remove any Proprietary Information from the Grantee's premises or record any Proprietary Information, and, to the extent permitted by applicable law, the City will not disclose Proprietary Information to any Person. All documents, records or other information which is disclosed by the Grantee to the City and which the Grantee claims is Proprietary Information shall be labeled as "Proprietary" shall be the sole responsibility of the Grantee. The protections offered to the Grantee by this Section 29 shall not apply to documents, records or other information which: (a) are made public or become available to the public other than through a disclosure by the City; (b) are already in the possession of the City prior to the Effective Date; (c) are received from a third party without restriction; (d) are independently developed by the City; or (e) are disclosed pursuant to a valid court order or applicable law.

33. **Public Hearings and Meetings.** The City may conduct public hearings or meetings regarding any Grantee obligations which remain unfulfilled after notice and opportunity to cure the unmet obligation at any time during the Term, provided that the City gives the Grantee notice at least thirty (30) days in advance of the commencement of such public hearing or meetings and provided further that such public hearings or meetings shall not occur more often than every two (2) years during the Term.
34. **Installation Report.** The general purposes of the Section 31 are to enable the City to coordinate construction and other work in the Streets in an efficient manner; reschedule paving and repair of Streets that may be subject to imminent construction by telecommunications providers; minimize disruption to the public; and otherwise manage the Streets in a more efficient and effective manner. The Grantee shall meet with the City semiannually to discuss reasonably anticipated plans for construction in the Streets in the coming six (6) months. Within ten (10) days after the meeting, the Grantee shall submit to the City a letter setting forth the Grantee's anticipated plans as discussed at the meeting and any other agreements or matters discussed at the meeting. The Grantee and City shall work cooperatively to coordinate construction in the Streets. The Grantee agree to meet with the City at other times at the City's request to discuss changes in such construction plans, new plans for construction in the Streets, or other matters related to the City's coordination of construction in the Streets or management of the Streets.
35. **Additional Filings.** At the City's request, the Grantee shall provide to the City a copy of any material communication, public report, petition or other filing, either received from, or submitted by Grantee to, any local, state or federal agency or official (and any response thereto submitted by or received by the Grantee), that in any way materially affects the City's authority to manage the Streets, or the Grantee's representations and warranties set forth in this Agreement, but not including tax returns or other filings that are confidential.

ARTICLE VI.

LIABILITY AND INSURANCE

36. **Insurance – Specifications.** Throughout the Term, the Grantee shall, at its own expense, maintain a liability insurance policy or policies, together with evidence acceptable to the City

demonstrating that the premiums for said policy or policies have been paid. Such policy or policies shall be issued by companies duly licensed to do business in the Commonwealth of Virginia. Such companies must carry a rating by Best of not less than "A." Such policy or policies shall be in the form of a standard commercial general liability policy or policies and shall (i) insure the Grantee and (ii) provide insurance coverage to the City and its officers, boards, commissions, councils, elected officials and agents (through appropriate endorsements if necessary) in the minimum combined amount of two million dollars (\$2,000,000.00) for bodily injury and property damage. The foregoing minimum limitation shall not prohibit the Grantee from obtaining a general liability insurance policy or policies in excess of such limitations. The Grantee shall furnish the City with a certificate evidencing the aforesaid insurance coverage and naming the City, its officers, boards, commissions, councils, elected officials and agents as additional insureds on the liability policy or policies required under this Section 33. In addition, the City shall be named in the aforesaid insurance Certificate Holder and shall be provided at least forty-five (45) days' notice of cancellation or material change of said insurance. Nothing in this Section 33 is intended to prohibit the Grantee from providing self-insurance not less than the amounts specified in this Section 33, provided that the Grantee shall furnish the City with written evidence, in a form reasonably acceptable to the City Attorney, setting forth the Grantee's status as a self-insured corporation and a description of the Grantee's corporate risk management program, including if applicable, written evidence of a combination of commercial insurance coverage and self-insurance.

37. **Insurance – Maintenance.** The liability insurance policies or other evidence of insurance required in Section 33 shall be maintained by the Grantee throughout the Term and such other period of time during which the Grantee operates or is engaged in the removal of Equipment. If the Grantee is self-insured, the Grantee shall provide written evidence acceptable to the City Attorney that the foregoing statement is a condition of and applicable to such self-insurance. Within sixty (60) days after the date of any cancellation of insurance, the Grantee shall obtain and furnish to the City a certificate or replacement insurance policy or policies or other evidence of insurance and/or corporate risk management program combining commercial insurance and self-insurance in a form reasonably acceptable to the City Attorney. Such certificate or other evidence shall show continuing insurance coverage as required by Section 33 from the date of cancellation of prior insurance forward.
38. **Increased Insurance Coverage.** In the event of any changed circumstances following the Effective Date, which materially affect the risks associated with the activities permitted or authorized to the Grantee by this Agreement, the City, after consulting with the Grantee, may alter the minimum limitation of the liability insurance policy or policies or other evidence of insurance required in Section 33.
39. **Liability Not Limited.** The legal liability of the Grantee to the City and any Person for any of the matters that are subject of the liability insurance policies or other evidence of insurance required by Section 33, including, without limitation, the Grantee's indemnification obligations set forth in this Agreement, shall not be limited by such insurance policies nor by the recovery of any amounts thereunder, except to the extent necessary to avoid duplicative recovery from or payment by the Grantee.

40. **Liability of Grantee.** The Grantee shall be responsible for any liability, including, without limitation, any liability of the City and any officer, employee or agent of the City, arising solely out of or in connection with negligent acts or omissions of the Grantee or any officer, employee, agent or subcontractor thereof, in the installation, operation, upgrade, repair or removal of Equipment or the provision of Telecommunications Services through the Equipment. The Grantee shall, at its own cost and expense, replace, repair or restore any of the City's damaged property to its prior condition if such damage is caused by any act or failure to act of the Grantee or any officer, employee, agent or subcontractor thereof, in connection with the installation, operation, upgrade, repair or removal of Equipment or the provision of Telecommunications Services through the Equipment. The Grantee shall have no liability to the City and any officer, employee or agent of the City for any special, incidental, consequential, punitive or other damages as a result of the exercise of any right of the Grantee pursuant to this Agreement or applicable law.
41. **Liability of City.** The City, its officers, employees and agents shall not be responsible for any liability of the Grantee, any Affiliated Person or any other Person, arising out of or in connection with acts or omissions of the Grantee or any officer, employee, agent or subcontractor thereof, in the installation, operation, upgrade, repair or removal of Equipment or the provision of Telecommunications Services through the Equipment. The City and its officers, employees and agents shall have no liability to the Grantee, any Affiliated Person or any other Person for any special, incidental, consequential, punitive, or other damages as a result of the exercise of any right of the City pursuant to this Agreement or applicable law, the rights of the City to approve or disapprove the grant, termination, amendment, renewal or transfer of the Franchise, or to otherwise modify all or any part of this Agreement or the Franchise.
42. **Indemnification of City.** The Grantee shall defend, indemnify and hold harmless the City, its officers, employees and agents from and against all liabilities, whether special, incidental, consequential or punitive, and all other damages, costs and expenses (including reasonable attorneys' fees) arising solely out of or in connection with negligent acts or omissions of the Grantee or any officer, employee, agent or subcontractor thereof, in the award of this Franchise, the installation, operation, upgrade, repair or removal of Equipment or the provision of Telecommunications Services through the Equipment. The City shall notify the Grantee promptly of any claim or lawsuit filed against the City which may be covered by this Section 39. The Grantee and the City shall cooperate with each other by providing such nonfinancial assistance as may be requested by the other party in connection with any claim arising out of or in connection with the selection of franchisees for, or the negotiation or award of, this Agreement.

ARTICLE VII.

PERFORMANCE BOND/SECURITY FUND

43. **General Requirement.** Prior to the Effective Date, the Grantee shall deposit with the City an irrevocable, unconditional surety bond, reasonably acceptable to the City Attorney, in the amount of One Hundred Thousand Dollars (\$100,000.00) as the Grantee's Performance Bond. Throughout the Term, and for one hundred twenty (120) days thereafter, unless the

City notifies the Grantee that a reasonable longer period shall apply, the Grantee shall maintain the Performance Bond in the amount specified in this Section 40.

44. **Surety Fund.** The Director of Public Works may require the Grantee to submit as the Grantee's Security Fund an irrevocable, unconditional letter of credit, a cashier's check, or a corporate check, reasonably acceptable to the City Attorney, in the amount of Five Thousand Dollars (\$5,000.00) or ten percent (10%) of the cost of construction that relates to the destruction of the Streets, whichever is greater, for the installation of any Equipment that requires the destruction of the City's Streets for each Work in Street Permit issued by the City. The Grantee shall only be required to maintain such letter of credit, cashier's check, or corporate check for the duration of such work in the Streets as a Security Fund for the purposes set forth in Section 43. If the City does not utilize the Security Fund pursuant to Section 43, the City shall refund the Security Fund, or any portion remaining thereof, to the Grantee within twenty-one (21) days following the Grantee's completion and the City's acceptance of the Grantee's work in the Streets. At the Grantee's option, subject to the Grantor's right to require a Security Fund pursuant to the terms of Section 42, the Grantee may increase the amount of its Performance Bond by Fifty Thousand Dollars (\$50,000.00) in lieu of providing a Surety Fund.
45. **Changed Amount.** At any time during the Term, the City may, acting reasonably, require or permit the Grantee to change the amount either of the Performance Bond or Surety Fund if the City finds that new risk or other factors exist that reasonably necessitate or justify a change in the amount of the Performance Bond or Security Fund. Such new factors may include, but not be limited to, such matters as material changes in the net worth of the Grantee; changes in the identity of the Grantee that would require the prior written consent of the City pursuant to Section 49 of this Agreement; material changes in the amount and location of Equipment; the Grantee's recent record of repeated non-compliance with the terms and conditions of this Agreement; and material changes in the amount and nature of construction or other activities to be performed by the Grantee pursuant to this Agreement.
46. **Purpose of Performance Bond and Surety Fund.** The Performance Bond and the Surety Fund shall serve as security for:
- a. the faithful performance by the Grantee of all terms, conditions and obligations of this Agreement;
 - b. any expenditure, damage or loss incurred by the City occasioned by the Grantee's failure to comply with all rules, regulations, orders, permits and other directives of the City issued pursuant to this Agreement;
 - c. the payment of premiums for the liability insurance required pursuant to Section 39 of this Agreement if the Performance Bond/Surety Fund is compromised, in part, of a letter of credit;
 - d. the removal of Equipment from the Streets at the termination of the Agreement, at the election of the City, pursuant to Section 58 of this Agreement;
 - e. any loss or damage to the Streets or any property of the City during the installation, operation, upgrade, repair or removal of Equipment;
 - f. the payment of any other amounts that become due to the City pursuant to this Agreement or law;

- g. the timely renewal of any letter of credit that constitutes the Performance Bond or the Surety Fund; and
 - h. any other costs, loss or damage incurred by the City as a result of the Grantee's failure to perform its obligations pursuant to this Agreement.
- 47. **Withdrawals from the Performance Bond or Surety Fund.** Subject to the notice requirements of Section 46, the City may make withdrawals from the Performance Bond or the Security Fund for the satisfaction of obligations under this Agreement, or for the purposes specified in Section 44 of this Agreement. Withdrawals from the Performance Bond or the Security Fund shall not be deemed a cure of the default(s) that led to such withdrawals. The City may not seek recourse against either the Performance Bond or the Security Fund for any costs or damages for which the City has previously been compensated through a withdrawal from the Performance Bond or the Security Fund or otherwise by the Grantee.
- 48. **Notice of Withdrawals.** The City shall give the Grantee at least ten (10) days' notice prior to making any withdrawal from the Performance Bond or the Security Fund, provided, however, that the City shall not make any withdrawals by reason of any breach for which the Grantee has not been given notice prior to the notice required by this section 45 and any other provision of this Agreement. The withdrawal of amounts from the Performance Bond or the Security Fund shall constitute a credit against the amount of the applicable liability of the Grantee to the City, but only to the extent of said withdrawal.
- 49. **Replenishment of the Security Fund.** Within thirty (30) days after receipt of notice from the City that any amount has been withdrawn from the Security Fund, as provided in Section 45 of this Agreement, the Grantee shall restore the Security Fund to the amount specified in Section 42 of this Agreement, provided that, if a court finally determines that said withdrawal by the City was improper, the City shall refund the improperly withdrawn amount to the Security Fund or to the Grantee such that the balance in the Security Fund shall not exceed the amount specified in Section 42 of this Agreement. In case of such an improper withdrawal, the Grantee shall receive any interest accrued on the amount improperly withdrawn from the time of withdrawal to the time of refund to the Security Fund. If the Grantee has not made the required restoration to the Security Fund within such thirty (30) day period, interest on said amount shall accrue to the extent permitted by law, to commence at the completion of such thirty (30) day period. The City may withdraw from the Security Fund such interest periodically up to the date on which the Grantee makes the required principal payment, provided that the Grantee shall not be obligated to pay such interest with such principal payment to the extent such interest has been already withdrawn by the City.
- 50. **Not a Limit on Liability.** The obligation to perform and the liability of the Grantee pursuant to this Agreement shall not be limited by the acceptance of either the Performance Bond or the Security Fund required by this Article VII.
- 51. **Form.** The Performance Bond and any replacement bond, shall contain the following endorsement: "It is hereby understood and agreed that this bond may not be canceled or not renewed by the surety until at least sixty (60) days' notice to the City of the insurer's intention to cancel or not renew the Security Fund.

ARTICLE VIII.

TRANSFER RESTRICTIONS

52. **Transfer of Franchise.** Neither the Franchise, nor fifty percent (50%) or more of the rights, interests or obligations of the Grantee in the Telecommunications System or the Equipment shall be, directly or indirectly, acquired or disposed of, either by act of the Grantee or any Affiliated Person, by act of any Person holding Control of or any interest in the Grantee, the Telecommunications System, the Equipment or the Franchise, by operation of law or otherwise, without the prior written consent of the City, provided that the City shall consider any such action in accordance with its usual procedural rules and the procedures set forth in Section 53 hereof. For the purposes of this agreement, a transfer of franchise is not intended to apply to transfers or assignments to a parent, subsidiary, or affiliate of the Grantee.
53. **Transfer Requiring Notice Only.** In the event less than fifty percent (50%), but more than twenty-five percent (25%), of the rights, interests or obligations of the Grantee in the Telecommunications System or the Equipment is, directly or indirectly, acquired or disposed of, either by act of the Grantee or any Affiliated Person, by act of any Person holding Control of or any interest in the Grantee, the Telecommunications System, the Equipment or the Franchise, by operation of law or otherwise, the Grantee shall provide notice to the City identifying the transferee(s) and a contact person for such transferee(s).
54. **Change of Control.** The ownership and Control structure of the Grantee as of the Effective Date is set forth in Appendix A. In the event that a change in Control of the Grantee is proposed by the Grantee after the Effective Date, the Grantee shall provide to the City, within thirty (30) days after any filing with the Virginia State Corporation Commission seeking consent to such change of Control, or, if no such filing is required, at least sixty (60) days prior to the closing or consummation of any such change of Control of the Grantee: (a) notice identifying the Person that will acquire Control of the Grantee; and (b) a summary of the proposed transaction that would result in the change of Control. The Grantee shall also submit to the City a written certification, executed by an authorized senior officer or executive of the Grantee, that subsequent to the change in Control of the Grantee: (i) the Grantee shall continue to have the financial ability to construct, repair, remove and relocate the Equipment, as provided in this Agreement; (ii) the Grantee shall continue to hold all required certificates of public convenience and necessity, or such other successor authorization, issued by the Virginia State Corporation Commission; (iii) the liability insurance policy and performance bond/security fund as required by Sections 33 and 40 of this Agreement shall continue to be in place; and (iv) the Grantee shall continue to be bound by the terms and conditions of this Agreement. The City may request the Grantee to submit such additional information as the City may reasonably determine.
55. **Petition.** The Grantee shall promptly notify the City of any proposed action requiring the consent of the City pursuant to Section 49 hereof by submitting to the City a petition requesting consent. Each petition shall fully describe the proposed action and shall be accompanied by: (a) a summary of the proposed transaction between the Grantee and the proposed transferee; (b) a statement setting forth in reasonable detail the identity of the proposed transferee and the nature of its business; (c) information with respect to the proposed transferee to demonstrate that the proposed transferee meets the requirements of Section 53 (a) hereof; and (d) an agreement signed by the proposed transferee that it will

comply with the terms and conditions of this Agreement. A copy of the application or petition filed by the Grantee seeking consent of the Virginia State Corporation Commission to a transfer, sale or disposition will satisfy the requirements of this petition with any information required by this Section 52 that is not otherwise contained in such application or petition. The City may require the Grantee to submit such additional information as the City may reasonably determine.

56. **Consideration of the Petition.** Within one-hundred twenty (120) days from the date the City received a complete petition, as provided in Section 52 hereof, or such longer period of time as may be agreed upon by the City and the Grantee, the City shall grant its consent to the petition, provided that there is written evidence reasonably acceptable to the City as follows:
- a. The proposed transferee has the financial ability to construct, repair, remove and relocate the Equipment, as provided in this Agreement;
 - b. To the extent required by state law, the proposed transferee holds a valid and existing certificate of public convenience and necessity, or such other successor authorization, issued by the Virginia State Corporation Commission, which authorizes the Grantee to undertake the activities contemplated by this Agreement;
 - c. There is no then-outstanding breach of a material provision of this Agreement for which the Grantee has received notice and such breach remains uncured, is not in the process of being cured, or will not in the future be cured;
 - d. There are no then-outstanding breaches, by the proposed transferee, or a material provision of any similar telecommunications ordinances or agreements in other similar jurisdictions which are not in the process of being cured, or will not in the future be cured, or are not the subject of a good-faith dispute among the relevant parties;
 - e. The proposed transferee and/or Grantee has complied with the requirements of Section 52 hereof for the submission of information and agreements;
 - f. The proposed transferee has provided a liability insurance policy and a performance bond/security fund as required by Sections 33 and 40 of this Agreement; and
 - g. after receipt of a petition, the City shall consider such petition in accordance with standard City procedures. The Grantee shall provide all requested assistance to the City in connection with the City's review of the petition, and as appropriate, shall secure the cooperation and assistance of all Persons involved in any action described in Section 49.
57. **Consent Not A Waiver; Occupation of Streets by Any Person.** The grant or waiver of anyone or more of consents under Section 53 hereof shall not render unnecessary any subsequent consent, nor shall the grant of any such consent constitute a waiver of any other rights of the City.

Nothing in this Article VIII waives the ordinances or rules of the City or the City's right to require Persons that are occupying or using the Streets to provide Telecommunications Service in the City to obtain any lawful licenses, permits, franchises or other authorizations as may be applicable.

58. **Permitted Encumbrances.** Nothing in this Article VIII shall be deemed to prohibit any assignment, pledge, lease, sublease, mortgage, or other transfer of all or any part of the Equipment, or any right or interest therein, for financing purposes, provided that each such assignment, pledge, lease, sublease, mortgage, or other transfer shall be subject to the rights of the City pursuant to this Agreement and applicable law. The consent of the City shall not

be required with respect to any transfer to, or taking possession by, any banking or lending institution which is a secured creditor of the Grantee of all or any part of the System pursuant to the rights of such secured creditor the laws of the Commonwealth of Virginia, provided further that the City's rights are in no way adversely affected or diminished.

**ARTICLE IX.
TERMINATION**

59. **Termination Events.** The City, at its option, may terminate the Agreement upon any material breach of the Agreement by the Grantee, including, but not limited to, the following.
- a. the occurrence of any event that may reasonably lead to the foreclosure or other judicial or non-judicial sale of all or any material part of the Equipment, if the Grantee fails to demonstrate to the reasonable satisfaction of the City within thirty (30) days after notice that such event will not lead to such foreclosure or other judicial or non-judicial sale;
 - b. the condemnation by public authority, other than the City, or sale or dedication under threat or in lieu of condemnation, of all or substantially all of the Equipment, the effect of which would materially frustrate or impede the ability of the Grantee to carry out its obligations and the purposes of this Agreement, if the Grantee fails to demonstrate to the reasonable satisfaction of the City, within thirty (30) days after notice that such condemnation, sale or dedication would not materially frustrate or impede such ability of the Grantee;
 - c. If: (A) the Grantee shall make an assignment of the Grantee or the Equipment for the benefit of creditors, shall become and be adjudicated insolvent, shall petition or apply to any tribunal for, or consent to, the appointment of, or taking possession by, a receiver, custodian, liquidator or trustee or similar official pursuant to state or local laws, ordinances or regulations of or for it or any substantial part of its property or assets, including all or any of the Equipment; (B) a writ or warrant of attachment, execution, distraint, levy, possession or any similar process shall be issued by any tribunal against all or any material part of the Equipment; (C) any creditor of the trustee, receiver, custodian, liquidator or similar official for the Grantee or of any material parts of the Equipment under the law of any jurisdiction, whether now or hereinafter in effect, and a final order, judgment or decree is entered appointing any such trustee, receiver, custodian, liquidator or similar official, or approving the petition in any such proceedings; or (D) any final order, judgment or decree is entered in any proceedings against the Grantee decreeing the voluntary or involuntary dissolution of the Grantee;
 - d. any denial, forfeiture or revocation by any federal, state or local governmental authority having regulatory jurisdiction over the Grantee of any authorization required by law or the expiration without renewal of any such authorization, and such events, either individually or in the aggregate, materially jeopardize the provision of Telecommunications Services in the City, and the Grantee fails to take steps within thirty (30) days after notice to obtain or restore such authorization, and to diligently pursue such steps;

- e. any failure of the Grantee to maintain the insurance and/or corporate risk management program, if such program is applicable, substantially as required by Article VI of this Agreement;
- f. any failure of the Grantee to maintain the Performance Bond/Security Fund required by Article VII of this Agreement;
- g. any failure of the Grantee to comply with the transfer restrictions or change of Control provisions set forth in Article VIII of this Agreement;
- h. any failure of the Grantee to comply with any material provision of this Agreement that is not cured within thirty (30) days after the Grantee receives notice from the City, or such longer period of time as may be reasonable under the circumstances, provided the cure is commenced within the thirty (30) day period after notice from the City and the Grantee is proceeding with due diligence to complete such cure;
- i. any Abandonment of the System; and
- j. any persistent failure of the Grantee, after notice and an opportunity to cure with respect to substantially all such failures of the Grantee, to comply with the term, condition or provision of this Agreement or any other ordinance, law, regulation, rule or order of the City relating to management of the Streets in connection with construction, operation, installation, repair, upgrade or removal of Equipment.

60. **Rights Upon Termination.** The City and the Grantee recognize the importance and difficulty associated with the disposition of the Equipment following the expiration or termination of this Agreement. Therefore, in the event such expiration or termination occurs, the parties agree to establish a "Working Committee" to develop appropriate courses of conduct that will adequately recognize and address, in a reasonable and prudent manner, the costs and benefits to both parties in a manner that considers the effective use of existing Equipment. There shall be a rebuttable presumption that direct buried Equipment shall remain in place after termination provided that: (i) such Equipment is not being used to provide any Service in the City or elsewhere; (ii) the Grantee submits to the City maps and drawings showing the location of such Equipment; and (iii) such Equipment does not pose any risk to the health or safety of any individual Person. In the event the Working Committee cannot agree, within six (6) months of the Committee's formation, on the disposition of the Equipment upon any termination or expiration of this Agreement, the City, in its sole discretion, may, but shall not be obligated to, direct the Grantee to remove from the Streets, at the Grantee's sole cost and expense, all, or any portion designated by the City, of the Equipment in accordance with all applicable requirements of the City and subject to the requirements set forth in Section 58.

61. **Conditions of Removal.** In the event the City directs the Grantee to remove the Equipment from the Streets, or the Working Committee agrees that the Equipment shall be removed from the Streets, the Grantee shall undertake such removal subject to the following:

- a. in removing the Equipment, or part thereof, the Grantee shall refill and compact, at its own cost and expense, any excavation that shall be made by it and shall leave, in all material aspects, all Streets and other property in as good condition as that prevailing prior to the Grantee's removal of the Equipment from the Streets without affecting, altering or disturbing in any way any electric or other cables, wires, structures or attachments;

- b. the City shall have the right to inspect and approve the condition of such Streets within thirty (30) days after notice such removal is completed, and to the extent that the City determines that said Streets and other property have not been left in materially as good condition as that prevailing prior to the Grantee's removal of the Equipment, the Grantee shall be liable to the City for the cost of restoring the Streets and other property to said condition;
 - c. the Performance Bond/Surety Fund, liability insurance and indemnity provisions of this Agreement shall remain in full force and effect during the entire period of removal and associated repair of all Streets, and for not less than one hundred twenty (120) days thereafter; and
 - d. removal shall be commenced within ninety (90) days of the removal order by the City and shall be substantially completed within twelve (12) months thereafter including all reasonably associated repair of the Streets.
62. **Failure to Commence Removal.** If, in the reasonable judgment of the City, the Grantee fails to commence removal of the equipment within thirty (30) days after the City's removal order, or if the Grantee fails to substantially complete such removal, including all associated repair of the Streets, within twelve (12) months thereafter, then, to the extent not inconsistent with applicable law, the City shall have the right to:
- a. Declare that all rights, title and interest to the Equipment belong to the City with all rights of ownership, including, but not limited to, the right to connect and use the Equipment or to effect a transfer of all right, title and interest in the Equipment to another Person for operation; or
 - b. Authorize the removal of the Equipment installed by the Grantee in the Streets at the Grantee's cost and expense, by another Person
 - c. To the extent consistent with applicable law, any portion of the Equipment designated by the City for removal and not timely removed by the Grantee shall belong to and become the property of the City without payment to the Grantee, and the Grantee shall execute and deliver such documents, as the City shall request, in a form and substance acceptable to the City, to evidence such ownership by the City.
63. **No Condemnation.** None of the declaration, connection, use, transfer or other actions by the City under this Article IX shall constitute a condemnation by the City or a sale or dedication under threat or in lieu of condemnation.

ARTICLE X.

SUBSEQUENT ACTION

64. **Consistency with Applicable Law.** By acceptance of the terms and conditions of this Agreement, the Grantee acknowledges and agrees that the processes and procedures pursuant to which this Agreement was entered into and the Franchise was granted are consistent with applicable law as of the Effective Date of this Agreement. "Applicable law" for the purposes of this Article X shall include federal, state and local statutes and regulation, and federal, state and local final, non-appealable judicial and administrative decisions. The Grantee shall at all times comply with all provisions in this Agreement and all lawful amendments and modifications to this Agreement.

65. **Procedures in Event of Subsequent Invalidity.** In the event that, after the Effective Date, any court, agency, commission, legislative body or other authority of competent jurisdiction (i) declares this Agreement invalid, in whole or in part, or (ii) requires the Grantee either to (A) perform any act that is inconsistent with any provision of this Agreement or (B) cease performing any act required by any provision of this Agreement, including any obligations with respect to compensation or other financial obligations pursuant to this Agreement, or the parties otherwise determine that this Agreement does not comply with Applicable Law, then the Grantee shall promptly notify the City of such fact.
- a. Upon receipt of such notification, the City, acting in good faith, shall determine whether such declaration or requirement has a material and adverse effect on this Agreement. Regardless of the City's determination or the length of time that such determination may take, the Grantee may comply with such declaration or requirement, and such compliance will not be considered a breach or default of this Agreement. If the City, acting in good faith, determines that such declaration or requirement does not have a material and adverse effect on this Agreement, then the Grantee shall continue to comply with such declaration or requirement. If the City, acting in good faith, determines that such declaration or requirement does have such an effect or that compliance with such declaration or requirement by the Grantee would materially frustrate or impede the ability of the Grantee to carry out its obligations pursuant to, and the purposes of this Agreement, then the Grantee and the City shall enter into good faith negotiations to amend this Agreement, so as to enable the Grantee to perform obligations equivalent to those immediately prior to such declaration or requirement, to the maximum extent consistent with said declaration or requirement. If the Grantee or the City fails to negotiate in good faith to produce an agreement which is reasonably acceptable to both the City and the Grantee, then the Grantee or the City may accelerate the expiration of the Term so that the Term shall expire on a date determined by the party accelerating the Term not less than six (6) months after such determination. In the event there a six (6) months or less remaining in the Term, this Section 62 shall not operate to extend the Term.

**ARTICLE XI.
MISCELLANEOUS**

66. **Appendices.** The Appendices to this Agreement, attached hereto, and all portions thereof and exhibits thereto, are, except as otherwise specified in such Appendices, incorporated herein by reference and expressly made a part of this Agreement. The procedures for approval of any subsequent amendment or modification to said Appendices shall be the same as those applicable to any amendment or modification hereof, except as specified in such Appendices or elsewhere in this Agreement.
67. **Action Taken by City.** Any action to be taken by the City pursuant to this Agreement shall be taken in accordance with the applicable rules and procedures of the City, as said rules and procedures may be amended or modified throughout the Term, as well as any applicable state or federal laws, rules, or regulations.

68. **Entire Agreement.** This Agreement, including all Appendices, embodies the entire understanding and agreement of the City and the Grantee with respect to the subject matter hereof and merges and supersedes all prior representations, agreement and understandings, whether oral or written, between the City and the Grantee with respect to the subject matter hereof, including without limitation, all prior drafts of this Agreement and any Appendix to this Agreement and any and all written or oral statements or representations by any official, employee, agent, attorney, consultant or independent contractor of the City or the Grantee.
69. **Delays and Failures Beyond Control of Grantee.** Notwithstanding any other provision of this Agreement, the Grantee shall not be liable for delay in performance of, or failure to perform, in whole or in part, its obligations pursuant to this Agreement due to strike, war or act of war (whether an actual declaration of war is made or not), insurrection, riot, act of public enemy, accident, fire, flood or other act of God, technical failure, sabotage or other events, where the Grantee has exercised all due care in the prevention thereof, to the extent that such causes or other events are beyond the control of the Grantee and such causes or events are without the fault or negligence of the Grantee. In the event that any such delay in performance or failure to perform affects only part of the Grantee's capacity to perform, the Grantee shall perform to the maximum extent it is able to do so and shall take all reasonable steps within its power to correct such causes(s). The Grantee agrees that in correcting such cause(s), it shall take all reasonable steps to do so in as expeditious a manner as possible. The Grantee shall notify the City in writing of the occurrence of an event covered by this Section 66 within five (5) business days of the date upon which Grantee learns of its occurrence.
70. **Notices and Contact Persons.** All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments, designations, or other direction or communication hereunder by any party to another shall be in writing and shall be sufficiently given and served upon the other party, immediately if delivered personally or by telex or telecopy (provided with respect to telex and telecopy the such transmissions are received on a business day during normal business hours), the first business day after dispatch if sent by express mail, and the second business day after dispatch if sent by first class mail, registered or certified, return receipt requested, postage prepaid, and addressed as follows:

City of Richmond
900 East Broad Street
Richmond, VA 23219
(804) 646-7970
Fax: (804) 646-7987

With copies to:

City Attorney
900 East Broad Street - Suite 300
Richmond, VA 23219
(804) 646-7940

Fax: (804) 646-6653

Director of Public Works
Department of Public Works
900 East Broad Street - Suite 701
Richmond, VA 23219
(804) 646-6430
Fax: (804) 646-6629

GRANTEE:

Windstream Communications
Attn: Franchises & Easements
11101 Anderson Drive
Little Rock, AR 72212
corp.franchise.agreements@windstream.com

With copy to:

Windstream Communications
Attn: Legal
4001 North Rodney Parham Road
Little Rock, AR 72212

- 71. Additional Representations and Warranties.** In addition to the representations, warranties, and covenants of the Grantee to the City set forth elsewhere in this Agreement, the Grantee represents and warrants to the City and covenants and agrees (which representations, warranties, covenants, and agreements shall not be affected or waived by any inspection or examination made by or on behalf of the City) that, as of the Effective Date:
- a. **Organization, Standing, Power, Authorization and Enforceability.** The Grantee is a Legal Liability Company duly organized, validly existing and in good standing under the laws of the State of Delaware and is duly authorized to do business in the Commonwealth of Virginia and the City of Richmond. The Grantee has all requisite power and authority to won or lease its properties and assets, to conduct its businesses as currently conducted and to execute, deliver and perform this Agreement and all other agreements entered into or delivered in connection with or a contemplated hereby, and if it is conducting business in another jurisdiction, it is in good standing as a foreign corporation in each jurisdiction in which it conducts business. The execution, delivery and performance of this Agreement and all other agreements entered into in connection with the transactions contemplated hereby have been duly, legally and validly authorized by all necessary action on the part of the Grantee and its Grantor(s) , and this Agreement and all other agreements entered into in connection with the transactions contemplated hereby have been duly executed and delivered by the Grantee and constitute (or upon execution and delivery will constitute) the valid and binding obligations of the Grantee

and are enforceable (or upon execution and delivery will be enforceable) in accordance with their respective terms.

- b. **Consent.** No consent, approval or authorization of, or declaration of filing with, any public, governmental or other authority (including without limitation, the FCC or any other federal agency, authority, commission or council, and, if applicable, public utility commissions, telephone companies and other entities) on the part of the Grantee is required for the valid execution and delivery of this Agreement or any other agreement or instrument executed or delivered in connection herewith.
- c. **No Coercion; Full Disclosure.** The Grantee enters into this Agreement willingly and without coercion, undue influence or duress. In addition, the Grantee has not entered into this Agreement with the intent to act contrary to the provisions herein.
- d. **Accuracy of Written Information.** Without limiting the specific language of any other representation and warranty herein, all information furnished by the Grantee to the City in writing in connection with their Agreement, by authorized officers of Grantee, is accurate and complete in all material respects, and includes all material facts required to be stated herein and does not contain any untrue statement of a material fact or omit any material fact necessary to make the statements therein not misleading, and the Grantee has not misrepresented or omitted material facts in its negotiations with the City.
- e. **Compliance with Law.** The Grantee is in material compliance with all laws, ordinances, decrees and governmental rules and regulations applicable to the provision of Telecommunications Services and has obtained all government licenses, permits, and authorizations necessary for the provision of Telecommunications Services.
- f. **Litigation; Investigations.** Except as disclosed in writing to the City prior to the execution of this Agreement, there is no civil, criminal, administrative, arbitration or other proceeding, investigation or claim, pending or threatened against the Grantee, at law or in equity, or before any foreign, federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, including, without limitation, matters involving the granting of a temporary or permanent injunction against the Grantee that, if granted, would have a material adverse effect on the ability of the Grantee pursuant to this Agreement.
- g. **Fees.** The Grantee has paid all franchise, license or other fees and charges that have become due pursuant to any telecommunications franchise in Virginia and has made adequate provisions for such fees and charges that have accrued.
- h. **Licenses and Permits.** The Grantee has used best efforts to secure all necessary permits and licenses in connection with the installation, operation, upgrade, repair and removal of Equipment and the provision of Telecommunications Services over such Equipment, and has filed all required registrations, applications, reports and other documents with the FCC and public utilities commissions and other entities exercising jurisdiction over the provision of Telecommunications Services or construction of delivery systems therefor. Further, the Grantee is presently aware of no event that has occurred that could result in the revocation or termination of any license or authorization to provide Telecommunications Services in the City. In the event the Grantee received notice or becomes aware that it has not secured all necessary permits and licenses as provided in

this Section 68 (h) or has not filed all required registrations, applications, reports and other documents, the Grantee shall take immediate steps to do so.

- 72. Additional Covenants.** Until the termination of this Agreement and the satisfaction in full by the Grantee of its obligations under this Agreement, in consideration of the Franchise, the Grantee agrees that it will comply with the following affirmative covenants, unless the City otherwise consents in writing:
- a. **Compliance with Laws; Licenses and Permits.** The Grantee shall comply with: (i) all applicable laws, rules, regulations, orders, writs, decrees and judgments including, but not limited to, those of the FCC relating to the Equipment and those of any other federal, state agency or authority of competent jurisdiction relating to the Equipment; and (ii) all local laws and rules, regulations, orders, or other directives of the City issued pursuant to this Agreement relating to use of the Streets. The Grantee shall have the sole responsibility for obtaining all permits, licenses and other forms of approval or authorization necessary to install, operate, upgrade, repair and remove Equipment and provide Telecommunications Services therewith.
 - b. **Maintain Existence.** The Grantee shall preserve and maintain its existence, its business, and all of its rights and privileges necessary or appropriate in the normal conduct of said business, unless any such change shall not have a material adverse impact on the Grantee's ability to perform its obligations under this Agreement. The Grantee shall maintain its good standing in the state of formation and, if applicable, continue to qualify to do business and remain in good standing as a foreign corporation in Virginia. The Grantee shall conduct business in accordance with its charter and bylaws and other governing documents, and shall comply with the material terms of all mortgages, indentures, leases, contracts and other agreements and instruments binding upon it, the failure to comply with which would materially affect its ability to perform its obligations under this Agreement, except where contested in good faith and by appropriate proceedings.
 - c. **Ability to Perform.** In the event City reasonably believes there is a material risk that the Grantee will be unable to perform its obligations under this Agreement, including the construction, repair, removal or relocation of the Equipment, the City may request, and the Grantee shall provide to the City, a report addressing such matters and in such detail and containing such substance as the City may reasonably determine, demonstrating that it can perform, on a timely basis, all obligations pursuant to this Agreement and the other agreements to which the Grantee is or becomes a party in connection herewith. The Grantee shall supplement any such report as the City may reasonably request.
 - d. **Condition of Equipment.** All Equipment will be maintained in good repair and condition throughout the Term, to the extent necessary to avoid damaging the Streets.
- 73. Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted transferees and assigns. All of the provisions of this Agreement apply to the Grantee, its successors, and assigns.
- 74. No Waiver; Cumulative Remedies.** No failure on the part of the City or the Grantee to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right preclude any other right, all subject to the conditions and limitations established in this Agreement. The rights and remedies

provided herein are cumulative and not exclusive of any remedies provided by law, and nothing contained in this Agreement shall impair any of the rights of the City or the Grantee under applicable law, subject in each case to the terms and conditions of this Agreement. A waiver of any right or remedy by the City or the Grantee at any one time shall not affect the exercise of such right or remedy or any other right or other remedy by the City or the Grantee at any other time. In order for any waiver of the City or the Grantee to be effective, it must be in writing.

75. **Headings: Other Terms.** The headings contained in this Agreement are to facilitate reference only, do not form a part of this Agreement, and shall not in any way affect the construction or interpretation hereof. Terms such as "hereby," "herein," "hereof," "hereinafter," "hereunder," and "hereto" refer to this Agreement as a whole and not to the particular sentence or paragraph where they appear, unless the context otherwise requires. The term "may" is permissive; the terms "shall" and "will" are mandatory, not merely directive. All references to any gender shall be deemed to include all others, as the context may require. Terms used in the plural include the singular, and vice versa, unless the context otherwise requires.
76. **No Agency.** The Grantee is not an agent of the City when it conducts the work to be performed pursuant to this Agreement.
77. **Survival.** All representations and warranties contained in this Agreement shall survive the Term. The Grantee acknowledges that certain of the obligations to be performed under this Agreement are to be performed after the Franchise terminates or expires.
78. **Delegation of City Rights.** The City reserves the right to delegate and re-delegate, from time to time, any of its rights or obligations under this Agreement to any body, organization or official of the City. Upon any such delegation or re-delegation, references to "City" in this Agreement shall refer to the body, organization or official to whom such delegation or re-delegation has been made. Any such delegation by the City shall be effective upon written notice by the City to the Grantee of such delegation. Upon receipt of such notice by the Grantee, the Grantee shall be bound by all terms and conditions of the delegation not in conflict with this Agreement. Any such delegation, revocation or re-delegation, no matter how often made, shall not be deemed an amendment to this Agreement or require any consent of the Grantee.
79. **Claims Under Agreement.** The City and the Grantee agree that any and all claims asserted by or against the City arising under this Agreement or related thereto shall be heard and determined either in a court of the United States located in Richmond, Virginia ("Federal Court") or in a court of the Commonwealth of Virginia located in the City of Richmond ("Virginia State Court"). To effectuate this Agreement and intent, the Grantee agrees that if the City initiates any action against the Grantee in Federal Court or in Virginia State Court, service of process may be made on the Grantee by serving the registered agent of the Grantee in person or by registered mail addressed to the registered agent of the Grantee, at its office in the City of Richmond as required by this Agreement, or to such other address as the Grantee may provide to the City in writing.
80. **Modification.** Except as otherwise provided in this Agreement, any Appendix to this Agreement, or applicable law, no provision of this Agreement nor any Appendix to this Agreement, shall be amended or otherwise modified, in whole or in part, except by an

instrument in writing, duly executed by the City and the Grantee, which amendment shall be authorized on behalf of the City through the adoption of an appropriate resolution or order by the City, as required by applicable law.

81. **Reservation of Rights.** The City reserves the right to adopt or issue such rules, regulations, orders or other directives governing the Grantee, Equipment or Telecommunications Services as it shall find necessary, appropriate, and within the exercise of its police power or such other power or authority as the City may have, and such other orders as the City shall find necessary or appropriate pursuant to and in furtherance of the purposes of this Agreement, and the Grantee expressly agrees to comply with all such lawful rules, regulations, orders or other directives. No rule, regulation, order or other directive issued pursuant to this Section 78 shall constitute an amendment to this Agreement, provided that such rule, regulation, order or other directive is not inconsistent with this Agreement.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives have executed this Franchise Agreement and mad the same effective as of the day and year first written above.

WINDSTREAM COMMUNICATIONS, LLC.

By _____

[Name]

[Title]

CITY OF RICHMOND, VIRGINIA

By _____

[Name]

[Title]

APPROVED AS TO FORM

By Bonnie M. Ashley

[Name]

Assistant City Attorney