

CHAPTER 28
COMMUNICATIONS SERVICES

Article I. Scope of Ordinance

28-101 Scope of Ordinance

Article II. Findings, Authority, Definitions

28-201 Declaration of Findings
28-202 Adoption Pursuant to Home Rule Powers
28-203 Defined Terms

Article III. Grant of Franchises and Authority to Use Right-of-Way

28-301 Registration
28-302 Non-Exclusive
28-303 Grant
28-304 Grant of License
28-305 Nature of Grant of Franchise
28-306 Acceptance
28-307 Term
28-308 Amendment and Renewal
28-309 Use of Right-of-Way; Police Powers; Franchisees' Use Subordinate
28-310 No Interference
28-311 Exclusion of Certain Locations/Facilities
28-312 Location, Type and Design of Facilities Subject to Approval
28-313 Co-location and Additional Facilities Requirements, Planned Infrastructure
28-314 Right-of-Way Management Code
28-315 Underground Facility Locating Service
28-316 Conditions Relating to Private Property
28-317 Permit Requirements
28-318 Franchise Subject to Wireless Ordinances
28-319 As Built Drawings
28-320 Agent
28-321 Franchisees Responsible for Costs

Article IV. Franchise and License Fees

28-401 Application Fees
28-402 Franchise Fees
28-403 License Fees
28-404 Timing of Payment of Fees
28-405 Interest on Late Payments and Under Payments
28-406 Fee Statement

28-407	No Accord and Satisfaction
28-408	Maintain Records
28-409	Description of Service
28-410	Right of Inspection
28-411	Payment of Taxes; Franchise Fee Not a Tax
28-412	Duty to Notify City of Resellers
28-413	Sale or Lease of Conduit
28-414	Bundled Services

Article V. Open Video Service

28-501	Open Video Service
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Article VI. Transfer of Ownership

28-601	Consent of City Required
28-602	Exception to Consent Requirement
28-603	Assigning Franchise Rights, Interests and Obligations

Article VII. General Conditions

28-701	Compliance With Laws
28-702	Enforcement; Attorneys' Fees
28-703	Advertising, Signs or Extraneous Markings
28-704	Tree Protection
28-705	Forfeiture of Privilege
28-706	Removal of Facilities
28-707	Relocation of Facilities
28-708	Non-discrimination

Article VIII. Confidential Information

28-801	Confidential Information
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Article IX. Liability and Indemnification

28-901	Protection Against Harm or Damage
28-902	City Held Harmless

Article X. Insurance

28-1001	Insurance Required
28-1002	Certificate of Insurance
28-1003	Liability Not Limited

Article XI. Unlawful to Operate Without a Franchise

28-1101 Unlawful to Operate Without a Franchise

Article XII – Invalidity and Remedies

28-1201 Validity of Provisions
28-1202 Franchise Rights and Remedies

Article 1. Scope of Ordinance

Sec. 28-101 Scope of Ordinance

This Ordinance shall apply to any public or private entity who seeks to construct, install, or operate a Communications System or Facilities, as such terms are defined herein, within the Right-of-Way, unless such entity already has an existing valid Franchise from the City to construct, install, or maintain a Communications System in the Right-of-Way prior to the effective date of this Ordinance or is otherwise exempt from this requirement by operation of applicable state Law. Provided, however, that all of the provisions related to construction or permitting specifications adopted pursuant to the City’s police powers, to the extent that they do not conflict with the material terms of an existing Franchise, shall be fully applicable to all such Franchisees. This Ordinance shall apply to City owned or controlled Communications Systems except to the extent such lines or facilities are utilized on an internal, non-commercial basis by the City or any of its Departments. This Ordinance shall not apply to the provision of Cable Service. (Ord. 2004-23, Adop. 8/10/04)

Article II. Findings, Authority, Definitions

Sec. 28-201 Declaration of Findings

The City hereby declares as a legislative finding that the Right-of-Way within the City of Hutchinson:

Is a unique and physically limited resource;

Is critical to the travel and transport of persons and property in the City;

Is intended for public uses and must be managed and controlled consistent with that intent; and can be partially occupied by the Facilities of utilities and public service entities, to the enhancement of the health, welfare, and general economic well being of the City and its citizens; and

Requires adoption of specific additional regulations to ensure minimal inconvenience to the public, coordinate users, maximize available space, reduce

maintenance and costs to the public, and facilitate entry of a maximum number of providers of cable, telecommunications, and other services in the public interest. (Ord. 2004-23, Adop. 8/10/04)

Sec. 28-202 Adoption Pursuant to Home Rule Powers

The City adopts this Ordinance and any Franchises granted hereunder pursuant to K.S.A. 12-2001, its Home Rule powers, and other applicable law. Any rights contained within a Franchise or License granted pursuant to this Ordinance are subject to the Home Rule powers of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Every Franchisee or Licensee shall comply with all applicable Laws enacted by the City pursuant to its Home Rule powers to the extent consistent with federal law. (Ord. 2004-23, Adop. 8/10/04)

Sec. 28-203 Defined Terms

For purposes of this Ordinance, the following terms, phrases, words, and their derivatives shall have the meanings set forth in this Section, unless the context clearly indicates that another meaning is intended. Words used in the present tense include the future tense, words in the single number include the plural number, and words in the plural number include the singular. The words "shall" and "will" are mandatory, and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

"Access Lines" means the following billed lines and trunks, whether provided on a retail or wholesale basis: residential lines; DSL and or ISDN lines (channels); PBX trunks; Centrex or Centrex-like stations; simulated exchange access lines provided by a central office based switching arrangement where all stations served by such simulated exchange access lines are used by a single customer of the provider of such arrangement; where stations are served by simulated exchange access lines provided by a central office based switching arrangement and the stations served are not used by a single customer of the provider of such arrangement, each station shall constitute an access line; and pay phone lines unless prohibited by applicable law. "Access line" shall include wireless telecommunications services subject to 47 C.F.R. Part 24. "Access line" shall not include the following: wireless telecommunications services subject to 47 C.F.R. Part 22; unbundled loop facilities; and special access services.

"Affiliate" means each person, directly or indirectly, controlling, controlled by, or under common control with a Franchisee; provided that Affiliate shall in no event mean any limited partner, member, or shareholder holding an interest of less than 15 percent of such Franchisee.

"Antenna" means any device that transmits and/or receives radio waves for voice, data or video communications purposes including, but not limited to, television, AM/FM radio, microwave, cellular telephone and similar forms of communications. A combination of

panels, boxes, or other antenna physically connected and designed in conjunction to receive signals at one location in the System shall be considered one (1) antenna.

"Cable Services" means:

1. The one-way transmission to subscribers of (i) video programming, or (ii) other programming service; and
2. Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

"City" means the City of Hutchinson, Kansas.

"Co-location" means the shared use of Facilities, such as poles, ducts or conduit, including but not limited to the placement of conduit owned by more than one Right-of-Way user in the same trench or boring and the placement of equipment owned by more than one user in the same conduit. Co-location does not include interconnection of Facilities or the sale or purchase of capacity (whether bundled or unbundled).

"Communications Service" or "Service" means the transmission of writing, signs, signals, pictures, sounds or other forms of intelligence through cables, wires or lines, including, but not limited to, any "telecommunications service," "enhanced service," "information service," interconnection, including interconnect of cellular or PCS or other mobile services, "Open Video Service," or "Internet service," as such terms are now, or may in the future be, defined under federal law, and including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of telecommunications) incidental to such transmission. This term does not include "Cable Services," but these services shall be subject to separate cable franchising requirements and application.

"Communications System" or "System" means the cables, wires, lines, optic fiber, and any associated converters, equipment, or other facilities designed, constructed or occupied by a Franchisee or others for the purpose of producing, receiving, amplifying or distributing communications service to or from locations within the City.

"Facilities" means any portion of a System located in, along, over, upon, under, or through the Right-of-Way.

"Franchise" or "Agreement" means the individual Franchises that are governed by this Ordinance and agreed to and executed by Franchisee.

"Franchisee" means any entity who currently has a franchise granted by the City of Hutchinson, or who is granted a Franchise pursuant to this Ordinance and that entity's agents, employees, lawful successors, assignees, or transferees.

"Franchise Fee" means the fee imposed by the City on a Franchisee pursuant to Section 4 of this Ordinance.

"Gross Receipts" means all revenues received directly or indirectly by a Franchisee or its Affiliates for Communications Services that either originate or terminate within the corporate limits of the City of Hutchinson, and all revenue derived from the use of Facilities. This term shall be interpreted as expansively as legally permissible and shall incorporate any and all new services, technologies or sources of revenue that may develop over the course of the term of the Franchise. For illustration purposes only, such Gross Receipts shall specifically include, but shall not be limited to, all revenue of a Franchisee derived from the following:

1. Recurring local exchange service revenues from businesses and residences which include basic telephone exchange service, Touch Tone, Custom Calling Services and measured local calls;
2. Recurring local exchange service revenues from public, semi-public and private coin telephone use;
3. Local directory assistance (411);
4. Line status verification/busy interrupt;
5. Local operator assistance;
6. Information delivery service;
7. Cellular, PCS or other mobile revenue attributable to Franchisee's use of Right-of-Way (such as interconnect fees, or cell sites connections);
8. Non-recurring local exchange service revenue, which shall include customer service charges for installation of lines and reconnection of service.
9. Revenue received by the Franchisee from Reseller Service Providers, unless the reseller has a franchise with City and directly pays a franchise fee or occupation tax on such revenues to the City;
10. Internet/data access charges or services, including all high-speed and traditional subscriber line charges or services (such as, without limitation, T1, T3, OC3, frame relay, DSL, ISDN, cable modem, special access, or point to point);
11. Revenue from rent, lease, physical use, or co-location of the Facilities or a portion thereof for any purpose;

12. Late charges, penalties or interest received from customers;
13. Sale of accounts receivable; and
14. All other applicable revenues not listed herein.

"Gross Receipts" shall not include revenues from Cable Services subject to a Cable Services Franchise, from the provision of interexchange services or uncollected debt, and any federal, state or local taxes or franchise fees separately stated on a customer's bill. Provided, that a Franchisee shall include uncollected debt in Gross Receipts at the time it is actually collected.

"License" means the individual grant of the right to use the Right-of-Way for a Communications System solely for private use of the Licensee and not for resale or lease to others.

"Licensee" means any entity granted a License pursuant to this Ordinance and not otherwise required by the Ordinance or State Law to have a Franchise.

"Linear Foot" – means the length in feet of cable, wire, fiber, or other linear Facilities physically connected, wrapped, or lashed as a single cable or bundle of cables, or with respect to underground Facilities, means the length of a conduit or an array of conduits contemporaneously installed during the same construction project by a single provider. Where applicable, a separate Franchise shall be required for each separate entity who owns or controls Facilities within an array of conduits.

"Open Video Services" means any video programming Services provided to any person by a Franchisee certified by the FCC to operate an Open Video System pursuant to Section 47 U.S.C. 573, as may be amended, regardless of the Facilities used.

"Pass Through Service" means the Facilities for a Communication System that merely pass through the City from one point to another point and from which no Gross Receipts are directly attributable from subscribers or other carriers within the City.

"Public Project" means any project planned or undertaken by the City or any governmental entity for construction, reconstruction, maintenance, or repair of public facilities or improvements, or any other purpose of a public nature.

"Public Project for Private Development" means a Public Project, or that portion thereof, arising solely from a request or requirement of a third party (non-City or governmental) primarily for the benefit and use of a third party.

"Reseller Service Provider" means a person or business providing Service within the City that does not own or control its own facilities in the Right-of-Way, but instead uses the Right-of-Way by interconnecting with or using the network elements of another

service provider utilizing the Right-of-Way, and/or by leasing excess capacity from a facility-based service provider.

"Right-of-Way" means the surface and space on, above and below every municipal street, alley, road, highway, lane or City right-of-way dedicated or commonly used now or hereafter for utility purposes, including but not limited to overhead lighting facilities, and including utility easements wherein the City now or hereafter acquires the right and authority to locate or permit the location of utilities consistent with communications facilities. This term shall not include any county, state, or federal right-of-way or any property owned or controlled by any person or agency other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such Person or Agency. Right-of-Way shall not include property owned or held by City and not typically considered Right-of-Way such as City parks and City buildings.

"Wired Access Point Antenna" means any Antenna located in the Right-of-Way connected directly to wire, cable, or fiber optic communications Facilities within the City or any Antenna having its highest point positioned in the Right-of-Way at a height that is otherwise subject to separate zoning and wireless siting ordinances.
(Ord. 2004-23, Adop. 8/10/04)

Article III. Grant of Franchises and Authority to Use Right-of-Way

Sec. 28-301 Registration. All providers of Communications Services that intend to place Facilities in the Right-of-Way shall register with the City Engineer. Such providers shall be required to obtain a franchise, license, or other permit to use the Right-of-Way in the manner provided by this Ordinance, a Right-of-Way management ordinance, or other provisions of the Code of the City of Hutchinson. Such registration shall be in such form as may reasonably be required by the City. After the receipt of a completed registration, the City shall determine the type of application required of the provider.
(Ord. 2004-23, Adop. 8/10/04)

Sec. 28-302. Non-Exclusive. Franchises and Licenses granted pursuant to this Ordinance shall be nonexclusive. The City specifically reserves the right to grant, at any time, Franchises or other rights to use the Right-of-Way for any purpose and to any other person, including itself, as it deems appropriate, subject to applicable federal and State law. (Ord. 2004-23, Adop. 8/10/04)

Sec. 28-303. Grant. Any Franchise granted pursuant to the terms of this Ordinance shall convey the right, privilege and authority to construct, operate, and maintain Facilities in, through and along the City's Right-of-Way for the purposes of supplying Communications Services on a nonexclusive basis within the City, subject, however, to the terms and conditions herein set forth and within an individual Franchise. As a condition of any such grant, a Franchisee is required to obtain and is responsible for any necessary permit, license certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City,

the FCC or the KCC, subject to the Franchisee's right to challenge in good faith such requirements as established by the FCC, KCC or other City ordinance.

No Franchise granted pursuant to this Ordinance shall provide authority to provide Cable Service as a cable operator (as defined by 47 U.S.C. § 522(5)) within the City. Upon a Franchisee's request for a franchise to provide Cable Service as a cable operator (as defined by 47 U.S.C. § 522(5)) within the City, the City agrees to timely negotiate such franchise in good faith with the Franchisee. Neither does this Ordinance authorize the grant of a Franchise to operate an Open Video System without payment of fees permitted by 47 U.S.C. § 573(c)(2)(B) and without complying with FCC regulations promulgated pursuant to 47 U.S.C. § 573, and first obtaining a separate or amended Franchise. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-304. Grant of a License. Licenses granted pursuant to the terms of this Ordinance and any Right-of-Way management ordinance shall be solely for private use of the Licensee and not for the resale or lease of Communications Services or System to others. Such License shall be granted only for specific routes or locations described in the License and for such term as described in the license.

All references in this Ordinance to the grant of a “Franchise” and the rights and obligations of a “Franchisee” shall likewise apply to the grant of a “License” and the rights and obligations of a “Licensee” without the necessity of stating “Franchise or License” except where the context clearly indicates application only to a Franchise. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-305. Nature of Grant of Franchise. Franchises granted under authority of this Ordinance shall not convey title, equitable or legal, in the Right-of-Way, and gives only the right to occupy Right-of-Way, for the purposes and for the period stated in the individual Franchises. A Franchise does not excuse the Franchisee from obtaining appropriate access or pole attachment agreements before locating its Facilities on another person’s Facilities. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-306. Acceptance. No Franchise or License granted under this Ordinance shall be effective until the Franchisee or Licensee shall have executed a written agreement setting forth the particular terms and provisions under which the rights to occupy and use the Right-of-Way will be granted. Such agreement may incorporate by reference provisions of this Ordinance, a Right-of-Way management ordinance, or other Code provisions or City regulations. Written acceptance of a Franchise in the manner provided by State Law may constitute the writing required by this subsection. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-307. Term.

A. The specific length of the term of the Franchises granted hereunder shall be set out in the individual Franchise. The term of the Franchise notwithstanding, upon written request of either the City or a Franchisee, the Franchise may be reviewed at any

time after four (4) years from the effective date of the Franchise and either the City or the Franchisee may propose amendments to any provision of the Franchise by giving thirty days written notice to the other of the amendment(s) desired. The City and Franchisee shall negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s).

B. Upon written request of either the City or the Franchisee, the City and the Franchisee shall negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s) at any time upon any of the following events:

1. Change in federal, state, or local law, regulation, or order which materially affects any rights or obligations of either the City or a Franchisee, including but not limited to the scope of the grant to the Franchisee or the compensation to be received by the City.
2. Change in the structure or operation of the communications industry or the Service provided through the System which materially affects any rights or obligations of either the City or a Franchisee, including but not limited to the scope of the grant to the Franchisee or the compensation to be received by the City.
3. Any other material and unintended change or shift in the economic benefit the City or the Franchisee relied upon and anticipated upon entering into the Franchise.

C. The compensation provision of the individual Franchise shall be reopened and renegotiated in good faith if communication consumers within the City have access to alternative providers of Communications Services who use the Right-of-Way and do not pay a Franchise fee or other payment substantially equivalent to what is required under this Ordinance and the Franchise, which results in the application of compensation requirements that are discriminatory and not competitively neutral with respect to the Franchisee. The use of Right-of-Way provisions of a Franchise shall be reopened and renegotiated if consumers within the City have access to alternative providers of Communications Services through Systems who use the Right-of-Way and do not have requirements on the use of Right-of-Way substantially equivalent to the requirements of this Ordinance or a Franchise, which results in a material and unfair disadvantage to the Franchisee. Upon any such event, the City shall have up to one hundred eighty (180) days after written request of the Franchisee in which to restore competitive neutrality, provided that any adjustment in compensation resulting from renegotiations under this Subsection (C) shall be effective no later than ninety (90) days after receipt of such written request.

D. Failure of the City and Franchisee to agree upon mutually satisfactory amendments or to successfully renegotiate the materially affected provisions of the Franchise under subsection (B) or (C) shall give rise to dispute resolution as follows: At the expiration of one hundred eighty (180) days from the date of the written request (or

sooner if requested by both the City and the Franchisee) the City and the Franchisee shall each select a representative who shall jointly select a third representative. The three representatives shall hear the positions of the City and Franchisee and shall determine the matters in disagreement by majority vote. Such decision shall be presented to City and the Franchisee as the renegotiated language under subsection (B) or (C). Rejection of the dispute resolution by either the City or the Franchisee shall give rise to a right to terminate the Franchise, or at the option of the parties, the Franchise shall remain in effect according to its then existing terms.

E. The Franchise shall remain in effect according to its terms pending completion of any review or renegotiation provided by this section.

(Ord. 2004-23, Adop. 8/10/04)

Sec. 28-308. Amendment and Renewal. Any amendment of a Franchise shall be subject to the procedures of the Franchise Act, K.S.A. 12-2001, et seq. No Franchise or License shall be extended in term or renewed until any ongoing violations or defaults in the performance of the Franchise or License agreement or the requirements of this Ordinance have been cured, or a plan detailing the corrective action to be taken by the Franchisee or Licensee has been approved by the City. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-309. Use of Right-of-Way; Police Powers; Franchisees' Use Subordinate. Facilities shall be placed with adequate clearance from existing public or private utilities in the Right-of-Way or a Public Project so as not to impact or be impacted by such public or private utilities or improvements or public project. Every Franchisee shall construct and maintain its Facilities in accordance with all applicable federal, state and local laws, including all permit requirements, fee payments, and all other City codes and ordinances in effect as of the date of this Ordinance or hereinafter adopted to the extent not in contravention of state or federal law. The grant of a Franchise pursuant to this Ordinance does not in any way impact the continuing authority of the City through the proper exercise of its Home Rule powers to adopt and enforce ordinances necessary to provide for the health, safety and welfare of the public. In granting a Franchise the City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of Facilities on any particular segment of Right-of-Way. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon the Franchisee. The use of the Right-of-Way authorized by a Franchise granted pursuant to this Ordinance shall in all matters be subordinate to the City's use and rights therein, except to the extent that the City's use of the Right-of-Way is for the provision of commercial Communications Services. A Franchisee shall coordinate the placement of its Facilities in a manner that minimizes adverse impact on public and private improvements, as reasonably determined by the City Engineer. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-310. No Interference. Every Franchisee shall construct and maintain its Facilities so as not to interfere with other users of the Right-of-Way. Except as may otherwise be provided, a Franchisee shall notify all residents affected by the proposed work prior to commencement of such work. Notice shall include, where reasonably

possible, ten (10) days in advance of construction, a letter, and/or door hanger describing the work to be done, time of beginning and completing the work, the name of the company, and a phone number to contact the company seven (7) days a week, twenty-four (24) hours a day. All construction and maintenance by a Franchisee or its subcontractors shall be performed in accordance with industry standards. All Facilities determined by the City Engineer to be in interference shall be moved by the Franchisee at the Franchisee's own expense. (*Ord. 2004-23, Adop. 8/10/04*)

Sec. 28-311. Exclusion of Certain Locations/Facilities. Prior to a Franchisee's installation of any Facilities in the Right-of-Way and after it provides the City with its proposed plans for the Facilities, the City may in its reasonable discretion designate certain locations or facilities in the Right-of-Way to be excluded from use by a Franchisee for its Facilities, including but not limited to ornamental or similar specially-designed streets lights, or other facilities or locations which, in the reasonable judgment of the City Engineer do not have electrical service adequate or appropriate for the Franchisee's Facilities or cannot safely bear the weight or wind loading thereof, or any other facility or location that in the reasonable judgment of the City Engineer is incompatible with the proposed Facilities or would be rendered unsafe or unstable by the installation, provided that all Franchisees are treated in a similar manner. The City Engineer may further exclude certain other Facilities that have been designated or planned for other use or are not otherwise available for use by a Franchisee due to engineering, technological, proprietary, legal, or other limitations or restrictions as may be reasonably determined by the City. The City shall provide a written explanation for any denial for a particular location and shall work with a Franchisee to identify other suitable routes. (*Ord. 2004-23, Adop. 8/10/04*)

Sec. 28-312. Location, Type and Design of Facilities Subject to Approval.

A. The design, location, and nature of all Facilities shall be subject to the reasonable review and approval of the City Engineer in a non-discriminatory manner. This is a means to properly manage and control all Right-of-Way usage in the City, and to protect the public health, safety, and welfare. The review and approval is to ensure efficient coordination relating to Right-of-Way use relating to public and private utilities and to evaluate the configuration and size of Facilities that may be located in the Right-of-Way or other public or private property.

B. Except as provided herein, all Facilities constructed by a Franchisee shall be placed underground unless otherwise agreed to by the City.

1. Whenever any one or more existing Facilities for electrical, cable, or Communications Services are located underground in the Right-of-Way, all new or replacement Facilities shall be placed underground.
2. Where there are obstructions in the Right-of-Way such as trees, shrubs, utilities, commercial signs, man-made structures, or other like obstructions which make the cost of underground construction

unreasonable, a Franchisee may request waiver of this requirement, in which event the City will not unreasonably withhold its consent.

3. When a Franchisee is allowed to place Facilities above ground under this section, Franchisee may attach its Facilities to an existing utility pole pursuant to a properly executed agreement with the pole owner, provided, however, that any necessary replacement of the pole in order to accommodate the attachment shall be subject to the proper exercise of the City's police powers, and in no instance shall a Franchisee erect a new pole within an existing aerial pole line absent the City's prior authorization.
4. Above-ground pedestals, vaults, or other above-ground Facilities, may be installed only if approved by the City where alternative underground facilities are not feasible or where underground requirements are otherwise waived pursuant to this Section, and shall generally be located behind the sidewalk where feasible and shall be screened from public view. Facilities in rear lot easements shall be exempt from the screening requirements except when they are within fifty feet of a street or highway.
5. The underground requirements of this subsection (B) shall not apply to the maintenance and repair of existing Facilities, as determined by the City Engineer.

C. Except as may otherwise be provided by other applicable ordinances of the City, where reasonable and appropriate and where adequate public Right-of-Way exist, a Franchisee shall place above-ground Facilities underground in conjunction with City capital improvement projects and/or at specific locations requested by the City provided that such placement is practical, efficient, and economically feasible.

D. Wired Access Point Antenna located on the Right-of-Way, other City owned, or controlled property shall not be authorized by this Ordinance, but shall require a separate Lease or Use agreement with the City. Wireless facilities shall be subject to the Wireless Ordinance of the City.

E. All Facilities, whether on Right-of-Way or public or private property, shall also be subject to size and height limitations or other applicable zoning restrictions in accordance with any generally applicable Ordinance adopted by the City.
(Ord. 2004-23, Adop. 8/10/04)

Sec. 28-313. Co-location and Additional Facilities Requirements, Planned Infrastructure.

A. Prior to trenching and/or constructing any new or additional underground conduit within the Right-of-Way, a Franchisee shall certify in writing to the City Engineer

that it has made appropriate inquiry to all existing utilities and other entities possessing a right to occupy the Right-of-Way as to the availability of existing or planned trenching and/or conduit that the Franchisee could reasonably utilize to meet its needs, and that no such conduit is available or planned at a reasonable cost by any other entity on the time schedule reasonably needed by Franchisee. Entities contacted for purposes of this section shall respond to the contacting party within fifteen (15) working days following such request.

B. All entities subject to this Ordinance shall make space in its trench and/or conduit within the Right-of-Way available to other Franchisees consistent with the federal requirements of 47 U.S.C. § 224.

C. Upon a determination that no such trenching and/or conduit is available, a Franchisee may trench and/or install new conduit pursuant to the following requirements:

1. The Franchisee shall provide written notification of the proposed construction activity to all other existing utilities and Franchise holders, who shall have fifteen (15) days from the receipt of such notification to indicate in writing to the City and the Franchisee as to whether they desire to jointly undertake the construction of such trenching and/or conduit or otherwise co-locate their Facilities or a System at such time. Any utility or Franchise holder electing to jointly construct or co-locate its Facilities or a System with that of Franchisee shall share in the pro-rata costs of such construction or co-location of Facilities and/or System reasonably incurred by Franchisee and shall participate in the project on the same time schedule as reasonably established by both the Franchisee and the City Engineer.
2. When a Franchisee installs any new trench and/or conduit, the Franchisee shall, at the request of the City Engineer to enable co-location by City or other entities, install sufficient additional space and/or conduit or other related facilities to meet the City's planned infrastructure needs and needs of other entities planning development of facilities in the area. Such excess conduit shall at the option of the Franchisee either (1) be owned by the City, or (2) be owned by a Franchisee. If ownership of the conduit is transferred to the City, the City shall reimburse the Franchisee in the amount of the incremental cost of the labor and material of installing the excess conduit simultaneous with the Franchisee's conduit. Such reimbursements are subject to review and approval by the City. If the Franchisee retains ownership of the excess conduit, the Franchisee shall be obligated to make such conduit and/or trench space available to any other user of the Rights of Way on a nondiscriminatory basis at not more than the prorata cost of that portion of the Excess Conduit determined by the total labor and material cost of all Facilities at that location. Such requirements shall be administered and applied on a competitively neutral

and nondiscriminatory basis to maximize the available space in the Rights of Way and to minimize the total number of excavations and cost of total communications infrastructure installation.

(Ord. 2004-23, Adop. 8/10/04)

Sec. 28-314. Right-of-Way Management Code. The City reserves its rights to adopt a right-of-way management and construction standards ordinance of general applicability pursuant to its public health, safety and welfare authority which shall apply to any Franchise granted pursuant to this Ordinance except where inconsistent with a material term of any such Franchise. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-315. Underground Facility Locating Service. A Franchisee shall cooperate with and participate fully in a reputable underground facility locating service and shall participate in Kansas One Call to insure that damage and/or interference with other underground facilities occupants is minimized. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-316. Conditions Relating to Private Property. If (1) a Franchisee should in the course of the construction and/or reconstruction of the System elect to place underground Facilities in the public utility easement on private property where there was, at the time of Franchisee's election, space available for the installation of such plant within the Right-of-Way, and (2) a Franchisee should fail, neglect or refuse to take pre-construction photography (or videography) of the condition of any private property upon which underground construction is to occur, a Franchisee shall have the burden of proof as to the condition of the private property prior to the initiation of such construction in any subsequent complaint resolution, arbitration or judicial procedure between a Franchisee and the private property owner. If a Franchisee enters private property for the purposes of construction where there is no dedicated public easement, Franchisee shall first secure the private property owner's written consent. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-317. Permit Requirements. This Ordinance and individual Franchises establish the general rules and scope of authority for a Franchisee to construct and maintain its Communications System within the Right-of-Way. The Franchisee is still required to obtain individual permitting approval from the City Engineer prior to engaging in actual construction of its specific Facilities within the Right-of-Way. At least fifteen (15) days before the beginning of any installation, removal or relocation of its Facilities, a Franchisee shall submit detailed plans of the proposed action to the City Engineer. The City Engineer shall, within fifteen (15) days of receipt of such plans, either approve the plans or inform the Franchisee of the reasons for disapproval. The Franchisee shall designate a responsible contact person with whom representatives of the City Engineer can communicate with on all matters relating to facilities installation and maintenance.

- A. Prior to any excavation within the Right-of-Way, a Franchisee shall obtain a permit, pay all applicable fees, and perform such work in accordance with applicable provisions of any applicable City ROW Management Code,

and any ordinances or regulations that may be adopted by the City regarding excavation work.

- B. Every Franchisee shall post a bond with the City in accordance with the City's ordinances in an amount determined by the City Engineer, to guarantee the timeliness and quality of any construction, repair and restoration work, including damage to public or private property, and to guarantee the removal of its Facilities from the City's Right-of-Way should such removal be required upon the expiration of its Franchise. Such bond amount shall not exceed the estimated costs of the specific construction activity, and within six months of satisfactory completion of the construction project the bond amount shall be reduced to an amount of no more than one tenth of the initial face amount of the bond. The City Attorney in the reasonable exercise of its discretion may waive the bond requirements upon a sufficient demonstration of self-insurance.
- C. Prior to the commencement of any construction or alteration of its Facilities located in the Right-of-Way, a Franchisee shall, if requested by the City Engineer, furnish to the City Engineer a subsurface utility engineering study based on available records maintained by existing utility companies, on the proposed route of construction, expansion or alteration, which must be approved by the City Engineer. The study must consist of the following tasks:
1. All available plans, plats and other location data indicating the existence and approximate location of all facilities along the proposed construction route;
 2. Completion of a visual survey and written record of the location and dimensions of any above ground features of any underground facilities along the proposed construction route, including but not limited to manholes, valve boxes, utility boxes, post and visible street cut repairs;
 3. Plot and incorporate the data obtained from completion of task 1. and 2. above, on to the Franchisee's proposed system route maps, plan sheets and computer aided drafting and design (CADD) files; and
 4. Provide all such data collected into a CADD file (or other format as may be identified by the City Engineer) compatible with that used by the City Engineer and deliver a copy to the City Engineer.

(Ord. 2004-23, Adop. 8/10/04)

Sec. 28-318. Franchisees Subject to Wireless Ordinances. Any Franchise notwithstanding, all Franchisees operating wireless communications systems within the

City are subject to all of the applicable Ordinances and zoning requirements of the City related to such activities. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-319. As Built Drawings. Every Franchisee shall keep and maintain accurate records and as-built drawings, in both paper and electronic format, of all Facilities (except customer service lines) constructed, reconstructed, or relocated in the Right-of-Way of arterial streets (as designated by City of Hutchinson Code) after the date hereof. Such Facilities shall be horizontally and vertically located at least every 100 feet and at any other alignment change. All points of Facilities shall be horizontally located from street centerline, or section or quarter section lines or corners. Vertical locations on all points of Facilities shall consist of elevations in either City datum or United States Geological Survey datum. The Franchisee shall cooperate promptly and fully with the City and take all reasonable measures necessary to provide accurate and complete information regarding the nature and horizontal and vertical location of its Facilities located within Right-of-Way when requested by the City or its authorized agents for a Public Project. Such location and identification shall be at the sole expense of the Franchisee without expense to the City, its employees, agents, or authorized contractors. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-320. Agent. Every Franchisee shall designate and maintain an agent, familiar with the Facilities, who is responsible for timely satisfaction of the information needs of the City and other users of the Right-of-Way. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-321. Franchisees Responsible for Costs. The Franchisee shall be responsible for all costs borne by the City that are directly associated with a Franchisee's installation, maintenance, repair, operation, use, and replacement of its Facilities within the Right-of-Way, that are not otherwise accounted for as part of the Permit fee established pursuant to the Right-of-Way Ordinance. All such costs shall be itemized and the City's books and records related to these costs shall be made available upon request to the Franchisee. Franchisee shall be responsible for its own costs incurred removing or relocation its facilities when required by the City due to City requirements relating to maintain and use of the Right-of-Way for City purposes. *(Ord. 2004-23, Adop. 8/10/04)*

Article IV. Franchise and License Fees

Sec. 28-401. Application Fees. No Franchise shall be issued without submission of an application and payment of a non-refundable application fee to the City of Five Hundred Dollars (\$500.00). Every Franchisee shall also be responsible for payment of any reasonable costs incurred by City in processing these applications or in adapting or executing a Franchise for use by the Franchisee to the extent such costs exceed the application fees paid. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-402. Franchise Fees. Every telecommunications services local exchange carrier (but not Licensee) shall pay to the City as compensation for the use of the Right-

of-Way pursuant to any Franchise granted under this Ordinance the following Franchise Fees to the City:

A. Once the Franchise Agreement is approved and becomes effective, all Franchisees providing Communications Services either originating or terminating within the City shall pay five percent (5%) of Gross Receipts.

B. Pass Through Services. Every telecommunications services local exchange carrier that provides Pass Through Services within the City who does not otherwise pay a Gross Receipts fee, shall pay an annual fee of Two Dollars and Fifty Cents (\$2.50) per linear foot of Right-of-Way occupied by the Franchisee's Facilities. Beginning January 1st each year, the annual fee shall be adjusted in an amount equal to the change in the Consumer Price Index for all Urban Consumers (CPI-U) for preceding year; this annual rate and the adjustment thereof shall be maintained by the City Clerk. *(Ord. 2005-10, Adop. 4/05/05; Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-403. License Fees. Every Licensee shall pay to the City the costs for the use of the Right-of-Way pursuant to any License granted under this Ordinance or a Right-of-Way management ordinance the following License Fees to the City:

A. Application fee. Prior to the grant of a License, an applicant for a License shall submit an application and make payment of a non-refundable application fee based upon a charge of Fifty Cents (\$.50) per linear foot of Right-of-Way to be occupied by the Facilities, up to a maximum of \$500.00. Every Licensee shall also be responsible for payment of any reasonable costs incurred by City in processing these applications or in adapting or executing an agreement for use by the Licensee to the extent such costs exceed the application fees paid.

B. License fee. A Licensee shall pay to the City an annual fee based upon Two Dollars and Fifty Cents (\$2.50) per linear foot of Right-of-Way occupied by the Licensee's Facilities. Beginning January 1st each year, the annual fee shall be adjusted in an amount equal to the change in the Consumer Price Index for all Urban Consumers (CPI-U) for the preceding year; this annual rate and the adjustment thereof shall be maintained by the City Clerk. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-404. Timing of Payment of Fees. Unless otherwise agreed to as part of the Franchise, all Franchise Fees shall be due and payable on a quarterly basis pursuant to K.S.A. 12-2001(j)(2). *(Ord. 2005-10, Adop. 4/05/05; Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-405. Interest on Late Payments and Under Payments. If any Franchise Fee, or any portion thereof, is not postmarked or delivered on or before the due date, interest thereon shall accrue from the due date until received, at the applicable statutory interest rate. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-406. Fee Statement. A statement showing the manner in which the Franchise Fee was calculated shall accompany each Franchise Fee payment. If any Fee Statement is determined to understate the Fee owed, then such additional amount owed shall be made with a corrected statement, including interest on said amount as provided herein. Within ninety (90) calendar days following the end of the calendar year, each person that paid a Franchise Fee shall submit a statement, certified as true, setting forth its Gross Receipts, and describing what revenues or receipts were included and excluded in the fee calculations for the calendar year, and describing any adjustments made in determining the Franchise Fee, or if applicable shall submit an accounting of the amount of linear feet of Right-of-Way occupied by the Franchisee's Facilities. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-407. No Accord and Satisfaction. No acceptance by the City of any Franchise Fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Franchise Fee payment be construed as a release of any claim of the City. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-408. Maintain Records. Every Franchisee shall at all times maintain complete and accurate books of account and records of the business, ownership, and operations of the Franchisee with respect to the System in a manner that allows the City to determine whether the Franchisee has properly calculated its Franchise Fee in compliance with this Ordinance. Should the City reasonably determine that the records are not being maintained in such manner, the Franchisee shall correct the manner in which the books and/or records are maintained so that the Franchisee comes into compliance with this section for a period of five (5) years. All financial books and records which are maintained in accordance with FCC regulations and the regulations of any governmental entity that regulates utilities in Kansas, and generally accepted accounting principles shall be deemed to be acceptable under this section. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-409. Description of Service. Franchisee shall, on an annual basis, provide the City with a description of new local communications services offered within the City during the prior twelve (12) month period. The first annual report shall also provide a listing of each separate type of service or bundled service offered during the initial annual period. Any individual or bundled service or item for which the provider has a separate charge shall be considered a separate service under this paragraph. *(Ord. 2005-10, Adop. 4/05/05; Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-410. Right of Inspection. The City or its designated representatives shall have the right to inspect, examine or audit, during normal business hours and upon reasonable notice, all documents, records or other information that pertains to a Franchisee's System and/or Franchise Fee obligations under this Ordinance and applicable Franchise. In addition to access to the records of the Franchisee for audits, upon request, a Franchisee shall provide reasonable access to records necessary to verify compliance with the terms of this Ordinance and any Franchise. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-411. Payment of Taxes; Franchise Fee Not a Tax. The Franchise Fees required herein as part of any Franchise shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City. The Franchise Fee is compensation for use of the Right-of-Way and shall in no way be deemed a tax of any kind. (Ord. 2004-23, Adop. 8/10/04)

Sec. 28-412. Duty to Notify City of Resellers. Within thirty (30) days of a Franchisee carrying any Communications Services of any Reseller Service Provider through the Franchisee's Facilities, the Franchisee shall notify the City of the name and address of such Reseller Service Provider and provide to City a written commitment as to the payment of franchise fees for the revenues attributable to such Reseller Service Provider. (Ord. 2004-23, Adop. 8/10/04)

Sec. 28-413. Sale or Lease of Conduit. Except as otherwise may be provided by law, a Franchisee shall not lease, sell or authorize the use of any conduit within the City's Right-of-Way to a non-affiliated third person for the installation of that person's Communications System for any purpose if that person has not obtained a duly issued Franchise, or other grant by the City to use the Right-of-Way and which includes the authority to use or maintain such System. (Ord. 2004-23, Adop. 8/10/04)

Sec. 28-414. Bundled Services. Gross receipts from bundled services shall be deemed attributable to services subject to the Franchise Fee. The burden will be on the Franchisee to prove in a manner reasonably acceptable to the City that any receipt or charge is not intended to be included within Gross Receipts. For the purpose of calculating Gross Receipts, discounts shall be applied equally to all services; the same percentage of discount shall be applied to each service included in the bundled bill. To the extent Franchisee markets "bundled" services, including combinations of services that may be subject to this Franchise and also a Cable Television Service Franchise, Franchisee shall fairly reflect to the City an appropriate and reasonable division of services among the various services offered based on the actual value of each separate service. (Ord. 2005-10, Adop. 4/05/05; Ord. 2004-23, Adop. 8/10/04)

Article V. Open Video Service

Sec. 28-501. Open Video Service. If a Franchisee, granted a Franchise pursuant to this Ordinance, intends to offer in the City Open Video Services, it shall comply with all applicable federal, state and local laws, including rules of the Federal Communications Commission applicable to such service. The City may in its discretion modify the terms of a Franchise or otherwise require a Franchisee to obtain a separate franchise to implement such requirements as the City may be authorized to make applicable to a Franchisee. This may include a payment of a franchise fee to City of five (5) percent of the Open Video System gross revenues, and conditions related to public, educational, and governmental access channels and funding. (Ord. 2004-23, Adop. 8/10/04)

Article VI. Transfer of Ownership

Sec. 28-601. Consent of City Required. No Franchisee shall sell, transfer, lease, assign, sublet, or dispose of in whole or in part, either by forced or involuntary sale, or by ordinary sale, consolidation, or otherwise, a Franchise granted hereunder or any of the rights or privileges granted by such Franchise, without the prior written consent of the City. Such consent shall not be unreasonably withheld, delayed or denied. The City reserves the right to be reimbursed for its reasonable costs relating to a transfer of ownership. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-602. Exception to Consent Requirement. Any assignment or transfer shall not require consent of the City when the Franchise is assigned, sold or transferred between wholly-owned subsidiaries of a parent corporation, provided that the Franchisee provides advance written notice to the City. In all such instances, the new Franchisee shall be responsible for all Franchise requirements and obligations. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-603. Assigning Franchise Rights, Interests and Obligations. Notwithstanding Section 6.1 above, the City acknowledges and agrees that a Franchisee may assign or collaterally assign, in whole or in part, its rights, interests and obligations hereunder without limitation to any of its affiliates, any party providing financing to a Franchisee, and any successors and assigns of the foregoing without the consent of the City. A Franchisee will provide the City with notice of any such assignment. The City agrees that the holder of any security interest shall not be prevented or impeded by the City from enforcing such security interest and shall not terminate the Franchise without the prior written consent of the assignee. The City shall execute all consents to assignment and/or acknowledgements of any security interest as are required by a Franchisee to give effect to the foregoing. Such acknowledgements may contain an agreement to allow the holder of such security interest to cure defaults by the Franchisee under this Ordinance or a Franchise granted pursuant to it and consent to allow the assignment to the successors-in-interest of the holder of such security interest. *(Ord. 2004-23, Adop. 8/10/04)*

Article VII. General Conditions

Sec. 28-701. Compliance With Laws. A Franchise granted pursuant to terms of this Ordinance shall include a provision which acknowledges that the City and the Franchisee shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction and use of public property. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-702. Enforcement; Attorneys' Fees. The City shall be entitled to enforce this Ordinance, and, any Franchises granted pursuant to it, through all remedies lawfully available, and a Franchisee shall pay City reasonable attorneys' fees in the event that

the Franchisee is determined judicially to have violated the terms of this Ordinance or a Franchise. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-703. Advertising, Signs or Extraneous Markings. No Franchisee shall place or cause to be placed any sort of signs, advertisements or other extraneous markings, whether relating to a Franchisee or any other person or entity on the public right-of-way, except such necessary minimal markings as approved by the City as are reasonably necessary to identify the Facilities for service, repair, maintenance or emergency purposes, or as may be otherwise required to be affixed by applicable law or regulation. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-704. Tree Protection. In the attachment, installation, removal, reattachment, reinstallation, relocation or replacement or otherwise of the Facilities, Franchisees shall comply with the tree pruning ordinance of City. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-705. Forfeiture of Privilege. In case of failure on the part of a Franchisee, its successors and assigns, to comply with any of the material provisions of this Ordinance or Franchise granted hereunder, or if a Franchisee, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of the material terms of this Ordinance or a Franchise, the Franchisee, its successors and assigns, shall forfeit all rights and privileges permitted herein, and all rights under the Franchise shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings: Before the City proceeds to forfeit a Franchise, it shall first serve a written notice upon the Franchisee, setting forth in detail the neglect or failure complained of, and the Franchisee shall have thirty (30) days thereafter in which to cure the default by complying with the conditions of this Ordinance or the Franchise. If at the end of such thirty (30) day period the City determines that the conditions have not been complied with the City shall take action by an affirmative vote of the City Council present at the meeting and voting, to terminate the Franchise; setting out the grounds upon which said Franchise is to be canceled or terminated. A Franchisee may, upon thirty (30) days notice to City, appeal to District Court. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-706. Removal of Facilities. Upon expiration of a Franchise, whether by lapse of time, by agreement between a Franchisee and the City, or by forfeiture thereof, a Franchisee shall remove, at its sole cost, from public property any and all of its Facilities that are the subject of its Franchise within a reasonable time after such expiration, not to exceed one hundred eighty (180) days, and, it shall be the duty of the Franchisee immediately upon such removal to restore the right-of-way from which the Facilities are removed to as good a condition as the same were before the removal was effected and as otherwise required by the City. Notwithstanding the foregoing, upon request of a Franchisee, the City may allow underground Facilities to be left in place when it is not practical or desirable to require removal. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-707. Relocation of Facilities.

A. Every Franchisee shall promptly locate, remove, relocate, or adjust any Facilities located in Right-of-Way if reasonably necessary and requested by the City for a Public Project. Such location removal, relocation, or adjustment for a particular Public Project shall be performed by the Franchisee once without expense to the City, its employees, agents, or authorized contractors and shall be specifically subject to rules and regulations of the City pertaining to such; provided, that if the Franchisee demonstrates to the satisfaction of the City that the Facility was originally established in a private easement that thereafter became part of the Right-of-Way, the removal, relocation, or adjustment shall be without expense to the Franchisee. If additional location, removal, relocation, or adjustment is the result of the inaccurate or mistaken information of the Franchisee, the Franchisee shall be responsible for costs associated with such without expense to the City.

B. The Franchisee shall not be responsible for the expenses of relocation to accommodate any new Public Project for Private Development. The expenses attributable to such a project shall be the responsibility of the third party upon the request and appropriate documentation of the Franchisee. Before such expenses may be billed to the third party, the Franchisee shall be required to coordinate with the third party and the City on the design and construction to ensure that the work required is necessary and done in a cost effective manner. Upon the request of the Franchisee or the third party, the allocation of expenses attributable to the project shall be made in the reasonable determination of the City. Eligible third parties may request to have the City specially assess those expenses billed by the Franchisee under this section. The City will use its best efforts, but is not required, to continue to provide a location in the Right-of-Way for the Franchisee's Facilities as part of a Public Project, provided that the Franchisee has cooperated promptly and fully with the City in the design of its Facilities as part of the Public Project.

C. Every Franchisee shall temporarily remove or raise or lower its wires or other Facilities upon request of any other person requesting relocation of Facilities and holding a validly issued building or moving permit of the City. The expense of such temporary removal, raising or lowering shall be paid by the party or parties requesting the same, and the Franchisee may request such payment in advance. A Franchisee shall be given not less than fifteen days written notice from the permit holder detailing the time and location of the moving operations, and not less than twenty-four (24) hours advance notice from the permit holder advising of the actual operation. The City shall not be liable for any such expense or notice requirement for the moving of houses or structures by the City or its contractors.

(Ord. 2004-23, Adop. 8/10/04)

Sec. 28-708. Non-discrimination. All Franchises and Licenses shall provide that a Franchisee or Licensee will not, on the grounds of race, color, sex, religion, national

origin, ancestry, disability, or age discriminate or permit discrimination against any person in the use of City facilities or in activities under the Franchise or License. (Ord. 2004-23, Adop. 8/10/04)

Article VIII. Confidential Information

Sec. 28-801. Confidential Information. By entering into a Franchise, the Franchisee acknowledges and agrees that the Franchise and certain information required to be filed with the City pursuant to this Ordinance and such Franchise are subject to inspection and copying by the public pursuant to the provisions of the Kansas Open Records Act, K.S.A. 45-215 et seq. To the extent allowed by Kansas law, if requested by a Franchisee, the City shall preserve a Franchisee's information obtained in the course of a Franchisee's use of the Right-of-Way hereunder as confidential, and with the same degree of care in protecting its own confidential or proprietary information, however, in no event less than reasonable care. It is understood and agreed by a Franchisee that the City has the right to disclose information obtained pursuant to this Ordinance to governmental agencies having requisite governmental or judicial authority over the terms of the Franchise, provided that the City has given the Franchisee prior written notice of impending disclosure and the Franchisee has a reasonable opportunity to seek confidential status or protective order or other such appropriate remedy. The obligations under this Section 8 shall survive termination of said Franchise. (Ord. 2004-23, Adop. 8/10/04)

Article IX. Liability and Indemnification

Sec. 28-901. Protection Against Harm or Damage. It shall be the responsibility of every Franchisee to take adequate measures to protect and defend its facilities in the Right-of-Way from harm or damage. If the Franchisee fails to accurately or timely locate Facilities when requested, it has no claim for cost or damages against the City and its authorized contractors unless such party is responsible for the harm or damage by its negligence or intentional conduct. The Franchisee shall be responsible to the City and its agents, representatives and authorized contractors for all damages including, but not limited to, delay damages, repair costs, down time, construction delays, penalties or other expenses of any kind arising out of the failure of the Franchisee to perform any of its obligations under this Ordinance or Franchise except to the extent the damaged party is responsible for the harm or damage by its negligence or intentional conduct. Provided, however, the City and its authorized contractors shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near a Franchisee's System. (Ord. 2004-23, Adop. 8/10/04)

Sec. 28-902. City Held Harmless. Every Franchisee shall hold and save and defend the City its officers, employees, agents, and authorized contractors, harmless from and against all claims, damages, expense, liability, and costs including attorney fees, to the extent occasioned in any manner by the grant of a Franchise to a Franchisee or its enforcement by City and Franchisee's occupancy including construction, operation, maintenance, and use of the Right-of-Way, except to the extent otherwise specified in

9.1 above. In the event a claim shall be made or an action shall be instituted against the City arising from any of the causes enumerated in this section, then upon notice by the City to the Franchisee, the Franchisee shall assume liability for the defense of such actions at the cost of the Franchisee, subject to the option of the City to appear and defend, at its own cost, in any such case. *(Ord. 2004-23, Adop. 8/10/04)*

Article X. Insurance

Sec. 28-1001. Insurance required. During the term of any Franchise, unless specified otherwise, every Franchisee shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers that are licensed to do business in the state of Kansas. Should the Franchisee elect to use the services of an affiliated captive insurance company for this purpose, that company shall possess a certificate of authority from the Kansas Insurance Commissioner. The Franchisee shall provide not less than the following insurance:

A. Workers' compensation as provided for under any worker's compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law.

B. Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims-made basis, with a limit of not less than two million dollars combined single limit per occurrence for bodily injury, personal injury, and property damage liability. The City shall be included as an additional insured with respect to liability arising from the Franchisee's operations under this chapter or the Franchise. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-1002. Certificate of insurance. A Franchisee shall, as a material condition of its Franchise, prior to the commencement of any work and prior to any renewal thereof, deliver to the City a certificate of insurance, satisfactory in form and content to the City, evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the City thirty (30) days prior written notice. The Franchisee shall make available to the City on request the policy declarations page and a certified copy of the policy in effect, so that limitations and exclusions can be evaluated for appropriateness of overall coverage. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-1003. Liability not limited. Nothing contained in this chapter or an individual Franchise shall limit a Franchisee's liability to the City to the limits of insurance certified or carried. *(Ord. 2004-23, Adop. 8/10/04)*

Article XI. Unlawful to Operate Without a Franchise

Sec. 28-1101. Unlawful to Operate Without a Franchise. It is unlawful for any person to construct, operate or maintain a communications system or to provide

communications services in the City utilizing City rights-of-way without a valid, unexpired Franchise or License, unless otherwise specifically authorized under applicable federal or state law. Any person who violates any provisions of this Ordinance shall be guilty of a Class A misdemeanor and shall be subject to a fine of two thousand five hundred dollars (\$2,500.00) per day. The payment of such fine notwithstanding, all such violators shall be subject to all other applicable provisions of this Ordinance to the fullest extent allowed by law, including but not limited to the payment of a Franchise Fee. *(Ord. 2004-23, Adop. 8/10/04)*

Article XII. Invalidity and Remedies

Sec. 28-1201. Validity of Provisions. The invalidity in whole or in part of any provision of this Ordinance shall not affect the validity of any other provision. *(Ord. 2004-23, Adop. 8/10/04)*

Sec. 28-1202. Franchise Rights and Remedies. The right and remedies of the parties under a Franchise shall be cumulative and in addition to any other rights and remedies provided by law or equity. A waiver of a breach of any provision thereof shall not constitute a waiver of any other breach. The laws of the state of Kansas shall govern this Ordinance and any Franchises granted hereunder. *(Ord. 2004-23, Adop. 8/10/04)*