

## Chapter 5.78

### TELECOMMUNICATIONS REGULATIONS

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#### **5.78.010 Findings.**

1. The Federal Telecommunications Act of 1996, Section 253(c), confirms the authority of local governments "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way."

2. The public rights-of-way are a substantial asset managed by the city in trust for its citizens. It is the city's obligation, and has been the historical role of the city, to manage the rights-of-way in a manner which best promotes the health, safety and welfare of its citizens, and results in fair compensation for occupancy and use of the rights-of-way.

3. A number of telecommunications providers currently occupy and use the public rights-of-way in the city in the course of conducting their various businesses. The city maintains and strives to keep in good repair the rights-of-way, at substantial and ongoing cost. Although the general taxpayers bear the financial burden of these costs, a primary cause for the early and excessive deterioration of the rights-of-way is their frequent excavation, construction and reconstruction by telecommunications providers who receive revenue and profit from their use of public property.

4. Based upon the provisions of the Telecommunications Act of 1996, whose intent is to promote competition among telecommunications providers and to permit such providers to enter new business areas, it is the city's expectation that it will experience a significant increase in the number of applications by telecommunications providers to utilize the public rights-of-way, and that such an increase will place a substantial additional management and financial burden on the city. Furthermore, the provisions of the Telecommunications Act of 1996 require that actions taken by the city be "competitively neutral and nondiscriminatory." This requirement obligates the city to establish a regulatory structure that treats all rights-of-way occupants and applicants on a nondiscriminatory basis. (Ord No. O1999 16, Added, 07/20/1999)

#### **5.78.020 Intent.**

Based upon the above Findings, it is the intent of the city in enacting this ordinance to accomplish the following:

1. Establish a regulatory and management structure and procedures for the occupancy and use of the public rights-of-way by all telecommunications providers, to the extent not preempted by federal and state law.

2. Encourage the entry of new telecommunications providers, on a competitively neutral and nondiscriminatory basis.

3. Establish nondiscriminatory procedures by which the city receives fair compensation for the occupancy and use of its public rights-of-way.

4. Establish nondiscriminatory procedures by which the adverse effects of the use of the rights-of-way by a multiplicity of telecommunications providers, such as congestion, damage, inconvenience to the public and visual blight, can be minimized. (Ord No. O1999 16, Added, 07/20/1999)

**5.78.030 Short title.**

This ordinance shall constitute, and may be termed, the "Telecommunications Regulatory Ordinance" of the City of Napa and may be referred to as such. (Ord No. O1999 16, Added, 07/20/1999)

**5.78.040 Applicability.**

A. This ordinance shall apply to all telecommunications providers that occupy and utilize the city's public rights-of-way or public property as such rights-of-way and property are defined in Section 4 herein, except as specifically exempted in B below.

B. Telecommunications providers that hold existing city franchises, licenses, permits, leases or other authorization to utilize the rights-of-way or public property shall be exempted from the provisions of this ordinance until the term of the franchise or other authorization expires. Any subsequent renewal or authorization shall be subject to the provisions of this ordinance, to the extent not preempted by state or federal law.

C. Telecommunications providers shall include franchised cable system operators to the extent that any such operator offers telecommunications services that are not defined as cable service by federal law.

D. All existing permits, licenses, or authorizations to occupy and use the rights-of-way, if renewed, shall be renewed as franchises, subject to the provisions of this ordinance.

E. Telecommunications providers that utilize the rights-of-way and desire to provide video programming services to the city's residents and businesses shall first obtain a cable system franchise from the city, provided that an open video system operator certified and authorized by the Federal Communications Commission shall not require a city franchise, but shall meet all obligations imposed by federal law and the applicable Federal Communications Commission regulations, including payment of in-lieu franchise fees and Public Education Government (PEG) Access obligations unless provided by other franchisee. (Ord No. O1999 16, Added, 07/20/1999)

**5.78.050 Definitions.**

For the purposes of this ordinance, the following terms, phrases, words and their derivations shall have the meaning given herein. Words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. Words not defined shall be given their common and ordinary meaning.

"Applicant" means any person that applies for a franchise pursuant to this ordinance.

"Application" means the specific request, submitted by an applicant, for a franchise, including all written documentation and other representations regarding the telecommunications system to be constructed and the telecommunications services to be offered.

"Application fee" means any fee established by the city pursuant to this ordinance to cover the cost of reviewing and processing an application.

"Cable service" means the following:

1. The one-way transmission to subscribers of video programming or 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.

"Cable system" means a facility regulated under the provisions of Title IV of the Communications Act of 1934, as amended, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment, that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

1. A facility that serves to transmit television signals of one (1) or more television broadcast stations;

2. A facility that serves only subscribers without using any public rights-of-way;

3. A facility of a common carrier which is subject in whole or in part to the provisions of Title II of the Federal Telecommunications Act of 1996, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers unless the extent of such use is solely to provide interactive on-demand services; or

4. An open video system that complies with Section 653 of the Federal Telecommunications Act of 1996; or

5. Any facilities of any electric utility used solely for operating its electric utility system.

"City" means the City of Napa, California.

"Council" means the city council of the City of Napa, California.

"FCC" means the Federal Communications Commission.

"Franchise" means an initial authorization, or renewal thereof, issued by the city council, which authorizes the construction and operation of a cable system or a telecommunications system. Any such authorization, in whatever form granted, shall not supersede the requirement to obtain any other generally required license or permit required for the privilege of transacting business within the city as required by the other ordinances and laws of the city.

"Franchise agreement" means a franchise grant ordinance or a contractual agreement, containing the specific provisions of the franchise granted, including references, specifications, requirements and other related matters.

"Franchise fee" means any fee or assessment of any kind imposed by the city on a grantee as compensation for the grantee's use of the public rights-of-way, and for the costs incurred by the grantor in the maintenance, repair and replacement of the rights-of-way.

"Grantee" means any "Person" receiving a franchise pursuant to this ordinance and under the granting franchise ordinance or agreement, and its lawful successor, transferee or assignee.

"Grantor" or "City" means the City of Napa as represented by the council or any delegate, acting within the scope of its jurisdiction.

"Gross annual revenues" or "Gross revenues" means the annual gross revenues received by a grantee from the provision of cable service and/or telecommunications service within the city, as follows:

1. For cable service, gross annual revenues shall include ancillary revenues such as, but not necessarily limited to, local advertising, home shopping channel commissions, Internet access and leased access revenues. Gross annual revenues shall not include refundable deposits, rebates or credits, and any sales, excise or other taxes or charges imposed externally to the franchise agreement and collected for direct pass-through to local, state or federal government.

2. For telecommunications service, gross annual revenues shall include all revenues received from the provision of telecommunications service in the city and arising from the operation of the franchise regardless of where billed.

"Open video system" or "OVS" means a system, as defined 47 U.S.C. Title VI, Part V, which provides video programming to subscribers through the facilities of a common carrier or other entity and whose operation is certified as an OVS operator by the FCC, and governed by the FCC regulations applicable to OVS service.

"Person" means an individual, partnership, association, joint-stock company, trust, corporation or governmental entity, and any lawful successor, transferee or assignee.

"Public property" means any property owned, controlled or managed by the city.

"Section" means any section, subsection or provision of this ordinance.

"Service area" or "Franchise area" means the entire geographic area within the city as it is now constituted or may in the future be constituted, unless otherwise specified in the franchise agreement.

"State" means the State of California.

"Street" or "Public rights-of-way" or "Rights-of-way" or "Public way" means each of the following which have been dedicated to the public or are hereafter dedicated to the public and maintained under city authority and located within the city limits: Streets, roadways, highways, avenues, lanes, alleys, sidewalks, easements, public rights-of-way and similar public property and areas that the grantor shall permit to be included within the definition of street from time to time.

"Subscriber" or "Customer" or "Consumer" means any person who or which elects to subscribe to, for any purpose, a cable service or a telecommunications service provided by the grantee by

means of or in connection with the cable system or telecommunications system, and who pays the charges therefor.

"Telecommunications provider" means any person that provides telecommunications services to a subscriber within the city.

"Telecommunications service" means any service defined as telecommunications service in the Federal Telecommunications Act of 1996, other than cable service.

"Telecommunications system" means any system that provides telecommunications service, and any of whose facilities occupy the rights-of-way.

"Video programming" means programming generally considered comparable to programming provided by a television broadcast station. (Ord No. O1999 16, Added, 07/20/1999)

#### **5.78.060 Franchise terms and conditions.**

##### **A. Franchise Purposes.**

A Franchise granted by the City under the provisions of this ordinance shall encompass the following purposes:

1. To engage in the business of providing cable service or telecommunications service, and such other services as may be permitted by law, which grantee chooses to provide to subscribers within the designated service area.

2. To erect, install, construct, repair, rebuild, reconstruct, replace, maintain, and retain, wires or cables lines, related electronic equipment, supporting structures, appurtenances, and other property in connection with the operation of a cable system or a telecommunications system in, on, over, under, upon, along and across streets or other public places within the designated service area.

3. To maintain and operate said franchise properties for the origination, reception, transmission, amplification, distribution and delivery of cable or telecommunications services, and such other services as may be permitted by law.

4. To set forth the obligations of a grantee under the franchise.

##### **B. Franchise Required.**

It shall be unlawful for any person to construct, install or operate a cable or telecommunications system in the city within any public street without a properly granted franchise awarded pursuant to the provisions of this ordinance.

##### **C. Term of the Franchise.**

1. A franchise granted hereunder shall be for a term established in the franchise agreement, commencing on the grantor's adoption of an ordinance or resolution authorizing the franchise.

2. A franchise granted hereunder may be renewed upon application by the grantee pursuant to the provisions of applicable state and federal law and of this ordinance.

D. Franchise Territory.

Any franchise shall be valid within all the territorial limits of the city, unless otherwise stated in the franchise agreement, and within any area added to the city during the term of the franchise.

E. Federal or State Jurisdiction.

This ordinance shall be construed in a manner consistent with all applicable federal and state laws, and shall apply to all franchises granted or renewed after the effective date of this ordinance to the extent permitted by applicable law.

F. Franchise Non-Transferable.

1. Grantee shall not sell, transfer, lease, assign, sublet or dispose of, in whole or in part, either by forced or involuntary sale, or by ordinary sale, contract, consolidation or otherwise, the franchise or any of the rights or privileges therein granted, without the prior consent of the council and then only upon such terms and conditions as may be reasonably prescribed by the council, which consent shall not be unreasonably denied or delayed. Any attempt to sell, transfer, lease, assign or otherwise dispose of the franchise without the consent of the council shall be a material violation of this ordinance and the franchise agreement. The granting of a security interest in any grantee assets, or any mortgage or other hypothecation, shall not be considered a transfer for the purposes of this section.

2. The requirements of Subsection (a) shall apply to any change in control of grantee. The word "control" as used herein is not limited to major stockholders or partnership interests, but includes actual working control in whatever manner exercised. In the event that grantee is a corporation, there shall be a rebuttable presumption of a change in control where ownership or control of more than thirty percent (30%) of the voting stock of grantee is acquired by a person or group of persons acting in concert, none of whom own or control the voting stock of the grantee as of the effective date of the franchise, singularly or collectively.

3. Transfer of the franchise from one wholly-owned subsidiary to another wholly-owned subsidiary shall not require prior consent of the grantor.

4. Grantee shall notify grantor in writing of any foreclosure or any other judicial sale of all or a substantial part of the franchise property of the grantee or upon the termination of any lease or interest covering all or a substantial part of said franchise property. Such notification shall be considered by grantor as notice that a change in control of ownership of the franchise has taken place and the provisions under this Section governing the consent of grantor to such change in control of ownership shall apply.

5. For the purpose of determining whether it shall consent to such change, transfer, or acquisition of control, grantor may inquire into the qualifications of the prospective transferee or controlling party, and grantee shall assist grantor in such inquiry. In seeking grantor's consent to any change of ownership or control, grantee shall have the responsibility of insuring that the grantee and/or the proposed transferee complete an application in accordance with any standard Federal Communications Commission forms or the equivalent. An application shall be submitted to grantor not less than one hundred twenty (120) days prior to the proposed date of transfer. The transferee shall be required to establish that it possesses the qualifications and financial and technical capability to operate and maintain the system and comply with all franchise requirements for the remainder of the term of the franchise. If the legal, financial (including all past obligations such as unpaid franchise fees), character, and technical qualifications of the applicant are satisfactory, the grantor shall consent to the transfer of the franchise. The consent of the grantor to such transfer shall not be unreasonably denied or delayed.

6. If any financial institution having a pledge of the grantee or its assets for the advancement of money for the construction and/or operation of the franchise shall take control of and operate the cable or telecommunications system, it shall notify the grantor. Further, said financial institution shall also submit a plan for such operation within thirty (30) days of assuming such control that will insure continued service and compliance with all franchise requirements during the term the financial institution exercises control over the cable or telecommunications system. The financial institution shall not exercise control over the cable or telecommunications system for a period exceeding one (1) year unless extended by the grantor in its discretion and during said period of time it shall have the right to petition the grantor to transfer the franchise to another grantee.

7. As a pre-condition of, and prior to any transfer, grantee shall reimburse grantor for grantor's reasonable processing and review expenses in connection with the transfer of the franchise or of

control of the franchise, including without limitation, costs of administrative review, financial, legal and technical evaluation of the proposed transferee, consultants (including technical and legal experts and all costs incurred by such experts), notice and publication costs and document preparation expenses. Any such reimbursement shall not be charged against any franchise fee due to grantor during the term of the franchise.

G. Geographical Coverage.

1. Grantee shall design, construct and maintain the cable or telecommunications system to have the capability to serve every person in the city, subject to any exceptions provided in the franchise agreement.

2. After service has been established for any service area, grantee shall provide service to any requesting subscriber within that service area within thirty (30) days from the date of request, provided that the grantee is able to secure all public rights-of-way necessary to extend service to such subscriber within such thirty (30) day period on reasonable terms and conditions.

H. Non-Exclusive Franchise.

Any franchise granted shall be non-exclusive. The grantor specifically reserves the right to grant, at any time, such additional franchises as it deems appropriate, subject to applicable state and federal law, provided that if the grantor grants an additional franchise on terms more favorable to the second grantee (whether by the grant of greater benefits or the imposition of lesser obligations), or if another party utilizing the public rights-of-way offers service competitive with grantee, then the initial grantee shall have the right to renegotiate its franchise to incorporate the more favorable terms and/or reduce its obligations to achieve competitively neutral and nondiscriminatory treatment.

I. Multiple Franchises.

1. Grantor may grant any number of franchises subject to applicable state or federal law. Grantor may limit the number of franchises granted, based upon, but not necessarily limited to, the requirements of applicable law and specific local considerations, such as the capacity of the public rights-of-way to accommodate multiple cables, wires and facilities in addition to the facilities of the utility systems, such as electrical power, telephone, gas and sewerage.

2. Developers of new residential housing with underground utilities shall provide conduit to accommodate cables for at least two (2) wired or cabled systems and dedicate the use of such conduit to the city.

3. Grantor may require that any new grantee be responsible for its own underground trenching and the costs associated therewith, if, in grantor's opinion, the public rights-of-way in any particular area cannot feasibly and reasonably accommodate additional wires, cables or ancillary facilities. (Ord No. O1999 16, Added, 07/20/1999)

**5.78.070 Franchise applications and renewal.**

A. Filing of Applications.

Any person desiring an initial franchise for a cable or telecommunications system shall file an application with the city. A reasonable non-refundable application fee established by the city shall accompany the application to cover all costs associated with processing and reviewing the application, including without limitation costs of administrative review, financial, legal and technical evaluation of the applicant, consultants (including technical and legal experts and all costs incurred by such experts), notice and publication requirements with respect to the consideration of the application and document preparation expenses. In the event such costs exceed the application fee, the selected applicant(s) shall pay the difference to the city within thirty (30) days following receipt of an itemized statement of such costs. Full and timely payment of such costs shall be a precondition to the grant of any such franchise.

B. Applications - Contents.

An application for an initial franchise for a cable or telecommunications system shall contain, where applicable:

1. A resume of prior history of applicant, including the expertise of applicant in the cable or telecommunications system field;
2. A list of the partners, general and limited, of the applicant, if a partnership, or the percentage of stock owned or controlled by each stockholder, if a corporation;
3. A description of the background of each such person;

4. The names and addresses of any parent or subsidiary of applicant or any other business entity owning or controlling applicant in whole or in part, or owned or controlled in whole or in part by applicant;

5. A current financial statement of applicant verified by a certified public accountant audit or otherwise certified to be true, complete and correct to the reasonable satisfaction of the city;

6. A proposed construction and service schedule;

7. Any reasonable additional information that the city deems applicable.

C. Consideration of Initial Applications.

1. Upon receipt of any application for an initial franchise, the city manager or a delegate shall prepare a report and make recommendations respecting such application to the city council.

2. A public hearing shall be set prior to any initial franchise grant, at a time and date approved by the council. Within thirty (30) days after the close of the hearing, the council shall make a decision based upon the evidence received at the hearing as to whether or not the franchise(s) should be granted, and, if granted, subject to what conditions. The council may grant one (1) or more franchises, or may decline to grant any franchise.

D. Franchise Renewal.

Franchise renewals shall be in accordance with applicable law. Grantor and grantee, by mutual consent, may enter into renewal negotiations at any time during the term of the franchise. (Ord No. O1999 16, Added, 07/20/1999)

**5.78.080 Franchise fee and financial requirements.**

A. Franchise Fee.

1. Following the issuance and acceptance of a franchise, the grantee shall pay to the grantor a franchise fee in the amount and at the times set forth in the franchise agreement.

2. Grantee may establish any lawful franchise fee for telecommunications and cable systems, provided that such franchise fee shall be nondiscriminatory. The amount of the franchise fee may be based upon, but not necessarily be limited to, the following, or a combination of the following:

(a) A percentage of the system gross revenues.

(b) A fee per linear foot of occupancy of the rights-of-way.

(c) A fee based upon the cost of grantor's acquisition of the rights-of-way, including the rights-of-way deterioration and necessary earlier repair of the rights-of-way caused by grantee's initial and subsequent excavations.

(d) A fee based upon the assessed value and fair rental value of comparable zoned private property adjoining various sections of the rights-of-way.

3. Grantor, by resolution of the city council taken no less often than every three (3) years following the effective date of this ordinance, shall establish a franchise fee schedule for cable and telecommunications system franchises that shall be applicable to subsequently granted franchises. The basis for establishing the schedule shall be contained in the council resolution, and shall be based on any or all of the methods enumerated in 2(a) through 2(d) above.

4. In establishing nondiscriminatory franchise fee schedules, grantor shall take into account in-kind obligations as well as franchise fees from existing franchises. As an example, an existing cable system franchise may provide channels and grant funds for public, educational and governmental access. The total compensation to the grantor in such a case would include the imputed value of these obligations plus the franchise fee paid.

5. Telecommunications providers, such as open video system operators, that do not require a local franchise, shall pay an in-lieu fee to the extent permitted by law, on a nondiscriminatory basis.

6. Grantees sharing the same underground conduit or the same utility poles in the right-of-way shall each pay a full franchise fee.

7. Franchise fees and in-lieu fees shall not be deemed to be a tax or assessment, but rather rental compensation for the occupancy and utilization of the public rights-of-way.

B. Invalidation of Franchise Fee.

In the event that a franchise fee established by the grantor under any of the methods enumerated in Section 5.78.080.A.2 above is found to be invalid by a court of competent jurisdiction, the grantor, within ninety (90) days of the final court decision, shall establish a new franchise fee schedule based on any nondiscriminatory method not invalidated. The new franchise fee schedule shall apply to all franchises affected by the court invalidation, from the date of the court

decision. A grantee failure to pay such re-established franchise fee shall be deemed a material breach of the franchise.

C. Payment of Fee.

1. Following the issuance and acceptance of the franchise, the grantee shall pay to the grantor a franchise fee in the amount and at the times set forth in the franchise agreement.

2. If the franchise fee is based on a percentage of gross revenues, the grantor, on an annual basis, shall be furnished a statement within sixty (60) days of the close of the calendar year, either audited and certified by an independent certified public accountant or certified by an officer of the grantee, reflecting the total amounts of gross revenues and all payments, deductions and computations for the period covered by the payment. Upon thirty (30) days prior written notice, grantor shall have the right to conduct an independent audit of grantee's records to determine whether grantee has paid the franchise fee or in-lieu fee required. If such audit indicates a franchise fee underpayment of two percent (2%) or more, the grantee shall assume all reasonable costs of such audit. No audit shall be conducted for any period prior to the date at which the applicable statute of limitations comes into effect.

3. Except as otherwise provided by law, no acceptance of any payment by the grantor shall be construed as a release or as an accord and satisfaction of any claim the grantor may have for further or additional sums payable as a franchise fee or an in-lieu fee under this ordinance or for the performance of any other obligation of the grantee.

4. In the event that any franchise and/or in-lieu fee payment or recomputed amount is not made on or before the dates specified in the franchise agreement, grantee shall pay as additional compensation:

(a) An interest charge, computed from such due date, at an annual rate equal to the prime lending rate of any national bank selected by grantor, plus one percent (1%) during the period for which payment was due; and

(b) If the payment is late by forty-five (45) days or more, a sum of money equal to five percent (5%) of the amount due in order to defray those additional expenses and costs incurred by the grantor by reason of delinquent payment.

(c) In the event of sale, unpaid franchise fees will become the obligation of the new franchise holder.

D. Security Fund.

1. Grantor may require grantee to provide a security fund, in an amount and form established in the franchise agreement. The amount of the security fund shall be established based on the extent of the grantee's obligations under the terms of the franchise.

2. The security fund shall be available to grantor to satisfy all claims, liens and/or taxes due grantor from grantee which arise by reason of construction, operation, or maintenance of the cable or telecommunications system, and to satisfy any actual or liquidated damages arising out of a franchise breach, subject to the procedures and amounts designated in the franchise agreement.

3. If the security fund is drawn upon by grantor in accordance with the procedures established in this ordinance and the franchise agreement, grantee shall cause the security fund to be replenished to the original amount no later than thirty (30) days after each withdrawal by grantor. Failure to replenish the security fund as required under this Section shall be deemed a material breach of the franchise.

4. Grantee shall retain all rights to litigate any of the actions taken by grantor in drawing upon the security fund.

E. Hold Harmless.

Grantee shall indemnify, defend and hold grantor, its officers, agents, employees, representatives and insurers harmless from any liability, claims, damages, costs or expenses, to the extent provided in the franchise agreement. This obligation shall survive the termination of any franchise.

F. Insurance.

1. Grantee shall take out and maintain at all times during the life of the franchise operations with an insurance company or companies acceptable to the city the following insurance policies which cover grantee's operations under the franchise:

(a) Commercial general liability

(b) Automobile liability

(c) Workers' compensation

(d) Property (for franchise property and equipment of grantee)

2. The specific policy forms, endorsements and amounts of insurance coverage required of grantee shall be detailed in the franchise agreement and shall be in accordance with current insurance requirements of city for similar risks, as determined by city risk manager and city attorney.

3. Documentation of all required insurance policies shall be provided in a form acceptable to the city risk manager and city attorney and as specified in the franchise agreement before operations of the franchise agreement commence. City shall have the right to suspend or cancel the franchise should grantee fail to maintain the insurance policies required in the franchise agreement. (Ord No. O1999 16, Added, 07/20/1999)

#### **5.78.090 Construction and operational requirements.**

##### **A. System Construction.**

1. Grantee shall not construct any cable or telecommunications system facilities until grantee has secured the necessary permits from grantor, or other cognizant public agencies.

2. In those areas of the city where transmission lines or distribution facilities of the public utilities providing telephone and electric power service are underground, the grantee likewise shall construct, operate and maintain its transmission and distribution facilities therein underground.

3. In those areas of the city where the grantee's cables or wires are located on the above-ground transmission or distribution facilities of the public utility providing telephone or electric power service, and in the event that the facilities of both such public utilities subsequently are placed underground, and the utilities pay the proportionate cost of the relocation, then the grantee likewise shall reconstruct, operate and maintain its transmission and distribution facilities underground, at grantee's cost. Certain of grantee's equipment which normally are placed above ground, may continue to remain in above-ground enclosures, unless otherwise provided in the franchise agreement.

4. Any material changes in or extensions of any poles, anchors, wires, cables, conduits, vaults, laterals or other fixtures and equipment (herein referred to as "structures"), or the construction of any additional structures, in, upon, along, across, under or over the streets, alleys and public ways shall be made under the direction of grantor's city engineer or a designee, who shall, if the proposed change, extension or construction conforms to the provisions hereof, issue written permits therefor. The height above public thoroughfares of all aerial wires shall conform to the requirements of the California regulatory body having jurisdiction thereof.

5. All transmission and distribution structures, lines and equipment erected by the grantee shall be located so as not to interfere with the proper use of streets, alleys and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways and places, and not to interfere with existing public utility installations.

6. In the event that any property or improvement of the grantor in the public rights-of-way is disturbed or damaged by the grantee or any of its contractors, agents or employees in connection with undertaking any and all work pursuant to the right granted to the grantee pursuant to this ordinance, the grantee shall promptly, at the grantee's sole cost and expense, restore as nearly as practicable to their former condition said property or improvement which was so disturbed or damaged, and in the event that any such property or improvement shall at any later time become uneven, unsettled or otherwise require restoration, repair or replacement because of such disturbance or damage by the grantee, then the grantee, as soon as reasonably possible, shall, promptly upon receipt of notice from the grantor and at the grantee's sole cost and expense, restore as nearly as practicable to their former condition said property or improvement which was disturbed or damaged. Any such restoration by the grantee to the former condition shall be made in accordance with such materials and specifications as may, from time to time, be then provided for by grantor ordinance.

7. Prior to commencing any work in the public rights-of-way, the grantee shall obtain any and all permits lawfully required by such grantor codes and ordinances of general application for such work, and pay the normal fees for such permits. These fees shall not be considered part of the franchise fee. In the event that emergency work may be required by the grantee, however, the

grantee shall obtain any and all such permits within three (3) working days after the beginning of such emergency work.

8. There shall be no unreasonable or unnecessary obstruction of the public rights-of-way by the grantee in connection with any of the work herein provided for, and the grantee shall maintain such barriers, signs and warning signals during any such work performed on or about the public rights-of-way or adjacent thereto as may be necessary to reasonably avoid injury or damage to life and property.

9. If at any time during the period of the franchise the grantor shall lawfully elect to alter or change the grade or location of any street, alley or other public rights-of-way, the grantee shall, upon reasonable notice by the grantor, remove, relay and relocate its poles, wires, cables, underground conduits, manholes and other fixtures at its own expense, and in each instance comply with the requirements of the grantor.

10. The grantee shall not place poles, conduits or other fixtures above or below ground where the same will interfere with any existing gas, electric, telephone fixtures, water hydrants or other utility, and all such poles, conduits or other fixtures placed in any street shall be so placed as to comply with all ordinances of the grantor.

11. The grantee may be required by the grantor to permit joint use of its property and appurtenances located in the streets, alleys or other public rights-of-way, by utilities insofar as such joint physical occupancy may be reasonably practicable and not interfere with grantee's operations, and upon payment of reasonable rental therefor; provided that in the absence of agreement regarding such joint use, the city council shall provide for mediation of the terms and conditions of such joint use and the compensation to be paid therefrom.

12. The grantee shall, on request of any person holding a moving permit issued by the grantor, temporarily move its wires or fixtures to permit the moving of buildings, the expense of such temporary removal to be paid by the person requesting the same, and the grantee shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary changes.

13. The grantee shall obtain written approval from the grantor prior to trimming or otherwise altering any trees upon and overhanging the streets, alleys, sidewalks and public places.

B. Applicable Technical and Other Standards.

The grantee shall construct, install, operate and maintain its cable or telecommunications system in a manner consistent with all applicable laws, ordinances, construction standards, governmental requirements, FCC technical standards, and any detailed standards set forth in its franchise agreement. In addition, the grantee shall provide to the grantor, upon request, a written report of the results of the grantee's periodic performance tests conducted pursuant to FCC, state and franchise standards and guidelines.

C. Non-Compliance with Standards.

Repeated and verified failure to maintain specified standards as described in Section B shall constitute a material breach of the franchise.

D. Abandonment or Removal.

1. In the event that the use of any property of grantee within the public rights-of-way is discontinued for a continuous period of twelve (12) months, grantee shall be deemed to have abandoned that franchise property. Any part of the cable or telecommunications system that is parallel or redundant to other parts of the system and is intended for use only when needed as a backup for the system or a part thereof, shall not be deemed to have been abandoned because of its lack of use. Grantor, when the above conditions are met, may make an initial finding of abandonment and shall thereafter provide grantee reasonable written notice and opportunity to refute the finding of abandonment, which finding shall become final if not adequately refuted by grantee.

2. Grantor, upon such terms as grantor may impose, may give grantee permission to abandon, without removing, any system facility or equipment laid, directly constructed, operated or maintained under the franchise. Unless such permission is granted or unless otherwise provided in this ordinance, the grantee shall remove all abandoned above-ground facilities and equipment upon receipt of written notice from grantor and shall restore any affected street to its former state at the time such facilities and equipment were installed, so as not to impair its usefulness. In removing its plant, structures and equipment, grantee shall refill, at its own expense, any excavation that shall be made by it and shall leave all public ways and places in as good condition as that prevailing prior to

such removal without materially interfering with any electrical or telephone cable or other utility wires, poles, or attachments. Grantor shall have the right to inspect and approve the condition of the public ways, public places, cables, wires, attachments and poles prior to and after removal. The liability, indemnity and insurance provisions of this ordinance and the security fund as provided herein shall continue in full force and effect during the period of removal and until full compliance by grantee with the terms and conditions of this section.

3. Upon abandonment of any franchise property in place, the grantee, if required by the grantor, shall submit to the grantor an instrument, satisfactory in form to the grantor, transferring to the grantor the ownership of the franchise property abandoned, subject to grantee's right, if any, to compensation under applicable law.

4. At the expiration of the term for which the franchise is granted, or upon its revocation or earlier expiration, as provided herein, in any such case without renewal, extension or transfer, the grantor shall have the right to require grantee to remove, at its own expense, all above-ground portions of the cable or telecommunications system from all streets and public ways within the city within a reasonable period of time, which shall not be less than one hundred eighty (180) days.

5. Notwithstanding anything to the contrary set forth in this ordinance, the grantee may abandon any underground franchise property in place so long as it does not materially interfere with the use of the street or public rights-of-way in which such property is located or with the use thereof by any public utility or other grantee. If such property does materially interfere with such use, which determination shall be in the sole discretion of grantor, grantee shall remove such property at grantee's sole expense. This obligation shall survive the termination of any franchise.

#### E. Restoration by Grantor--Reimbursement of Costs.

In the event of a failure by grantee to complete any work required herein or by any other law or ordinance, and if such work is not completed within thirty (30) days after receipt of written notice thereof from grantor or, if more than thirty (30) days are reasonably required therefor, if grantee does not commence such work within such thirty (30) days period and diligently complete the work thereafter (except in cases of emergency constituting a threat to public health, safety or welfare), grantor may cause such work to be done and grantee shall reimburse grantor the costs thereof within thirty (30) days after receipt of an itemized list of such costs, or grantor may recover such costs through the security fund provided by grantee.

#### F. Extended Operation and Continuity of Services.

Upon expiration or revocation of the franchise, the grantor shall have the discretion to permit grantee to continue to operate the cable or telecommunications system for an extended period of time. Grantee shall continue to operate the system under the terms and conditions of this ordinance and the franchise and to provide any and all of the services that may be offered at that time. It shall be the right of all subscribers to continue to receive all available services provided that financial and other obligations to grantee are honored. The grantee shall use reasonable efforts to provide continuous, uninterrupted service to its subscribers, including operation of the system during transition periods following franchise expiration or termination.

#### G. Receivership and Foreclosure.

1. A Franchise granted hereunder shall, at the option of grantor, cease and terminate one hundred twenty (120) days after appointment of a receiver or receivers, or trustee or trustees, to take over and conduct the business of grantee, whether in a receivership, reorganization, bankruptcy or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless: (1) such receivers or trustees shall have, within one hundred twenty (120) days after their election or appointment, fully complied with all the terms and provisions of this ordinance and the franchise granted pursuant hereto, and the receivership or trustees within said one hundred twenty (120) days shall have remedied any existing breaches under the Franchise or provided a plan for the remedy of such breaches which is satisfactory to the grantor; and (2) such receivers or trustees shall, within said one hundred twenty (120) days, execute an agreement duly approved by the court having jurisdiction in the premises whereby such receivers or trustees assume and agree to be bound by each and every term, provision and limitation of the franchise granted.

2. In the case of a foreclosure or other judicial sale of the franchise property, or any material part thereof, grantor may serve notice of termination upon grantee and the successful bidder at such sale, in which event the franchise granted and all rights and privileges of the grantee

hereunder shall cease and terminate thirty (30) days after service of such notice, unless: (1) grantor shall have approved the transfer of the franchise, as and in the manner that this ordinance provides; and (2) such successful bidder shall have covenanted and agreed with grantor to assume and be bound by all terms and conditions of the franchise. (Ord No. O1999 16, Added, 07/20/1999)

#### **5.78.100 Records and reports.**

##### **A. Records Required.**

1. Grantee shall at all times maintain:

(a) A full and complete set of plans, records and "as-built" maps showing the locations of the cable or telecommunications system installed or in use in the city.

(b) If requested by grantor, a summary of subscriber service calls, identifying the number, general nature and disposition of such calls, on a quarterly basis. A summary of such service calls shall be submitted to the grantor within thirty (30) days following any grantor request, in a form reasonably acceptable to the grantor.

2. The grantor may impose reasonable requests for additional information, records and documents from time to time, provided they reasonably relate to the scope of the city's regulatory rights under this ordinance or the grantee's franchise agreement.

3. Upon five (5) days written notice, and during normal business hours, grantee shall permit examination by any duly authorized representative of the grantor of all franchise property and facilities, together with any appurtenant property and facilities of grantee situated within or without the city, and all records relating to the franchise, provided they are necessary to enable the grantor to carry out its regulatory responsibilities under this ordinance or the franchise agreement. Grantee shall have the right to be present at any such examination.

##### **B. Annual Reports.**

1. Within ninety (90) days after the end of the calendar year, grantee shall submit a written annual report to grantor, if requested, with respect to the preceding calendar year in a form approved by grantor, including, but not limited to, the following information:

(a) A summary of the previous year's (or in the case of the initial reporting year, the initial year's) cable or telecommunications system activities, including but not limited to, services begun or discontinued during the reporting year;

(b) A list of grantee's officers, members of its board of directors, and other principals of grantee;

(c) A list of stockholders or other equity investors holding five percent (5%) or more of the voting interest in grantee;

(d) An indication of any portions of grantee's service area where service is not available, and a schedule for providing service;

(e) Any other information relevant to franchise regulation which the grantor shall reasonably request, and which is relevant to its regulatory responsibilities.

2. Upon request, grantee shall submit to grantor copies of all pleadings, applications and reports submitted by grantee to, as well as copies of all decisions, correspondence and actions by, any federal, state or local court, regulatory agency, or other governmental body which are non-routine in nature and which will materially affect its cable or telecommunications system operations within the franchise area. Information otherwise confidential by law and so designated by grantee, which is submitted to grantor, shall be retained in confidence by grantor and its authorized agents and shall not be made available for public inspection. Notwithstanding the foregoing, grantee shall have no obligation to provide copies of documents to grantor which contain trade secrets of grantee or which are otherwise of a confidential or proprietary nature to grantee unless it receives satisfactory assurances from grantor that such information can and will be held in strictest confidence by the grantor. To the extent possible, grantee will provide grantor with summaries of any required documents or copies thereof with trade secrets and proprietary matters deleted therefrom. The burden of proof shall be on grantee to establish the confidential nature of any information submitted, to the reasonable satisfaction of the grantor.

3. All reports required under this ordinance, except those designated by grantee as confidential, shall be available for public inspection in the grantor's offices during normal business hours.

4. All reports and records required under this ordinance shall be furnished at the sole expense of grantee, except as otherwise provided in the franchise agreement.

5. The willful refusal, failure, or neglect of grantee to file any of the reports required as and when due under this ordinance, may be deemed a material breach of the franchise if such reports are not provided to grantor within thirty (30) days after written request therefor, and may subject the grantee to all remedies, legal or equitable, which are available to grantor under this ordinance or the franchise agreement.

6. Any materially false or misleading statement or representation made knowingly and willfully by the grantee in any report required under this ordinance or under the franchise agreement may be deemed a material breach of the franchise and may subject grantee to all remedies, legal or equitable, which are available to grantor. (Ord No. O1999 16, Added, 07/20/1999)

#### **5.78.110 Franchise violations.**

##### **A. Grantor's Remedies for Violations and Breaches.**

1. If grantee fails to perform in a timely manner any material obligation required by this ordinance or a franchise granted hereunder, following notice from the grantor and an opportunity to cure such noncompliance in accordance with the provisions of this ordinance and the franchise, grantor may at its option and in its sole discretion:

(a) Cure the violation and recover the actual cost thereof from the security fund established herein if such violation is not cured within thirty (30) days after written notice to the grantee of grantor's intention to cure and draw upon the security fund;

(b) Assess against grantee liquidated damages in an amount set forth in the franchise agreement for any such violations(s) if such violation is not cured, or if grantee has not commenced a cure, on a schedule acceptable to grantor, within thirty (30) days after written notice to the grantee of grantor's intention to assess liquidated damages. Such assessment may be withdrawn from the security fund, and shall not constitute a waiver by grantor of any other right or remedy it may have under the franchise or applicable law, including without limitation, its right to recover from grantee such additional damages, losses, costs and expenses, including reasonable and actual attorney's fees, as may have been suffered or incurred by grantor by reason of or arising out of such breach of the franchise.

##### **B. Procedure for Remedying Franchise Violations.**

Prior to imposing any remedy or other sanction against grantee specified in this ordinance, grantor shall give grantee notice and opportunity to be heard on the matter, in accordance with the following procedures:

(a) Grantor shall first notify grantee of the violation in writing by personal delivery or registered or certified mail, and demand correction within a reasonable time, which shall not be less than ten (10) days in the case of the failure of the grantee to pay any sum or other amount due the grantor under this ordinance or the grantee's franchise and thirty (30) days in all other cases. If grantee fails to correct the violation within the time prescribed or if grantee fails to commence correction of the violation within the time prescribed and diligently remedy such violation thereafter, the grantor shall then give written notice of not less than twenty (20) days of a public hearing to be held before the city council. Said notice shall specify the violations alleged to have occurred.

(b) Subsequent to the public hearing, the council shall hear and consider all other relevant evidence, and thereafter render findings and its decision.

(c) In the event the council finds that the grantee has corrected the violation or has diligently commenced correction of such violation after notice thereof from grantor and is diligently proceeding to fully remedy such violation, or that no material violation has occurred, the proceedings shall terminate and no penalty or other sanction shall be imposed.

(d) In the event the council finds that material violations exist and that grantee has not corrected the same in a satisfactory manner or has not diligently commenced correction of such violation after notice thereof from grantor and is not diligently proceeding to fully remedy such violation, the council may impose one (1) or more of the remedies provided in this ordinance and the franchise agreement as it, in its discretion, deems appropriate under the circumstances.

##### **C. Grantor's Power to Revoke.**

1. Grantor reserves the right to revoke any franchise granted pursuant to this ordinance and rescind all rights and privileges associated with it, in accordance with the provisions of Section 5.78.110.B, in the following circumstances, each of which shall represent a default by grantee and a material breach under the franchise grant:

(a) If grantee shall default in the performance of its material obligations under this ordinance or the franchise agreement and shall continue such default after receipt of due notice and reasonable opportunity to cure the default;

(b) If grantee shall fail to provide or maintain in full force and effect the insurance coverage or security fund as required in the franchise agreement;

(c) If grantee shall violate any material order or ruling of any regulatory body having jurisdiction over the grantee relative to the grantee's franchise, unless such order or ruling is being contested by grantee by appropriate proceedings conducted in good faith;

(d) If grantee practices any fraud or deceit upon grantor;

(e) If grantee becomes insolvent, unable or unwilling to pay its debts, or is adjudged a bankrupt.

2. The termination and forfeiture of the grantee's franchise shall in no way affect any right of grantor to pursue any remedy under the franchise or any provision of law.

D. Force Majeure: Grantee's Inability to Perform.

In the event grantee's performance of any of the terms, conditions or obligations required by this ordinance or a franchise granted hereunder is prevented by a cause or event not within grantee's control, such inability to perform shall be deemed excused and no penalties or sanctions shall be imposed as a result thereof; provided, however, that such inability to perform shall not relieve a grantee from any obligations pertaining to refunds and credits for interruptions in service. For the purpose of this Section, causes or events not within the control of grantee shall include without limitation acts of God, strikes, sabotage, riots or civil disturbances, restraints imposed by order of a governmental agency or court, explosions, acts of public enemies, and natural disasters such as floods, earthquakes, landslides, and fires, but shall not include financial inability of the grantee to perform or failure of the grantee to obtain any necessary permits or licenses from other governmental agencies or the right to use the facilities of any public utility where such failure is due solely to the acts or omissions of grantee, or the failure of the grantee to secure supplies, services or equipment necessary for the installation, operation, maintenance or repair of the cable or telecommunications system where the grantee has failed to exercise reasonable diligence to secure such supplies, services or equipment. (Ord No. O1999 16, Added, 07/20/1999)

**5.78.120 Grantor and subscriber rights.**

A. Reservation of Grantor Rights.

In addition to any rights specifically reserved to the grantor by this ordinance, the grantor reserves to itself every right and power which is required to be reserved by a provision of any ordinance or under the franchise.

B. Waiver.

The grantor shall have the right to waive any provision of the franchise, except those required by federal or state law or regulation, if the grantor determines (1) that it is in the public interest to do so, and (2) that the enforcement of such provision will impose an undue hardship on the grantee or the subscribers. To be effective, such waiver shall be evidenced by a statement in writing signed by a duly authorized representative of the grantor. Waiver of any provision in one (1) instance shall not be deemed a waiver of such provision subsequent to such instance nor be deemed a waiver of any other provision of the franchise unless the statement so recites. (Ord No. O1999 16, Added, 07/20/1999)