#4

02-O -1257

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AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE A FRANCHISE AGREEMENT WITH DOMINION TELECOM

- ☐ CONSENT REFER
- ☐ REGULAR REPORT REFER
- ☐ ADVERTISE & REFER
- ☐ 1st ADOPT 2nd READ & REFER
- ☑ PERSONAL PAPER REFER

Date Referred 7/1/02

Referred To: City Utilities

Date Referred

Referred To:

Date Referred

Referred To:

First Reading

Committee

Date

Chair

Referred to

Committee	Committee
Date	Date
Chair	Chair
Action: Fav, Adv, Hold (see rev. side) Other:	Action: Fav, Adv, Hold (see rev. side) Other:
Members	Members
Refer To	Refer To

Committee	Committee
Date	Date
Chair	Chair
Action: Fav, Adv, Hold (see rev. side) Other:	Action: Fav, Adv, Hold (see rev. side) Other:
Members	Members
Refer To	Refer To

FINAL COUNCIL

☐2nd ☐1st & 2nd Reading

☐Consent ☐V Vote

CERTIFIE

MAYOR'S ACT

AN ORDINANCE

BY COUNCILMEMBER CLAIR MULLER **02-O-1257**

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE A FRANCHISE AGREEMENT WITH DOMINION TELECOM, INC. FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES, AS DEFINED IN THE TELECOMMUNICATIONS ACT OF 1996 (47 U.S.C. § 153) USING PUBLIC RIGHTS-OF-WAY; AND FOR OTHER PURPOSES

WHEREAS, Dominion Telecom, Inc. has applied for a franchise to provide telecommunications services on, under, over and through the public right-of-way of the City; and

WHEREAS, the City has previously adopted a comprehensive ordinance governing such use of its right-of-way, pursuant to the federal 1996 Telecommunications Act; and

WHEREAS, Dominion Telecom, Inc. has negotiated a franchise agreement with the City which provides such access and preserves the rights of the City.

NOW THEREFORE BE IT ORDAINED BY THE ATLANTA CITY COUNCIL AS FOLLOWS:

SECTION 1: That the Mayor be and is hereby authorized to execute a franchise agreement in substantially similar form as attached, with Dominion Telecom, Inc. for use of the public right-of-way for telecommunications purposes.

SECTION 2. That such franchise agreement shall expire and terminate on September 31, 2004.

SECTION 3. That Dominion Telecom, Inc. shall pay a franchise fee of three percent (3%) of gross revenues.

SECTION 4. That the City Attorney shall prepare a franchise agreement document, which shall be approved by the City Attorney as to form.

SECTION 5. That said franchise agreement shall not be binding on the City until approved by the Mayor and delivered to Dominion Telecom, Inc.

FRANCHISE AGREEMENT

BETWEEN

THE CITY OF ATLANTA, GEORGIA

AND

DOMINION TELECOM, INC.

Dated:_____

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FRANCHISE AGREEMENT

This AGREEMENT, executed as of the _____ day of_____, 2002 (the "Effective Date"), by and between THE CITY OF ATLANTA, GEORGIA (hereinafter referred to as the "City"), and DOMINION TELECOM, INC., a corporation duly organized and validly existing under the laws of the State of Virginia, whose principal place of business is located at 4355 Innslake Drive, Glen Allen, Virginia 23060 (hereinafter referred to as the "Grantee").

W I T N E S S E T H:

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

WHEREAS, consistent with applicable law, the City desires to manage the Streets and obtain fair and reasonable compensation from Telecommunications Providers (as hereinafter defined) for the use of the Streets on a non-discriminatory basis;

WHEREAS, the Grantee desires to obtain a franchise to use and occupy the Streets for the purpose of constructing and maintaining a Telecommunications System (as hereinafter defined) and providing Telecommunications Services (as hereinafter defined) on a competitively neutral and nondiscriminatory basis in accordance with the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 et. seq.;

WHEREAS, the City intends to exercise, to the fullest extent permitted by applicable law, its authority with respect to the management of the occupation and use of the Streets in connection with the provision of Telecommunication Services;

WHEREAS, the Grantee has requested that the City grant it a telecommunications franchise to permit the Grantee to maintain a Telecommunications System in the streets;

WHEREAS, in response to the Grantee's request, the City has agreed to grant a telecommunications franchise to the Grantee and enter into this Agreement; and

WHEREAS, the Grantee understands and acknowledges that if Grantee shall be subject to the requirements governing the use and occupance of the streets as set out by City Ordinance;

NOW, THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby covenant and agree as follows:

ARTICLE 1.

DEFINITIONS

1.1. Definitions. The following terms, as used in this Agreement, have the following meanings, with all terms defined in this Article 1 in the singular to have the correlative meaning when used in the plural and vice versa:

1.1.01. "Affiliated Person" means each Person who falls into one or more of the following categories: (i) each Person having, directly or indirectly, a Controlling Interest in the Grantee; (ii) each Person in which the Grantee has, directly or indirectly, a Controlling Interest; (iii) each officer, director, joint venturer or joint venture partner of the Grantee; and (iv) each Person, directly or indirectly, controlling, controlled by, or under common Control with, the Grantee; provided that "Affiliated Person" shall in no event mean the City or any creditor of the Grantee solely by virtue of its status as a creditor and that is not otherwise an Affiliated Person

by reason of owning a Controlling Interest in, being owned by, or being under common ownership, common management or common Control with, the Grantee.

1.1.02. "Agreement" means this Franchise Agreement, together with all Appendices attached hereto and all amendments or modifications thereto.

1.1.03. "Cable Services" means "cable services" as defined in the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996, and as they may be further amended from time to time (the "Cable Act"). In the event that "cable services" is no longer defined in the Cable Act or the definition in the Cable Act otherwise becomes inapplicable, "Cable Services" shall mean "cable services" as defined in the Cable Act immediately prior to such term no longer being defined in the Cable Act or such definition otherwise becoming inapplicable.

1.1.04. "City" means the City of Atlanta, Georgia.

1.1.05. "Code" means the Code of Ordinances of the City, as amended from time to time.

1.1.06. "Control" or "Controlling Interest" means actual working control in whatever manner exercised, including, without limitation, working control through ownership, management, debt instruments or negative control, as the case may be, of the Grantee or the Equipment in the Streets. A rebuttable presumption of the existence of Control or a Controlling Interest shall arise from the beneficial ownership, directly or indirectly, by any Person, or group of Persons acting in concert, of more than twenty percent (20%) of any Person (which person or group of Persons is hereinafter referred to as "Controlling Person). "Control" or "Controlling

Interest" as used herein may be held simultaneously by more than one Person or group of persons.

1.1.07. "Customer" means any Person who uses the Telecommunications Services of the Grantee in the corporate limits of the City.

"Effective Date" means the date this Agreement was executed as set forth in the opening clause of this Agreement.

1.1.08. "Effective Date" means the date this Agreement was executed as set forth in the opening clause of this Agreement.

1.1.09. "Equipment" means any and all transmission facilities, poles, wires, electrical conductors, conduits, ducts, subways, manholes, fixtures, appliances and appurtenances that are used in connection with the provision of Telecommunications Services.

1.1.10. "FCC" means the Federal Communications Commission.

1.1.11. "Franchise" has the meaning set forth in Section 2.1 of this Agreement.

1.1.12. "Franchise Fee" has the meaning set forth in Section 4.1 of this Agreement.

1.1.13. "GPSC" means the Georgia Public Service Commission.

1.1.14. "Grantee" means X, Inc.

1.1.15. "Gross Revenues" means all revenue that is received, directly or indirectly by the Franchisee with facilities in the Right-of-Way, from or in connection with the provision of Telecommunication Services over the Franchisee's Telecommunications System in the established corporate limits of the City; provided that Gross Revenue shall not include any fees or any sales or excise taxes collected for direct pass-through to any entity with facilities in the

Right-of-Way other than an Affiliated Person, including any local, state or federal government, and further provided that Gross Revenue shall not include any revenue generated by the rental, lease, sale, or other use of a Franchisee's Facilities by a Person who is also a Franchisee.

1.1.16. "Performance Bond/Security Fund" has the meaning set forth in Section 9.1 of this Agreement.

1.1.17. "Person" means any individual or any association, firm, partnership, joint venture, corporation or other legally recognized entity, whether for profit or not for profit, but shall not mean the City.

1.1.18. "SEC" means the Securities and Exchange Commission.

1.1.19. "Streets" means the surface of, as well as the spaces above and below, any and all paved or unpaved public roads, as defined in Ga. Code Ann. § 32-1-3(24) (1998), public alleyways and boulevards and other public rights-of-way within or belonging to the City.

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

1.1.21. "Telecommunications Ordinance" means that portion of the Atlanta City Code contained in § 138-126 et seq.

1.1.22. "Telecommunications Provider" means any Person who:

(1) owns, constructs, operates or maintains Equipment in the Streets used to provide Telecommunications Services, regardless of whether such Telecommunications Services originate or terminate in the City; or

(2) provides Telecommunications Services that originate or terminate in the City by means of: (i) specifically identifiable Equipment in the Streets, which Equipment is owned by such Person or made available to such Person under a lease or any other arrangement for a period longer than one hundred twenty 120 days; or (ii) Equipment in the Streets if the use of such Equipment is continuing and substantial, and the City has determined that it is necessary and appropriate to impose the requirements of the Telecommunications Ordinance in order to preserve the application of the Telecommunications Ordinance on a competitively neutral and nondiscriminatory basis consistent with applicable law.

1.1.23. "Telecommunications Services" means the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used, provided, however, that the term "Telecommunications Services" shall not include Cable Services.

1.1.24. "Telecommunications System" means the plant, Equipment, real property (including interests in real property), personal property (tangible and intangible), cable(s), wire(s), optical fibers, amplifier(s), antenna, and all other electronic devices, equipment and facilities used to provide Telecommunications Services to, from, within or across any part of the City.

1.1.25. "Term" has the meaning set forth in Section 2.2 of this Agreement.

ARTICLE 2.

GRANT OF AUTHORITY

2.1. Grant of Franchise. The City hereby grants the Grantee, subject to the conditions of this Agreement, a franchise (the "Franchise") to occupy and use the Streets to construct, install, operate, upgrade, repair, maintain and remove Equipment used to provide Telecommunications Services upon, along, over and under the Streets.

2.2. Term of Franchise. The Franchise commences on the Effective Date and expires on April 1, 2003, unless the Franchise is renewed as provided in Section 2.4, or terminated as provided in Section 11.1, of this Agreement. The period of time that the Franchise is in effect is referred to as the "Term."

2.3. Nonexclusive Franchise. Nothing in this Agreement affects the right of the City to grant any other Person a franchise to occupy and use the Streets to construct, install, operate, upgrade, repair, maintain and remove Equipment used to provide any Telecommunications Services, or to engage in any other activity in the Streets. Nothing in this Agreement affects the right of the City to occupy and use the Streets to construct, install, operate, upgrade, repair, maintain and remove Equipment used to provide any Telecommunications Services, or to engage in any other activity in the Streets, provided such occupancy and use or other activity does not interfere unreasonably with the rights granted to Grantee herein.

2.4. Renewal. This Agreement may be renewed, at the option of the City, for up to two (2) additional two-year terms. The Grantee may submit a written petition to renew the Franchise, not later than six (6) months nor more than twelve (12) months prior to the end of the

Term. The City is not obligated to renew the Franchise, and the Grantee has no right to renewal of the Franchise.

2.5. Public Works and Public Improvements. Nothing in this Agreement abrogates the right of the City to perform any public works or public improvements. If Equipment interferes with the construction, installation, operation, maintenance, repair or removal of such public works or public improvements, the Grantee, at its own expense, shall, promptly after receipt of notice of such interference from the City, protect, alter or relocate such Equipment, as directed by the City. If the Grantee refuses or neglects to so protect, alter or relocate said Equipment within a reasonable time, the City may break through, remove, alter or relocate the Equipment without any liability to the Grantee, and the Grantee shall pay to the City the reasonable costs incurred in connection with such breaking through, removal, alteration or relocation. The City and its officers, employees, agents, attorneys, consultants and independent contractors shall not have any liability to the Grantee for any damage as a result of, or in connection with, such public works or public improvements.

2.6. Regulatory Approvals. The Grantee shall obtain all necessary approvals, licenses, permits or other authorizations from the appropriate federal, state and local authorities to offer Telecommunications Services through the Equipment, and shall, upon the City's request, submit evidence of such approvals to the City.

2.7. Street Closings. Nothing in this Agreement waives or releases the rights of the City in and to the Streets. If all or part of the Streets are eliminated, closed or abandoned, the Franchise shall cease with respect to such Streets upon the effective date of the final action of the City in connection therewith. If the elimination, closing or abandonment of all or part of the

Streets is undertaken for the benefit of any private Person, the City shall make reasonable efforts to condition its consent to the elimination, closing or abandonment on the agreement of the private Person to (i) grant the Grantee the right to continue to occupy and use the Streets, or (ii) reimburse the Grantee for the reasonable costs of relocating the affected Equipment.

ARTICLE 3.

SERVICES

3.1. No Discrimination. The Grantee shall not discriminate in the provision of Telecommunications Services on the basis of race, creed, color, national origin, sex, age, handicap, marital status or sexual orientation.

3.2. Uses of Equipment. On April 1 of each year throughout the Term, the Grantee shall provide annually to the City a detailed description of the uses of the Equipment and the categories of users during the previous twelve (12) months. The description shall be in a form and provide sufficient detail to allow the City to identify the categories of uses over, on and through the Equipment, and shall inform the City of the total number of linear miles, linear feet, cable-run miles, fiber run miles, depth and width of all manholes and all handholes pursuant to City ordinance. The description required by this section shall substantially conform with the reporting requirements as they may be established from time to time by the Department of Public Works.

ARTICLE 4.

COMPENSATION AND OTHER PAYMENTS

4.1. Franchise Fee. As compensation for the rights granted herein, the Grantee shall pay three percent (3%) of Gross Revenues to the City as a Franchise Fee, provided that in any

calendar year that Grantee's Gross Revenue does not exceed Five Hundred Thousands Dollars ($500,000.00), the Franchise Fee shall be Fifteen Thousand Dollars ($15,000.00) per year. The Grantee's obligation to pay the Franchise Fee shall commence on the Effective Date and continue throughout the Term. Fees shall be paid on a quarterly basis for the preceding quarter, and shall be due on April 1, July 1, October 1, and the first business day of January of each year throughout the Term. In the event the Term commences or expires on a day other than the first or last day of a calendar quarter, the Franchise Fee shall be prorated relative to the number of days in the quarter that the Franchise is in effect. On or before each quarterly payment date, Grantee shall provide a certificate, signed and attested to by the appropriate corporate officers, which verifies Grantee's Gross Revenues for the prior quarter.

4.2. Franchise Application and Acceptance Fees. If this is the first Franchise Agreement between Grantee and the City, the City hereby acknowledges receipt of a non-refundable application fee of Ten Thousand Dollars ($10,000.00) to the City prior to the execution of this agreement. The fees required by this Section 4.2 shall not be applied to, offset against or deducted from any franchise fees or other payments required by this Agreement.

4.3. Payment Credits and Deductions. The compensation and other payments to be made pursuant to this Article 4 shall not be deemed to be in the nature of a tax, and shall be in addition to and not in lieu of any business licenses, permit fees for work in the Streets, special taxes on poles or conduits, and any other fees or charges that the Grantee shall be required to pay to the City or to any state or federal agency or authority. There shall be no deduction allowed for ad valorem taxes against the Franchise Fee or other payments or fees required by this Agreement.

4.4. Interest on Late Payments. If any payment required by this Agreement is not actually received by the City or the Grantee, as the case may be, on or before the applicable due date fixed in this Agreement, the City or the Grantee, as appropriate, shall pay interest thereon, from the due date to the date paid, at a rate equal to the rate of interest then charged by the City for late payments of real estate taxes pursuant to Ga. Code Ann. § 48-2-40 (1998).

4.5. Reservation of Rights. Except as otherwise provided herein, no acceptance of any Franchise Fee payment by the City shall be construed as an accord and satisfaction that the amount paid is in fact the correct amount; nor shall such acceptance of any payment be construed as a release of any claim that the City may have for further or additional sums payable under the provisions of this Agreement. All amounts paid shall be subject to audit and recomputation by the City, provided that any such audit and recomputation is completed by the City within five (5) years of the date on which the payment in question was made to the City and is performed in accordance with Section 7.6.

4.6. Remedy for Underpayment. If, as a result of an audit or any other review, the City determines that the Grantee has underpaid Franchise Fees in any twelve-month period by ten percent (10%) or more, then, in addition to making full payment of the relevant obligation, including interest as described in Section 4.4 of this Agreement, the Grantee shall reimburse the City for all of the reasonable costs associated with the audit or review, including all reasonable out-of-pocket costs for attorneys, accountants and other consultants.

4.7. Continuing Obligation and Holdover. If the Grantee continues to use Equipment in the Streets to provide Telecommunications Services after the Term, then the Grantee shall continue to comply with all applicable provisions of this Agreement, including, without

limitation, all compensation and other payment provisions of this Agreement, throughout the period of such continued operation; provided that any such continued operation shall in no way be construed as a renewal or other extension of this Agreement or the Franchise, nor as a limitation on the remedies, if any, available to the City as a result of such continued operation after the Term, including, but not limited to, damages and restitution. If this Agreement terminates for any reason whatsoever and the Grantee fails to cease using Equipment in the Streets to provide Telecommunications Services, the City, in addition to all other remedies available to it under this Agreement or by law, shall be entitled to receive all payments it is entitled to receive under this Agreement, including, but not limited to, the compensation set forth in Section 4.1 of this Agreement.

ARTICLE 5.

CONSTRUCTION-RELATED REQUIREMENTS

5.1. Quality. All work involved in the construction, installation, operation, upgrade, repair, maintenance and removal of Equipment shall be performed in a safe, thorough and reliable manner, using materials of good and durable quality and shall meet, or exceed, the specifications required by the City's Department of Public Works. If it is determined by the City or any other agency or authority of competent jurisdiction, at any time, that any Equipment is harmful to the health or safety of any Person, then the Grantee shall, at its own cost and expense, promptly correct all such harmful conditions.

5.2. Liability Limitation. Neither the City nor its officers, employees, agents, attorneys, consultants or independent contractors shall be responsible to the Grantee or any Affiliated Person for any liability as a result of or in connection with the protection, breaking-

through, movement, removal, alteration or relocation of any Equipment by or on behalf of the Grantee or the City in connection with any emergency, public work, public improvement, alteration of any municipal structure, any change in the grade of line of any Street, or the elimination, discontinuation and closing of any Street, as provided in this Agreement.

5.3. New Grades or Lines. If the grades or lines of any Street are changed at any time during the Term, then the Grantee shall, at its own cost and expense and upon the request of the City, after reasonable notice to the Grantee, protect or promptly alter or relocate Equipment, within a reasonable time after notice, so as to conform with such new grades or lines. If the Grantee refuses or neglects to so protect, alter, or relocate Equipment, the City shall have the right to break-through, remove, alter or relocate such Equipment without any liability to the Grantee and the Grantee shall pay to the City the costs incurred in connection with such breaking-through, removal, alteration or relocation.

5.4. Protection of Streets. In connection with the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment, the Grantee shall, at its own cost and expense, protect the Streets and any structures thereon, thereunder or thereover, and shall, except in an emergency, obtain the prior approval of the City before altering the Streets or any such structures. Any such approved alteration shall be made by the Grantee, at its sole cost and expense, in the manner reasonably prescribed by the City, if any. The Grantee shall be liable, at its own cost and expense, to replace or repair, in accordance with existing standards of the City in effect at the time of the work, any Street or structure thereon, thereunder or thereover that may become disturbed or damaged as a result of the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment.

The Grantee shall warrant any such replacement or repair for one (1) year. If the Grantee does not commence such replacement or repair within a reasonable time after notice, the City or the owner of the affected structure may make such replacement or repair and the Grantee shall pay the actual cost incurred by the City for same within thirty (30) days of its receipt of the City's invoice therefor.

5.5. No Obstruction. In connection with the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment, the Grantee shall not, except in an emergency, obstruct the sidewalks, streets, subways, railways, rivers or other traffic to, from or within the corporate limits of the City without the prior consent of the City, which consent shall not be unreasonably withheld. Equipment of the Grantee in the Streets shall be located so as to cause minimum interference with the lawful use of the Streets and adjoining property by other Persons.

5.6. No Interference. In the provision of Telecommunications Services, the Grantee shall, to the extent not prevented by an emergency, provide its Telecommunications Services within the corporate limits of the City in such a manner that the operation of its Telecommunications System shall not interfere with other lawful, permitted uses of the Streets.

5.7. Underground Utilities. The Grantee shall comply with any current or future City ordinances requiring the placement of Equipment underground.

5.8. Moving Equipment. The Grantee shall, upon prior written notice by the City or any Person holding a permit to move any structure, and within the time that is reasonable under the circumstances, temporarily move Equipment to permit the moving of said structure. The

Grantee may impose a reasonable charge on any Person other than the City for any such movement of its Equipment.

5.9. Safety Precautions. The Grantee shall, at its own cost and expense, undertake all reasonable and appropriate efforts to prevent accidents at its work sites, including the placement and maintenance of proper guards, fences, barricades, watchmen and suitable and sufficient lighting.

5.10. Moving Wires. The City may, at any time and in accordance with applicable law, in case of fire, disaster or other emergency, as determined by the City in its sole discretion, cut or move Equipment as and to the extent necessary to contain or alleviate the harm threatened by the emergency at hand and/or to repair any damage to the Streets resulting therefrom, in which event the City shall not incur any liability to the Grantee or any Affiliated Person. When possible, the Grantee shall be consulted prior to any such cutting or movement of Equipment and shall be given the opportunity to perform such work itself. All costs to repair or replace such Equipment shall be borne by the Grantee.

5.11. Pole Space and Conduit Space. The Grantee and the City shall enter into agreements from time to time for the reciprocal use of the poles and conduits of each by the other; provided (i) such use by the City of the Grantee's poles and conduits shall not interfere with the proper use thereof by the Grantee for its purposes or in the exercise of the rights granted to it by this Franchise; (ii) such use by the Grantee of the City's poles shall not interfere with the proper use thereof by the City for its purposes or in the exercise of its functions; and (iii) each shall indemnify, keep and hold the other harmless from any and all loss, damage, cost or expense

to or, that may be incurred by either or to which either may be subjected by reason or as a result of such use and occupancy of their respective poles.

5.12. Trimming of Trees. The Grantee's maintenance of its Telecommunications System, including the trimming of any vegetation, trees or shrubbery so as to prevent the branches of trees or other vegetative growth from coming in contact with the wires, cables or other facilities of the Grantee or from preventing the Grantee's access to its facilities, shall be conducted in compliance with the City's ordinances for Tree Protection, presently codified in Chapter 158, Article II of the Code, and in observance of private property rights. The Grantee shall obtain the approval of the City's Arborist prior to conducting any trimming activity on or in the Streets and shall remove any trimmings on or in the Streets within twenty-four hours after being cut. Should the Grantee, its contractor or agent fail to remove such trimmings promptly, the Grantee shall reimburse the City for the City's costs in effecting such removal, upon receipt of the City's invoice.

5.13. Employee Discrimination Ban. The Grantee shall comply in all respects with all applicable federal, state and local employment discrimination laws and requirements during the Term. To the extent permitted by applicable law, the City incorporates by reference the equal employment opportunity requirements contained in Atlanta City Code Section 2-1414 in their entirety, as if fully set forth herein, and Grantee agrees to comply with such requirements. During the performance of this Agreement, Grantee agrees as follows:

(a) The Grantee shall not discriminate against any employee, or applicant for employment, because of race, religion, color, sex or national origin. As used here, the words 'shall not discriminate' shall mean and include without limitation the following:

> Recruited, whether by advertising or other means; compensated, whether in the form of rates of pay, or other forms of compensation; selected for training, including apprenticeship; promoted; upgraded; demoted; downgraded; transferred; laid off; and terminated.

The contractor agrees to and shall post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officers setting forth the provisions of the EEO clause.

5.14. Equal Business Opportunity. It is the policy of the City of Atlanta to promote full and equal business opportunity for all persons doing business with the City. The City has instituted an Equal Business Opportunity Program to reinforce and support outreach efforts to open contracting opportunities to all businesses, regardless of race, gender or ethnicity, reduce the economic disadvantages suffered by African American-, Hispanic-, and Female-owned businesses as a result of discrimination based on race, gender and ethnicity, ensure that the City of Atlanta is not a passive participant in ongoing private sector discrimination, and promote equal opportunity for all businesses in Atlanta so that equal business opportunity will become as institutionalized in the Atlanta marketplace as discrimination is today. In light of such efforts, Franchisee agrees that it will utilize best efforts to outreach to African American-, Hispanic-, and Female-owned businesses and engage them where possible to perform subcontracted construction activities or other work in the Streets pursuant to this Agreement. The City may, from time to time, request documentation regarding Franchisee's use of African American-, Hispanic-, and Female-owned businesses in order to further the goals of its Equal Business Opportunity Program.

ARTICLE 6.

IN-KIND SERVICES

Any provider may seek to provide in-kind services to the City, but any setoff to the franchise fee based on the provision of in-kind services must be authorized by prior agreement of the parties evidenced by a separate written agreement.

ARTICLE 7.

OVERSIGHT AND MANAGEMENT

7.1. City's Right of Oversight. The City has the right to oversee, regulate, manage and inspect the construction, installation, operation, upgrade, repair, maintenance and removal of Equipment in the Streets and the provision of Telecommunications Services through Equipment in accordance with the provisions of this Agreement and applicable law. The City reserves the right to adopt or issue, in accordance with applicable law, such rules, regulations, orders or other directives governing the Grantee, the Equipment or the Grantee's Telecommunications System as it shall find necessary or appropriate in the exercise of its police power or pursuant to and in furtherance of the purposes of this Agreement. The Grantee expressly agrees to comply with all such valid rules, regulations, orders or other directives. No rule, regulation, order or other directive issued pursuant to this Section 7.1 shall constitute an amendment to this Agreement.

7.2. Permits. The Grantee shall obtain all construction, building or other permits or approvals necessary before constructing, installing, operating, upgrading, repairing, maintaining or removing Equipment. Nothing in this Agreement waives any of the City's ordinances or regulations, or the City's right to require the Grantee and its Customers to secure appropriate permits or approvals for use of Telecommunications Services. Any fees that the City charges to

the Grantee, Affiliated Persons or its Customers to issue permits or approvals shall not be offset against the compensation or other payments that the Grantee is required to pay to the City pursuant to this Agreement.

7.3. Managerial and Operational Standards. The Grantee shall establish and maintain such managerial and operational standards, procedures, records and controls as shall be required to enable the Grantee to be, at all times throughout the Term, in compliance with each material term and condition of this Agreement and to promptly ascertain and remedy any failure to be in compliance with each such term or condition.

7.4. Reports. At the request of the City, the Grantee shall promptly submit to the City such information regarding the Grantee and any Affiliated Person as the City may require, and to which the City is legally entitled, to verify compliance with any term or condition of this Agreement.

7.5. Books and Records. Throughout the Term, the Grantee shall maintain in the City, or make available in the City within a reasonable time of the City's request therefor, complete and accurate books of account and records of the business, ownership and operations of the Grantee with respect to the Equipment and Telecommunications Services provided therewith, including without limitation, books of account and records adequate to enable the Grantee to demonstrate, at all times throughout the Term, that it is, and has been, in compliance with each term and condition of this Agreement. Each document pertaining to financial matters that may be the subject of an audit by the City shall be retained by the Grantee for a minimum of five (5) years following the date on which such document was created. Should the City reasonably determine that the records are not being maintained in a manner that enables the Grantee to

demonstrate at all times throughout the Term that it is, and has been, in compliance with each term and condition of this Agreement, the Grantee shall, unless otherwise prohibited by applicable law or commercial impracticability, alter the manner in which the books and records are maintained so that the Grantee comes into compliance with this Section

7.6. Right of Inspection. The City and its designated representatives shall have the right to inspect, examine and audit, during normal business hours and upon reasonable advance notice to the Grantee, all documents, records and other information of the Grantee and any Affiliated Person that pertain to the Equipment in the Streets, compensation to the City, and Grantee's employment practices to determine compliance with the provisions of this Agreement. Upon request by the City, all such documents, records and other information shall be made available within thirty (30) days and within the corporate limits of the City in order to facilitate the inspection, examination or audit. Further, during normal business hours and upon reasonable notice to the Grantee, the City and its designated representatives may inspect and examine any other aspect of the Equipment and the Telecommunications System as necessary to confirm compliance by the Grantee with the terms and conditions of this Agreement.

7.7. Treatment of Proprietary Information. Grantee shall not deny the City access to any of the documents, records or other information required to demonstrate compliance with this Agreement on grounds that such documents, records or information contain proprietary information. The Grantee may label any document, record or other information as proprietary or confidential if it considers it such. The labeling of documents, records or other information as proprietary or confidential shall be the sole responsibility of the Grantee. The City shall maintain the confidentiality of the Grantee's documents, records or other information disclosed to the

extent allowed by law. In the event the City intends to release any document, record or other information that has been labeled confidential by the Grantee pursuant to the Georgia Open Records Act, Ga. Code Ann. §§ 50-18-70 to –76 (1998), or otherwise in accordance with applicable law, the City shall provide written notice to the Grantee not less than three (3) business days prior to any such proposed release. The Grantee shall be entitled to assume and prosecute the defense against any such release with counsel of its own choosing at its sole cost and expense.

7.8. Compliance Audits and Public Hearings. The City may conduct compliance audits and/or hold public hearings with respect to matters covered in this Agreement at any time during the Term, provided that the City gives the Grantee written notice thirty (30) days in advance of the commencement of any such compliance audits and/or public hearings and provided that such audits and/or hearings shall not occur more frequently than every two (2) years.

7.9. Installation Report. Each quarter the Grantee shall provide to the City a report and/or drawing describing any installation or upgrade of Equipment by the Grantee in the Streets during the previous quarter. The report and/or drawing also shall describe the Grantee's reasonably anticipated plans for such installation and upgrade for the coming twenty-four (24) months. The format of the report, and any associated drawings, shall be proscribed by the Department of Public Works handbook. Notwithstanding the requirements of this Section 7.9, the Grantee shall provide to the City, upon the City's request, any additional information that the City reasonably deems necessary during the Term to ensure compliance with the terms of this Agreement.

7.10. Additional Filings. The Grantee shall provide annually to the City a list of any and all material communications, public reports, petitions or other filings submitted by the Grantee to any local, state or federal agency or official (and any response thereto received by the Grantee) that in any way materially affects adversely the Grantee's ability to adhere to the terms of this Franchise Agreement or to operate the Equipment or the Telecommunications Services provided therewith, but not including any tax returns or other filings that are confidential. Upon the request of the City, the Grantee shall promptly, but in no case later than ten (10) business days following the request, deliver to the City a complete copy of any item on said list.

7.11. Nonperformance Penalties. If any of the following events occur, the City, at its discretion, may impose on the Grantee a penalty up to a maximum of One Thousand Dollars ($1,000.00) per occurrence, which penalty is in addition to any other penalties or remedies available to the City under this Agreement and any other laws, ordinances and regulations:

7.11.01. Equipment is constructed, installed, operated, upgraded, repaired, maintained or removed in/from the Streets without appropriate permits and other regulatory approvals having been obtained from the City, as required by Section 7.2 of this Agreement.

7.11.02. Sidewalks, streets, subways, railways, rivers or other traffic to, from or within the corporate limits of the City are obstructed without permission having been obtained from the City, as required by Section 5.5 of this Agreement.

7.11.03. Structures in the Streets are altered without City approval or not protected, as required by Section 5.4 of this Agreement.

ARTICLE 8.

LIABILITY AND INSURANCE

8.1. Insurance -- Specifications. Throughout the Term, the Grantee shall, at its own expense, maintain General Liability and Workers Compensation insurance policies, respectively, (i) in the minimum combined amount of Three Million Dollars ($3,000,000.00) for bodily injury, personal injury and property damage, and (ii) in conformance with State of Georgia statutory requirements, in a form reasonably acceptable to the City. Such policies shall be issued by companies approved to do business in the State of Georgia, carrying a rating by Best of not less than "A" and reasonably acceptable to the City. Such General Liability policy or policies shall insure the Grantee, and shall name as additional insured the City and its officers, boards, commissions, councils, elected officials, agents and employees (through appropriate endorsements if necessary). The foregoing minimum limitation shall not prohibit the Grantee from obtaining a liability insurance policy or policies in excess of such limitations, provided that the City, its officers, boards, commissions, councils, elected officials, agents and employees shall be named as additional insureds to the full extent of any limitation contained in any such policy or policies obtained by the Grantee.

8.2. Insurance -- Maintenance. The insurance policies required in Section 8.1 shall be maintained by the Grantee throughout the Term and such other period of time during which the Grantee operates or is engaged in the removal of Equipment. Each such liability insurance policy shall contain an endorsement substantially in the form of the following:

> It is hereby understood and agreed that this policy may not be canceled, nor the intention not to renew be stated, until thirty (30) days after receipt by the City of a written notice of such intent to cancel or not to renew.

Prior to any such cancellation, the Grantee shall obtain and furnish to the City replacement insurance policies in a form reasonably acceptable to the City.

8.3. Increased Insurance Coverage. In the event of any changed circumstances following the Effective Date that result in a measurable increased risk of loss or damage in excess of the amounts provided for in Section 8.1, above, the City, after consulting with the Grantee, may alter the minimum limitation of the liability insurance policy or policies required in Section 8.1 as required to cover such potentially increased loss or damage exposure.

8.4. Liability Not Limited. The legal liability of the Grantee to the City and any Person for any of the matters that are the subject of the liability insurance policies required by Section 8.1, including, without limitation, the Grantee's indemnification obligations set forth in this Agreement, shall not be limited by such insurance policies nor by the recovery of any amounts thereunder, except to the extent necessary to avoid duplicative recoveries from or payments by the Grantee.

8.5. Liability of Grantee. The Grantee shall be responsible for any liability, including any liability of the City and any Person, including any officer, employee, agent, attorney, consultant and independent contractor of the City, arising out of or in connection with the Grantee's acts or omissions with respect to the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment by the Grantee, or the provision by the Grantee of Telecommunications Services through the Equipment. The Grantee shall, at its own cost and expense, replace, repair or restore any property damaged in connection with the performance of any of the foregoing activities to its prior condition and shall pay appropriate compensation in the

event of any injury to or death of any Person occasioned by any act or failure to act of the Grantee, any Affiliated Person, or any officer, employee, agent or subcontractor thereof, in connection with the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment or the provision of Telecommunications Services through the Equipment. Provided, however, the foregoing responsibility and obligation does not eliminate any municipal immunity or other immunities accorded to the City, and Grantee shall not be responsible for any liability where the City would have immunity.

8.6. Liability of City. The City, its officers, employees, agents, attorneys, consultants and independent contractors shall not be responsible for any acts or omissions of the Grantee, any Affiliated Person or any other Person, arising out of or in connection with the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment or the provision of Telecommunications Services through the Equipment. The City and its officers, employees, agents, attorneys, consultants and independent contractors shall have no liability to the Grantee, any Affiliated Person or any other Person for any special, incidental, consequential, punitive, or other damages as a result of the exercise of any right of the City pursuant to this Agreement or applicable law, including, without limitation, the rights of the City to approve or disapprove the grant, termination, amendment, renewal or transfer of the Franchise, or to otherwise modify all or any part of this Agreement or the Franchise.

8.7. Indemnification of City. The Grantee and each Affiliated Person shall defend, indemnify and hold harmless the City, its officers, employees, agents, attorneys, consultants and independent contractors from and against all liabilities, whether special, incidental, consequential or punitive, and all other damages, costs and expenses (including reasonable attorneys' fees)

arising out of or in connection with the award of this Franchise, the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment or the provision of Telecommunications Services through the Equipment; provided, however, the foregoing indemnification does not eliminate any municipal immunity or other immunities accorded to the City, and Grantee shall not be responsible for any liability where the City would have immunity. The Grantee and each Affiliated Person also shall cooperate with the City by providing such nonfinancial assistance as reasonably may be requested by the City in connection with any claim arising out of or in connection with the selection of franchisees for, or the negotiation or award of, a Franchise or this Agreement.

8.8. Limitation. As between the City and the Grantee or any Affiliated Person, the liability and indemnity obligations of the Grantee pursuant to Sections 8.5, 8.6 and 8.7 of this Agreement shall not apply to any willful misconduct of any City officer, employee, agent, attorney, consultant or independent contractor.

ARTICLE 9.

PERFORMANCE BOND/SECURITY FUND/CASH DEPOSIT

9.1. General Requirement. Prior to the Effective Date, the Grantee shall deposit with the City one or more surety bond(s), which together total Five Hundred Thousand Dollars ($500,000.00) (said $500,000.00 constitutes the "Grantee's Performance Bond/Security Fund"). Throughout the Term, and for one hundred and twenty (120) days thereafter, unless the City notifies the Grantee that a reasonably longer period shall apply, the Grantee shall maintain the Performance Bond/Security Fund in the amount specified in this Section 9.1. At any time during the Term, the City may require the Grantee to increase the amount of the Performance

Bond/Security Fund if the City finds that new risk factors exist that reasonably necessitate an increase in the amount of the Performance Bond/Security Fund.

9.2. Indemnification. The Performance Bond/Security Fund shall indemnify the City, up to the full face amount of the Performance Bond/Security Fund, for (i) any unreimbursed loss or damage to the Streets or any property of the City caused by the Grantee during the construction, installation, operation, upgrade, repair, maintenance or removal of Equipment; (ii) any other unreimbursed cost, loss or damage actually incurred by the City as a result of the Grantee's failure to perform its obligations pursuant to this Agreement; and (iii) the removal of all or any part of the Equipment from the Streets by the City, as authorized by this Agreement.

9.3. Other Purposes. The Performance Bond/Security Fund also shall serve as security for:

9.3.01. The faithful performance by the Grantee of all terms, conditions and obligations of this Agreement;

9.3.02. Any unreimbursed expenditure, damage or loss incurred by the City occasioned by the Grantee's failure to comply with all rules, regulations, orders, permits and other lawful directives of the City issued pursuant to this Agreement;

9.3.03. Payment of the compensation set forth in Section 4.1 of this Agreement upon the Grantee's failure to pay same;

9.3.04. The payment of premiums for the liability insurance required pursuant to Article 8 of this Agreement upon the Grantee's failure to pay same;

9.3.05. The removal of Equipment from the Streets at the termination of this Agreement, at the election of the City, pursuant to Section 11.6 of this Agreement;

9.3.06. The payment of any other unpaid amounts that become due to the City pursuant to this Agreement or law; and

9.3.07. Any unreimbursed costs, losses or damages incurred by the City as a result of a default of the Grantee's obligations under this Agreement.

9.4. Withdrawals from the Performance Bond/Security Fund. The City may make withdrawals from the Performance Bond/Security Fund for the satisfaction of obligations under Section 9.2 of this Agreement, or for the purposes specified in Section 9.3 of this Agreement. Withdrawals from the Performance Bond/Security Fund shall be deemed a cure of the default(s) that led to such withdrawals to the extent of such withdrawal. The City may not seek other recourse against the Grantee for any costs or damages for which the City has previously been compensated through a withdrawal from the Performance Bond/Security Fund or otherwise by the Grantee.

9.5. Notice of Withdrawals. At least thirty (30) days before any proposed withdrawal from the Performance Bond/Security Fund, the City shall notify the Grantee of the proposed date and amount thereof. The Grantee shall be entitled, at any time during the thirty-day period following its receipt of said notice, to cure the breach with respect to which the withdrawal is proposed to be made. The City shall not make any withdrawals by reason of any breach that is either (i) cured or with respect to which a plan to cure reasonably acceptable to the City has been presented to the City by the Grantee prior to the time at which the proposed withdrawal can be made, or (ii) with respect to which the Grantee has not been given notice as provided above. The withdrawal of amount(s) from the Performance Bond/Security Fund shall, to the extent of said

withdrawal, constitute a credit against the amount of the applicable liability of the Grantee to the City.

9.6. Replenishment. Within thirty (30) days after receipt of notice from the City that any amount has been withdrawn from the Performance Bond/Security Fund as provided in Section 9.5 of this Agreement, the Grantee shall restore the Performance Bond/Security Fund to the amount specified in Section 9.1 of this Agreement, provided that, if a court finally determines that said withdrawal by the City was improper, the City shall, within thirty (30) days of the court's determination, refund the improperly withdrawn amount to the Performance Bond/Security Fund if necessary to return the balance in the Performance Bond/Security Fund to the amount specified in Section 9.1 of this Agreement or, if not, to the Grantee. If the Grantee has not made the required restoration to the Performance Bond/Security Fund within such thirty-day period, interest on said amount shall accrue at the rate specified in Section 4.4 of this Agreement, to commence at the completion of such thirty-day period. The City may withdraw from the Performance Bond/Security Fund such interest periodically up to the date on which the Grantee makes the required principal payment, provided that the Grantee shall not be obligated to pay such interest with such principal payment to the extent such interest has been already withdrawn by the City. In the event of an improper withdrawal, the Grantee shall receive interest at the rate specified in Section 4.4, above, on the amount improperly withdrawn. Said interest shall accrue and be payable from the time of withdrawal to the time of refund to the Fund or the Grantee, as appropriate.

9.7. Not a Limit on Liability. The obligation to perform under, and the liability of the Grantee pursuant to, this Agreement shall not be limited by the acceptance of the Performance Bond/Security Fund required by this Article 9.

9.8. Form. The Performance Bond/Security Fund, and any replacement bond, shall contain the following endorsement:

> It is hereby understood and agreed that this bond may not be canceled or not renewed by the surety until at least thirty (30) days written notice has been provided to the City of surety's intention to cancel or not renew this bond.

9.9. Cash Deposit/Letter of Credit. Upon application for a construction permit, and during the pendency of all construction activities, the Grantee shall maintain either an irrevocable letter of credit from a qualified financial institution or a cash deposit. Notwithstanding the provisions above concerning bonding and insurance, the City shall be entitled to reimbursement from the letter of credit or cash deposit to compensate the City for expenses incurred due to a failure of Grantee to timely repair the right of way, for penalties assessed against Grantee, and for all other costs associated with violations of this Agreement or the City of Atlanta Code of Ordinances. The amount of the letter of credit or cash deposit shall be Ten Thousand Dollars ($10,000.00) for work in the Streets of up to five hundred (500) feet, and Twenty-Five Thousand Dollars ($25,000.00) for work performed in the Streets that exceeds five hundred (500) feet. Any cash deposit shall be maintained in an interest bearing account. Demand on, and release of, the letter of credit or cash deposit shall be governed by Atlanta City Code § 138-65(12).

ARTICLE 10.

TRANSFER RESTRICTIONS

10.1. Transfer of Interest. Except as provided in Section 10.6 hereof, and excepting conveyances and leases of real or personal property in the ordinary course of the operation of the Grantee's Telecommunications System (but not excepting leases which by their size or nature are the functional equivalent of transfers of the Grantee's Telecommunications System), neither the Franchise granted herein nor any rights or obligations of the Grantee in the Telecommunications System or pursuant to this Agreement shall be encumbered, assigned, sold, transferred, pledged, leased, sublet, or mortgaged in any manner, in whole or in part, to any Person, nor shall title therein, either legal or equitable, or any right or interest therein, pass to or vest in any Person, either by act of the Grantee, by act of any Person holding Control of or any interest in the Grantee or the Grantee's Telecommunications System or the Franchise granted herein, by operation of law, or otherwise, without the prior written consent of the City pursuant to the procedures set forth in this Article 10, provided that the City shall consider any such action in accordance with its usual procedural rules and provided further that the City's consent shall not be unreasonably withheld.

10.2. Transfer of Control or Stock. Notwithstanding any other provision of this Agreement, except as provided in Section 10.6 hereof, no change in Control of the Grantee, the Grantee's Telecommunications System or the Franchise granted herein shall occur after the Effective Date, by act of the Grantee, by act of any Person holding Control of the Grantee, the Grantee's Telecommunications System or the Franchise granted herein, by operation of law, or otherwise, without the prior written consent of the City granted pursuant to the procedures set

forth in this Article 10, provided that the City shall consider any such action in accordance with its usual procedural rules and provided further that the City's consent shall not be unreasonably withheld. The requirements of Section 10.3 hereof shall also apply whenever any change is proposed of twenty percent (20%) or more of the ownership or Control of the Grantee, the Grantee's Telecommunications System, the Franchise granted herein or of any Person holding Control of the Grantee, the Grantee's Telecommunications System or the Franchise (but nothing herein shall be construed as suggesting that a proposed change of less than twenty percent (20%) does not require consent of the City (acting pursuant to the procedures set forth in this Article 10) if it would in fact result in a change in Control of the Grantee, the Grantee's Telecommunications System or the Franchise granted herein), and any other event which could result in a change in ownership or Control of the Grantee, regardless of the manner in which such ownership or Control is evidenced *(e.g.*, stock, bonds, debt instruments or other indicia of ownership or Control).

10.3. Petition. The Grantee shall promptly notify the City of any proposed action requiring the consent of the City pursuant to Sections 10.1 or 10.2 hereof or to which this Section 10.3 applies by submitting to the Mayor, with a copy to the City Attorney, a petition requesting the submission by the Mayor of such petition to the City Council and approval thereof by the City Council or requesting a determination that no such submission and approval is required and its argument why such submission and approval is not required. Each petition shall fully describe the proposed action and shall be accompanied by a justification for the action and, if applicable, the Grantee's argument as to why such action would not involve a change in Control of the Grantee, the Grantee's Telecommunications System or the Franchise, and such

additional supporting information as the Mayor may reasonably require in order to review and evaluate the proposed action. The Mayor shall expeditiously review the petition and shall (a) notify the Grantee in writing if the Mayor determines that approval of the City Council is not required or (b) if the Mayor determines that such submission and approval is required, either (i) notify the Grantee that the Mayor does not approve the proposed action and therefore will not submit the petition to the City Council, or (ii) submit the petition to the City Council for its approval. If approval of the proposed action is required, the City shall act on the petition within one hundred twenty (120) days after Grantee's submission of the petition, together with all supporting information required by this Section 10.3.

10.4. Consideration of the Petition. The Mayor may take such actions as he deems appropriate in considering the petition and determining whether consent is needed or should be granted. In considering the petition, the Mayor, may inquire into: (i) the qualifications of each Person involved in the proposed action, (ii) all matters relevant to whether the relevant Person(s) will adhere to all applicable provisions of this Agreement; and (iii) all other matters that are relevant in evaluating the petition. After receipt of a petition, the City Council may, as it deems necessary or appropriate, schedule a public hearing on the petition. The Grantee shall provide all requested assistance to the Mayor in connection with any such inquiry and, as appropriate, shall secure the cooperation and assistance of all Persons involved in said action.

10.5. Conditions. As a condition to the granting of any consent required by this Section 10.5, the Mayor and/or the City Council may require that each Person involved in any action described in Sections 10.1 or 10.2 hereof shall execute an agreement, in a form and containing such conditions as may be specified by the City, providing that such Person assumes

and agrees to be bound by all applicable provisions of this Agreement, that this Agreement continues in full force and effect, and such other conditions which the City deems necessary or appropriate in the circumstances. The execution of such agreement by such Person(s) shall in no way relieve the Grantee or any other transferor involved in any action described in Sections 10.1 or 10.2 hereof, of its obligations pursuant to this Agreement.

10.6. Permitted Encumbrances. Nothing in this Article 10 shall be deemed to prohibit any assignment, pledge, lease, sublease, mortgage or other transfer of all or any part of the Equipment, or any right or interest therein, for financing purposes, provided that each such assignment, pledge, lease, sublease, mortgage or other transfer shall be subject to the rights of the City pursuant to this Agreement and applicable law. The consent of the City shall not be required with respect to any transfer to, or taking of possession by, any banking or lending institution that is a secured creditor of the Grantee of all or any part of the Telecommunications System pursuant to the rights of such secured creditor under the laws of the State of Georgia, provided, further that, the City's rights are in no way adversely affected or diminished.

ARTICLE 11.

TERMINATION

11.1. Termination Events. The City, at its option, may terminate this Agreement upon any material breach of the Agreement by the Grantee, including, but not limited to, the following:

11.1.01. The occurrence of any event relating to the financial status of the Grantee that may reasonably lead to the foreclosure or other judicial or nonjudicial sale of all or any material part of the Equipment in the Streets, if the Grantee fails to demonstrate to the

reasonable satisfaction of the City that such event will not lead to such foreclosure or other judicial or nonjudicial sale within thirty (30) days after receipt of notice therefor from the City;

11.1.02. The condemnation by public authority, other than the City, or sale or dedication under threat or in lieu of condemnation, of all or substantially all of the Equipment in the Streets, the effect of which would materially frustrate or impede the ability of the Grantee to carry out its obligations and the purposes of this Agreement, if the Grantee fails to demonstrate to the reasonable satisfaction of the City, within thirty (30) days after receipt of notice therefor from the City, that such condemnation, sale or dedication would not materially frustrate or impede such ability of the Grantee;

11.1.03. If: (A) the Grantee shall (i) make an assignment of the Grantee or the Equipment in the Streets for the benefit of creditors, (ii) become and be adjudicated insolvent, or (iii) petition or apply to any tribunal for, or consent to, the appointment of, or taking possession by, a receiver, custodian, liquidator or trustee or similar official pursuant to state or local laws, ordinances or regulations of or for it or any substantial part of its property or assets, including all or any of the Equipment in the Streets; (B) a writ or warrant of attachment, execution, distraint, levy, possession or any similar process shall be issued by any tribunal against all or any material part of the Grantee's property or assets; (C) any creditor of the Grantee petitions or applies to any tribunal for the appointment of, or taking possession by, a trustee, receiver, custodian, liquidator or similar official for the Grantee or of any material parts of the property or assets of the Grantee under the law of any jurisdiction, whether now or hereinafter in effect, and a final order, judgment or decree is entered appointing any such trustee, receiver, custodian, liquidator or similar official, or approving the petition in any such proceedings; or (D) any final order,

judgment or decree is entered in any proceedings against the Grantee decreeing the voluntary or involuntary dissolution of the Grantee;

11.1.04. Any denial, forfeiture or revocation by any federal, state or local governmental authority having regulatory jurisdiction over the Grantee of any authorization required by law, or the expiration without renewal of any such authorization, and such event(s), either individually or in the aggregate, materially jeopardize the provision by the Grantee of Telecommunications Services, and the Grantee fails to take steps to obtain or restore such authorization within thirty (30) days after notice;

11.1.05. Any failure of the Grantee to maintain the insurance required by Article 8 of this Agreement;

11.1.06. Any failure of the Grantee to maintain the Performance Bond/Security Fund required by Article 9 of this Agreement;

11.1.07. Any failure of the Grantee to comply with the transfer restrictions set forth in Article 10 of this Agreement;

11.1.08. Any failure of the Grantee to comply with any other material provision of this Agreement that is not cured within thirty (30) days after the Grantee receives notice from the City; and

11.1.09. Any persistent failure of the Grantee after notice to comply with any term, condition or provision of this Agreement or any other ordinance, law, regulation, rule or order of the City.

11.2. Rights Upon Termination. In the event of any termination of this Agreement, whether pursuant to this Article 11 or by the expiration of the Term, Grantee, at its election

(i) shall offer, in writing for a period of at least sixty (60) days , to sell the Equipment to the City or the City's designee at a price to be determined in accordance with Section 11.3; (ii) may seek to sell the Equipment to an unaffiliated third party provided such third party has obtained a franchise from the City; or (iii) `at the Grantee's cost and expense, shall remove the Equipment in the Streets. In the event the City, the City's designee or a third party franchisee does not purchase the Equipment, the Grantee shall remove the Equipment in the Streets.

11.3. Price. The price to be paid to the Grantee upon an acquisition pursuant to Section 11.2 shall be the fair market value of the Equipment in the Streets, with no value allocable to the Franchise itself. The date of valuation for purposes of Section 11.2 shall be the date of termination of the Franchise. For the purpose of determining such valuation, the parties shall select a mutually agreeable independent appraiser to compute the purchase price in accordance with industry practice and the aforementioned standards. If the parties cannot agree on an appraiser in ten (10) days, the parties will seek an appraiser from the American Arbitration Association. The appraiser shall be afforded access to the Grantee's books and records, as necessary to make the appraisal. The parties shall share equally the costs and expenses of the appraiser. The City will notify the Grantee, within sixty (60) days after receipt of the appraisal, of its election of rights pursuant to Section 11.2. If the City elects to make the purchase permitted under Section 11.2, it will purchase the same at a closing to occur within a reasonable time after its election.

11.4. Grantee's Obligations. In the event of any acquisition of the Equipment in the Streets by the City or the City's designee pursuant to Section 11.2 of this Agreement, the Grantee shall:

11.4.01. Cooperate with the City to effectuate an orderly transfer to the City of all records and information concerning the Equipment in the Streets;

11.4.02. Promptly execute all appropriate documents to transfer to the City title to the Equipment in the Streets as well as all contracts, leases, licenses, permits, rights-of-way, and any other rights, contracts or understandings necessary to maintain and operate the Equipment in the Streets, as appropriate; and

11.4.03. Promptly supply the City with all records necessary to (1) reflect the City's ownership of the Equipment in the Streets; and (2) operate and maintain the Equipment in the Streets, including, without limitation, all Customer records and plant and Equipment layout documents.

11.5. Removal at City's Discretion. Upon any termination of this Agreement, the City, in its sole discretion, may, but shall not be obligated to, direct the Grantee to remove, at the Grantee's sole cost and expense, all, or any portion designated by the City, of the Equipment in the Streets in accordance with all applicable requirements of the City and subject to the following:

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

11.5.02. The City shall have the right to inspect and approve the condition of such Streets after removal and, to the extent that the City reasonably determines in good faith that said Streets and other property have not been left in materially as good condition as that prevailing prior to the Grantee's removal of the Equipment, the Grantee shall be liable to the City for the cost of restoring the Streets and other property to said condition;

11.5.03. The Performance Bond/Security Fund, liability insurance and indemnity provisions of this Agreement shall remain in full force and effect during the entire period of removal and associated repair of all Streets, and for not less than one hundred and twenty (120) days thereafter; and

11.5.04. Removal shall be commenced within thirty (30) days of the removal order by the City and shall be substantially completed within twelve (12) months thereafter, including all reasonably associated repair of the Streets.

11.6. Failure to Commence Removal. If, in the reasonable judgment of the City, the Grantee fails to commence removal of the Equipment in the Streets within thirty (30) days after the City's removal order, or if the Grantee fails to substantially complete such removal, including all associated repair of the Streets, within twelve (12) months thereafter, then, to the extent not inconsistent with applicable law, the City shall have the right to:

11.6.01. Declare that all right, title and interest to the Equipment in the Streets belong to the City with all rights of ownership, including, but not limited to, the right to connect and use the Equipment or to effect a transfer of all right, title and interest in the Equipment to another Person for operation; or

11.6.02. Authorize removal of the Equipment installed by the Grantee in the Streets, at the Grantee's cost and expense, by another Person.

To the extent consistent with applicable law, any portion of the Grantee's Equipment in the Streets designated by the City for removal and not timely removed by the Grantee shall belong to and become the property of the City without payment to the Grantee, notwithstanding the provisions of Section 11.3 hereof; and the Grantee shall execute and deliver such documents as the City shall request, in form and substance acceptable to the City, to evidence such ownership by the City.

ARTICLE 12.

SUBSEQUENT ACTION

12.1. Procedures in Event of Subsequent Invalidity. In the event that, after the Effective Date, any court, agency, commission, legislative body or other authority of competent jurisdiction (A) declares this Agreement invalid, in whole or in part; or (B) requires the Grantee either to (i) perform any act that is inconsistent with any provision of this Agreement, or (ii) cease performing any act required by any provision of this Agreement, including any obligations with respect to compensation or other financial obligations pursuant to this Agreement, then the Grantee shall promptly notify the City of such fact. Upon receipt of such notification, the City, acting in good faith, shall determine whether such declaration or requirement has a material and adverse effect on this Agreement. If the City, acting in good faith, determines that such declaration or requirement does not have a material and adverse effect on this Agreement, then the Grantee shall comply with such declaration or requirement. If the City, acting in good faith, determines that such declaration or requirement does have such an

effect, or that compliance with such declaration or requirement by the Grantee would materially frustrate or impede the ability of the Grantee to carry out its obligations pursuant to, and the purposes of, this Agreement, then the Grantee and the City shall enter into good faith negotiations to amend this Agreement so as to accommodate said declaration or requirement and to enable the Grantee to perform obligations and provide Telecommunications Services equivalent to those performed and/or provided immediately prior to such declaration or requirement, to the maximum extent consistent with said declaration or requirement. If the Grantee fails to negotiate in good faith to produce an agreement that is reasonably acceptable to both the City and the Grantee, then the City may accelerate the expiration of the Term so that the Term shall expire on a date determined by the City not less than thirty-six (36) months after such determination.

ARTICLE 13.

MISCELLANEOUS

13.1. Appendices. The Appendices to this Agreement, attached hereto, and all portions thereof and exhibits thereto, are, except as otherwise specified in such Appendices, incorporated herein by reference and expressly made a part of this Agreement. The procedures for approval of any subsequent amendment or modification to said Appendices shall be the same as those applicable to any amendment or modification hereof, except as specified in such Appendices or elsewhere in this Agreement.

13.2. Action Taken by City. Any action to be taken by the City pursuant to this Agreement shall be taken in accordance with the applicable Federal, State and City rules and procedures, as said rules and procedures may be amended or modified throughout the Term.

13.3. Entire Agreement. This Agreement, including all Appendices, embodies the entire understanding and agreement of the City and the Grantee with respect to the subject matter hereof and merges and supersedes all prior representations, agreements and understandings, whether oral or written, between the City and the Grantee with respect to the subject matter hereof, including, without limitation, all prior drafts of this Agreement and any Appendix to this Agreement and any and all written or oral statements or representations by any official, employee, agent, attorney, consultant or independent contractor of the City or the Grantee.

13.4. Delays and Failures Beyond Control of Grantee. Notwithstanding any other provision of this Agreement, the Grantee shall not be liable for delay in performance of, or failure to perform, in whole or in part, its obligations pursuant to this Agreement due to strike, war or act of war (whether an actual declaration of war is made or not), insurrection, riot, act of public enemy, accident, fire, flood or other act of God, technical failure, sabotage or other event, where the Grantee has exercised all due care reasonable in the circumstances in the prevention thereof, to the extent that such causes or other events are beyond the control of the Grantee and such causes or events are without the fault or negligence of the Grantee. In the event that any such delay in performance or failure to perform affects only part of the Grantee's capacity to perform, the Grantee shall perform to the maximum extent it is able to do so and shall take all steps within its power to correct such cause(s). The Grantee agrees that in correcting such cause(s), it shall take all reasonable steps to do so in as expeditious a manner as possible. The Grantee will notify the City in writing of the occurrence of an event covered by this Section 13.4 within five (5) business days of the date upon which the Grantee learns of its occurrence.

13.5. Notices. All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments, designations, or other direction or communication hereunder by any party to another shall be in writing and shall be sufficiently given and served upon the other party, immediately if delivered personally or by telex or telecopy (provided with respect to telex and telecopy that such transmissions are received on a business day during normal business hours), the first business day after dispatch if sent by express mail, and the second business day after dispatch if sent by first class mail, registered or certified, return receipt requested, postage prepaid, and addressed as follows:

CITY: Commissioner
Department of Public Works
55 Trinity Avenue, S.W.
Atlanta, Georgia 30335
Fax No.: (404) 658-7552

With a copy to (which shall not constitute notice):

City Attorney
Department of Law
68 Mitchell St., S.W.
Atlanta, Georgia 30335-0332
Fax No.: (404) 658-6894

GRANTEE: X, Inc.

13.6. Additional Representations and Warranties. In addition to the representations, warranties and covenants of the Grantee to the City set forth elsewhere in this Agreement, the Grantee represents and warrants to the City and covenants and agrees (which representations, warranties, covenants and agreements shall not be affected or waived by any inspection or examination made by or on behalf of the City) that, as of the Effective Date:

13.6.01. Organization, Standing, Power, Authorization and Enforceability. The Grantee is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and is duly authorized to do business in the State of Georgia and the City. The Grantee has all requisite power and authority to own or lease its properties and assets, to conduct its businesses as currently conducted and to execute, deliver and perform this Agreement and all other agreements entered into or delivered in connection with or as contemplated hereby, and is qualified to do business and is in good standing as a foreign corporation in each jurisdiction in which it conducts business. The execution, delivery and performance of this Agreement and all other agreements entered into in connection with the transactions contemplated hereby have been duly, legally and validly authorized by all necessary action on the part of the Grantee, and this Agreement and all other agreements entered into in connection with the transactions contemplated hereby have been duly executed and delivered by the Grantee and constitute (or upon execution and delivery will constitute) the valid and binding obligations of the Grantee and are enforceable (or upon execution and delivery will be enforceable) in accordance with their respective terms.

13.6.02. Consent. No consent, approval or authorization of, or declaration or filing with, any public, governmental or other authority (including, without limitation, the FCC or any other federal agency or any state, county, or municipal agency, authority, commission or council, and, if applicable, public utility commissions, telephone companies and other entities) on the part of the Grantee is required for the valid execution and delivery of this Agreement or any other agreement or instrument executed or delivered in connection herewith.

13.6.03. No Coercion; Full Disclosure. The Grantee enters into this Agreement willingly and without coercion, undue influence or duress. The Grantee has reviewed each and every obligation imposed upon it pursuant to this Agreement or otherwise in connection with the Franchise. The Grantee has not entered into this Agreement with the intent to act contrary to the provisions hereof, and the Grantee represents and warrants that so long as it operates the Telecommunications System, it will be bound by the terms and conditions of this Agreement.

Without limiting the specific language of any other representation and warranty herein, all information furnished by the Grantee to the City in connection with this Agreement is accurate and complete in all material respects, and includes all material facts required to be stated therein and does not contain any untrue statement of a material fact or omit any material fact necessary to make the statements therein not misleading. There is no fact known to the Grantee that materially and adversely affects or in the future could reasonably be expected to materially and adversely affect the provision of services that has not been set forth in this Agreement or the other documents, certificates and instruments delivered to the City by or on behalf of the Grantee specifically for use in connection with the transactions contemplated by this Agreement.

13.6.04. Compliance with Law. The Grantee is in compliance with all laws, ordinances, decrees and governmental rules and regulations applicable to the provision of Telecommunications Services over the Equipment and has obtained all government licenses, permits and authorizations necessary for the provision of Telecommunications Services over the Equipment.

13.6.05. Litigation; Investigations. Except as disclosed in writing to the City prior to the execution of this Agreement, there is no civil, criminal, administrative, arbitration or

other proceeding, investigation or claim (including, without limitation, proceedings with respect to unfair labor practice matters or labor organization activity matters), pending or threatened against the Grantee or any Affiliated Person, at law or in equity, or before any foreign, federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, including, without limitation, matters involving the granting of a temporary or permanent injunction against the Grantee or any Affiliated Person that, if granted, would have a material adverse affect on the business, operation, properties, assets or financial condition of the Grantee, or which questions the validity or prospective validity of this Agreement, or of any essential element upon which this Agreement depends, or of any action to be taken by the Grantee or any Affiliated Person.

13.6.06. Fees. The Grantee has paid all franchise, license or other fees and charges that have become due pursuant to any franchise or permit and has made adequate provisions for any such fees and charges that have accrued.

13.6.07. Licenses and Permits. The Grantee has duly secured, or will secure in a timely fashion, all permits and licenses required in connection with the construction, installation, operation, upgrade, repair, maintenance and removal of Equipment and the provision of Telecommunications Services therewith, and has filed or will file all required registrations, applications, reports and other documents with the FCC and public utilities commissions and other entities exercising jurisdiction over the provision by the Grantee of Telecommunications Services or the construction of delivery systems therefor. Further, to the Grantee's knowledge, no event has occurred that could (i) result in the revocation or termination of any such permits, licenses or authorizations, or (ii) materially and adversely affect any rights of the Grantee. To the

Grantee's knowledge, no event has occurred that permits revocation or termination of any such permit, license or authorization or that materially and adversely affects or, so far as the Grantee can now foresee, will materially and adversely affect, the provision of Telecommunications Services by the Grantee. The Grantee has obtained, or will obtain in a timely fashion, all leases, easements and equipment rental or other agreements necessary for the provision of Telecommunications Services as now provided by the Grantee.

13.7. Additional Covenants. Until the termination of this Agreement and the satisfaction in full by the Grantee of its obligations under this Agreement, in consideration of the Franchise, the Grantee and its guarantor(s), as applicable, agree that they will comply with the following affirmative covenants, unless the City otherwise consents in writing:

13.7.01. Compliance with Laws, Licenses and Permits. The Grantee shall comply with: (i) all applicable laws, rules, regulations, orders, writs, decrees and judgments (including, but not limited to, those of the FCC and any other federal, state agency or authority of competent jurisdiction); and (ii) all valid local laws and all valid rules, regulations, orders, or other directives of the City issued pursuant to this Agreement. The Grantee shall have the sole responsibility for obtaining all permits, licenses and other forms of approval or authorization necessary to construct, install, operate, upgrade, repair, maintain and remove Equipment and provide Telecommunications Services therewith.

13.7.02. Maintain Existence. The Grantee shall preserve and maintain its existence, its business, and all of its rights and privileges necessary or appropriate in the normal conduct of said business, unless any such change shall not have a material adverse impact on the Grantee's ability to provide Telecommunications Services as provided herein or fulfill its

obligations hereunder. The Grantee shall maintain its good standing in the state of formation and continue to qualify to do business and remain in good standing as a foreign corporation in each foreign jurisdiction in which it conducts business. The Grantee shall conduct business in accordance with its charter and bylaws and other governing documents, and shall comply with the material terms of all mortgages, indentures, leases, contracts and other agreements and instruments binding upon it, the failure to comply with which would materially and adversely affect its ability to perform its obligations under this Agreement, except where contested in good faith and by appropriate proceedings.

13.7.03. Financial Condition. The Grantee shall, throughout the Term and thereafter, for as long as the Grantee occupies and uses the Streets to construct, install, operate, upgrade, repair, maintain and remove Equipment, maintain adequate financial resources to perform all obligations pursuant to this Agreement. Upon request, the Grantee shall provide to the City a report addressing such matters and in such detail and containing such substance as the City may reasonably determine, demonstrating that it can perform, on a timely basis, all obligations imposed upon it pursuant to this Agreement and the other agreements to which the Grantee is or becomes a party in connection herewith. The Grantee shall supplement any such report as the City may reasonably request. The request for a report shall not be made more often than once every two (2) years unless the City reasonably believes that there is a material risk that the Grantee, in light of its financial resources and obligations, will not or may not fully perform the obligations of this Agreement, in which case the City may immediately request such a report from the Grantee.

13.7.04. Condition of Equipment. All Equipment in the Streets will be maintained in good repair and proper working order and condition throughout the Term.

13.8. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted transferees and assigns. All of the provisions of this Agreement apply to the Grantee, its successors, and assigns.

13.9. No Waiver; Cumulative Remedies. No failure on the part of the City to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right preclude any other right, all subject to the conditions and limitations established in this Agreement. The rights and remedies provided herein are cumulative and not exclusive of any remedies provided by law, and nothing contained in this Agreement shall impair any of the rights of the City under applicable law, subject in each case to the terms and conditions of this Agreement. A waiver of any right or remedy by the City at any one time shall not affect the exercise of such right or remedy or any other right or other remedy by the City at any other time. In order for any waiver of the City to be effective, it must be in writing.

13.10. Severability. If any section, subsection, sentence, clause, phrase or other portion of this Agreement is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect.

13.11. Headings; Other Terms. The headings contained in this Agreement are to facilitate reference only, do not form a part of this Agreement, and shall not in any way affect the construction or interpretation hereof. Terms such as "hereby," "herein," "hereof," "hereinafter," "hereunder," and "hereto" refer to this Agreement as a whole and not to the particular sentence or paragraph where they appear, unless the context otherwise requires. The term "may" is permissive; the terms "shall" and "will" are mandatory, not merely directive. All references to any gender shall be deemed to include all others, as the context may require. Terms used in the plural include the singular, and vice versa, unless the context otherwise requires.

13.12. No Agency. The Grantee shall conduct the work to be performed pursuant to this Agreement as an independent contractor and not as an agent of the City.

13.13. Survival. All representations and warranties contained in this Agreement shall survive the Term. The Grantee acknowledges that certain of the obligations to be performed under this Agreement are to be performed after the Franchise terminates or expires.

13.14. Delegation of City Rights. The City reserves the right to delegate and redelegate, from time to time, any of its rights or obligations under this Agreement to any body, organization or official. Upon any such delegation or redelegation, references to "City" in this Agreement shall refer to the body, organization or official to whom such delegation or redelegation has been made. Any such delegation by the City shall be effective upon written notice by the City to the Grantee of such delegation. Upon receipt of such notice by the Grantee, the Grantee shall be bound by all terms and conditions of the delegation not in conflict with this Agreement. Any such delegation, revocation or redelegation, no matter how often made, shall not be deemed an amendment to this Agreement or require any consent of the Grantee.

13.15. Claims Under Agreement. The City and the Grantee, on its behalf and on behalf of its guarantor(s), as applicable, agree that any and all claims asserted by or against the City arising under this Agreement or related thereto shall be heard and determined by the appropriate judicial or administrative forum having proper jurisdiction thereof, including but not limited to the FCC, the GPSC, a court of the United States located in the City or a court of the State of Georgia located in the City. Further, the Grantee shall reimburse the City for all reasonable transportation, lodging and similar related travel costs incurred by the City in defending successfully any action brought by the Grantee against the City before the FCC and heard outside the corporate limits of the City.

13.16. Modification. Except as otherwise provided in this Agreement, any Appendix to this Agreement, or applicable law, no provision of this Agreement nor any Appendix to this Agreement, shall be amended or otherwise modified, in whole or in part, except by an instrument, in writing, duly executed by the City and the Grantee, which amendment shall be authorized on behalf of the City through the adoption of an appropriate resolution or order by the City, as required by applicable law.

13.17. Reservation of Rights. The City reserves the right to adopt or issue, to the extent permitted by applicable law, such rules, regulations, orders or other directives governing the installation and maintenance of the Equipment and/or the Telecommunications System as it shall find necessary or appropriate in the exercise of its police power or in furtherance of the purposes of this Agreement. The Grantee expressly agrees to comply with all such rules, regulations, orders or other directive. No rule, regulation, order or other directive issued pursuant to this Section 13.17 shall constitute an amendment to this Agreement.

IN WITNESS WHEREOF, the party of the first part, by its Mayor, thereunto duly authorized by the City Council of the City has caused the corporate name of the City to be hereunto signed and the corporate seal of the City to be affixed and the Grantee, the party of the second part, by its officers thereunto duly authorized, has caused its name to be hereunto signed and its seal to be hereunto affixed as of the date and year first above written.

CITY OF ATLANTA, GEORGIA

Attest:

By: _____
Mayor

_____
Municipal Clerk
(City Seal)

RECOMMENDED:

_____
Commissioner
Department of Public Works

By: _____
Chief Operating Officer

APPROVED AS TO FORM:

APPROVED:

_____
Deputy City Attorney

_____
Chief Financial Officer

Attest:

DOMINION TELECOM, INC.

By: _____
Corporate Secretary
(Corporate Seal)

By: _____