

ORDINANCE NO. 98-05

AN ORDINANCE APPROVING A TELECOMMUNICATIONS
FRANCHISE AGREEMENT FOR THE CITY OF WENDOVER, TOOELE
COUNTY, UTAH.

Preamble

A. The City of Wendover, Tooele County, Utah is authorized by Utah Code Annotated Title 10, Chapter 8, and by other provisions of law to enact rules and regulations governing the use of public rights of way within the City, including excavation therein.

B. The Utah League of Cities and Towns, in conjunction with various public and private entities has prepared and proposed a model Telecommunications Franchise Agreement.

C. The City has reviewed the proposed model Telecommunications Franchise Agreement, and deems it in the best interest of the City to adopt the same, with revisions designed to meet the special needs of the City.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF
WENDOVER, TOOELE COUNTY, UTAH AS FOLLOWS:

Section 1. Adoption of Agreement. An Agreement governing telecommunications franchises within the City is hereby adopted, to read in its entirety as set forth in Exhibit "A." Said Agreement may be modified by the Mayor or his designee to meet the needs of the City and telecommunications providers, as provided in the City's Telecommunications Right of Way Ordinance.

Section 2. Severability. If any section, paragraph, clause or provision of this ordinance shall be held invalid, unlawful or unenforceable, the same shall not effect the validity or enforceability of the remaining provisions of this Ordinance.

City of Wendover, Utah
Ordinance Approving Telecommunications
Franchise Agreement

Section 5. Effective Date. This ordinance shall become effective twenty days after publication or posting or 30 days after final passage by the governing body, whichever is closer to final passage.

PASSED AND ADOPTED BY THE CITY COUNCIL OF WENDOVER, TOOELE COUNTY, UTAH THIS 4TH DAY OF FEBRUARY, 1998.

THE CITY OF WENDOVER

BY:



KENT PETERSON
MAYOR

ATTEST:


MARGARET WHEELER
CITY RECORDER

EXHIBIT "A"

City of Wendover, Utah
Telecommunications Franchise Agreement

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT (hereinafter "Agreement") is entered into by and between the City of Wendover, Tooele County, Utah (hereinafter the CITY"), a municipal corporation and political subdivision of the State of Utah, with principal offices at P.O. Box 430, 100 South 9th Street, Wendover, Utah 84083, and _____ (hereinafter "PROVIDER"), with its principal offices at _____.

WITNESSETH:

WHEREAS, the PROVIDER desires to provide voice, data or video transmission services within the CITY and in connection therewith to establish a telecommunications network in, under, along, over and across present and future rights-of-way of the CITY; and

WHEREAS, the CITY has enacted Ordinance No. 98- 05 (hereinafter the "Telecommunications Rights-of-Way Ordinance") which governs the application and review process for Telecommunication Franchises in the CITY; and

WHEREAS, the CITY, in exercise of its management of public Rights-of-Way, believes that it is in the best interest of the public to provide the PROVIDER a nonexclusive franchise to operate a telecommunications network in the CITY.

NOW, THEREFORE, in consideration of the mutual covenants and agreements of the parties contained herein, and for other good and valuable consideration, the CITY and the PROVIDER agree as follows:

ARTICLE 1. FRANCHISE AGREEMENT AND ORDINANCE.

1.1. Agreement. Upon approval by the CITY Council and execution by the parties, this Agreement shall be deemed to constitute a contract by and between CITY and PROVIDER.

1.2. Ordinance. The CITY has adopted the Telecommunications Rights-of-Way Ordinance which is attached to this Agreement as Exhibit "A" and incorporated herein by reference. The PROVIDER acknowledges that it has had an opportunity to read and become familiar with the Telecommunications Rights-of-Way Ordinance. The parties agree that the provisions and requirements of the Telecommunications Rights-of-Way Ordinance are material terms of this

Agreement, and that each party hereby agrees to be contractually bound to comply with the terms of the Telecommunications Rights-of-Way Ordinance. The definitions in the

Telecommunications Rights-of-Way Ordinance shall apply herein unless a different meaning is indicated. Nothing in this Section shall be deemed to require the PROVIDER to comply with any provision of the Telecommunications Rights-of-Way Ordinance which is determined to be unlawful or beyond the CITY's authority.

1.3. Ordinance Amendments. The CITY reserves the right to amend the Telecommunications Rights-of-Way Ordinance at any time. The CITY shall give the PROVIDER notice and an opportunity to be heard concerning any proposed amendments. If there is any inconsistency between the PROVIDER's rights and obligations under the Telecommunications Rights-of-Way Ordinance as amended and this Agreement, the provisions of this Agreement shall govern during its term. Otherwise, the PROVIDER agrees to comply with any such amendments.

1.4. Franchise Description. The Telecommunications Franchise provided hereby shall confer upon the PROVIDER the nonexclusive right, privilege, and franchise to construct and maintain a telecommunications network in, under, above and across the present and future public Rights-of-Way in the CITY. The franchise does not grant to the PROVIDER the right, privilege or authority to engage in community antenna (or cable) television business; although, nothing contained herein shall preclude the PROVIDER from (1) permitting those with a cable franchise who are lawfully engaged in such business to utilize the PROVIDER's System within the CITY for such purposes, or (2) from providing such service in the future if an appropriate franchise is obtained and all other legal requirements have been satisfied.

1.5. Licenses. The PROVIDER acknowledges that it has obtained the necessary approvals, licenses or permits required by federal and state law to provide telecommunication services consistent with the provisions of this Agreement and with the Telecommunications Rights-of-Way Ordinance.

1.6. Relationship. Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in a manner that would indicate any such relationship with each other.

ARTICLE 2. FRANCHISE FEE.

2.1. Franchise Fee. For the Franchise granted herein, the PROVIDER shall pay to the CITY a franchise fee of five percent (5.0%) of its Gross Revenues, less any business license fee or business license tax enacted by the CITY. All payments shall be made to the CITY, and sent as follows, unless the PROVIDER is otherwise notified of a change in address in writing by the CITY:

City of Wendover, Utah
P.O. Box 430
Wendover, Utah 84083

2.2. Up-front Franchise Fee. Upon granting of this Franchise, the Provider shall pay a \$2500 up-front franchise fee. The Provider may offset the franchise fee paid to the City pursuant to Article 2.1, up to the amount of the up-front franchise fee paid to the City.

2.3. Equal Treatment. CITY agrees that if any service forming part of the base for calculating the franchise fee under this Agreement is, or becomes, subject to competition from a third party, the CITY will either impose and collect from such third party a fee or tax on Gross Revenues from such competing service in the same percentage specified herein, plus the percentage specified as a utility revenue tax or license fee in the then current ordinances of the CITY, or waive collection of the fee provided for herein that are subject to such competition.

ARTICLE 3. TERM AND RENEWAL.

3.1. Term and Renewal. The franchise granted to PROVIDER shall be for a period of _____ () years commencing on the first day of the month following this Agreement, unless this Franchise be sooner terminated as herein provided. At the end of the initial _____ () year term of this Agreement, the franchise granted herein may be renewed by the PROVIDER upon the same terms and conditions as contained in this Agreement for an additional _____ () year term, by providing to the CITY's representative designated herein written notice of the PROVIDER's intent to renew not less than ninety (90) calendar days before the expiration of the initial franchise term.

3.2. Rights of PROVIDER Upon Expiration or Revocation. Upon expiration of the franchise granted herein, whether by lapse of time, by agreement between the PROVIDER and the CITY, or by revocation or forfeiture, the PROVIDER shall have the right to remove from the Rights-of-Way any and all of its System, but in such event, it shall be the duty of the PROVIDER, immediately upon such removal, to

restore the Rights-of Way from which such System is removed to as good condition as the same was before the removal was effected.

ARTICLE 4. PUBLIC USE RIGHTS.

4.1. City Uses of Poles and Overhead Structures. The CITY shall have the right, without cost, to use all poles owned by the PROVIDER within the CITY for fire alarms, police signal systems, or any lawful public use; provided, however, any said uses by the CITY shall be for activities owned, operated or used by the CITY for any public purposes and shall not include the provision of telecommunications service to third parties.

4.2. Limitations on Use Rights. Nothing in this Agreement shall be construed to require the PROVIDER to increase pole capacity, alter the manner in which the PROVIDER attaches equipment to the poles, or alter the manner in which the PROVIDER operates and maintains its equipment. Such CITY attachments shall be installed and maintained in accordance with the reasonable requirements of the PROVIDER and the current National Electrical Safety Code. CITY attachments shall be attached or installed only after written approval by the PROVIDER, which approval will be processed in a timely manner and will not be unreasonably withheld.

4.3. Maintenance of CITY Facilities. The CITY's use rights shall also be subject to the parties reaching an agreement regarding the CITY's maintenance of the CITY attachments.

ARTICLE 5. POLICE POWERS.

The CITY expressly reserves, and the PROVIDER expressly recognizes, the CITY's right and duty to adopt, from time to time, in addition to provisions herein contained, such ordinances and rules and regulations as the CITY may deem necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties.

ARTICLE 6. CHANGING CONDITIONS AND SEVERABILITY.

6.1. Meet to Confer. The PROVIDER and the CITY recognize that many aspects of the telecommunication business are currently the subject of discussion, examination and inquiry by different segments of the industry and affected regulatory authorities and that these activities may ultimately result in fundamental changes in the way the PROVIDER conducts its business and the way

the CITY regulates the business. In recognition of the present state of uncertainty respecting these matters, the PROVIDER and the CITY each agree, upon request of the other during the term of this Agreement, to meet with the other and discuss in good faith whether it would be appropriate, in view of developments of the kind referred to above during the term of this Agreement, to amend this Agreement or enter into separate, mutually satisfactory arrangements to effect a proper accommodation of any such developments.

6.2. Severability. If any section, sentence, paragraph, term or provision of this Agreement or the Telecommunications Rights-of-Way Ordinance is for any reason determined to be or rendered illegal, invalid or superseded by other lawful authority, including any state or federal, legislative, regulatory or administrative authority having jurisdiction thereof, or is determined to be unconstitutional, illegal or invalid by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision, all of which shall remain in full force and effect for the term of this Agreement or any renewal or renewals thereof. Provided that if the invalidated portion is considered a material consideration for entering into this Agreement, the parties will negotiate, in good faith, an amendment to this Agreement. As used herein, "material consideration" for the CITY is its ability to collect the Franchise Fee during the term of this Agreement and its ability to manage the Rights-of-Way in a manner similar to that provided in this Agreement, the Telecommunications Rights-of-Way Ordinance, and the CITY's excavation ordinance. For the PROVIDER, "material consideration" is its ability to use the Rights-of-Way for telecommunication purposes in a manner similar to that provided in this Agreement, the Telecommunications Rights-of-Way Ordinance, and the CITY's excavation ordinance.

ARTICLE 7. EARLY TERMINATION, REVOCATION OF FRANCHISE AND OTHER REMEDIES.

7.1. Grounds for Termination. The CITY may terminate or revoke this Agreement and all rights and privileges herein provided for any of the following reasons:

(a) The PROVIDER fails to make timely payments of the Franchise Fee as required under Article 2 of this Agreement and does not correct such failure within sixty (60) calendar days after written notice by the CITY of such failure;

(b) The PROVIDER, by act or omission, materially violates a material duty herein set forth in any particular within the PROVIDER's control, and with respect to which redress is not otherwise herein provided. In such event, the CITY, acting by or through its CITY Council, may determine, after hearing, that such failure is of a material nature, and thereupon, after written notice giving the PROVIDER notice of such determination, the PROVIDER, within sixty (60) calendar days of such notice, shall commence efforts to remedy the conditions identified in the notice and shall have ninety (90) calendar days from the date it receives notice to remedy the conditions. After the expiration of such 90-day period and failure to correct such conditions, the CITY may declare the franchise forfeited and this Agreement terminated, and thereupon, the PROVIDER shall have no further rights or authority hereunder; provided, however, that any such declaration of forfeiture and termination shall be subject to judicial review as provided by law, and provided further, that in the event such failure is of such nature that it cannot be reasonably corrected within the 90-day time period provided above, the CITY shall provide additional time for the reasonable correction of such alleged failure if the reason for the noncompliance was not the intentional or negligent act or omission of the PROVIDER; [for an Agreement with the incumbent local exchange carrier, they should be allowed to continue operation while the issue is being negotiated in good faith; or

(c) The PROVIDER becomes insolvent, unable or unwilling to pay its debts; is adjudged bankrupt; or all or part of its facilities should be sold under an instrument to secure a debt and is not redeemed by the PROVIDER within sixty (60) days.

7.2. Reserved Rights. Nothing contained herein shall be deemed to preclude the PROVIDER from pursuing any legal or equitable rights or remedies it may have to challenge the action of the CITY.

7.3. Remedies at Law. In the event the PROVIDER or the CITY fails to fulfill any of its respective obligations under this Agreement, the CITY or the PROVIDER, whichever the case may be, shall have a breach of contract claim and remedy against the other, in addition to any other remedy provided herein or by law; provided, however, that no remedy that would have the effect of amending the specific provisions of this Agreement shall become effective without such action that would be necessary to formally amend the Agreement.

7.4. Third Party Beneficiaries. The benefits and protection provided by this Agreement shall inure solely to the benefit of the CITY and the PROVIDER. This Agreement shall not be deemed to create any right in any person who is not a party

and shall not be construed in any respect to be a contract in whole or in part for the benefit of any third party (other than the permitted successors and assigns of a party hereto).

ARTICLE 8. PARTIES' DESIGNEES.

8.1. CITY Designee and Address. The Mayor of the City of Wendover or his/her designee(s) shall serve as the CITY's representative regarding administration of this Agreement. Unless otherwise specified herein or in the Telecommunications Rights-of-Way Ordinance, all notices from the PROVIDER to the CITY pursuant to or concerning this Agreement, shall be delivered to the CITY's representative at the address stated in paragraph 2.1, above, or such other officer and address as the CITY may designate by written notice to the PROVIDER.

8.2. PROVIDER Designee and Address. The PROVIDER'S designee and his/her address are as follows: _____
_____. The PROVIDER'S designee shall serve as the PROVIDER's representative regarding administration of this Agreement. Unless otherwise specified herein or in the Telecommunications Rights-of-Way Ordinance, all notices from the CITY to the PROVIDER pursuant to or concerning this Agreement, shall be delivered to the address listed in this paragraph 8.2, and such other office as the PROVIDER may designate by written notice to the CITY.

8.3. Failure of Designee. The failure or omission of the CITY's or PROVIDER's representative to act shall not constitute any waiver or estoppel by the CITY or PROVIDER.

ARTICLE 9. INSURANCE AND INDEMNIFICATION

9.1. Insurance. Prior to commencing operations in the CITY pursuant to this Agreement, the PROVIDER shall furnish to the CITY evidence that it has adequate general liability and property damage insurance. The evidence may consist of a statement that the PROVIDER is effectively self-insured if the PROVIDER has substantial financial resources, as evidenced by its current certified financial statements and established credit rating, or substantial assets located in the state of Utah. Any and all insurance, whether purchased by the PROVIDER from a commercial carrier, whether provided through a self-insured program, or whether provided in some other form or other program, shall be in a form, in an amount and of a scope of coverage acceptable to the CITY.

9.2. Indemnification. The PROVIDER agrees to indemnify, defend and hold the CITY harmless from and against any and all claims, demands, liens, and all liability or damage of whatsoever kind on account of or arising from the PROVIDER's acts or omissions pursuant to or related to this Agreement, and to pay any and all costs, including reasonable attorneys' fees, incurred by the CITY in defense of such claims. The CITY shall promptly give written notice to the PROVIDER of any claim, demand, lien, liability, or damage with respect to which the CITY seeks indemnification and, unless in the CITY's judgment a conflict of interest may exist between the parties with respect to the claim, demand, lien, liability, or damage, the CITY shall permit the PROVIDER to assume the defense of such with counsel of the PROVIDER's choosing, unless the city reasonably objects such counsel. Notwithstanding any provision of this section to the contrary, the PROVIDER shall not be obligated to indemnify, defend or hold the CITY harmless to the extent any claim, demand, lien, damage, or liability arises out of or in connection with negligent acts or omissions of the CITY.

ARTICLE 10. GENERAL PROVISIONS.

10.1. Binding Agreement. The parties represent that (a) when executed by their respective parties, this Agreement shall constitute legal and binding obligations of the parties; and (b) that each party has complied with all relevant statutes, ordinances, resolutions, by-laws and other legal requirements applicable to their operation in entering into this Agreement.

10.2. Utah Law. This Agreement shall be interpreted pursuant to Utah law.

10.3. Time of Essence. Time shall be of the essence of this Agreement.

10.4. Interpretation of Agreement. The invalidity of any portion of this Agreement shall not prevent the remainder from being carried into effect. Whenever the context of any provision shall require it, the singular number shall be held to include the plural number, and vice versa, and the use of any gender shall include any other and all genders. The paragraphs and section headings in this Agreement are for convenience only and do not constitute a part of the provisions hereof.

10.5. No Presumption. All parties have participated in preparing this Agreement. Therefore, the parties stipulate that any court interpreting or construing the Agreement shall not apply the rule of construction that the Agreement should be more strictly construed against the drafting party.

10.6. Amendments. This Agreement may be modified or amended by written agreement only. No oral modifications or amendments shall be effective.

10.7. Binding Agreement. This Agreement shall be binding upon the heirs, successors, administrators and assigns of each of the parties.

SIGNED AND ENTERED INTO this 4th day of February, 1998.

THE CITY OF WENDOVER, UTAH:

PROVIDER:

[Signature]

BY: _____

ITS: Mayor

ITS: _____

ATTEST:

Margaret L. Wheeler
City Recorder

STATE OF UTAH)
COUNTY OF Tooele) : ss.

On the 5 day of February, 1998, personally appeared before me Margaret Wheeler, who being by me duly sworn did say that he/she is the City Recorder of Wendover, ut, and that the foregoing instrument was signed in behalf of said entity by authority of a resolution of its board of directors; and they acknowledged to me that said corporation executed the same.

[Signature]
Notary Public

Seal:

