

RESOLUTION NO. 269

A RESOLUTION CALLING FOR THE APPROVAL OF A NEW RIGHTS-OF-WAY USE AGREEMENT FOR COMMUNICATIONS FACILITIES.

WHEREAS, the City of Chesterfield previously approved an Interim Right-of-Way Application Procedure and a Use Agreement; and

WHEREAS, the City now has adopted a new ordinance regulating the use of rights-of-way for the construction, operation, and maintenance of communication systems and cable systems; and

WHEREAS, it is now appropriate for a new and modified version of the Right-of-Way Use Agreement for communication facilities to be approved so as to provide an expeditious way for the City to review requests for the use of the rights-of-way; and

NOW THEREFORE BE IT RESOLVED BY THE CITY OF CHESTERFIELD AS FOLLOWS:

Section 1. The City hereby adopts the Rights-of-Way Use Agreement for communication facilities attached as Exhibit A and made a part hereof as if fully set out herein.

Section 2. This ordinance shall take effect and will be in full force and effect from and after its passage and approval.

PASSED AND APPROVED this 19TH day of MARCH, 2001.


Mayor

ATTEST:


City Clerk

**RIGHTS-OF-WAY USE AGREEMENT
FOR COMMUNICATIONS FACILITIES**

THIS AGREEMENT, made and entered into this _____ day of _____, 2001, by and between, the City of Chesterfield, a municipal corporation (the "Licensee"), and _____, (the "City").

WHEREAS, _____ has requested an agreement from the City authorizing the use of the City Rights-of-Way to construct, install, maintain, and operate its communications fiber optic cable and related facilities for communications or related capabilities; and

WHEREAS, Missouri law authorizes the City to regulate the use and occupancy of Rights-of-Way for placement of a System as hereinafter defined, and to require compensation and to adopt rules and regulations regarding such use and occupancy; and

WHEREAS, the City is authorized to and has established standards for occupancy of the Rights-of-Way by communications facilities and other uses that are consistent with and recognize the Public Service Commission's duties and jurisdiction; and

WHEREAS, the City and Licensee desire to execute this Agreement providing for the rate of compensation required to be paid to the City by Licensee, establishing the terms of such use of the Rights-of-Way by Licensee, and incorporating the provisions of the Cable and Communications Code,

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, the Parties mutually agree as follows:

SECTION 1. GENERAL

- 1.1 **Preservation of Police Power Authority.** Any rights granted to Licensee pursuant to this Agreement are subject to the authority of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public.
- 1.2 **Defined Terms.** For purposes of this Agreement, the terms, phrases, words, and their derivatives shall have the meanings as set forth in the Communication and Cable Code of the City, Chapter _____ (the "Code" or "Cable and Communications Code").
- 1.3 **Agreement Subject to Provisions of Cable and Communications Code.** This Agreement fully incorporates the provisions of the Cable and Communications Code as if fully set forth herein, and Licensee agrees as a part of this Agreement to abide by the provisions of such Code, and to be subject to the enforcement by the City as provided therein and in this Agreement as a material term herein. This Agreement may establish supplementary obligations on Licensee, but nothing in this Agreement shall be deemed to waive any obligation or requirement applicable to Licensee authorized or established by the Code.

SECTION 2. GRANT OF AUTHORITY TO USE THE RIGHTS-OF-WAY

- 2.1 **Agreements Non-Exclusive.** This Agreement shall grant nonexclusive privileges to use the Rights-of-Way. The City specifically reserves the right to grant, at any time, such additional Agreements or other rights to use the Rights-of-Way for any purpose and to any other person, including itself, as it deems appropriate, subject to applicable federal and state law.

2.2 **Nature of Rights Granted by this Agreement.** This Agreement shall not convey title, equitable or legal, in the Rights-of-Way, and gives only the right to occupy Rights-of-Way, for the purposes and for the period stated in this Agreement and subject to the requirements herein. This Agreement shall not grant the right to use Facilities owned or controlled by the City or a third-party, without the separate consent of such party, nor shall it excuse Licensee from obtaining appropriate access or pole attachment agreements before locating on Facilities controlled or owned by the City or a third party.

2.2 **Grant.** Licensee is hereby granted the right and privilege to construct, operate, and maintain facilities in, through and along the City's right-of-way and utility easements for the purposes of supplying **Communications Services** on a nonexclusive basis within the City, subject, however, to the terms and conditions herein set forth within this Agreement and the Code, and all such special conditions as may be set forth in **Exhibit A**. As a condition of this grant, Licensee is required to obtain and is responsible for any necessary permit, license certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City the FCC or the Missouri Public Service Commission, subject to Licensee's right to challenge in good faith such requirements.

This Agreement does not provide Licensee the right to provide cable service or operate an Open Video System.

2.3 **Use of Rights-of-Way; Police Powers; Licensee's Use Subordinate.** The Licensee shall construct and maintain its Facilities in accordance with all applicable federal, state and local laws, including all permit requirements, and fee payments, and all other City codes and ordinances in effect as of the date of this Agreement or hereinafter adopted to the extent not in contravention of state or federal law. The City makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of facilities on any particular segment of Rights-of-Way. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon the Licensee. The use of the Rights-of-Way authorized by this Agreement shall in all matters be subordinate to the City's use and rights therein and Licensee shall be limited to such uses as have been expressly granted to Licensee by the City.

2.4 **No interference.** Licensee shall construct and maintain its Facilities so as not to interfere with other users of the Rights-of-Way. Except as may otherwise be provided, the Licensee shall reasonably notify all residents affected by the proposed work prior to commencement of such work. All construction and maintenance by Licensee or its subcontractors shall be performed in accordance with industry standards.

2.5 **Notification, Joint Installation and Collocation Requirements.** Licensee shall, prior to any excavation or installation within the Rights-of-Way, provide sufficient notification and joint installation opportunity on a shared-cost basis to potential users of the Rights-of-Way as may be required by the City. Licensee shall further make its installed facilities available to other Licensees on a nondiscriminatory competitively neutral basis consistent with the requirements of federal law codified at § 47 U.S.C. 224.

2.6 **Additional Facilities Requirements; Planned Infrastructure.** When Licensee installs any new conduit, the Licensee shall simultaneously install sufficient additional conduit or other related facilities ("Excess Conduit") as may be determined by the City Engineer in

accordance with the Code. When sections of Licensee's conduit is installed simultaneously with another Licensee, the cost of such sections of Excess Conduit shall also be cost shared among each licensee as may be established by the City. In no event shall any Licensee that chooses to allow collocation in its Facilities do so in a manner that is competitively discriminatory or creates an obstacle to entry under the terms made available.

- 2.7 **Licensee Responsible for Costs.** The Licensee shall be responsible for all reasonable costs borne by the City that are directly associated with its installation, maintenance, repair, operation, use, and replacement of its Facilities within the Rights-of-Way, that are not otherwise accounted for as part of the Permit fee established pursuant to the Code. All such costs shall be itemized and the City's books and records related to these costs shall be made available upon request to the Licensee. Licensee shall be responsible for its own costs incurred removing or relocating its Facilities when required by the City due to City requirements relating to maintenance and use of the Rights-of-Way for City purposes.

SECTION 3. TERM

This Agreement shall be effective for a term of five (5) years from the effective date herein of this Agreement, subject to termination or forfeiture as provided herein.

SECTION 4. COMPENSATION

- 4.1 **Compensation.** The Licensee agrees to pay the Use Fees and such other compensation in the amount and under such additional regulations and provisions as are set forth in the Code. Licensee acknowledges that it has reviewed the Code and agrees that such compensation is fair and reasonable compensation to the City for use of the Rights-of-Way.
- 4.2 **Taxes; Use Fee Not a Tax.** The Use Fees and other compensation required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City, except as may be provided for in the Code. Licensee acknowledges that the Use Fee is compensation for use of the Rights-of-Way and shall in no way be deemed a tax of any kind.

SECTION 5. TRANSFER OF AGREEMENT OR FACILITIES

- 5.1 **Transfer of Agreement.** The Licensee shall not sell, transfer, lease, assign, sublet or dispose of, in whole or in part, either by forced or voluntary sale, or by ordinary sale, consolidation, or otherwise, this Agreement or any of the rights or privileges granted by this Agreement, without the prior written consent of the City; provided that such transfer may occur without written consent of the City to a wholly owned parent or subsidiary, or between wholly owned subsidiaries, upon thirty days prior notice to the City. Such consent shall not be unreasonably withheld. The City reserves the right to be reimbursed for its reasonable costs relating to a transfer of ownership. Licensee shall not change its name under which it does business with the public without providing at least 30 days prior notice to the City.
- 5.2 **Sale or Lease of Facilities.** Except as otherwise may be provided by law, Licensee shall not lease, sell, or otherwise transfer possession or control of the Facilities, or any portion

thereof, for any purpose to any person that has not obtained a duly issued Agreement, or other grant by the City to use the Rights-of-Way and which includes the authority to use or maintain such leased or transferred Facilities.

SECTION 6. FORFEITURE OF LICENSE AND PRIVILEGE.

In case of failure on the part of the Licensee, its successors and assigns, to comply with any of the provisions of this Agreement, including the provisions of the Code, or if the Licensee, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of the terms of this Agreement, including the provisions of the Code, the Licensee, its successors and assigns, shall forfeit all rights and privileges permitted herein, and all rights hereunder shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings: Before the City proceeds to forfeit this Agreement, it shall first serve a written notice upon the Company, setting forth in detail the neglect or failure complained of, and the Company shall have thirty (30) days thereafter in which to cure the default by complying with the conditions of this Agreement. If at the end of such thirty (30) day period the City determines that the conditions have not been complied with the City shall take action by an affirmative vote of the City Council present at the meeting and voting, to terminate the Agreement; setting out the grounds upon which said Agreement is to be canceled or terminated. Nothing herein shall prevent the City from taking any other action or remedy as may be set forth in the Code or as may otherwise exist at law.

SECTION 7. GENERAL CONDITIONS

- 7.1 **Compliance With Laws.** In performing activities and exercising its rights and obligations under this Agreement, the Licensee shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction and use of public property.
- 7.2 **Enforcement; Attorneys' Fees.** The City shall be entitled to enforce this Agreement through all remedies lawfully available, and Licensee shall pay City its costs of enforcement, including reasonable attorneys' fees in the event that Licensee is determined judicially to have violated the terms of this Agreement.
- 7.3 **Relationship of the Parties.** Under no circumstances shall this Agreement be construed as one of agency, partnership, joint venture, or employment between the parties.
- 7.4 **Relocation or Removal of Facilities.** Licensee shall at its own cost relocate or remove its Facilities as required by the City under such conditions as may be set forth in the Code.
- 7.5 **No Cause of Action Against the City.** The Licensee shall have no remedy or recourse whatsoever against the City for any loss, cost, expense, or damage arising from any of the provisions or requirements of this Agreement, or because of the enforcement thereof by said City, or for the failure of said City to have the authority to grant, all, or any part, of the herein granted; provided that said Licensee expressly acknowledges that it accepted the rights herein granted in reliance upon its independent and personal investigation and understanding of the power of authority of said City to enter into the Agreement herein with Licensee; provided further that the Licensee acknowledges by its acceptance of said Agreement that it has not been induced to enter into this Agreement upon any

understanding, or promise, whether given verbally or in writing by or on behalf of said City, or by any other person concerning any term or condition of this Agreement not expressed herein; provided further that the Licensee acknowledges by the acceptance of this Agreement that it has carefully read the provisions, terms, and conditions hereof and all incorporated provisions and is willing to, and does accept, all of the risk attendant to said provisions, terms, and conditions.

SECTION 8. INDEMNIFICATION

Licensee at its sole cost and expense, hereby agrees to indemnify, protect, defend (with counsel acceptable to the City) and hold harmless the City, its elected officials, officers, employees, and agents, from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and expenses of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of the fact that the City entered into this Agreement with Licensee, the rights granted to Licensee, or the activities performed, or failed to be performed, by Licensee under this Agreement, or otherwise, except to the extent arising from or caused by the sole or gross negligence or willful misconduct of the City, its elected officials, officers, employees, agents or contractors. This indemnification shall survive the expiration or termination of this Agreement for a period of five (5) years after the effective date of expiration or termination.

SECTION 9. MISCELLANEOUS

- 9.1 This Agreement, together with all Exhibits, shall constitute the entire Agreement and no negotiations or discussions prior to execution shall be of any effect.
- 9.2 The invalidity in whole or in part of any provision shall not affect the validity of any other provision.
- 9.3 The right and remedies of the Parties shall be cumulative and in addition to any other rights and remedies provided by law or equity. A waiver of a breach of any provision thereof shall not constitute a waiver of any other breach. The laws of the State of Missouri shall govern this Agreement.
- 9.4 This agreement shall create no third-party beneficiary rights.
- 9.5 Notices shall be in writing, mailed certified with return receipt requested, effective upon receipt and sent to:

The Licensee:

The City:

City of Chesterfield, Missouri
16052 Swingley Ridge
Chesterfield, Missouri 63017

Attn: _____

or to replacement addresses that may be later designed in writing.

SECTION 10. EFFECTIVE AND ACCEPTANCE.

EXHIBIT A

SPECIAL CONDITIONS

The following special conditions shall be a condition of this Agreement and shall supercede any provision in this Agreement to the contrary: