CITY COUNCIL
ATLANTA, GEORGIA

04- 0 -0142

AN ORDINANCE BY CITY UTILITIES COMMITTEE

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE A FRANCHISE AGREEMENT WITH TELEPORT COMMUNICATIONS ATLANTA, INC., A DELAWARE CORPORATION, A WHOLLY OWNED SUBSIDIARY OF AT&T CORP., A NEW YORK CORPORATION, TO PROVIDE TELECOMMUNICATIONS SERVICES USING PUBLIC RIGHT-OF-WAY; SPECIFYING THE COMPENSATION DUE THE CITY OF ATLANTA BY THE FRANCHISE AGREEMENT AND WAIVING A CERTAIN PROVISION OF THE ROW FOR THIS INSTANCE ONLY; AND FOR OTHER PURPOSES

WHEREAS, TELEPORT COMMUNICATIONS ATLANTA, INC., desires to provide telecommunications services on, under over and through the public right-of-way of the City; and

WHEREAS, TELEPORT COMMUNICATIONS ATLANTA, INC., has negotiated a franchise agreement with the City, which provides such access and preserves the rights of the City.

NOW, THEREFORE THE CITY COUNCIL OF THE CITY OF ATLANTA, GEORGIA HEREBY ORDAINS:

SECTION 1: That the Mayor be and is hereby authorized to execute a franchise agreement with TELEPORT COMMUNICATIONS ATLANTA, INC., for use of the public right-of-way for telecommunications purposes.

SECITON 2: That such franchise agreement shall expire and terminate on April 1, 2006. -

SECTION 3: TELEPORT COMMUNICATIONS ATLANTA, INC., shall pay the City an annual franchise fee equal to three percent (3%) of the franchisee's annual Gross Revenue, provided that in any calendar year that Grantee's Gross Revenue does not exceed $500,000.00, the Franchise Fee shall be $15,000.00 per year; provided further, however, that in no event will the Franchise Fee exceed an annual inflation-based cap. During the first two years of this Agreement, this cap will be set at eleven million dollars ($11,000,000.00) annually. For the following three years of this Agreement, this eleven million dollar ($11,000,000.00) cap will be increased annually at the anniversary date of the execution of this Agreement, by the rate of inflation, which will be measured by the percentage change in the Gross-Domestic-Price Index ("GDI"), which is the gross domestic product fixed weight price index calculated by the United States Department of Commerce. 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 15, July 15, October 15, and the 15th day of January of each year throughout the Term. In the 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 or authorized corporate representatives, which verifies Grantee's Gross Revenues for the prior quarter.

SECTION 4: That the City Attorney shall prepare a franchise agreement containing all of the foregoing terms, 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 executed by the Mayor sealed by the Municipal Clerk and delivered to TELEPORT COMMUNICATIONS ATLANTA, INC.

SECTION 6: That the City hereby modifies, waives or amends for this instance only, the following provision of Chapter 138:138-134 (a)(1) —Term of the franchise.

A true copy,
Rhonda Dauphin Johnson
Municipal Clerk, CMC

ADOPTED by the Council MAR 01, 2004
APPROVED by the Mayor MAR 09, 2004

TABLE OF CONTENTS

Page

ARTICLE 1. DEFINITION 2

1.1 Definitions 2

ARTICLE 2. GRANT OF AUTHORITY 6

2.1 Grant of Franchise 6

2.2 Term of Franchise 6

2.3 Nonexclusive Franchise 6

2.4 Renewal. This Agreement may be renewed upon the mutual Consent of the parties for up to two (2) additional two-year Terms 7

2.5 Public Works and Public Improvements 7

2.6 Regulatory Approvals 7

2.7 Street Closings 7

ARTICLE 3. SERVICES 8

3.1 No Discrimination. 8

ARTICLE 4. COMPENSATION AND OTHER PAYMENTS 8

4.1 Franchise Fee 8

4.2 Payment Credits and Deductions 9

4.3 Interest on Late Payments 9

4.4 Reservation of Rights 9

4.5 Remedy for Underpayment 10

4.6 Continuing Obligation and Holdover 10

ARTICLE 5. CONSTRUCTION-RELATED REQUIREMENTS 11

5.1 Quality..... 11

5.2 Protection of Streets..... 11

5.3 No Obstruction..... 11

5.4 No Interference..... 12

5.5 Underground Utilities..... 12

5.6 Moving Equipment..... 12

5.7 Safety Precautions. 12

5.8 Moving Wires..... 12

5.9 Pole Space and Conduit Space..... 13

5.10 Trimming of Trees. 13

5.11 Employee Discrimination Ban..... 13

5.12 Equal Business Opportunity. 14

ARTICLE 6. OVERSIGHT AND MANAGEMENT 15

6.1 City's Police Powers Recognized..... 15

6.2 Permits..... 15

6.3 Reports..... 16

6.4 Books and Records..... 16

6.5 Treatment of Proprietary Information..... 16

6.6 Compliance Audits and Public Hearings..... 17

6.7 Installation Report..... 17

6.8 Additional Filings..... 17

6.9 Nonperformance..... 18

ARTICLE 7. LIABILITY AND INSURANCE..... 18

7.1 Insurance – Specifications..... 18
7.2 Insurance – Maintenance..... 19
7.3 Increased Insurance Coverage..... 19
7.4 Liability Not Limited..... 19
75. Liability of Grantee..... 20
7.6 Liability of City..... 20
7.7 Limitation..... 21
ARTICLE 8. PERFORMANCE BOND/SECURITY FUND/CASH DEPOSIT 21
8.1 General Requirement..... 21
8.2 Indemnification. 21
8.3 Other Purposes. 22
8.4 Withdrawals from the Performance Bond/Security Fund 22
8.5 Notice of Withdrawals..... 22
8.6 Replenishment..... 23
8.7 Not a Limit on Liability. 23
8.8 Form..... 24
ARTICLE 9. TRANSFER RESTRICTIONS..... 24
9.1 Transfer of Interest..... 24
9.2 Permitted Encumbrances..... 24
ARTICLE 10. TERMINATION..... 25
10.1 Termination Events. 25
10.2 Abandonment..... 26
ARTICLE 11. SUBSEQUENT ACTION..... 27
11.1 Procedures in Event of Subsequent Invalidity. 27

ARTICLE 12. MISCELLANEOUS 28

12.1. Appendices..... 28

12.2 Action Taken by City. 28

12.3 Entire Agreement. 28

12.4 Delays and Failures Beyond Control of Grantee. 29

12.5 Change of Law 29

12.6 Notices..... 29

12.7 Additional Representations and Warranties. 30

12.8 Binding Effect..... 32

12.9 No Waiver; Cumulative Remedies..... 32

12.10 Severability..... 33

12.11 Headings; Other Terms. 33

12.12 No Agency..... 33

12.13 Survival..... 33

12.14 Delegation of City Rights..... 34

12.15 Claims Under Agreement. 34

12.16 Modification. 34

12.17 Reservation of Rights. 34

FRANCHISE AGREEMENT

This **AGREEMENT**, executed as of the _____ day of _____, 2001, by and between **THE CITY OF ATLANTA, GEORGIA** (hereinafter referred to as the "City"), and TELEPORT COMMUNICATIONS ATLANTA, INC, a Delaware corporation, a wholly owned subsidiary of AT&T Corp., a new York corporation, duly organized and validly existing under the laws of the State of Delaware, whose principal place of business is located at 118 AT&T Way, Bedminster, New Jersey 07921 (hereinafter referred to as the "Grantee").

WITNESSETH:

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 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;

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 I

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 venture 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, if any.

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 "Construction" means the construction or installation of Equipment used to provide Telecommunications services, consistent with applicable FCC rules.

1.1.07 "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.

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

1.1.09 "Effective Date" means _____, the date this Agreement became effective between the parties.

1.1.10 "Emergency" means a reasonably unforeseen occurrence with a potential to endanger personal safety or health or cause substantial damage to property, including an unplanned disruption of service, which calls for immediate action.

1.1.11 "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.

1.1.12 "FCC" means the Federal Communications Commission.

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

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

1.1.15 "GPSC" means the Georgia Public Service Commission.

1.1.16 "Grantee" means Level 3 Communications

1.1.17 "Gross Revenues" means all revenue that is received, directly or indirectly by the Grantee with facilities in the Right-of-Way, from or in connection with the provision of Telecommunication Services over the Grantee'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.

1.1.18 "Maintenance" means the performance of routine work to prevent troubles or the rearrangement or repair of Equipment consistent with applicable FCC rules.

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

1.1.20 "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.

1.1.21 "SEC" means the Securities and Exchange Commission.

1.1.22 "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.

1.1.23 "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.

1.1.24 "Telecommunications Ordinance" means that portion of the Atlanta City Code contained in Chapter 138, Article V et seq.

1.1.25 "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.

1.1.26 "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.

1.1.27 "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.

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

ARTICLE II

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 and maintain 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, 2006, 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 maintain the public health, safety, and

welfare, provided such occupancy and use or other activity is consistent with applicable law and does not interfere unreasonably with the rights granted to Grantee herein.

2.4 **Renewal.** This Agreement may be renewed upon the mutual consent of the parties 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.

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 shall, promptly after receipt of notice of such interference from the City, protect, alter or relocate such Equipment consistent with applicable law. If the Grantee refuses or neglects to so protect, alter or relocate said Equipment within a reasonable time, the City may, to the extent consistent with applicable law, 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 and state authorities to offer Telecommunications Services, 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 consistent with applicable law.

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 III

SERVICES 3.1

3.1 **No Discrimination.** The Grantee shall provide Telecommunications Services consistent with applicable law.

ARTICLE IV

COMPENSATION AND OTHER PAYMENTS 4.1

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 $500,000.00, the Franchise Fee shall be $15,000.00 per year; provided further, however, that in no event will the Franchise Fee exceed an annual inflation-based cap. During the first two years of this Agreement, this cap will be set at eleven million dollars ($11,000,000.00) annually. For the following three years of the Agreement, this eleven million dollar ($11,000,000.00) cap will be increased annually, at the anniversary date of the execution of this Agreement, by the rate of inflation, which will be measured by the, percentage change in the Gross-Domestic-Price Index ("GDP-PI"), which is the gross domestic product fixed weight price index calculated by the United States Department of Commerce. 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 15, July 15, October 15, and the 15th day of January of each year throughout the Term. In the event the Term 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 or authorized corporate representative(s), which verifies Grantee's Gross Revenues for the prior quarter.

4.2 **Payment Credits and Deductions.** The compensation made pursuant to this Article 4 shall be in addition to and not in lieu of any other fees that Grantee shall be legally 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 required by this Agreement.

4.3 **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 the legal rate of interest pursuant to Ga. Code Ann. § 7-4-2.

4.4 **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 three (3) years of the date on which the payment in question was made to the City and is performed in accordance with Section 7.6. In addition, no payment of any Franchise Fee

by the Grantee shall be construed as any waiver of the Grantee's rights which rights are expressly reserved.

4.5 **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 Grantee shall make full payment of the relevant obligation, including interest at the legal rate set forth in O.C.G.A. § 7-4-2, and shall reimburse the City for all of the reasonable costs associated with the audit or review. Provided further that if, as result of any audit or any other review conducted by the Grantee, the Grantee determines that it has overpaid Franchisee Fees to the City, then the City shall make full refund of the overpayment, including legal interest at the legal rate set forth in O.C.G.A. § 7-4-2, which may be in the form of a credit on future Franchise Fees.

4.6 **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 or to the Grantee 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 V

CONSTRUCTION-RELATED REQUIREMENTS

5.1 **Quality.** All work involved in the construction and maintenance of Equipment shall be performed in a safe, thorough and reliable manner consistent with applicable legal requirements, using materials of good and durable quality. 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 **Protection of Streets.** In connection with the construction and maintenance 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 and maintenance of Equipment.

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 therefore.

5.3 **No Obstruction.** In connection with the construction and maintenance of Equipment, the Grantee shall not, except in an emergency, unreasonably 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.

5.4 **No Interference.** During the course of construction and maintenance of Equipment, the Grantee shall, to the extent not prevented by an emergency, not interfere with other lawful, permitted uses of the Streets.

5.5 **Underground Utilities.** The City may designate certain areas in which it prefers that new Facilities may be placed underground. The Grantee is not required to place transmission and distribution facilities underground when aerial facilities exist and, where existing aerial facilities are being retired and removed from service, replacement will be made using underground construction if technically practical and economically feasible.

5.6 **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 for any such movement of its Equipment, consistent with applicable law.

5.7 **Safety Precautions**. The Grantee shall, at its own cost and expense, undertake all reasonable steps to safeguard its work sites.

5.8 **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 reasonable 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 there from, in which event the City shall not incur any liability to the Grantee or any Affiliated Person. The City shall use its best efforts to consult with the Grantee 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.

5.9 **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 is consistent with applicable law and 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; (iii) the discounts and concessions on conduit and pole attachments set forth in Article V shall not apply when such conduit or pole attachments are used to provide Telecommunications Service in competition with Grantee; and (iv) 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 to the extent permitted by law.

5.10 **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 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.

5.11 **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, sexual orientation, 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.

5.12 **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, Grantee 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 VI

OVERSIGHT AND MANAGEMENT

6.1 **City's Police Powers Recognized**. The City has the right and authority to manage its rights-of-way in the exercise of its police powers. The City reserves the right to adopt or issue rules, regulations, orders or other directives as necessary to exercise such powers in furtherance of the purpose of this Agreement consistent with applicable law, including, but not limited to, the City's Right-of-Way Handbook. The Grantee expressly agrees to comply with all such valid rules, regulations, orders or other directives, including, but not limited to, the City's Right-of-Way Handbook. No rule, regulation, order or other directive issued pursuant to this Section 7.1 shall constitute an amendment to this Agreement.

6.2 **Permits.** Grantee shall obtain permits for construction and maintenance of Equipment in the Public Rights-of-Way consistent with applicable rules and regulations. Applications for permits shall be reviewed, and if the application is complete, the City shall issue a permit as soon as practicable. In the event a permit has not been approved or denied by the Commissioner of Public Works or his designee within thirty (30) days of the receipt of a completed application, the Grantee may request in writing an expedited review of the completed permit application. Upon receipt of a written request for an expedited review, the Commissioner or his designee shall approve or deny said completed application within fourteen days of such request. Notwithstanding the foregoing, this expedited thirty (30) day approval process shall not apply to permit applications that: (1) relate to ongoing major construction activity in the Public Rights-of-Way; or (2) seek to construct facilities in a

specific area in the Public Rights-of-Way that would materially interfere with previously permitted or previously planned activities ongoing or scheduled to begin in the thirty days after receipt of the application. The Commissioner of the Department of Public Works or designee shall be notified as soon as practicable regarding work performed under emergency conditions, and the Grantee shall comply with any reasonable request of the City for the restoration of the public right-of-way.

6.3 **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 reasonably require, and to which the City is legally entitled, to verify compliance with any material term or condition of this Agreement.

6.4 **Books and Records.** Throughout the Term, the Grantee shall maintain complete and accurate books of account and records of the business that pertain to the Grantee's ownership of Equipment in the Public Rights-of-Way, and that are adequate to enable the Grantee to demonstrate, at all times throughout the Term, that it is, and has been, in compliance with each material term and condition of this Agreement. Such books and records shall be made available for review and inspection by the City upon reasonable request therefore. 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 three (3) years following the date on which such document was created.

6.5 **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.

6.6 **Compliance Audits and Public Hearings.** The City may conduct compliance audits and/or hold public hearings with respect to material matters covered in this Agreement at any time during the Term, provided that the City gives the Grantee written notice no less than 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.

6.7 **Installation Report.** On an annual basis the Grantee shall provide to the City with a forecast of the Grantee's reasonably anticipated plans for installation and upgrade inside the City for the coming twenty-four (24) months. To the extent practicable, the City shall take steps to ensure that its agencies that perform the water and sewer work for the City, shall provide the Grantee with their forecast of anticipated plans for installation and upgrade inside the City for the coming twenty-four (24) months. The City, the City's agents and the Grantee shall additionally hold such meetings and exchange such information as they deem necessary with a view towards coordinating their respective activities in these areas. Notwithstanding the foregoing, the Grantee and the City each retain absolute discretion over the timing and other aspects of their proposed projects.

6.8 **Additional Filings.** Upon request, the Grantee shall either provide to the City or direct the City to publicly accessible websites that contain 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.

6.9 **Nonperformance.** If any of the following events occur, the City may notify the Grantee and provide the Grantee with thirty (30) days after the Grantee receives notice from the City to cure the events listed. In the event the Grantee fails to cure the events listed within thirty (30) days, the City may, at its option, terminate this Agreement consistent with Article 11:

6.9.1 Work is performed in the Streets, including, but not limited to the construction and maintenance of equipment, without appropriate permits and other regulatory approval required by law;

6.9.2 Sidewalks, streets, subways, railways, rivers or other traffic to, from or within the corporate limits of the City are unreasonably obstructed without permission having been obtained from the City, as required by Section 6.3 of this Agreement.

6.9.3 Structures in the Streets are altered without City approval or not protected, as required by Section 6.2 of this Agreement.

ARTICLE VII

LIABILITY AND INSURANCE

7.1 **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) 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 duly licensed 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 policy or policies shall insure both (i) the Grantee, and (ii) the City. The foregoing minimum limitation shall not prohibit the Grantee from obtaining a liability insurance policy or policies in excess of such limitations. Alternatively, and in lieu of the foregoing insurance requirements, the

Grantee may elect to self-insure against all or some of the risks associated with the scope of work contained in this Agreement if it can provide evidence of its ability to do so upon request.

7.2 **Insurance - Maintenance.** The insurance policies or self-insurance 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.

7.3 **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 and the Grantee may mutually agree to 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.

7.4 **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 set forth in the Grantee's approved tariffs and

except to the extent necessary to avoid duplicative recoveries from or payments by the Grantee.

7.5 **Liability of Grantee; Indemnification of City.** The Grantee agrees to indemnify and hold harmless the City and all officers, employees, agents, attorneys, consultants and independent contractors of the City, against any and all claims, damages, demands, actions, causes of action, costs and expenses of any nature, which may result from any injury to, or the death of any persons, or from the loss or damages arising out of or in connection with the Grantee's acts or omissions with respect to the construction and maintenance of Facilities covered by permits, including standing permits, issued by the City; except to the extent arising from the negligent acts or willful misconduct or omissions of the City, provided the Grantee is notified in writing of such claim against the City and shall have been given ample opportunity to defend same. 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.

7.6 **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 except to the extent arising from the negligent acts or willful misconduct or omissions of the City. 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 except to the extent arising from the negligent acts or willful misconduct or omissions of the City.

7.7 **Limitation.** As between the City and the Grantee or any Affiliated Person, the liability and indemnity obligations of the Grantee pursuant to this Agreement shall not apply to the negligent acts or omissions of the City or to any willful misconduct of any City officer, employee, agent, attorney, consultant or independent contractor.

ARTICLES VIII

PERFORMANCE BOND/CASH DEPOSIT

8.1 **General Requirement.** Upon the City Council's adoption of the Ordinance that approves the Mayor's execution of this Agreement and the Mayors signing of that Ordinance, 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"). If Grantee fails to secure said Performance Bond, this Agreement shall immediately terminate. If the parties fail to execute this Agreement, the City shall release the Grantee's Performance Bond. 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 in the amount specified in this Section 9.1.

8.2 **Indemnification.** The Performance Bond shall indemnify the City, up to the full face amount of the Performance Bond, 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; or (ii) any other

unreimbursed cost, loss or damage actually incurred by the City as a result of the Grantee's failure to perform its material obligations pursuant to this Agreement.

8.3 **Other Purposes**. The Performance Bond also shall serve as security for:

8.3.1 The faithful performance by the Grantee of material terms, conditions and obligations of this Agreement, including, but not limited to, the compensation requirements set forth in Article IV and the insurance requirements set forth in Article VIII; or

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

8.4 **Withdrawals from the Performance Bond/Security Fund.** The City may make withdrawals from the Performance Bond for the satisfaction of obligations under Section 8.2 of this Agreement, or for the purposes specified in Section 8.3 of this Agreement. Withdrawals from the Performance Bond 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 or otherwise by the Grantee.

8.5 **Notice of Withdrawals.** At least thirty (30) days before any proposed withdrawal from the Performance Bond, 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 shall, to the extent of said withdrawal, constitute a credit against the amount of the applicable liability of the Grantee to the City.

8.6 **Replenishment.** Within thirty (30) days after receipt of notice from the City that any amount has been withdrawn from the Performance Bond as provided in Section 9.5 of this Agreement, the Grantee shall restore the Performance Bond 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 if necessary to return the balance in the Performance Bond 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 any Performance Bond within such thirty-day period, interest on said amount shall accrue at the rate specified in Section 4.3 of this Agreement, to commence at the completion of such thirty-day period. The City may withdraw from the Performance Bond 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 3.3, above, on the amount improperly withdrawn. Said interest shall accrue and be payable from the time of withdrawal to the time of refund to any Bond or the Grantee, as appropriate.

8.7 **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 required by this Article 9.

8.8 **Form.** The Performance Bond 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.

ARTICLE IX

TRANSFER RESTRICTIONS

9.1 **Transfer of Interest.** If the Grantee assigns, sells, or otherwise disposes of the entirety of the rights and privileges granted by this Agreement, the assignee, or buyer, shall be obligated to negotiate an acceptable Franchise Agreement with the City.

9.2 **Permitted Encumbrances.** Nothing in this Article 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, if any, 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 X

TERMINATION

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

10.1.1 The occurrence of any event relating to the financial status of the Grantee that may reasonably lead to the foreclosure or other judicial or non-judicial 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 therefore from the City;

10.1.2. 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;

10.1.3 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, 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;

10.1.4 Any denial, forfeiture or revocation by any federal or state authority having regulatory jurisdiction over the Grantee of any authorization to provide Telecommunications Services in the City 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;

10.1.5 Any failure of the Grantee to comply with the requirements of Article 8;

10.1.6. Any failure of the Grantee to comply with the requirements of Article 9;

10.1.7. Any failure of the Grantee to comply with the requirements of Article 10;

10.1.8.Any persistent failure of the Grantee after notice to comply with any material term, condition or provision of this Agreement or any other ordinance, law, regulation, rule or order of the City that is not cured within thirty (30) days after the Grantee receives notice from the City.

10.2 **Abandonment.** If, the Grantee abandons Equipment it owns in the Streets, then, to the extent not inconsistent with applicable law, the City may direct the Grantee by written

notice to remove all or any portion of such abandoned Equipment at the Grantee's expense if the City determines that the abandoned Equipment's presence substantially interferes with the public safety upon a finding that such Equipment: (a) compromises safety at any time for a public rights-of-way user or during construction or maintenance in the public rights-of-way; (b) prevents another person from locating facilities in that area of the public rights-of-way where the Abandoned Equipment is located when other alternative locations are not reasonably available; or (c) creates a disruptive maintenance condition.

ARTICLE XI

SUBSEQUENT ACTION

11.1 **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 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 either Party fails to negotiate in good faith to produce an agreement that is reasonably acceptable to both the City and the Grantee, then either Party may accelerate the expiration of the Term so that the Term shall expire on a date determined by the Party accelerating the expiration not less than thirty-six (36) months after such determination.

ARTICLE XII

MISCELLANEOUS

12.1 **Appendices.** The Appendices to this Agreement, if any, 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.

12.2 **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.

12.3 **Entire Agreement**. This Agreement, including all Appendices, if any, 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, if any, 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.

12.4 **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,. 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 reasonable steps within its power to correct such cause(s) 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 12.4 within five (5) business days of the date upon which the Grantee learns of its occurrence.

12.5 **Change of Law.** In the event that any effective legislative, regulatory, judicial or other action materially affects any terms of this Agreement, the Grantee or the City may, on thirty (30) days' written notice, require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually agreeable new terms or take such other measures consistent with the action. In the event that such new terms are not renegotiated within ninety (90) days after such notice, then either Party file an action with a court of competent jurisdiction seeking appropriate relief.

12.6 **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:

Legal Department
Teleport Communications Atlanta, Inc.
118 AT&T Way
Bedminister, NJ 08810

12.7 **Additional Representations and Warranties.** In addition to the representations, warranties and covenants of the Grantee to the City set forth elsewhere in this Agreement, if any, 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:

12.7.1 **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 Georgia 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.

12.7.2 **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.

12.7.3 **Full Disclosure**. The Grantee has reviewed each and every obligation imposed upon it pursuant to this Agreement. The Grantee has not entered into this Agreement with the intent to act contrary and will comply with 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.

12.7.4 **Compliance with Law.** The Grantee has obtained all government licenses, permits and authorizations by the FCC and the GPSC to provide Telecommunications Services

12.7.5 **Litigation; Investigations**. The Grantee will promptly notify the City in writing of any civil, criminal, administrative, arbitration or other proceeding, investigation or claim, including the granting of a temporary or permanent injunction, pending or threatened against the Grantee relating to Grantee's use of the public rights-of-way or that would have a material adverse affect on the ability of the Grantee to construct and maintain Equipment.

12.7.6 **Fees.** The Grantee has paid or will pay consistent with this Agreement applicable franchise fees and has made adequate provisions for any such fees and charges that have accrued.

12.7.7 **Licenses and Permits.** The Grantee has duly secured, or will secure in a timely fashion, all applicable permits consistent with this Agreement.

12.8 **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.

12.9 **No Waiver; Cumulative Remedies.** No failure on the part of either party 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 either party under applicable law,

subject in each case to the terms and conditions of this Agreement. A waiver of any right or remedy by either party at any one time shall not affect the exercise of such right or remedy or any other right or other remedy by either party at any other time. In order for any waiver of either party to be effective, it must be in writing.

12.10 **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.

12.11 **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.

12.12 **No Agency**. The Grantee is not an agent of the City.

12.13 **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.

12.14 **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.

12.15 **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.

I2.16 **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.

12.17 **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 as it shall find necessary or appropriate in the exercise of its police power or in furtherance of the purposes of this Agreement not inconsistent with the Grantee's rights under this Agreement and not inconsistent with the Grantee's rights

pursuant to state and federal law. The Grantee expressly agrees to comply with valid rules, regulations, orders or other directive.

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

By: _____
Mayor

Attest

_____
(City Seal)

RECOMMENDED:

_____
Commissioner,
Department of Public Works

By: _____
Chief Operating Officer

APPROVED AS TO FORM:

_____
Deputy City Attorney

APPROVED:

_____
Chief Financial Officer

Attest:

By: _____
Corporate Secretary
(Corporate Seal)

By: _____
Corporate Representative

04- O -0142
(Do Not Write Above This Line)

AN ORDINANCE BY CITY UTILITIES COMMITTEE

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE A FRANCHISE AGREEMENT WITH TELEPORT COMMUNICATIONS ATLANTA, INC., A DELAWARE CORPORATION, A WHOLLY OWNED SUBSIDIARY OF AT&T CORP., A NEW YORK CORPORATION, TO PROVIDE TELECOMMUNICATIONS SERVICES USING PUBLIC RIGHT-OF-WAY; SPECIFYING THE COMPENSATION DUE THE CITY OF ATLANTA BY THE FRANCHISE AGREEMENT AND WAIVING A PROVISION OF THE ROW ORDINANCE FOR THIS INSTANCE ONLY; AND FOR OTHER PURPOSES

1st ADOPTED BY
FEB 16 2004
COUNCIL

Final ADOPTED BY
MAR 01 2004
COUNCIL

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

Date Referred 2/2/04
Referred To: City Utilities
Date Referred 2/16/04
Refferred To: City Utilities
Date Referred
Referred To:

First Reading
Committee City Utilities
Date JANUARY 27, 2004
Chair Howard Shook
Referred To C U C

Committee	Committee
City Utilities	Date
Feb. 10 2004	Chair
Howard Shook	Action Fav, Adv, Hold (see rev. side) Other
Action Fav, Adv, Hold (see rev. side) Other	Members
Members	
Clair Muller	
Refer To 2nd Reading, 1st Adpt.	Refer To

Committee	Committee
City Utilities	Date
Feb. 24, 2004	Chair
Howard Shook	Action Fav, Adv, Hold (see rev. side) Other
Action Fav, Adv, Hold (see rev. side) Other	Members
Members	
Clair Muller	
Refer To 3rd Reading Final Adoption	Refer To

FINAL COUNCIL ACTION
☑ 2nd (3-16-04, 3-1-04 Readings) ☐ 1st & 2nd ☐ 3rd
☐ Consent ☐ V Vote ☑ RC Vote

CERTIFIED

CERTIFIED
MAR 1 2004
ACTING COUNCIL PRESIDENT PROTEM

CERTIFIED
MAR 01 2004
MUNICIPAL CLERK

MAYOR'S ACTION

APPROVED
MAR 9 2004
MAYOR

RCS# 5512
3/01/04
7:15 PM

Atlanta City Council

Regular Session

MULTIPLE

04-O-0141 AND 04-O-0142

ADOPT FINAL

YEAS:	12
NAYS:	0
ABSTENTIONS:	0
NOT VOTING:	1
EXCUSED:	3
ABSENT	0

Y Smith	NV Archibong	Y Moore	Y Mitchell
Y Starnes	E Fauver	Y Martin	E Norwood
Y Young	Y Shook	Y Maddox	Y Willis
Y Winslow	Y Muller	Y Boazman	E Woolard

MULTIPLE