EXHIBIT D
Proposed Berkley, California Ordinance

ORDINANCE NO. 6608-N.S.

ADDING CHAPTER 16.10 TO THE BERKELEY MUNICIPAL CODE TO REGULATE THE INSTALLATION OF TELECOMMUNICATIONS FACILITIES WHICH UTILIZE STREETS, PUBLIC RIGHTS-OF-WAY, EASEMENTS, OR OTHER PUBLIC PROPERTY; REGISTRATION REQUIRED FOR USE OF PRIVATE PROPERTY

BE IT ORDAINED by the Council of the City of Berkeley, California as follows:

Section 1. **That Chapter 16.10 of the Berkeley Municipal Code is hereby adopted to read as follows:**

Chapter 16.10

TELECOMMUNICATIONS CARRIERS

Sections

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16.10.020	**Definitions**
16.10.030	**Telecommunications Carriers Using Public Property-Registration, Licenses or Franchises, Special Telecommunications Permit and Related Fees Required; Exemptions for Cable Television and OVS Systems and Federal or State Preemption.**
16.10.040	**Required Registration of Telecommunications Carriers; Process; Required Annual Update; Fees Required**
16.10.050	**Special Telecommunications Permit-Applicability**
16.10.060	**Special Telecommunications Permit Application-Contents-Fee**
16.10.070	**City Determination of Whether Applicant is Subject to Licensing or Franchising-Effect of Failure to File State Exemption Information, Waiver**
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16.10.010 Purpose

The purpose of this ordinance is to more specifically regulate Telecommunications carriers providing telecommunications services using public rights of ways and other public property because other applicable laws provide an insufficient basis to address the frequency, nature and scope of the excavations and encroachments necessitated by telecommunications carriers. The regulations enacted by this ordinance are intended to minimize disruption of vehicular and pedestrian traffic, foster an aesthetically pleasing urban environment and prevent visual blight, compensate the City of Berkeley for the use of its property; reimburse the City for its costs of regulating the installation and maintenance of telecommunications facilities, systems and equipment on public property and public rights of way and determine competing uses of such property. This ordinance ~~is~~ also requires the registration of Telecommunications equipment, and systems installed on private property in order to facilitate joint trenching wherever possible and to minimize disruption of public property and public rights of way. The codification of these requirements in a consistent and comprehensive manner is also intended to create a more predictable regulatory environment and thereby encourage the expansion of telecommunications services and the entrance of all carriers on a competitively equal basis. Nothing herein shall modify or amend any existing legally binding franchise, license, or agreement.

16.10.020 Definitions.

The following terms apply for purposes for purposes of this chapter.

"Affiliated Person" or "Affiliates," means each Person who falls into one or more of the following categories: (i) each Person having, directly or indirectly, a Controlling Interest in a Telecommunications Carrier; (ii) each Person in which a Telecommunications Carrier has, directly or indirectly, a Controlling
Interest; (iii) each officer, director, general partner, limited partner holding an interest of five percent (5%) or more, joint venturer, or joint venture partner in a Telecommunications System in the City; and (iv) each Person, directly or indirectly, controlling, controlled by, or under common Control with a Telecommunications Carrier; provided that "Affiliated Person" excludes the City, any limited partner holding an interest of less than five percent (5%) in a Telecommunications Carrier, or any creditor of a Telecommunications Carrier, solely by virtue of its status as a creditor, and which 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 a Telecommunications Carrier. "Assignment" or "Transfer" means any assignment, transfer, sale or other transaction of a franchised or licensed Telecommunications System, or any part thereof, or its corporate or partnership parent, which has the effect of changing the operational, managerial, or financial Control of the Telecommunications System or the Telecommunications Carrier.

"Cables" means any wires, copper, coax, or fiber or conduit used to house the same, utilized for Telecommunications purposes.

"Cable operator" means any Person or group of Persons who:

1. Provides Cable Service over a Cable System and directly or through one or more Affiliates owns a Controlling Interest in such Cable System; or

2. Otherwise controls or is responsible for, through any arrangement, the management and operation of such a Cable System.

"Cable System" or "Cable Television System" means a facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide Cable Service as defined in the Cable Act and which is provided to multiple subscribers within the City. However, such terms do not include the following:

1. A facility that serves only to retransmit the television signals of one or more broadcast stations; or

2. A facility that serves subscribers without using any public right-of-way; or

3. A facility of a common carrier which is subject, in whole, or in part, to the provisions of Title II of the Communications Act of 1934, except that such facility shall be considered a Cable System (other than for purposes of Section 621(c) of the Cable Act, codified at 47 USC 541) to the extent such facility is used in the transmission of video, voice, or data programming or services directly to subscribers; or

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

"City" means the City of Berkeley, California.

"City Council" means the City Council of the City.

"Consultant" means the entity hired by the Telecommunications Carrier under the supervision of the City to inspect construction or to locate utilities.

"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 Telecommunications System, or the Telecommunications Carrier. 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 (other than underwriters during the period in which they are offering securities to the public) of twenty percent (20%) or more of any Person (which

Person or group of Persons is referred to as "Controlling Person"), or being a party to a management contract.

"Easement" means and shall include any public easement or other compatible use created by dedication, or by other means, to the City for public utility purposes or any other purpose whatsoever.

"Excess Capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhole or other utility facility within the public way that is or will be available for use for third party Telecommunications Facilities.

"Fiber Cable" or "Fiber Optic Cable" means very thin and pliable cylinders, or strands of glass or plastic, or any future functional equivalent, used or capable of being used to carry signals transmitted by means of modulated light.

"Nodes" shall mean the cabinet and equipment, including power supply, fans, gas generators, batteries and optical to electrical converters, located in the neighborhoods, which serve homes, businesses, and institutions, and which is the point where fiber facilities, cable facilities and/or other wire cables are connected.

"Other Ways" means the highways, streets, alleys, utility easements or other rights-of-way within the City, but under the jurisdiction or control of a governmental entity other than the City.

"Overhead Facilities" means utility poles, utility facilities and telecommunications facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

"Open Video System" or "OVS" shall have that meaning given in the Telecommunications Act of 1996.

"Pedestal" shall mean an above-ground enclosure which houses active and/or passive equipment relating to the Telecommunications System.

"Person" means any individual, corporation, estate, trust, partnership, association of two or more Persons having a joint common interest, or joint stock company.

"Power Supply" shall mean an electronic or gas driven device designed to provide electrical power to all or a portion of the Telecommunications System.

"PROW" means Streets, Public Rights-of-Way, and Easements.

"Public Property" means and includes all real property owned, operated or controlled by the City, other than PROW and any privately-owned area within City's jurisdiction which is not yet, but is designated as a proposed public place on a tentative subdivision map approved by City,

"Public Right-of-Way" means any public street, public way, public place or rights-of-way, now laid out or dedicated, and the space on, above or below it, and all extensions thereof, and additions thereto, owned, operated and/or controlled by the City or subject to an easement owned by City and any privately-owned area within City's jurisdiction which is not yet, but is designated as a proposed public place on a tentative subdivision map approved by City.

"Pull Box" shall mean a flush mounted or above-ground housing which encloses one or more conduit openings.

"PUC" means the California Public Utilities Commission.

"Revocation," "Termination" or "Nonrenewal" means an official act by the City that removes, repeals or rescinds previously approved authorization for a licensed or franchised Telecommunications Carrier to operate a Telecommunication System within the City.

"Street" means the surface of, and the space above and below a public street (or any path or thoroughfare designated for vehicular and/or pedestrian traffic), or other easement now or hereafter held by the City (including any street, as defined, which is acquired by eminent domain) for the purpose of public travel.

"Subscriber" means a Person lawfully receiving or using a Telecommunications Service delivered by a Telecommunications Carrier over a Telecommunications System.

"Surplus Space" or "Surplus Capacity" means that portion of the usable space on a utility pole or other Telecommunications Facilities which has the necessary clearance from other users, as required by the orders and regulations of the California Public Utilities Commission (PUC) to allow its use by a Telecommunications Carrier.

"Tap" means an electronic or photonic pathway, by way of wire, coaxial, fiber, or otherwise between that portion of the Telecommunications System located in the public rights-of-way and the subscriber's residential, commercial, or industrial structure.

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

"Telecommunications Carrier" or "Telecommunications Operator" means (i) any Person who owns or controls, by way of fee ownership, lease, management agreement, any Telecommunications System or Telecommunications Facilities, or (ii) the direct or indirect provider of Telecommunication Services whether the Telecommunication Service is offered by the owner of the Telecommunications System, an affiliate, or a related entity, by way of ownership, lease, control, or operation of a Telecommunications System. A Person shall be deemed a Telecommunications Carrier, even if it does not directly provide Telecommunications Services, if it rents or leases a Telecommunications System and/or Telecommunications Facilities to another Person which provides Telecommunications Services.

"Telecommunications Equipment" means equipment, other than customer premises equipment, used by a Telecommunications Carrier to provide Telecommunications Services, and includes software integral to such equipment (including upgrades) which are not located, in whole or in part, in, above, or below Streets, Public Rights-of-Way or other Public Property.

"Telecommunications Facilities" shall mean any facility located, in whole or in part, in, above, or below PROW or Public Property used by the Telecommunications Carrier in its Telecommunications System including without limitation, conduits, cables, cabinets, Nodes, structures, headend equipment, power supplies, receive only earthstations, down link equipment and antennas, electronics, fiber cable, coaxial cable, drops and switching equipment whether part of a stand-alone system or in conjunction with or as part of a Cable System.

"Telecommunications Service" means the offering of Telecommunications for a fee directly or indirectly to any Person.

"Telecommunications System" means an operating system which is located, in whole or in part, on, in, above, or below PROW or other Public Property which is designed and utilized, in whole or in part, to provide Telecommunications Services. A Telecommunications System may be built in conjunction with, or be part of, a Cable System.

"Telephone Company" means every Person within the scope of Public Utilities Code Section 7901 who has constructed or may construct telegraph or telephone lines pursuant to a Certificate of Public Convenience and Necessity issued by the PUC.

"Underground Facilities" means utility and Telecommunications Facilities located under the surface of the ground, excluding the underground foundations or supports for overhead facilities.

"Usable Space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the PUC.

"Utility Easement" means any easement owned by the City or acquired, established, dedicated or devoted for public utility purposes.

"Utility Facilities" means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, plant and equipment located under, on or above the surface of the ground within the public ways and used or to be used for the purpose of providing utility or Telecommunications Services.

16.10.030 Telecommunications Carriers Using Public Property-Registration, Licenses and Franchises and Special Telecommunications Permit Required-Exemptions.

A. Applicable Requirements. All Telecommunication Carriers other than Cable and OVS operators governed by subdivision B, seeking to utilize or utilizing Public Property or PROW to provide telecommunications service on or after the effective date of this ordinance shall be subject to the requirements set forth in this chapter and generally described in this section. Use of private property for the installation of a telecommunications system shall be subject to the registration requirements of this chapter in addition to any federal, state and local laws including zoning and building permit requirements to which such installation is otherwise subject .

1. Registration with the City and payment of related registration fees, in accordance with section 16.10.040, in order to facilitate Telecommunications carriers' compliance with the regulations imposed by this chapter and related local, state and federal requirements.

2. The execution of a written license with the City and the payment of related compensation for use of the right of way or public property pursuant to Section 16.10.080, where the carrier does not intend to provide services within the geographical limits of the City of Berkeley, unless the City determines either that the carrier is exempt under state or federal law from the payment of a license fee pursuant to Section 16.10.070

3. The execution of a written franchise subject to this chapter and Chapter 9.60 and the payment of related compensation, where the Telecommunications Carrier intends to provide telecommunications services within the geographical limits of the City, unless the City determines either that the carrier is exempt under state or federal law from the payment of a franchise fee pursuant to Section 16.10.070.

4 A Special Telecommunications Permit and related fees pursuant to Section 16.10.050 et. sequitur.

5. The additional requirements imposed by this chapter on the installation, maintenance, operation, removal and upgrade of the Telecommunications Equipment, facilities, system and related record-keeping, reporting, insurance, indemnity, financial, and other regulatory requirements of this chapter.

6. Any other permits and fees and requirements otherwise imposed by federal state or local law, including excavation or encroachments permits under Title 16 of the Berkeley Municipal Code and any franchises and licenses.

B. Exemption for Cable Television Systems and OVS Systems Franchised Subject to Chapter 9.56. Cable Operators using Public Property or PROW solely to operate a Cable Television system shall not be subject to this ordinance but shall comply with Chapter 9.56 and any other applicable provision of local, state or federal law. Nothing in this section shall exempt a cable operator who operates telecommunications services other than a Cable Television system from the provisions of this chapter with respect to such other services.

16.10.040 Required Registration of Telecommunications Carriers; Process; Required Annual Update; Fees Required.

A. Duty To Register and Update Registration Forms Annually. Upon the effective date of this ordinance all Telecommunications Carriers currently engaged in using public property or public rights of way or private property shall complete registration forms provided by the City and pay related fees. Such carriers shall update the forms on such forms on January 1 of each succeeding year and pay the fees imposed in connection therewith.

B. Registrations Forms and Information Required. The registrant shall disclose and provide the following information:

1. The identity and legal status of the registrant, including any affiliates.

2 The name, address and telephone number of the officer, agent or employee responsible for the accuracy of the registration statement.

3. A map, in electronic and/or other form required by the City, of the location of and a description of registrant's existing or proposed Telecommunications Facilities within the City in the form and detail required by the City. Such information shall include whether and to what extent said carrier has existing excess capacity and shall remain confidential to the extent permitted by applicable law.

4. A description of the Telecommunications Service that the registrant intends to offer or provide, or is currently offering or providing to persons, firms, businesses or institutions within the City, as well as a specific time table or schedule for the provision of each Telecommunications Service.

5. Information satisfactory to the City to enable it to determine whether the registrant is subject to franchising or licensing under this Ordinance.

6. Information satisfactory to the City to enable it to determine that the registrant has applied for and received any certificate of authority required by the PUC to provide Telecommunications Services or Telecommunications Facilities within the City. The Telecommunications Carrier shall state which of the Telecommunications Services, if any, offered or to be offered within the City are not covered or authorized by said PUC certificate of authority.

7. Information satisfactory to the City to enable it to determine that the registrant has applied for and received all construction permits, operating licenses or other approvals required by the FCC to provide telecommunications Services or Telecommunications Facilities within the City.

8. The identity and address of every Person that has entered into any agreement which authorizes, directly, or indirectly, such Person to utilize a dedicated and discrete portion, by way of sale, lease, indefeasible right of use, or otherwise, Telecommunications Facilities or all or a portion of the Telecommunications System (The "Telecommunications Agreement") within the City other than a residential user, or another Telephone Corporation which possesses a Certificate of Public Convenience and Necessity from the PUC.

9. A Three-year Business Plan and Three Year Construction Plan for proposed activities within the City. Said information shall remain confidential to the extent permitted by applicable law.

10. Photographs or artist drawings of all above-ground facilities and their precise proposed locations and dimensions.

11. Such other information relating to PROW use as the City may reasonably require.

16.10.050 Special Telecommunications Permit-Applicability; Application Subject to Prior Notice and Dialogue With the Public Regarding Above-Ground facilities and with Other Telecommunications Carriers regarding Excess Conduit and Joint Installation.

A. Upon adoption of this chapter, in addition to registration pursuant to section 16.10.040, required annual registration information updates and any other permit or entitlement required by local state or federal law, including any license or franchise which may be required pursuant to this chapter, all Telecommunications Carriers, other than Cable and OVS Operators exempt pursuant to section 16.10.030 B, shall obtain a Special Telecommunications Permit pursuant to section 16.10.050 prior to installing any Telecommunications Facilities on Public Property or PROW and shall pay all fees imposed in connection therewith. Such permit is in addition to any

other excavation, encroachment or other permit required by Title 16 of the Berkeley Municipal Code or any other provision of law and shall be required both where such facilities are being installed overhead, aerial in existing conduit owned by other Telecommunications carriers or in new conduit necessitating an excavation of public property or PROW is installed.

B. Telecommunications Carriers shall provide advance notice to the public of the proposed quantity, precise dimensions, design, color, type and location of Pedestals and other above-ground telecommunications facilities and information about noise generated by such facilities and alternatives for reducing the aesthetic impact s of the facilities, including but not limited to size reductions, screening and alternative locations and undergrounding. Such notice is required to include photographs or artists renderings, of all above-ground Pedestals and other visible equipment, from which their size must be apparent. It must also include, a detailed description of the equipment included within the facility including: the electronic components, natural gas generator, electrical fans, and the anticipated noise levels during winter and summer months and the emergency backup operations and equipment. The proposed maintenance schedule for such above-ground facilities shall be included. Telecommunications Carrier will provide its non-toll telephone number answered twenty-four (24) hours a day and a telephone number of the City which may be called if the property owner is concerned about the installation. Carrier must respond to any inquiry within 48 hours and shall promptly report to the City what the response has been. The Carrier shall attempt take all reasonable steps to modify its proposed plans to accommodate public concerns prior to filing an application with the City regarding the installation of such facilities.

C Telecommunications Carrier shall first seek to use excess conduit of other carriers prior to seeking construction on or in public property or PROW. It shall also provide reasonable advance notice to other carriers and provide them an opportunity to jointly install telecommunications facilities in the property which is proposed to be the host of the carrier's telecommunications facilities pursuant to the Special Telecommunications permit.

D. The granting of a Special Telecommunications Permit shall be considered a project as defined by Public Resources Code Section 21065 and shall be subject to review under the California Environmental Quality Act (CEQA) as required by Public Resources Code 21000 et. seq., the CEQA Guidelines (Title 14. California Code of Regulations), and the City's Environmental Review Procedures as they may be amended from time to time.

16.10.060 Special Telecommunications, Permit Application-Contents - Fee.

An Application for a Special Telecommunications Permit, along with payment of any fees required therefor, shall be filed with the City, in the form and manner required by the City and shall contain all the following:

1 The identity of the Applicant, including all affiliates of the Applicant.

2. A description of the Telecommunications Services that are or will be offered or provided by licensee over its Telecommunications System including whether such services are to be provided within the geographical limits of the City.

3. A description of the transmission medium that will be used by the licensee to offer or provide such Telecommunications Services.

4. Preliminary engineering plans, specifications and a network map of the facilities to be located within the City, including a map in electronic and/or other form required by the City constituting an update of any such map which may previously have been provided by the Applicant to the City in connection with registration pursuant to section 16.10.040. Such plans, specifications and map shall be in sufficient detail to identify:

a. the location and route requested for Applicant's proposed Telecommunications Facilities and where excavation of Public property or PROW is being proposed, Applicant shall demonstrate that : i) reasonable advance notice and opportunity to participate was afforded to other Telecommunications Carriers to jointly install their Telecommunications Equipment and Facilities in the Public Property and PROW which is to be the host of the applicant's equipment and facilities pursuant to the permit for which the application is filed; and ii) the Applicant sought but was unable to obtain the excess conduit of other Telecommunications' Carriers along the proposed route for Applicant's proposed communications facilities.

b. the location of all overhead and underground Telecommunication, Facilities in the Streets and Public Right-of-Ways along proposed route including the proposed quantity, precise dimensions, color, type and location of existing and proposed Pedestals and other above-ground telecommunications facilities and equipment, along with photographs or artists renderings, of all above-ground Pedestals and other visible equipment, from which their size must be apparent. It must also include, a detailed description of the equipment included within the node including: the electronic components, natural gas generator, electrical fans, and the anticipated noise levels during winter and summer months and the emergency backup operations and the proposed maintenance schedule for such above-ground facilities. For such above-ground facilities, proof shall be made to the satisfaction of the City that the public notice requirements of section 16.10.050 have been fulfilled.

c. the locations, if any, for interconnection with the Telecommunications System of other Telecommunications Carriers.

d. the specific trees, structures, improvements, facilities and obstructions, if any that Applicant proposes to temporarily or permanently remove or relocate.

5. If the Applicant is proposing to install Overhead Facilities, evidence that Surplus Space is available for locating its Telecommunications System on existing utility poles along the proposed route and that the affected utility has consented to the installation.

6. If Applicant is proposing an Underground Installation in existing ducts or conduits within the PROW, information in sufficient detail to identify:

a. The Excess Capacity currently available in such ducts or conduits before installation of Applicant's Telecommunications Facilities;

b. The Excess Capacity, if any, that will exist in such ducts or conduits after installation of Applicant's Telecommunications Facilities.

7. If applicant is proposing an Underground Installation within new ducts or conduits to be constructed within the PROW:

a. the location proposed for the new ducts or conduits;

b. The Excess Capacity that will exist in such ducts or conduits after installation of Applicant's Telecommunications Facilities.

8. A preliminary construction schedule and completion date.

9. A preliminary traffic control plan in accordance the Work Area Traffic Control Handbook, latest edition.

10. Information in sufficient detail to establish that the Applicant's technical qualifications, experience and expertise regarding the Telecommunications System and Telecommunications Facilities described in the Application.

11. Information to establish that the Applicant has obtained all other governmental approvals and permits to construct and operate the Telecommunications Facilities and to offer or provide the Telecommunications Services and a certification that the Applicant will comply with all applicable local state and federal requirements in the installation, operation, maintenance., removal of its Telecommunications System~~,~~ and Facilities.

12. If the Applicant asserts that all or part of the activities for which the permit is sought are exempt from either licensing or franchising and related fees and compensation pursuant to state or federal law, a Petition for Exemption shall accompany such application, setting forth with specificity, the legal and factual reasons, which shall be supported by written documentation , as to why any or all the activities which are the subject of the permit application are exempt from licensing or franchising. Failure to comply with the documentation required to claim exemption pursuant to this section shall entitle the City to treat the subject of the permit application as subject to either licensing or franchising pursuant to this chapter.

13. Any and all convictions or findings by any governmental authority that the applicant has violated any law or ordinance (including environmental laws or ordinances) license agreement, or franchise agreement relating to, in any way, the use of PROW in any community.

14. Such other and further information as may reasonably be required by the City Manager.

16.10.070 City Determination of Whether Applicant is Subject to Licensing and Franchising-Effect of Failure to File State Exemption Information-Waiver

If the Applicant claims that all or part of the telecommunications facilities, equipment or system to be installed on Public Property or PROW is exempt from City licensing or franchising, on the grounds that such licensing or franchising is contrary to state or federal law, the City shall determine whether an Applicant for a Special Telecommunications permit is subject to either a license or franchise imposed by this chapter for all or part of its telecommunications facilities, equipment or system. If the City determines that a license or franchise is required, the license or franchise shall be obtained as set forth in this chapter. Failure to submit a Petition for Exemption, together with all information and fees required by the City in connection therewith as required by this chapter shall be deemed a waiver of any such claim of exemption. If the City determines the application is exempt in whole or in part, such exemption shall only apply to the particular matters in such application found to be preemptive of City licensing or franchise requirements and only to the extent the City has determined.

16.10.080 Applicant Determined Exempt from Licensing or Franchising -City Determination of Application for Special Telecommunications Permit -Prior Notice to Affected members of the Public As to Above-Ground Facilities

A. Determination of Special Telecommunications Permit. Where the City has concluded that an Applicant is exempt from the licensing and franchising provisions of this chapter as provided in section 16.10.060, the City shall determine whether to issue the Special Telecommunications Permit.

B. Prior to making its determination, City shall provide reasonable advance notice to affected members of the public of the proposed quantity, precise dimensions, design, color, type and location of Pedestals and other above-ground telecommunications facilities. Such notice shall include information about noise generated by such facilities and alternatives for reducing the aesthetic impacts of such facilities, including but not limited to size reductions, landscaping, screening ~~and~~ alternative locations and undergrounding. Such notice shall also include photographs or artists renderings, of all above-ground Pedestals and other visible equipment, from which their size must be apparent. It must also include, a detailed description of the equipment included within the node including: the electronic components, natural gas generator, electrical fans, and the anticipated noise levels during winter and

summer months and the emergency backup operations and equipment. The proposed maintenance schedule for such above-ground facilities shall be included. The Notice shall specify the name, title and telephone number of the individual in the City to whom comments may be made and when such comments are due.

C. The determination to grant or deny a Special Telecommunications permit and to grant or deny a license or franchise pursuant to Section 16.10.090- 16.10.110 shall be based upon the criteria set forth in this section provided however that the grant or denial of a license or franchise shall be subject to the additional criteria and requirements imposed by the sections of this chapter and of this code regulating such license or franchise. The City shall consider the following:

1. The legal and technical ability of the Applicant.
2. The capacity of the PROW to accommodate the Applicant's proposed Telecommunications Facilities.
3. The capacity of the PROW to accommodate additional utility and Telecommunications Facilities if the permit is granted.
4. The damage or disruption, if any, to public or private facilities, improvements, aesthetics, services, travel or landscaping if the permit is granted.
5. The public interest in minimizing the cost and disruption of construction within the PROW.
6. The availability of alternate routes and/or locations for the proposed Telecommunications Facilities.
7. The aesthetic and blighting effect of any above-ground facilities by virtue of their design, dimensions, locations and quantity.
8. Any and all convictions or findings by any governmental authority that the applicant has violated any law or ordinance (including environmental laws or ordinances) or license agreement or franchise agreement relating to, in any way, use of PROW which would reflect on the Applicant's ability to comply with the terms of this chapter or other applicable local law including the applicant's failure to comply with this chapter as to any prior application or currently operating facility. The City may decline to further process an application for a new permit or entitlement pending the applicant's compliance with this chapter or other applicable provision of local law as to its telecommunications facilities

D Modifications Any approval of a permit may require modifications to the proposed activities pursuant thereto as a result of the City's consideration of the factors set forth above, including by limiting or changing the number, size and location of the above ground facilities and equipment proposed to be installed and/or requiring the installation of landscape or other camouflaging techniques or requiring undergrounding to minimize **adverse visual impacts and obstructions.**

E Conditions Imposed Including Compliance With Standards in Chapter. City may impose any reasonable conditions on the permit, including the timing, method of construction, and location of the facilities proposed to be installed pursuant to such permit and any public notice which may be required. Any permit granted shall be conditioned upon the Applicant's compliance with standards regarding the installation, maintenance, operation, removal, and upgrade of the Telecommunications Equipment, facilities, system and related noticing, record-keeping, reporting insurance, indemnity, financial, and other regulatory requirements of this chapter.

16.10.090 Telecommunications Carriers Not Exempt from Licensing and Franchising-Application for Special Telecommunications Permit Merged Into License/Franchise Application; Additional Information.

A. Non-exempt carriers; merger of Special Telecommunications Permit application into license/franchise application. Where the City has determined, pursuant to Section 16.10.070, that all or part of a Telecommunications Carrier's activities to install telecommunications equipment or facilities on Public Property and PROW are subject to the procurement of a City license or franchise, or the Carrier has not petitioned for an exemption from such requirements, as provided in this chapter, the application for a Special Telecommunications Permit shall be merged into an application for a license, if no services are being provided within the geographical limits of the City, or into an application for a franchise, if telecommunications services are being provided within the geographical limits of the City.

B. Additional Information Required. In addition to the information supplied in connection with application for a Special Telecommunications Permit, the City may require any additional information which it deems necessary in order to determine whether a license or franchise shall be granted. In the case of an application for a franchise, such information shall include all of the following:

1. Whether the Applicant intends to provide cable service, video dial tone service or other video programming service, and sufficient information to determine whether such service is subject to cable franchising.
2. An accurate map in the electronic and/or other form required by the City showing the location of any existing Telecommunications System(s) in the City that Applicant intends to use or lease.
3. A description of the Telecommunications Services or Telecommunications Facilities, if any, that the Applicant will offer or make available to the City and other public, educational and governmental institutions.
4. A description of Applicant's access and line extension policies.
5. The area or areas of the City the Applicant desires to serve and if applicable, a schedule for build-out to the entire franchise area.

16.10.100 Processing Fees and Compensation Required For License or Franchise.

Each and every Licensee or Franchisee shall pay a processing fee as determined by the City Council to reimburse the City for its costs in processing the application for a license or franchise. In addition, the applicant shall pay a License/Franchise Fee for the use of the property rights granted to the Licensee/Franchisee, namely, the privilege of using PROW or Public Property to construct, maintain, and operate a Telecommunications System or any portion thereof, as a condition and requirement of each and every License/Franchise. Such fee shall consist of the following components:

A. Minimum Compensation Component. Each and every Licensee/Franchisee which constructs, maintains, and operates a Telecommunications System, or any portion thereof, or provides a Telecommunications Service, which the City has not determined not to be exempt pursuant to Section 16.10.070, shall pay minimum compensation (the "Minimum Compensation Requirement") determined by the City Council on an annual basis by resolution or in an amount to be established in the License or

Franchise. The Minimum Compensation Requirement shall not exceed the fair market value of the property rights granted to the Franchisee, i.e., the privilege of using PROW or Public Property, and Easements to construct, maintain, and operate a Telecommunications System or portion thereof, which are not exempt in their entirety from the imposition of a compensation requirement by applicable federal or state law. The City may accept in-kind compensation for all or a portion of the Minimum Compensation Requirement of approximately equal value.

B. Additional Compensation. Either at the time of issuance of any License, Franchise, Permit, or other authorization, or any time thereafter, the City may determine whether or not the Minimum Compensation Requirement equates to or is less than the fair market value of the property rights granted to the Licensee, namely, the privilege of utilizing PROW or Public Property to construct,

maintain, and operate a Telecommunications System or portion thereof. If the City determines that said non-exempt property rights possess a fair market value in excess of the Minimum Compensation Requirement, the City may require the Licensee or Franchisee to provide additional compensation to the City, in cash or in-kind services or facilities, which represents in value the difference between the Minimum Compensation Requirement and the fair market value (the "Additional Compensation") (the Minimum Compensation Requirement and the Additional Compensation shall collectively be referred to as the "Total Compensation"). Under no circumstances shall the Total Compensation exceed the fair market value of the non-exempt property rights granted to the Licensee, Franchisee, or holder of the permit or authorization. The City Council may, from time to time, but no more frequently than annually, establish by resolution the Additional Compensation and modify said Additional Compensation based upon increases in the fair market value of the non-exempt property rights granted or conveyed unless the City Council has enter into a written agreement to establish a different compensation for such period.

C. Acceptance of License/Franchise Constitutes Acceptance of License/Franchise Fee Imposed. Execution of the written license or franchise agreement shall constitute an acceptance of the Minimum Compensation and Additional Compensation requirements of this chapter.

16.10.110 Factors and Process for Approving License or Franchise-Council Approval Required; Term; Non-exclusive Grant; Limited Use Granted.

The City Manager shall determine whether to recommend that the City Council grant a license or franchise as set forth herein.

A. Additional Factors to be Considered In addition to the factors set forth in Section 16.10.080, the City Manager shall consider the following additional factors in making his recommendations to the City Council as to whether and on what terms to grant a license or franchise :

1. The service that Applicant will provide to the community and region.
2. The effect, if any, on public health, safety and welfare if the Franchise requested is granted.
3. Such other factors-as may demonstrate that the grant to use the PROW will serve the community interest.

B. Procedure The procedure for Council consideration of such license or franchise shall be as set forth in Chapter 9.60.

C. Term The term for which each license or grant is made shall be specified in the license or franchise agreement but in no event shall be greater that any maximum term set by law.

D. Nonexclusive Grant: No License or Franchise granted under this section shall confer any exclusive right, privilege, license or franchise to occupy or use the PROW for delivery of Telecommunications Services or any other purposes.

E. Limited Use Granted: No License or Franchise granted under this Section shall convey any right, title or interest in the PROW, but shall be deemed a Franchise only to use and occupy the PROW for the limited purpose and term stated in the grant. Further, no Franchise shall be construed as any warranty of title.

F. License/Franchise Agreement Subject to terms For Special Telecommunications permit pursuant to 16.10.080: The license or franchise granted pursuant to this chapter shall be conditioned upon compliance by the Licensee or Franchisee with standards regarding the installation, maintenance, operation, removal and upgrade of the Telecommunications Facilities, System and related record-keeping, insurance, indemnity, financial, and other regulatory requirements of this chapter.

16.10.120 Assignment, Transfer, Lease or Sale of Franchise, License, Telecommunications System, or Telecommunications Facilities.

A There shall be no assignment of a Franchise or License, in whole or in part, or any Change in Control of the franchised or licensed Telecommunications Carrier, without the prior express written approval of the City.

B. Any assignment or transfer, or any change in Control, without the City's prior written consent shall constitute a default which will cause a Franchise or License to terminate.

C. At least one hundred twenty (120) days before a proposed assignment or change in Control of the Franchise or License is scheduled to become effective, the Telecommunications Carrier shall request in writing the City's consent. The Telecommunications Carrier shall submit to the City (concurrently with the submission of its written request) (i) any other information or documentation required by the State or federal government; (ii) the information referenced in this Ordinance; (iii) unedited and unredacted copies of the sale or transfer documents with all schedules and exhibits thereto; and (iv) information regarding the financial ability and stability of the proposed assignee with respect to being able to perform all obligations of the existing Franchise or License.

D. The City shall not unreasonably withhold its consent to such an assignment or change in Control. However, in evaluating the request for assignment, transfer, sale, or change in Control, the City may, in its sole discretion and among other things, undertake a technical inspection and audit of the Telecommunications System to determine whether the Telecommunications System complies with all applicable technical and safety codes, and with this Ordinance, the Franchise, or License.

E. If the City determines (as a result of the technical inspection and audit) that the Telecommunications System does not comply with federal, state, or local standards, then the Telecommunications Carrier shall be provided with an opportunity to correct or cure the non-compliance. In the alternative and in the discretion of the City Council, the City shall work with both the current and proposed Telecommunications Carrier to cure the non-compliance.

F. Before an assignment or change in Control is approved by the City, the proposed assignee, transferee, or buyer shall execute an affidavit acknowledging that it has read, understood, and will abide by both this Ordinance and the applicable Franchise or License.

G. In the event of any approved assignment or change in Control, the assignee or transferee shall assume all obligations and liabilities of the former Telecommunications Carrier relating to the Franchise or License unless specifically relieved by the City at the time the assignment or change in Control is approved.

H. The Telecommunications Carrier shall reimburse City for City's reasonable processing and review expenses in connection with a transfer of the Franchise or License or a change in Control of the Franchise or License, including, without limitation, costs of administrative review, financial, legal, and technical evaluation of the proposed transferee, costs of consultants (including technical and legal experts), notice and publication costs, and document preparation expenses. City may send the Telecommunications Carrier an itemized description of all such charges, and the Telecommunications Carrier shall pay such amount within twenty (20) days after the receipt of such description.

I. Violation. If the Telecommunications Carrier violates any provision of this section, the Franchise or License shall terminate.

J. Telecommunications Carrier shall not lease, sell or otherwise transfer ("Transfer") any interest in any Telecommunications Facilities or Telecommunications System including conduit,

fiber, wire, cable or capacity in such conduit, fiber, wire or cable installed pursuant to this Ordinance without prior written notice to the City.

16.10.130 System Construction Schedule/Submittal of Plans.

A. Date For Work Completion The Telecommunications Carrier shall complete system construction and offer Telecommunications Service and any other service authorized by the Franchise, License or Permit no later than the date specified in the Franchise, License or Permit.

B. Construction Plan. No less than one hundred twenty (120) days prior to commencement of construction, Telecommunications Carrier shall file with the City Manager or other designated employees of the City, a general construction plan describing in detail the Telecommunications System and Telecommunications Facilities, areas to be served, and an estimated time schedule for such construction ("Construction Plan"). The Construction Plan shall include photographs or artist renderings of all above-ground facilities as well as their locations, dimensions color and other information set forth in the application for the Special Telecommunications Excavation Permit as required by section 16.10.060 or as modified with City approval. Any modifications to construction plans must be reviewed and approved by the City before modifications can be implemented by Telecommunications Carrier.

C. Notice to the City. No permits shall be issued until the Construction Plan is approved by the City.

D. Notice to Other Providers. Telecommunications Carrier shall provide the City with general engineering base maps identifying existing underground and aerial utility routes, streets, parcels, poles, and construction needs including points of connections for existing residences, potential trench routes, and potential locations for Nodes, Amplifiers, Power Supplies, and taps in the Construction Plan.

E. Traffic Control Plans. Telecommunications Carrier shall furnish detailed traffic control plans, which shall include site-specific hours of construction, to the City Engineer prior to the commencement of any construction activities which may incommode traffic (the "Traffic Control Plan") at the times specified by the City. No construction related activities may be conducted in the PROW without a City approved Traffic Control Plan.

F. Telephone Contact. During construction, Telecommunications Carrier shall provide the City and residents a telephone contact number, answered twenty-four (24) hours a day, to enable the City to report any concerns regarding construction of the Facilities. After business hours such calls will be routed to an on-call supervisor. In the event that the City reports any concerns to Telecommunications Carrier, Telecommunications Carrier shall respond in a timely manner. Telecommunications Carrier shall correct within two (2) business days any adverse impact to the City's use or operations or the use or operations of a third party caused by Telecommunications Carrier construction activities in the Streets and Public Rights-of Way at no cost to the City

G. Daily Notice. Every working day during construction, Telecommunications Carrier shall notify the designated City staff member of the location of that next day's construction activities. The number of concurrent construction locations may be limited by the City.

H. Construction Status Report. During construction, Telecommunications Carrier shall submit to the City periodic progress reports describing in detail the status of construction in relation to the Construction Plan. The first report shall be submitted within thirty (30) days of commencement of construction and shall be updated each thirty (30) days thereafter.

16.10.140 Location of Facilities.

A. All Telecommunications Facilities shall be installed within existing underground ducts or conduits whenever Excess Capacity is available on reasonable terms. Overhead facilities may be installed only if space is available on existing utility poles.

B. Whenever existing Telecommunications Facilities or electric utility facilities are located underground along a particular street or public way, new Telecommunications Facilities must be installed underground along that street or public way.

C. Whenever any new or existing Telecommunications Facilities or electric utility lines are located or relocated underground along a particular street or public way, the Telecommunications Carrier shall relocate its Telecommunications Facilities underground concurrently with the other lines at its sole expense to the full extent permitted by law.

D. Whenever new Telecommunications Facilities will exhaust the capacity of a street or otherwise make the installation of future Telecommunications Facilities impractical, the Telecommunications Carrier installing the new Telecommunications Facilities shall provide additional ducts, conduits, manholes and other facilities designated by the City for reasonable nondiscriminatory access by other Telecommunications Carriers.

16.10.150 Coordination.

To the maximum extent possible, Telecommunications Carrier shall coordinate its construction work with other companies installing infrastructure in the public rights-of-way. Prior to performing any work, Telecommunications Carrier shall contact all other Telecommunications Carrier and utilities using or planning to use City rights-of-way to determine (a) whether any surplus conduit is available in the areas that Telecommunications Carrier plans to install facilities, and (b) whether any joint trenching or boring projects are feasible and provide a written report relating thereto to the City.

16.10.160 Conditions of Use of Streets and Public Rights-of-Ways.

A. All wires, conduits, cable, and other property and facilities of a Telecommunications Carrier shall be so located, constructed, installed and maintained so as not to endanger or unnecessarily interfere with usual and customary use, traffic and travel upon the PROW and Public Property of the City as well as adjacent private property pursuant to a routing plan to be approved by the City Manager or his/her designee.

B. In the event a Telecommunications Carrier's system creates a hazardous or unsafe condition or an unreasonable interference with property, such Telecommunications Carrier shall voluntarily, or upon the request of the City, remove or modify that part of the Telecommunications System to eliminate such condition from the subject property.

C. A Telecommunications Carrier shall not place equipment where it will interfere with existing and future City uses of the PROW or Public Property, with the rights of private property owners, with gas, electric, or telephone fixtures, with water hydrants or mains, with wastewater stations, with any traffic control system, or any other service or facility that benefits the City's or its residents' health, safety or welfare.

D. A Telecommunications Carrier, at its own expense, shall protect PROW and support or temporarily disconnect or relocate at its sole cost in the same Street or other Street or Public Right-of-Way, any property of such Telecommunications Carrier when necessitated by reason of:

1. Traffic conditions;
2. Public safety;
3. Temporary or permanent street closing;
4. Street construction or resurfacing;
5. A change or establishment of street grade;
6. Installation of sewers, drains, water pipes, storm drains, lift stations, force mains, power or signal lines, and any traffic control system; or
7. Any improvement, construction or repair or any improvement related to the City's or its residents health, safety or welfare.

E. It shall be the responsibility of a Telecommunications Carrier to locate and mark or otherwise visibly indicate and alert others to the location of its underground cable before employees, agents, of independent contractors of any entity perform work in the marked-off area. The Telecommunications Carrier shall participate in and adhere to the practices of Underground Services Alert ("USA") and provide at least forty-eight (48) hours prior notice to USA prior to any excavation.

16.10.170 Duty to Remove Telecommunications Facilities from PROW and Public Property.

A. The City may order the Telecommunications carrier to remove its facilities from public property or PROW at its own expense whenever the following occurs:

1. A Telecommunications Carrier ceases to operate all, or part of the Telecommunications System for a continuous period of six (6) months,
2. A Telecommunications Carrier ceases and fails to complete construction of the Telecommunications System outlined in the Franchise, License or Permit,
3. The City elects not to renew any Franchise, License or Permit pursuant to the provisions set forth in this Ordinance,
4. The Telecommunications Carrier's Franchise, License or Permit is revoked, the affected Telecommunications Carrier.

B. If not removed voluntarily by a Telecommunications Carrier, then the City may notify such Telecommunications Carrier that should removal of the property not be accomplished within a reasonable time specified by the City, the City may direct its officials or representatives to remove such Telecommunications System property at that **Telecommunications Carrier's**

expense. The Faithful Performance Bond, Letter of Credit, or Security Fund required as set forth in this Ordinance shall be available to pay for such work.

C. If officials or representatives of the City remove a Telecommunications System, and such Telecommunications Carrier does not claim the property within one hundred twenty (120) days of its removal, then the City may take whatever steps are available under State law to declare the property surplus, and sell it, with the proceeds of such sale (if permitted by State law) going to the City.

D. When such Telecommunications Carrier removes its Telecommunications System from the Streets, Public Rights-of-Ways and Public Property located within the City, the Telecommunications Carrier shall at its own expense, and in a manner approved by the City, replace and restore such PROW or Public Property to a condition comparable to that which existed before the work causing the disturbance was done.

E. Removal of Deactivated Equipment. Telecommunications Carriers shall maintain the deactivated Telecommunications Facilities at no cost to the City until removed by the Telecommunications Carrier. The Telecommunications Carrier shall provide a written list to the City of all deactivated Telecommunications Facilities located within the City at quarterly intervals. The Telecommunications Carrier shall remove or disable non-useful Telecommunications Facilities in accordance with a Removal Plan approved by the City. The Telecommunications Carrier shall provide the City a list of the specific Telecommunications Facilities to be removed and their locations. The Telecommunications Carrier shall remove all these Telecommunications Facilities within ninety (90) days after an underground system is activated unless another period is specified by the City

F. Upgrade of above-ground pedestals. Whenever technology has advanced to the point where a substantially smaller pedestal above ground or installation below ground would perform essentially the same function as the installed pedestals at the same approximate cost in constant dollars, and it is the then current industry practice to use such structures in new area installations, the affected Telecommunications Carrier shall at its expense promptly replace the existing pedestals with the new equipment provided however, that the replacement is not required until a reasonable period has elapsed since installation to permit the Carrier to amortize its investment in the Pedestals. The minimum period over which the Carrier is permitted by the Internal Revenue Service to depreciate the Pedestals shall be deemed to be a reasonable period. Such upgrade shall be made at the times, locations and in the manner determined by the City.

16.10.180 Construction and Maintenance Standards.

A. Methods of construction, installation, maintenance and repair of any Telecommunications System shall comply with the most current editions of the Zoning Codes, Building Codes, Excavation Codes, Construction Codes, Plumbing Codes, National Electrical Safety Code the National Electric Code, the Codes, the Public Works Construction Standards, as they are modified from time to time, and any applicable Federal or State statutes, regulations or requirements.

B. All construction, installation, maintenance and repair shall treat the aesthetics of the property as a priority, shall not substantially affect the appearance or the integrity of the structure, and shall not be installed on the bias across the property or side of a residence or other structure without the property owner's permission.

C. All underground taps shall follow (to the greatest extent possible) property lines, and cross property only at right angles unless otherwise permitted by the property owner, **or required**

due to the physical characteristics of the subsurface, or required under applicable law. The City may, either by way of a generally applicable resolution or through the imposition of routing conditions in any Franchise, License or Permit, determine the routing or placement of cable, conduit, Nodes, Pedestals, Power Supplies, vaults, and other equipment relating to the Telecommunications System.

D. All new and replacement construction shall be accomplished and maintained between the hours specified by the City in the approved permit or ordinances or as otherwise agreed to by the parties. Construction shall not interfere with the services of the City or third parties.

E. Telecommunications Carrier shall place all above-ground active and passive equipment in flush mounted or low profile waterproof pedestals whose design, size, location, color, appearance, and placement have been prior approved by the City in writing and shall be in conformance with the Code and all applicable City ordinances, regulations, rules, and guidelines. Above-ground installations shall only be allowed in situations where the Applicant has demonstrated to the reasonable satisfaction of the City that no below-ground placement is physically, technologically, or economically possible.

F. Telecommunications Carrier shall provide the City a central 24 hours a day, seven days a week, telephone contact number to receive complaints from City or its residents regarding right-of-way installations. Telecommunications Carrier shall maintain such telephone contact number so long as Telecommunications Carrier maintains any Telecommunication Facilities, Telecommunications System, or portion thereof, in, above, or under PROW.

G. Previously installed aerial cable shall be undergrounded in concert with utilities pursuant to the general ordinances of the City and applicable State law or on a voluntary basis by all utilities. This coordinated undergrounding shall be performed on a cost-sharing basis by Telecommunications Carrier and the public utilities involved.

H. Telecommunications Carrier shall be responsible for maintaining all above-ground components and landscaping or other screening in good condition, well painted and free of graffiti and other markings, undamaged and concealed from the public and property owner's view as long as the components remain. Telecommunications Carrier assumes all responsibility for damage or injury resulting from placement or maintenance of any aboveground component. If Telecommunications Carrier fails to comply with any written City demand relating thereto, the City may perform said work and withdraw its costs and expenses from the Security Fund including administrative costs established pursuant to Section 1.26(A).

I. Deviation Procedure for Nonconforming Situations.

1. In instances where Telecommunications Carrier cannot conform to any of the regulations of this Ordinance, Telecommunications Carrier may apply for a deviation.

2. A request for a deviation shall be submitted and approved prior to the submittal of any permit for installation of any Telecommunications Facilities.

3. The deviation will be reviewed and a determination made by the City Manager.

4. A deviation request shall be submitted by letter form to the City Manager and contain the following:

a. An exhibit showing the proposed location and type of Telecommunications Facilities to be installed.

b. The names and telephone numbers of any property owner, tenant or home owners association that may be affected by the deviation request.

c. Documentation that any property owner, tenant, or home owners association that may be affected by the deviation request has been contacted and informed about the deviation request.

d. A detailed explanation and justification for the proposed deviation request and references to the appropriate section(s) of this Ordinance which relief is being requested.

5. A deviation shall be reviewed and a determination made based on the following findings:

a. That the proposed request is in the best interest of the public health, safety and welfare.

b. That the proposed request cannot conform to the regulations of this Ordinance due to extenuating circumstances beyond the control of Telecommunications Carrier, such as but not limited to: (1) existing location of utilities from another utility provider; or (2) existing conditions which prohibit installation (e.g., walls/fences or existing structures).

c. That the proposed request does not cause the accumulation of Telecommunications Facilities in close proximity.

16.10.190 Reservation of Right to Inspect Construction, Documents Related to Construction, and Tests Related to Performance, Technical Integrity and Quality of Signal, Preventive Maintenance and Safety.

In order to verify that a Telecommunications Carrier has constructed and maintained the Telecommunications System in the manner required by this Ordinance, and conducted the various performance, technical integrity, preventive maintenance and safety tests required by federal state and local laws, the City reserves the right to inspect, at the expense of the Telecommunications Carrier, all facets of a Telecommunications Carrier's construction, as well as to inspect documents related to construction, and inspect test results related to performance, technical integrity, preventive maintenance and safety.

16.10.200 Construction Default.

A. Upon the failure, refusal or neglect of the Telecommunications Carrier to cause any construction, repair, or the terms of any permit, or other necessary work to comply with the terms of any Franchise Agreement or License, thereby creating an adverse impact upon public safety, City may (but shall not be required to) cause such work to be completed in whole or in part, and upon so doing shall submit to the Telecommunications Carrier an itemized statement of costs. The Telecommunications Carrier shall be
given reasonable advance notice of City's intent to exercise this power, and twenty (20) days to cure the default. The Telecommunications Carrier shall, within thirty (30) days of billing, pay to City the actual costs incurred. Amounts not so timely paid may be deducted from the Performance Bonds or Security Deposit.

B. Whenever construction is being performed in a manner contrary to the provisions of this Ordinance, the City Manager, or an inspection official representing the City, may order the work stopped by notice in writing served on any person engaged in, or causing the construction. Any work stopped shall not resume until authorized in writing by the City Manager or his or her designated representative.

16.10.210 Vacation or Abandonment.

Except as otherwise provided by law in the event any PROW or portion thereof used by the Telecommunications Carrier shall be vacated by the City, or the use thereof discontinued by the Telecommunications Carrier, upon reasonable notice the Telecommunications Carrier shall forthwith remove its facilities therefrom unless specifically permitted to continue the same. On the removal thereof, the Telecommunications Carrier shall restore, repair or reconstruct the area where such removal has occurred, to such condition as may be required by the City, but not in excess of the original condition. In the event of any failure, neglect or refusal of the

Telecommunications Carrier, after thirty (30) days' notice by the City, to do such work, City may cause it to be done, and the Telecommunications Carrier shall, within thirty (30) days of billing, pay to City the actual costs incurred.

16.10.220 Abandonment in Place.

City may, upon written application by the Telecommunications Carrier, approve the abandonment of any property in place by the Telecommunications Carrier under such terms and conditions as City may approve. Upon City approved abandonment of any property in place, the Telecommunications Carrier shall cause to be executed, acknowledged, and delivered to City such instruments as City shall prescribe and approve transferring and conveying the ownership of such property to City.

16.10.230 Facility Agreements.

No Franchise License or Permit or other entitlement shall relieve the Telecommunications Carrier of any obligations involved in obtaining pole or conduit space from any department of City, any utility company, or from others maintaining utilities in City's PROW.

16.10.240 System Technical Data.

The Telecommunications Carrier shall provide City, data in a digital format specified by the City, on a computer disk or other data storage device requested by City, which details and documents all of the Telecommunications Carrier's Equipment and Facilities and their geographic location in the City. Such computer disk or other device shall be updated annually and whenever there have been significant changes in the location of the Telecommunications Carrier's Equipment and Telecommunications Facilities. In addition, the Telecommunications Carrier shall maintain in its local office a complete and up-to-date set of as-built system maps and drawings upon completion of construction or reconstruction, equipment specification and maintenance publications, and signal level diagrams for each active piece of electronic equipment in the system. As-built drawings shall show all lines and installed equipment, and tap values and spigots. The scale of maps and drawings shall be sufficient to show the required details in

easily readable form and size. Technical data at the local office shall also include approved pole applications, details and documentation of satellite and microwave equipment, mobile radio units, heavy construction vehicles and equipment, and video and audio equipment normally used in the operation of the system. If City requires use of technical data in its own offices, it may make copies of any items at Telecommunications Carrier's expense.

16.10.250 Availability of Technical Data.

All technical data shall be available for City's inspection during normal business hours and upon reasonable notice. In the event of System failure or other operating emergency, the technical data will be made available at any time, so long as the provision of said data does not unreasonably interfere with the Telecommunications Carrier's operations

16.10.260 Retention and Submission of Reports and Records.

A. Telecommunications Carrier shall maintain and retain such records and reports reasonably necessary for the City to determine compliance with the obligations imposed on it by this Ordinance.

B. Telecommunication Carrier shall provide the following information and reports annually to the City as more specifically described herein:

1. A Telecommunication Carrier shall furnish the City with the names and addresses of every Person that has entered into any agreement which authorizes, directly or indirectly, such Person to utilize a dedicated and discrete portion, by way of sale, lease, indefeasible right of use, or otherwise, Telecommunications Facilities or all or a portion of the Telecommunications System (the "Telecommunications Agreement") within the City other than a residential user, or another Telephone Corporation which possesses a Certificate of Public Convenience and Necessity from the PUC.

2. The execution of any agreement which allows any Person to utilize Telecommunications Facilities, or all or a portion of the Telecommunications System within the City, for the provision of video services, or Cable Services.

3. Telecommunications Carrier shall provide the City with copies of all Agreements specified in Paragraph (C)(1)-(2) above.

D(1). Telecommunication Carrier shall include a provision substantially similar in purpose and effect to the provision specified in subparagraph D(2) below (the "Government Approval Provision") in all future negotiated telecommunications agreements. If the City determines that a Person has failed to comply with the Governmental Approval Provision requiring prior approval from the City, the City will provide written notice to the Telecommunication Carrier and to the affected party. If the affected party fails to come into compliance or reach an agreement with the City within thirty (30) days from the date when the Telecommunication Carrier receives written notice from the City of the dispute, then the Telecommunication Carrier will notify the third party that it is in breach of its Telecommunications Agreement and that it will implement reasonable steps consistent with said Telecommunications Agreement to terminate the agreement or the portion of the agreement which provides for the provision of services which required governmental approval for which said approval was not obtained.

(2). The Government Approval Provision shall read in substance as follows:

". . . shall obtain all government Franchises, Licenses, Permits, approvals or consents necessary for it to provide service within the City of Berkeley ("Approvals") pursuant to this Agreement. Failure to obtain such Approvals, or to maintain them as necessary during the term of this Agreement, shall constitute a material breach of this Agreement."

16.10.270 Inspection and Review of Books, Records and Other Data.

A. A Telecommunications Carrier shall keep complete and accurate books of accounts, and records of the business and operations under, and in connection with, the Telecommunications System.

B. The City shall have the right to review (either by mail or at the Telecommunications Carrier's local office) all records reasonably necessary for the administration and enforcement of this Ordinance and/or Franchise or License on fifteen (15) days written request. Such review shall occur within the Telecommunications Carrier's regular office hours unless a different time is otherwise mutually agreed upon or administratively or judicially ordered.

C. The City shall have the right to hire, at its own expense, an independent certified public accountant, or other business or financial expert, to review the books and records of a Telecommunications Carrier. If after a financial audit it is determined that the Telecommunications Carrier has underpaid amounts owed to the City by an amount **exceeding**

two percent (2%) of what was actually paid, then the City may require the Telecommunications Carrier to reimburse the City for the actual cost of the audit.

D. A false entry into the books and/or records of a Telecommunications Carrier, made by a Telecommunications Carrier, of a material fact shall constitute a material violation of this Ordinance.

E. A Telecommunications Carrier shall provide to the City upon its request complete and accurate books and records of the key aspects of the Telecommunications System's operation for at least the preceding three (3) years in such a manner that all matters pertaining to the City can be easily produced and/or verified at the request of the City. Also, the Telecommunications Carrier shall provide upon request any other applicable records and information that may be required by any other federal or state agency having jurisdiction over one or more classes of Telecommunications Carrier.

16.10.280 Indemnity.

Except as provided in or as supplemented by any Franchise Agreement, License or Permit, and to the maximum extent permitted by applicable law, a Telecommunications Carrier shall at all times defend, indemnify, protect, save harmless, and exempt the City, the City Council, its officers, agents, servants, attorneys and employees, from any, and all, penalty, damage or charges arising out of claims, suits, demands, causes of action, or award of damages whether compensatory or punitive, or expenses arising therefrom, either at law or in equity, which arise out of, or are caused by, the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of a Telecommunications System within the City based upon any act or omission of a Telecommunications Carrier, its agents or employees, contractors, subcontractors, independent contractors, or representatives. With respect to the penalties, damages or charges referenced herein, reasonable attorneys' fees, consultants' fees, and expert witness fees are included as those costs which shall be recovered by the City.

16.10.290 Liability Insurance.

A. Except as provided in or as supplemented by any Franchise Agreement, License or Permit, a Telecommunications Carrier shall secure and maintain, public liability, property damage insurance, and umbrella coverage in at least the following amounts:

1. Public liability: One million dollars per person/per occurrence;
2. Property damage: One million dollars per any one claim;
3. Umbrella liability: Five million dollars.

B. The public and personal liability and property damage insurance policy shall specifically include the City, the City Council, its employees, and agents as additional insureds.

C. The public and personal liability and property damage insurance policies shall be issued by an agent or representative of an insurance company licensed to do business in the State and which has one of the three highest or best ratings from the Alfred M. Best Company.

D. The public liability and property damage insurance policies shall contain an endorsement obligating the insurance company to furnish the City with at least thirty (30) days written notice in advance of the cancellation of the policy.

E. Renewal or replacement policies or certificates shall be delivered to the City at least fifteen (15) days before the expiration of the insurance which such policies are to renew or be replaced.

F. Before a Telecommunications System provides Telecommunications Service to subscribers, the Telecommunications Carrier shall deliver the policies or certificates representing the insurance to the City as required herein.

16.10.300 Financial Security.

A. Security Fund.

1. Prior to the Effective Date of the any Franchise, License, Permit or other authorization, the Telecommunications Carrier shall deposit into a bank account established by the City, which may be commingled with security deposits from other Telecommunications Carriers, and shall maintain on deposit through the term of any Franchise, License, Permit, or other authorization, a sum specified in any Franchise, License, Permit, or other authorization as security for the faithful performance by Telecommunications Carrier of all of the provisions of any Franchise, License, Permit or other authorization, and compliance with this Ordinance and with all orders, permits and directions of the City, or any designated representative of the City having jurisdiction over Telecommunications Carrier's acts or defaults under any Franchise, License, Permit or other authorization of this Ordinance, and as security for the payment to the City of any claims, fees, liens, maintenance obligations relating to above-ground facilities, or taxes due the City which arise by reason of the construction, operation or maintenance of the System pursuant to any Franchise, License, Permit or other authorization, or this Ordinance, and to satisfy any actual or liquidated damages arising out of a breach. In lieu of the Security, the City may, in its discretion, accept a Letter of Credit for an equivalent amount in a form and from a financial institution acceptable to the City.

2. Except as otherwise provided in any Franchise, License, Permit, or other authorization, if the Telecommunications Carrier fails, after twenty (20) days written notice, to pay to the City any fees that are due and unpaid, or fails to repay within such twenty (20) days, any damages, costs or expenses which the City is compelled to pay by reason of any act or default of the Telecommunications Carrier in connection with its Franchise, License, Permit, or other authorization; or if Telecommunications Carrier fails to comply with any provision of any Franchise, License, Permit, or other authorization or this Ordinance and the City determines that such failure was without just cause and, in a manner consistent with the procedures specified in this Ordinance, City reasonably determines it can be remedied by a withdrawal from the security fund or is nevertheless subject to liquidated damages, then, in any such event, the City may immediately withdraw the amount thereof from the security fund, with interest and any liquidated damages. Upon such withdrawal, the City shall notify the Telecommunications Carrier of the amount and the date of withdrawal.

3. Within thirty (30) days after notice to Telecommunications Carrier that any amount has been withdrawn by City from the security fund, the Telecommunications Carrier shall deposit a sum of money sufficient to restore such security fund to the original amount.

4. Telecommunications Carrier shall be entitled to the return of the security fund, or portion thereof, with interest, that remains on deposit at the expiration or termination of any Franchise, License, Permit, or other authorization, once all amounts due to the City have been paid.

5. The rights reserved to the City with respect to the security fund are in addition to all other rights of the City, and no action, proceeding or exercise of a right with respect to such security fund shall affect any other right the City may have.

B. Faithful Performance Bond. Prior to issuance of any Franchise, License, Permit, or other authorization, Telecommunications Carrier shall furnish proof of the posting of a faithful performance bond in favor of the City, with corporate surety approved by the City in the sum specified in any Franchise, License, Permit, or other authorization and conditioned that the Telecommunications Carrier shall well and truly observe, fulfill, and perform each term and condition of any Franchise, License, Permit, or other authorization; provided, however, that such bond shall not be required after certification by City of the completion of construction. The corporate surety must be authorized to issue such bonds in the State of California, and the bond must be obtained and secured through an authorized agent in the City of Berkeley. During the course of construction, the amount of the bond may from time to time be reduced, as provided in any Franchise, License, Permit, or other authorization. Written evidence of payment of premiums shall be filed with the City.

16.10.320 Telecommunications Carriers Seeking Relief from This Ordinance.

A. Any Telecommunications Carrier governed by this Ordinance may file a written petition with the City Council seeking relief from one or more provisions of this Ordinance. A Telecommunications Carrier may specifically request the exemption from, or delay in, implementation of one or more provisions of this Ordinance. Also, the Telecommunications Carrier may request that a specific provision of this Ordinance not apply to such Telecommunications Carrier for a specified length of time or duration. The burden of persuasion and proof shall be on the requesting Telecommunications Carrier. The petition shall set forth the relief requested and the basis thereof with such supporting information and material as may be applicable and as requested by the City and the payment of a fee established by the City Manager designed to recover the City's actual costs of processing said application.

B. In order to receive any relief from one or more of the provisions of this Ordinance, a Telecommunications Carrier must demonstrate and prove to the City Council's reasonable satisfaction that at least one of the following facts exist:

1. That compliance with a particular provision and/or requirement would be commercially impracticable; or

2. That the Telecommunications Carrier has its own construction, maintenance, operation or customer service policies, which the City Council deems comparable to, or which exceed, any provision and/or requirement from which the Telecommunications Carrier seeks relief, or

3. That the health, safety and welfare interests of the City otherwise warrant the granting of such relief.

16.10.330 Failure of the City to Enforce this Ordinance.

A Telecommunications Carrier shall not be excused from complying with any of the requirements of this Ordinance, or any subsequently adopted amendments to this Ordinance, by any failure of the City on any one or more occasions to seek, or insist upon, compliance with such requirements or provisions.

16.10.340 Telecommunications Carriers or Its Assignees Subject to Present and Future Ordinances and/or Resolutions.

A. Any Telecommunications Carrier, its assignees, or transferees shall be subject to, and expected to comply with, all applicable ordinances and/or resolutions now or hereafter adopted and in effect within the City, including this Ordinance, to the extent that said Telecommunications Carrier has not received an exemption or relief from said ordinance(s) and/or resolution(s).

B. Any Telecommunications Carrier, its assignee, or transferee shall be subject to all federal and State laws and with all rules and regulations issued by all applicable regulatory agencies now or hereafter in existence.

C. To the extent not inconsistent with applicable law, any Telecommunications Carrier, its assignee, or transferee shall be subject to all enactments which constitute lawful exercises of the City's police power.

16.10.350 Resolution of Conflicts Between this Ordinance and a Subsequent Franchise Agreement or License.

Except as expressly provided to the contrary in such Franchise or License, where there is a conflict between this Ordinance and a subsequently granted Franchise Agreement or License, this Ordinance shall control and prevail.

16.10.360 Force Majeure.

Notwithstanding the other provisions of this Ordinance, a Telecommunications Carrier shall not be held in violation or material breach, default, or noncompliance of this Ordinance, nor suffer any enforcement or penalty relating thereto where such violation, breach, default or

noncompliance occurred or was caused by the force of an earthquake, flood, tidal wave, hurricane, or similar act of nature, or other event that is beyond a Telecommunications Carrier's ability to reasonably anticipate and control but shall not include an economic inability to perform.

16.10.370 Notices.

A. Both the City and each Telecommunications Carrier shall provide the other with the name and address of the contact designated to receive notices, filings, reports, records, documents and other correspondence. All notices shall be delivered to each party's contact by certified mail, return receipt requested, personal service with a signed receipt of delivery, overnight with receipt verification, or facsimile. All other filings, reports, records, documents and other correspondence may be delivered by any legally permissible means including, but not limited to, facsimile transmission, personal service, overnight mail, or package delivery. The delivery of all notices, reports, records and other correspondence shall be deemed to have occurred at the time of receipt unless otherwise designated by State law.

B. If the Telecommunications Carrier is required to maintain a Franchise or License, then the designation of such contact person for notice purposes may be contained within a Franchise Agreement or License.

16.10.380 Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this Ordinance, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this Ordinance, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect.

16.10.390 Administration--Declaration of Powers and Authority.

A. The City Manager is designated the officer of the City that is responsible for the continuing administration of this Ordinance and matters related to Telecommunications Service.

B. Unless prohibited by federal, State or local law, the City Manager may further delegate his/her powers and authority to a duly authorized representative with respect to administering this Ordinance or an applicable Franchise or License.

16.10.400 Revocation and Termination.

In addition to all other rights and powers retained by the City, the City shall have the right to revoke any Permit, Franchise or License granted hereunder and to terminate all rights and privileges of the Permit, Franchise or License hereunder in the event of a substantial breach of the terms and conditions of said Permit, Franchise or License, or of any rule or regulation of the City or City Engineer. A substantial breach shall include, but shall not be limited to, the following:

(1) Violation of any material provision of this ordinance or of any Permit, Franchise or License granted or renewed or pursuant to this ordinance;

(2) Any attempt to evade any material provision of the Permit, Franchise or License or to practice any fraud or deceit or deception upon the City;

(3) The failure to obtain permits for, or to begin or complete construction as provided under this ordinance and under the Franchise or License;

(4) Material misrepresentation of fact in the application for or negotiation of the Permit, Franchise or License;

(5) Conviction of any director, officer, employee, or agent of a Telecommunications Carrier of the offense of bribery or fraud connected with or resulting from the awarding of the Franchise or License;

(6) Failure to pay any Permit Fee, License Fee, or Franchise Fee or other payment required by this Ordinance, or required by any Permit, Franchise, or License granted pursuant to this Ordinance, to the City when due. Failure to pay said fee shall also require the Telecommunications Carrier to pay interest on any past-due fee or compensation to the City at the rate of one and one-half percent per month on the unpaid amount.

16.10.410 Possessory Interest.

By accepting any Franchise, License, or Permit granted pursuant to this Ordinance, Telecommunication Carrier acknowledges that notice is and was hereby given to Telecommunication Carrier pursuant to California Revenue and Taxation Code Section 107.6 that use or occupancy of any Public Property may cause certain taxes to be levied upon such interest. Telecommunication Carrier shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against its right to possession, occupancy or use of any PROW or Public Property pursuant to any right of possession, occupancy or use created by any Permit, Franchise or License.

16.10.420 Violations.

A. Criminal Penalties. Any person who violates any provision of this Ordinance shall be guilty of a misdemeanor or an infraction.

B. Civil Penalties. Any person who violates any provision of this Ordinance, or who violates any material condition of any Franchise, License or Permit issued hereunder, or who breaches any franchise agreement or other agreement with the City shall be liable to the City for a civil penalty of One Thousand Dollars ($1,000.00). For continuing violations or breaches, each day that a violation or breach continues shall be deemed a separate violation or breach subject to an additional civil penalty.

C. Termination or Modification of Agreements. If any person breaches any Franchise, License, Permit, this Ordinance or other agreement made pursuant to this Ordinance, the City may, following reasonable notice, opportunity to cure and opportunity to be heard, terminate the Franchise, License, Permit, or other agreement and, in addition, deny any future Franchise, License, or Permit.

D. Cumulative Remedies. The foregoing remedies shall be deemed non-exclusive, cumulative remedies and in addition to any other remedy the City may have at law or in equity.

Section 2. Copies of this Ordinance shall be posted for two (2) days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King, Jr. Way. Within fifteen (15) days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation

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At a regular meeting of the Council of the City of Berkeley, held on December 19, 2000, this Bill was passed to print and ordered published by posting by the following vote:

Ayes: Councilmembers Armstrong, Breland, Hawley, Maio, Olds, Spring and Mayor Dean

Noes: Councilmember Worthington.

Absent: Councilmember Shirek.

At a special meeting of the Council of the City of Berkeley held on December 22, 2000 this Ordinance was adopted by the following vote:

Ayes: Councilmembers Maio, Olds. Shirek, Spring, Woolley and Mayor Dean.

Noes: None.

Absent: Councilmembers Armstrong, Breland and Worthington.

Shirley Dean, Mayor

ATTEST:

Sherry M. Kelly, City Clerk

In effect: January 21, 2001