

169230

ORDINANCE NO.

Grant a franchise to MCI Metro Access Transmission Services, Inc. for a period of ten years.
(Ordinance)

The City of Portland ordains:

Section 1. NATURE AND TERM OF GRANT

A. 1. The City of Portland (City), does hereby grant to MCI Metro Access Transmission Services, Inc. a Delaware corporation qualified to do business in Oregon, (Grantee), and to its successors and assigns, as approved under Section 17 of this Franchise, a franchise to construct, operate and maintain a Telecommunications System, with all necessary facilities, in, over and under the surface of the City's Streets.

2. a. This franchise does not authorize the Grantee to operate a cable system or provide video programming, as defined by Section 602 of the Cable Communications Policy Act of 1984 (47 U.S.C.A. § 522 (Supp. 1989)). This franchise does not authorize the Grantee to provide telecommunications services. Prior to providing such services, Grantee shall apply for and obtain such authority as is necessary from the Oregon Public Utility Commission and/or the Federal Communications Commission. Grantee shall provide the City with documentation of such authority, upon written request.

b. If the Grantee applies for or obtains authority to operate a cable system or provide video programming, whether from the Oregon Public Utility Commission or elsewhere, Grantee shall serve written notice upon the City. The City and the Grantee shall have 90 days to negotiate, in good faith, to modify this Franchise to include such services. If the City and the Grantee cannot successfully conclude such negotiations within the 90 day period, the matter shall be submitted to arbitration under Section 20.

B. The term of this franchise, and all rights and obligations pertaining thereto, shall be ten years from the effective date of the franchise unless terminated sooner as provided herein. The effective date of this franchise shall be 60 days after passage by the City Council unless Grantee fails to file a written acceptance of this franchise as provided in Section 24 of this Franchise.

C. Prior to final approval of this franchise by City Council, Grantee shall submit a map of its initial Telecommunications System to the Office of Cable Communications and Franchise Management. The map shall be attached to this Franchise as Exhibit A and shall be incorporated by reference herein. Grantee shall submit with each subsequent franchise payment updated versions of such maps as changes are made to Grantee's Telecommunications System, including any acquisitions, additions due to annexation to the City, or any other additions to Grantee's Telecommunications System.

Section 2. DEFINITIONS

For the purpose of this franchise, the following terms, phrases, and their derivations, shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The work "shall" is always mandatory and not merely directory.

A. "Streets" means the surface of, and the space above and below, any public street, road, alley, or highway within the City, used or intended to be used by the general public for motor vehicles, to the extent the City has the right to allow the Grantee to use them.

B. "Telecommunications services" means:

1. Services interconnecting interexchange carriers, competitive carriers, and/or wholesale telecommunications providers for the purpose of voice, video, or data transmission;

2. Services connecting interexchange carriers and/or competitive carriers to telephone companies providing local exchange services for the purpose of voice, video, or data transmission;

3. Services connecting interexchange carriers or competitive carriers to any entity, other than another interexchange carrier, competitive carrier, or telephone company providing local exchange services, for the purpose of voice, video, or data transmission;

4. Services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission; and,

5. The design, engineering, construction, and maintenance of fiber optic cable links that are not otherwise connected to the Grantee's Telecommunications System.

6. Other telecommunications services as authorized by the Federal Communications Commission or the Oregon Public Utility Commission.

C. "Telecommunications System" means all wires, cables, ducts, conduits, vaults, poles, and other necessary facilities owned or used by the Grantee for the purpose of providing telecommunications services and located in, under and above City Streets, excluding ducts, conduits, and vaults leased from another City franchisee, licensee, or permittee.

Section 3. COMPENSATION AND AUDITING

A. 1. The Grantee shall pay a franchise fee to the City, throughout the term of this Franchise, as compensation for the benefits and privileges under this Franchise and in

consideration of permission to use the Streets of the City.

2. Grantee agrees to pay the City a Minimum Annual Franchise Fee or an amount equal to five percent (5%) of Grantee's gross revenues, whichever is greater.

3. For purposes of this Section,

a. "Gross revenues" shall mean gross revenues derived by Grantee for the provision of Telecommunications Services:

(i) originating or terminating in Portland, Oregon, and,

(ii) charged to a service address in Portland, Oregon, regardless of where the telephone call is billed or paid.

b. "Minimum Annual Franchise Fee" shall mean \$4,000 in the first year of this franchise, and shall increase by \$1,000 annually, until reaching a maximum of \$13,000 in year 10 of this franchise.

B. If the City requests telecommunications services from the Grantee, or installation or maintenance work under Section 9.B., Grantee may deduct the charges for such services from franchise fee payments only after receiving prior written approval by the City. Grantee shall charge the City Grantee's most favorable rate, offered at the time of the request, charged to a similar user within Oregon for a similar volume of service, subject to any of Grantee's tariffs and regulations on file with the Oregon Public Utility Commission. Other terms and conditions of such services may be specified in a separate agreement between the City and Grantee.

C. The gross revenue based franchise fee payable under this Franchise shall be computed and paid on or before the forty-fifty (45th) day following each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) during the term of this franchise. Payments not received by the City on or before the forty-fifth (45th) day following the end of the calendar year quarter period shall be assessed interest at the rate of one percent (1%) over the existing prime rate as set by First Interstate Bank of Oregon, N.A., compounded daily. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the City receives the payment.

D. 1. No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under this Section shall be subject to confirmation and recomputation by the City. The Grantee agrees to reimburse the City for:

a. The reasonable costs of such confirmation if the City's recomputation discloses that the Grantee has paid 95% or less of the franchise fees owing for the period at issue; or

b. One-half of the reasonable costs of such confirmation if the City's recomputation discloses that the Grantee had paid more than 95% but less than 98% of the franchise fees owing for the period at issue.

c. The City's costs which may be reimbursed under this subsection shall not exceed \$5,000.00.

2. If the City determines that Grantee made any underpayment, and that the underpayment exceeded 5% of the amount due, Grantee shall pay interest at the rate of one percent (1%) over the existing prime rate as set by First Interstate Bank of Oregon, N.A., compounded daily. Interest shall be due on the entire underpayment or on the entire late payment from the date on which payment was due until the date on which full payment is received.

3. If the Grantee disputes the City's determination of underpayment, the Grantee shall place the disputed amount in an escrow account and request binding arbitration of the dispute as provided in Section 20 of this Franchise.

E. Accompanying each payment of gross revenue based franchise fees to the City, the Grantee shall file with the City a report of its calculation of the franchise fee payment, setting forth its gross revenues, and the computation, basis and method of how gross revenues were calculated, including an explanation of revenue calculations for telecommunications services. Such reports shall be in a form satisfactory to the City.

F. All Grantee's books, maps, and records concerning its gross revenues and its calculation of franchise fee payments to the City shall be open for inspection by the proper officers of the City at all convenient times to determine the amount of compensation due the City under this franchise, and shall be kept so as to accurately show the same. Grantee shall prepare and furnish to the City, at the times prescribed by the City and in the form prescribed by the City after consultation with Grantee, such reports with respect to its operation, affairs, or property, as the City may deem reasonably necessary or appropriate. All other reports required by the Charter and ordinances of the City shall be made by Grantee from time to time as required.

G. The Grantee shall pay the cost of publication of the franchise and any amendments thereto, as such publication is required by law. In return for Grantee's dismissal of its lawsuit regarding the validity of the 1893 franchise issued to Western Union Telegraph Company, the City waives the requirements that Grantee pay the City's pre-franchising costs otherwise incurred in entering into this franchise agreement.

H. Payment of this franchise fee shall not exempt Grantee from the payment of any other fees, taxes or charges on the business, occupation, property or income of Grantee that may be imposed by the City, except as may otherwise be provided in the ordinance or ordinances imposing such other fees, taxes or charges. However, so long as the Grantee is not operating as a telecommunications utility, as defined by Oregon Revised Statutes 759.005 (1) (a) (1993), the City expressly waives application of City Code Section 7.14, Utility License Fees.

Section 4. GENERAL FINANCIAL AND INSURANCE PROVISIONS

A. Insurance.

1. The Grantee shall maintain public liability and property damage insurance that protects the Grantee and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 5. The insurance shall provide coverage at all times of not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$50,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$500,000 covering all claims per occurrence, plus costs of defense. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of the franchise. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be cancelled or materially altered without thirty (30) days written notice first being given to the City Auditor. If the insurance is cancelled or materially altered within the term of this franchise, Grantee shall provide a new policy with the same terms. Grantee agrees to maintain continuous uninterrupted coverage, in the amounts required, for the duration of the franchise.

2. The Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the approval of the City Attorney.

3. In the alternative to providing a certificate of insurance to the City, certifying liability insurance coverage as required in this section, Grantee may provide the City with a statement regarding its self-insurance. Grantee's self-insurance shall provide at least the same amount and scope of coverage for the Grantee and the City, its officers, agents and employees, as otherwise required under this Section. The adequacy of such self-insurance shall be subject to the City Attorney's review and approval. Upon Grantee's election to provide self-insurance coverage under this subsection, any failure by the Grantee to maintain

adequate self-insurance shall be cause for termination of this franchise under Section 18.

B. Faithful Performance Bond.

1. Upon the effective date of the franchise, the Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of \$100,000, conditioned that the Grantee shall well and truly observed, fulfill, and perform each term and condition of the franchise. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of the franchise, including, if necessary, the time required for removal of all of Grantee's system installed in the City's Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without prior 30 days written notice first being given to the City Auditor. The bond shall be reviewed and approved as to form by the City Attorney.

2. During the term of the franchise, Grantee shall file with the City Auditor a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under this subsection if a bona fide, good faith dispute exists between the City and the Grantee.

C. Construction Bond. During all times when Grantee is performing any construction work in or under the Streets requiring a street opening permit, Grantee shall post a faithful performance bond or irrevocable letter of credit, as is required for street opening permits, running to the City, with good and sufficient surety approved by the City, in the sum of \$100,000. The bond or letter of credit shall be conditioned that the Grantee shall well and truly observe, fulfill and perform each term and condition under Section 6. Grantee shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated upon final approval of Grantee's construction work in or under the Streets by the City Engineer. Upon such approval, the City agrees to sign all documents necessary to release the bond in accordance with the terms of this Section. During the duration of the construction work, Grantee shall file with the City Auditor a copy of the bond or letter of credit, along with written evidence of the required premiums. The bond or letter of credit shall be subject to the approval of the City Attorney as to its adequacy under the requirements of this Section.

Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS.

A. Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this franchise, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Telecommunications System in a safe

condition. Grantee shall consult and cooperate with the City while conducting its defense of the City.

B. Grantee also hereby agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its facilities in a timely manner in accordance with a relocation schedule furnished Grantee by the City Engineer in writing, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

Section 6. CONSTRUCTION AND RELOCATION.

A. 1. Subject to applicable regulations of the City, Grantee may perform all necessary construction to construct, operate and maintain its Telecommunications System. All construction and maintenance of any and all Telecommunications System facilities within Streets incident to Grantee's provision of service shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee. Grantee shall apply for and obtain all permits necessary for installation and/or construction of any such facilities, and for excavation and laying of any Telecommunications System facilities within City Streets. Grantee shall pay all applicable fees upon issuance of the requisite construction permits by the City to Grantee.

2. Prior to beginning construction, Grantee shall provide the City with an initial construction schedule for work in the Streets and the estimated total cost of such work. When Grantee's construction in the Streets is completed, Grantee shall provide the City with a map showing the location of its installed Telecommunications System in the Streets, as built. Such "as built" maps shall be in a form acceptable to the City Engineer.

3. Grantee may make excavations in City Streets for any facility needed for the maintenance or extension of the Grantee's Telecommunications System, subject to obtaining permits. Prior to doing such work, Grantee must apply for, and obtain, appropriate permits from the City, and give appropriate notices to any further franchisees, licensees or permittees of the City, or bureaus of the City, or other units of government owning or maintaining facilities which may be affected by the proposed excavation.

4. In the event that emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may initiate such emergency repairs immediately, and shall apply for appropriate permits the next business day following discovery of the emergency. Grantee must comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.

B. 1. Grantee is responsible for becoming familiar with, and understanding, the provisions of Oregon Revised Statutes (ORS) 757.541 through 757.571 (1993) (the "One-Call statutes"). Grantee shall comply with the terms and conditions set forth in the One-Call

statutes.

2. The One-Call statutes apply to the locating of underground facilities. An illustrative example of how these provisions apply would be as follows: Within forty-eight (48) business day hours after any City bureau or City franchisee, licensee or permittee notifies Grantee of a proposed street excavation, the Grantee shall: (a) Mark all of its locatable underground cables, ducts, conduits, or other facilities within the area of the proposed excavation; (b) Notify the excavator of any unlocatable underground facilities in the area of the proposed excavation; or, (c) Notify the excavator that the Grantee does not have any underground facilities in the vicinity of the proposed excavation.

C. The City shall have the right to require Grantee to change the location of its Telecommunications System within the Streets when the public convenience requires such change, and the expense thereof shall be paid by Grantee. The City shall provide the Grantee with the standard notice given under the circumstances to other franchisees, licensees, or permittees. Should Grantee fail to remove or relocate any such facilities by the date established by the City, the City may effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay. If the City requires Grantee to relocate its facilities located within the City's Streets, the City will make a reasonable effort to provide Grantee with an alternate location for its facilities within the City's Streets.

D. Grantee's system shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits or other facilities that may have been laid in the Streets by or under the City's authority.

E. Upon Grantee's acquisition of any Telecommunications System facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee retains any such facilities in the Streets, the Grantee shall submit to the City a statement describing all facilities involved, whether authorized by franchise or prior right, and specifying the location of all such facilities. Such facilities shall immediately be subject to the terms of this franchise.

F. Tree trimming.

1. Upon obtaining a written permit from the City Forester, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with Grantee's Telecommunications System. Except in emergencies, Grantee may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For purposes of this Section, emergencies exist when it is necessary to prune to protect the public from imminent danger. The owner or occupant shall have seven days from receipt of Grantee's notice to

prune such tree at his or her own expense. If the owner or occupant fails to do so, Grantee may prune such tree at its own expense.

2. The City Forester may, at his or her own discretion, waive the notification and permit process in the case of single trees, if Grantee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by Grantee shall be subject to the approval of the City Forester. The City Forester shall have the discretion to cancel the permit if, at any time, the Grantee or its agents, fails to use proper arboricultural practices.

Section 7. RESTORATION OF STREETS.

A. Whenever Grantee disturbs the surface of any street for any purpose, Grantee shall promptly restore the street to at least its prior condition, to the satisfaction of the City Engineer. When any opening is made by Grantee in a hard surface pavement in any Street, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer.

B. If Grantee excavates the surface of any street, Grantee shall be responsible for restoration and maintenance of the street and its surface within the area affected by the excavation. The City may, after providing notice to Grantee, refill and/or repave any opening made by Grantee in the street, and the expense thereof shall be paid by Grantee. The City reserves the right, after providing notice to Grantee, to remove and/or repair any work done by Grantee which, in the determination of the City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee. All excavations made by Grantee in the Streets shall be properly safeguarded for the prevention of accidents. All of Grantee's work under this Section shall be done in strict compliance with all rules, regulations and ordinances of the City.

Section 8. RESERVATION OF CITY STREET RIGHTS.

Nothing in this Franchise shall be construed to prevent the City from constructing sewer, grading, paving, repairing and/or altering any street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as to not obstruct, injure or prevent the free use and operation of the system of the Grantee herein. However, if any of the Grantee's Telecommunications System interferes with the construction or repair of any street or public improvement, including construction, repair or removal of a sewer or water main, the Grantee's system shall be removed or replaced in the manner the City shall direct. Any and all such removal or replacement shall be at the expense of the Grantee. Should Grantee fail to remove, adjust or relocate its facilities by the date established by the City Engineer's written notice to Grantee, the City may effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the

City due to Grantee's delay.

Section 9. CITY FIBER OPTIC PAIRS AND USE OF DUCTS.

A. 1. Grantee shall give prior notice to the City in the event of any new construction or installation of fiber optic lines within the City. Grantee shall install two pair of optical fibers for the City. The City shall use its fiber optics only for municipal purposes. The Grantee shall not deduct the cost of building or installing such fiber optic lines or cable from franchise fees, or any other payments to the City, or otherwise charge the City for such optical fibers. Grantee shall be responsible for maintaining the City's optical fibers together with the Grantee's lines.

2. Upon written request from the City, Grantee shall build and install connections to City optical fibers, provided by Grantee under Section 9.A.1. above, for the City. Grantee shall build and install such connections at a charge of its direct costs of materials and labor, plus ten percent (10%). The City shall be responsible for obtaining any necessary authority for Grantee to enter any premises necessary for building and installing the connections requested by the City.

B. 1. The City may install or affix and maintain wires and equipment for municipal purposes within any of Grantee's surplus conduit or ducts, as defined in Section 12, without charge to the City. All work to affix and/or maintain City wires and equipment shall be performed by Grantee and shall be performed at City expense. The City shall not have access to Grantee's surplus conduits or ducts without Grantee's prior approval, except in the event of an emergency requiring that the City obtain immediate access to those conduits or ducts. In such an emergency, the City shall exercise its best efforts to notify the Grantee as soon as possible of the emergency and the City's need for access.

2. The value of the City's use of Grantee's surplus conduits or ducts may not be deducted from its franchise fee and/or other fees payable to the City. Grantee shall not be responsible for any damage resulting to the wires or property of the City occurring as a result of City's use of Grantee's surplus conduits or ducts.

C. For the purposes of this Section 9, the term "municipal purposes" includes but is not limited to the use of the structures and installations for City fire, police, traffic, water, internal telephone, and/or signal systems. The term "municipal purposes" does not include: (1) the sale of telecommunications services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers; or (3) the transportation of water or wastewater.

Section 10. STREET VACATION. If any Street or portion thereof used by Grantee is vacated by the City during the term of this franchise, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated street area, Grantee

shall, without expense to the City, forthwith remove its Telecommunications System facilities from such street, and restore, repair or reconstruct the street area where such removal has occurred, and place the street area in such condition as may be required by the Council. In the event of failure, neglect or refusal of Grantee, after thirty days' notice by City Council, to repair, improve or maintain such street portions, the City may do such work or cause it to be done, and the cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket.

Section 11. MAINTENANCE OF FACILITIES. Grantee shall provide and put in use all Telecommunications System facilities necessary to control and carry Grantee's signals so as to prevent injury to the City's property or property belonging to any person, firm or corporation within the City. Grantee, at its own expense, shall repair, renew, change and improve said facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not connect in a manner that requires any customer, except the City, to install cables, ducts, conduits, or other facilities, in, under or over a City Street or other public right of way.

Section 12. COMMON USERS.

A. For the purposes of this Section,

1. "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.
2. "Conduit Facility" means any structure, or section thereof, containing one or more ducts, conduits, manholes, handhole or other such facilities in the Grantee's Telecommunications System.
3. "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.
4. "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association franchised, licensed or otherwise permitted by the City to use the Streets.
5. "Surplus ducts or conduits" are Conduit Facilities other than those occupied by the Grantee or any prior Licensee, one unoccupied duct held by Grantee as an emergency use spare, and other unoccupied ducts that the Grantee reasonably expects to use within the next 18 months.

B. Grantee acknowledges that the Streets have a finite capacity for containing conduits. Therefore, Grantee agrees that whenever the City Engineer determines it is impracticable to

permit construction of an underground conduit system by any other person which may at the time have authority to construct or maintain conduits or ducts in the Streets, the City Engineer may require Grantee to afford to such person the right to use Grantee's surplus ducts or conduits in common with the Grantee, pursuant to the terms and conditions of an agreement for use of surplus conduits and ducts being entered into by the Grantee and the Licensee.

C. If the Grantee and any Licensee fail or cannot otherwise agree within a reasonable time to fair and equitable terms, conditions and regulations, including but not limited to a conduit rental rate, within a reasonable period of time, the Grantee and the Licensee shall enter into binding arbitration to determine such terms, conditions and regulations. In such arbitration, the arbitrators shall determine the conduit rental rate at a fair market rate. The binding arbitration shall be as provided in Section 20 of this Franchise.

D. A Licensee occupying part of a Duct shall be deemed to occupy the entire Duct.

E. The Grantee shall give a Licensee 120 days notice of its need to occupy licensed conduit and shall propose that the Licensee take the first feasible action listed:

1. Pay revised conduit rent designed to recover the cost of retrofitting the conduit with multiplexing, optical fibers, or other space-saving technology sufficient to meet the Grantee's space needs;

2. Pay revised conduit rent based on the cost of new conduit constructed to meet the Grantee's space needs;

3. Vacate ducts that are no longer surplus;

4. Construct and maintain sufficient new conduit to meet the Grantee's space needs.

F. When two or more Licensees occupy a section of Conduit Facility, the last Licensee to occupy the Conduit Facility shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space-saving technology or construction of new conduit, all Licensees shall bear the increased cost.

G. All attachments shall meet local, state and federal clearance and other safety requirements, be adequately grounded and anchored, and meet the provisions of contracts executed between the Grantee and the Licensee. The Grantee may, at its option, correct any attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay the Grantee for any fines, fees, damages, or other costs the Licensee's attachments cause the Grantee to incur.

Section 13. DISCONTINUED USE OF FACILITIES.

A. Whenever Grantee intends to discontinue use of its Telecommunications System within all or part of a particular portion of the Streets and does not intend to use said facilities again in the future, Grantee shall submit to the City Engineer for the City Engineer's approval a completed application describing the facility and the date on which the Grantee intends to discontinue using the facility. Grantee may remove the facility or request that the City permit it to remain in place. Notwithstanding the Grantee's request that any such facility remain in place, the City Engineer may require the Grantee to remove the facility from the street area or modify the facility in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require the Grantee to perform a combination of modification and removal of the facility. Grantee shall complete such removal or modification in accordance with a schedule set by the City Engineer.

B. 1. Until such time as Grantee removes or modifies the affected facility as directed by the City Engineer, or until the rights to and responsibility for the affected facility are accepted by another person or corporation having authority to construct and maintain such facilities, Grantee shall be responsible for all necessary repairs, relocations of the facility, and maintenance of the street area in the same manner and degree as if the facility were in active use, and Grantee shall retain all liability for such facility.

2. a. Grantee has an extensive system of conduits which were built by its predecessor, Western Union Telegraph Company. This conduit system consists primarily of creosote-soaked timber. The responsibility, if any, for removing any creosote residues, and any potential liabilities arising from this creosote, shall be and remain forever the Grantee's responsibility, and not the City's.

b. Grantee may, in accordance with a schedule approved by the City Engineer, and at the Grantee's expense, remove all or any portion of these conduits from the Streets, provided that Grantee does so in accordance with all applicable City ordinances, and that it returns the Streets to their reasonably same condition prior to opening.

c. Whenever any of Grantee's Telecommunications System which has creosote on, in, or surrounding it interferes with any other use of the Streets, Grantee shall remove or remediate the creosote materials in accordance with applicable environmental laws and regulations. If Grantee fails to promptly remove or remediate the creosote material, the authorized entity requesting the removal may arrange to have the creosote materials removed or remediated, in accordance with applicable environmental laws and regulations, and the costs of such remediation or removal and proper disposal, as well as any costs of delay incurred, shall be charged to the Grantee, and the Grantee shall promptly pay such charges.

Section 14. HAZARDOUS SUBSTANCES.

A. Grantee shall comply with all applicable state and federal laws, statutes, regulations

and orders concerning Hazardous Substances relating to Grantee's Telecommunications System in the Streets. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(9) (1993).

B. 1. Grantee shall maintain and inspect its Telecommunications System located in the Streets. Upon reasonable notice to Grantee, the City may inspect Grantee's facilities in the Streets to determine if any release of Hazardous Substances has occurred, or may occur, from or related to Grantee's Telecommunications System.

2. In removing or modifying Grantee's facilities as provided in Section 13 of this Franchise, Grantee shall also remove all residue of Hazardous Substances, in compliance with applicable environmental clean-up standards related thereto.

C. Grantee agrees to forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by Grantee's ownership or operation of a Telecommunications System in the Streets.

Section 15. FRANCHISE NOT EXCLUSIVE. This franchise is not exclusive. The City expressly reserves the right to grant rights or franchises to other persons or corporations, as well as the right in its own name as a municipality, to use its Streets for similar or different purposes allowed Granted hereunder.

Section 16. REGULATION. The City Council shall be vested with the power and authority to reasonably regulate in the public interest the exercise of the privileges under this franchise. Any failure by the City to promptly enforce compliance with this Franchise shall not relieve Grantee of its obligation to comply with any provision of this franchise.

Section 17. CITY'S CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

A. Neither this franchise nor any of Grantee's Telecommunications System located in the Streets by authority of this franchise shall be sold, leased, mortgaged, assigned or otherwise transferred without the prior consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall notify the City of any transfers to such entities within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained herein shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Telecommunications System without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this franchise.

B. Grantee shall not lease any of its Telecommunications System facilities, or the Streets in which such are contained, without the City's consent as expressed by ordinance. However, Grantee may lease its Telecommunications System, or any portion thereof, in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its Telecommunications System.

C. Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the Auditor an executed counterpart or certified copy thereof. No sale, lease, mortgage, assignment, transfer or merger may occur until the successor, assignee or lessee has complied with the requirements of Section 4 of this franchise.

D. For the purpose of determining whether the City will consent to any assignment, transfer, merger, lease or mortgage, the City may inquire into the qualifications of the prospective party. The Grantee shall assist the City in any such inquiry. The City may condition any assignment, transfer, merger, lease or mortgage upon such conditions as it deems appropriate.

Section 18. REMEDIES.

A. Forfeiture.

1. In addition to any other rights set out elsewhere in this franchise, the City reserves the right to declare a forfeiture of the franchise, and all of Grantee's rights arising thereunder, in the event that:

- a. The Grantee violates any material provision of the franchise;
- b. The Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City; or
- c. There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Grantee's operation of its Telecommunications System within the City.

2. For purpose of this Section, the following are material provisions of this Franchise, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Franchise:

- a. The invalidation, failure to pay or any suspension of Grantee's payments of franchise fees to the City for use of the Streets under this franchise;

b. Any failure by the Grantee to submit timely reports regarding the calculation of its gross revenues based franchise fees to the City;

c. Any failure by Grantee to maintain the liability insurance required under this Franchise; and,

d. Any failure by Grantee to maintain the performance bond required under this Franchise;

e. Any failure by Grantee to otherwise fully comply with the requirements of Sections 3 through Section 17 of this Franchise.

B. **Additional Remedies.** In addition to any rights set out elsewhere in this franchise, as well as its rights under the City Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:

1. Impose a financial penalty of up to \$1,000, per franchise violation; or

2. Suspend the Grantee's franchise rights until the Grantee corrects or otherwise remedies the violation.

C. In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.

D. **Notice and Opportunity to Cure.** The City shall give Grantee thirty (30) days prior written notice of its intent to exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if the Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if the Grantee does not undertake efforts satisfactory to the City to remedy the stated reason, then the City Council may impose any or all of the remedies available under this Section. However, in no event shall the City exercise its rights under this Section if a bona fide, good faith dispute exists between the City and the Grantee.

Section 19. RENEGOTIATION.

A. In the event that any provision of this Franchise becomes invalid or unenforceable and the City Council or the Grantee expressly finds that such provision constituted a consideration material to entering into this Franchise, the City and the Grantee may mutually agree to renegotiate the terms of this Franchise. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party

accepts the offer to renegotiate, the parties shall have 90 days to conduct and complete the renegotiation. If the City and the Grantee cannot agree to renegotiate or cannot successfully conclude the renegotiation within 90 days from the date of the offer to renegotiate, the matter shall be submitted to arbitration under Section 20.

B. By mutual agreement, the City and the Grantee may meet at any time during the term of this Franchise to review and renegotiate matters of concern or interest to either of them. The topics of such renegotiation shall be stated in writing by each party prior to such meeting, but each party may include any topic or concern arising under this Franchise or otherwise.

Section 20. ARBITRATION.

A. Whenever the arbitration procedures provided under this Franchise are exercised, the determination of the arbitrators shall be final and binding upon both the City and the Grantee.

B. The City may initiate arbitration by resolution of its City Council, while the Grantee may choose to initiate arbitration by sending written notice to the City.

C. 1. If the City initiates arbitration, the City Council shall select one arbitrator in the resolution, and the Grantee by written notice shall select one arbitrator within 15 days after passage of the resolution. If the Grantee initiates arbitration, it shall identify its selected arbitrator in its written notice, and the City shall select one arbitrator, by resolution of the City Council, within 15 days of receiving the notice.

2. The two selected arbitrators shall select a third arbitrator within 15 days after the appointment of the second arbitrator. If the two arbitrators are unable to agree upon a third arbitrator within the time limit, then the third arbitrator shall be appointed by the presiding civil judge of the Multnomah County Circuit Court.

D. After all three arbitrators have been selected, they shall each take an oath to serve neutrally and impartially. The arbitration panel shall then schedule a date, time and place for hearing the presentations of the City and the Grantee. The hearing shall occur not less than 60 days after the appointment of the third arbitrator, unless extended by mutual agreement of the City and Grantee. The arbitrators shall make a written report to the City and the Grantee, including findings of fact and conclusions of law, on their final determination within 60 days after completion of the hearing. The determination of a majority of the arbitrators shall constitute a final, binding arbitration determination.

E. The arbitrators shall have such powers as are set forth in ORS 36.335 (1993).

F. The City and the Grantee shall each pay the cost of the arbitrator it selected. The cost of the third arbitrator, along with any other costs associated or arising from the arbitration, shall be divided equally between the City and the Grantee.

Section 21. EXPIRATION.

- A. Upon the expiration of this franchise, the City shall have the right, at its election, to:
1. Renew or extend the franchise to Grantee, in accordance with the Portland City Charter and applicable law;
 2. Terminate the franchise without further action; or,
 3. Take such further action as the City deems appropriate.
- B. Until such time as the City exercises its rights under this section the Grantee's rights and responsibilities within the City shall be controlled by the terms of the franchise.
- C. Upon the expiration of this franchise, on application made by the Grantee for new or additional authority to exercise the privileges, or any of them, hereby granted, the Grantee shall have the first and preferential right to take and receive such new authority upon terms and conditions approved by the City. If the Grantee does not promptly apply for such new or additional authority, or if the Grantee rejects the terms and conditions of such new authority offered by the City, the City may, after one year from the expiration of the prior franchise, grant a permit or franchise to any other corporation, association, firm, individual or individuals. In the event of such a grant, such other corporation, association, firm, individual or individuals taking such new or additional authority, shall in addition to any compensation to be paid to the City for such new or additional authority, pay to the Grantee, at or before the time such new or additional authority takes effect, and before the Grantees shall be deprived of the right to possess, maintain and operate its Telecommunications System located within the Streets, the fair and equitable valuation of Grantee's Telecommunications System located within the Streets. If the City and Grantee cannot agree on the fair and equitable value of said Telecommunications System, the dispute shall be determined by arbitration, as provided under Section 20 of this Franchise. Until such time as the City exercises its rights under this Section, the Grantee's rights and responsibilities within the City shall be controlled by the terms and conditions of this Franchise.

Section 22. CHARTER AND GENERAL ORDINANCES TO APPLY.

- A. This franchise is hereby made subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, now in effect or hereafter made effective, and particularly to the applicable provisions presently contained in Sections 10-101 through 10-218 inclusive, of said Charter (1942 compilation and revised in part by subsequent amendments), as the same now exist or hereafter are amended by the people of the City of Portland, which are hereby expressly made a part of this franchise.
- B. 1. Grantee acknowledges that information submitted to the City is open to public inspection under the Oregon Public Records Law, ORS 192.410 through 192.505 (1993).

Grantee is responsible for becoming familiar and understanding the provisions of the Oregon Public Records Law.

2. Grantee may identify information, such as trade secrets, submitted to the City as confidential. Grantee shall prominently mark any information for which it claims confidentiality with the word "Confidential", in letters at least one-half (1/2) inch in height, prior to submitting such information to the City. The City shall treat any information so marked as confidential, until the City receives any request for disclosure of such information. Within five (5) working days of receiving any such request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) working days within which to provide a written response to the City, before the City may disclose any of the requested confidential information. The City shall retain the final discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

C. Any litigation between the City and the Grantee arising under or regarding this franchise shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

Section 23. NOTICE. Any notice provided for under this franchise shall be sufficient if in writing and delivered personally to the following addressee or deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed as follows, (2) sent by overnight or commercial air courier (such as Federal Express), or sent by facsimile transmission to the facsimile number provided, or to such other address or facsimile number as the receiving party hereafter shall specify in writing:

If to the City: Office of Cable Communications and Franchise Management
City of Portland, Oregon
1211 SW 5th Avenue, Room 1160
Portland, Oregon 97204
FAX: (503) 823-5370

With a copy to: City Attorney's Officer
Room 315, City Hall
1220 SW Fifth Avenue
Portland, Oregon 97204
FAX: (503) 823-3089

If to the Grantee: President
MCI Metro Access Transmission Services, Inc.
2250 Lakeside Boulevard
Richardson, Texas 75082
FAX: (214) 918-1999

With a copy to: MCI Metro Access Transmission Services, Inc.
Office of the General Counsel
2400 N. Glenville Drive
Richardson, Texas 75082
FAX: (214) 918-6927

Section 24. WRITTEN ACCEPTANCE. On or before the thirtieth day after this ordinance becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by the Grantee, meeting the approval of the City Attorney. A failure on the part of Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this ordinance shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

Section 25. OTHER AUTHORITY SUPERSEDED. Upon the effectiveness of this franchise, any and all authority to operate previously granted to Grantee by the City shall be superseded by this Franchise.

Commissioner Earl Blumenauer
MBHenry & BWalters:jtl
May 17, 1995
cablefranch.bew\mcifranc.ord

Passed by the Council, **AUG 23 1995**

BARBARA CLARK
Auditor of the City of Portland
By *Britta Olson* Deputy

Franchise - MCI Metro Access Transmission Services, Inc.

~~1164~~ ~~803~~ 1404

Agenda No.

ORDINANCE NO. 169230

Title

Grant a franchise to MCI Metro Access Transmission Services, Inc., for a period of ten years. (Ordinance).

INTRODUCED BY:	DATE FILED: MAY 19 1995
COMMISSIONER BLUMENAUER	Barbara Clark Auditor of the City of Portland
NOTED BY COMMISSIONER	
Affairs	By: <u>Gay Kershner</u> Deputy
Finance and Administration	For Meeting of: _____
Safety	
Utilities	
Works <u>EB/JP</u>	ACTION TAKEN:
BUREAU APPROVAL	MAY 24 1995 CONTINUED TO JUL 12 1995 9:30 A.M.
Bureau: Cable Communications & Franchise Management	JUL 12 1995 PASSED TO SECOND READING AUG 23 1995 9:30 A.M.
Prepared by Date	
Ben Walters 5/17/95	
Budget Impact Review:	
<input checked="" type="checkbox"/> Completed <input type="checkbox"/> Not Required	
Bureau Head: <u>David Olson</u>	

AGENDA		FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:	
			YEAS	NAYS
Consent	Regular <input checked="" type="checkbox"/>	Blumenauer	✓	
NOTED BY		Hales	✓	
City Attorney	<u>Benjamin Walters</u>	Kafoury		
City Auditor		Lindberg	✓	
City Engineer		Katz	✓	