

ORDINANCE NO.

AN ORDINANCE IMPOSING CONTROLS, LIMITATIONS AND RESTRICTIONS ON THE APPROVAL AND ISSUANCE OF CONTRACTUAL LICENSES, PERMITS AND/OR AUTHORIZATIONS FOR USE AND OCCUPATION OF THE STREETS, ALLEYS, THOROUGHFARES AND RIGHTS-OF-WAY OF THE CITY OF MEMPHIS FOR INSTALLATION AND USE OF FACILITIES FOR THE OPERATION OF PUBLIC AND PRIVATE UTILITIES OTHER THAN FIBER OPTIC AND OTHER COMMUNICATIONS SYSTEMS ESTABLISHING REQUIREMENTS, TERMS, CONDITIONS, LIMITATIONS AND PROVISIONS FOR RECOVERY OF THE CITY'S COSTS INCURRED FOR THE CONSTRUCTION, MAINTENANCE, POLICING, MANAGEMENT OR REPAIR OF THE STREETS, ALLEYS, THOROUGHFARES AND RIGHTS-OF-WAY OF THE CITY

WHEREAS, it is proper under Tennessee law that permission to use the public rights-of-way for communications systems and public and private utilities be sought and obtained from the City by public and private utilities and utility providers under authority of Section 15 of Ordinance No. 1852, the Home Rule Charter of the City of Memphis and Section 3 of Chapter 11 of the Acts of 1879, which is preserved by Section 17 of the City's Home Rule Charter, and from all of which authority the City is made the proprietor of its streets and public rights of way in trust for its citizens; and

WHEREAS, the Council has adopted Ordinance 5551 governing the access, use and occupation of its streets and public rights of way by public and private utilities and utility providers;

WHEREAS, the Council desires to adopt a new ordinance that specifically governs access, use and occupation of its streets and public rights of way by public and private utilities other than utility providers;

WHEREAS, the Council desires to formally repeal all ordinances and compensation schemes based on a percentage of gross revenues or other methods of compensation, whether set by ordinance or administrative directive, and to adopt uniform provisions that specify conditions and requirements for access, use and occupation of its streets and public rights of way by public and private utilities, including methods and procedures for setting rates and fees based on that portion of the City's right of

way costs reasonably related to regulating specific activities or defraying the cost of providing services or benefit to such public and private utilities.

NOW, THEREFORE, BE IT ENACTED AND ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, AS FOLLOWS:

## **Article I. DECLARATION OF AUTHORITY.**

The City of Memphis has been delegated, as proprietor, the entire control over the streets, alleys, thoroughfares and rights-of-way located within its corporate limits by the General Assembly pursuant to Chapter 11 of the Acts of 1879 and subsequent Acts, all of which were preserved by Section 17 of the City's Home Rule Charter. In addition, the City possesses police powers to regulate the use of its streets, alleys, thoroughfares, rights-of-way and public places for the protection of the health, safety and welfare of its citizens. The City acts in its proprietary capacity by enacting this Ordinance and by authorizing the Mayor to issue authorizations, licenses, permits or easements issued or made pursuant to this ordinance or to enter into any contracts pursuant thereto and as such intends to be bound by the provisions of this Ordinance and any Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance as a natural person, except when its duty and obligation to protect the health, safety and welfare of its citizens requires that it act contrary to the express provisions of this Ordinance or any resulting Authorization, license, contract, permit or easement issued or made pursuant to this ordinance, since the abrogation or waiver of its police powers by contract or otherwise is contrary to the laws and public policy of this State. Upon adoption of this Ordinance and subsequent Franchise Licensing Ordinances, the Mayor and those acting at his direction are hereby authorized, empowered and directed to implement the provisions of this Ordinance and any subsequent Franchise Licensing Ordinances adopted by the Council from time to time and to take any and all other steps they deem

necessary or appropriate to implement this Ordinance and any subsequent Franchise Licensing Ordinances adopted by the Council from time to time.

## **Article II. Statement of Policy.**

(a) Any person or corporation organized by virtue of the laws of this State, or of any other State of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence or the equivalent thereof, which may be hereafter invented or discovered, is authorized, under Tennessee and federal statutes, to construct, operate and maintain a telegraph, telephone, or other lines necessary for the speedy transmission of intelligence, along and over the public highways and streets of the cities and towns of this State, subject to all reasonable police powers of the City to regulate the construction, maintenance, or operation of such line within its limits, including the right to exact reasonable rentals and compensation for the use of its streets on a non-discriminatory and competitively neutral basis.

(b) It is the policy of the City of Memphis to maintain the integrity, operational safety and functions of the City's streets and rights-of-way. It is also the policy of the City of Memphis to regulate and/or license the installation of underground Utility Systems and related facilities within the rights-of-way of the City; provided, however, that any such access, use and/or occupation of the City's streets and rights-of-way by private and public utilities shall be only allowed if approved by the Memphis City Council and if allowed shall be subject to (1) the provisions of this Ordinance and any subsequent Franchise Licensing Ordinances adopted by the Council and (2) shall be conditioned on the payment of compensation by any such private or public utility using and occupying the City's rights-of-way with their Utility Systems in such amounts determined by the City Council from time to time in accordance with applicable law. The City may, at its option, accept monetary compensation or in-kind compensation, or both. Valuation of in-kind compensation shall be calculated in accordance with the

method of valuation adopted by the Council.

### **Article III. Governing Law.**

It is the intent of the Council that this Ordinance and any agreement made under the authority of this Ordinance be governed by and interpreted in accordance with Tennessee law, including but not limited to the City's Charter, Tennessee Code Annotated, Sections 6-54-109 65-4-101 and 65-4-105 by Tennessee appellate courts.

### **Article IV. Definitions.**

For the purpose of this Ordinance the following definitions shall apply:

3.01 **"Anniversary Date"** shall mean each anniversary of the date on which any contract under this Ordinance is fully executed.

3.02 **"Charter"** shall mean collectively (i) Ordinance No. 1852, Home Rule Charter adopted by Referendum vote on November 8, 1966 (the "Home Rule Charter") and (ii) the Charter of the City of Memphis as enacted in Acts 1879 as amended, to the extent not repealed by the Home Rule Charter.

3.03 **"City"** shall mean the City of Memphis.

3.04 **"City Engineer"** shall mean the position of City Engineer created by the Charter or a successor position, or an acting City Engineer or the designee of the City Engineer.

3.05 **"Contract Year"** means with respect to any payments due the City under this Authorization Ordinance, each twelve (12) month period during the term of any Authorization, license, contract, permit or easement issued or made pursuant to this Authorization ordinance.

3.06 **"Confidential Information"** shall mean any Trade Secrets (as defined below) or other information relating to a Grantee that derives economic value from not being generally known to or readily accessible to other persons and is the subject of reasonable efforts to maintain its secrecy.

Confidential Information shall include, but not be limited to, (i) a Grantee's manner of operation, forms of agreements, plans, processes and programs; (ii) information about its finances and financial condition and about the finances and financial condition of clients or other entities affiliated with a Grantee; (iii) research, marketing plans, designs, procedures, formulas, discoveries, inventions, concepts, ideas, specifications, flowcharts, listings of customers, supplies, or analyses; and (iv) information supplied to Grantee by other parties which a Grantee is obligated to keep confidential. As used herein, "Trade Secrets: shall include any technical or non-technical data or information, design, procedure or improvement that derives economic value, actual or potential, from not being generally known to or readily ascertainable by proper means by the competitors of a Grantee. "Confidential Information" shall not include any information which has entered the public domain.

3.07 **"Council"** shall mean the Council of The City of Memphis.

3.08 **"Day"** or **"Days"** shall mean a calendar day or days.

3.09 **"Director of Finance"** shall mean the position of Director of Finance and Administration created pursuant to and under the Charter or a successor position, or an acting Director of Finance, or the designee of the Director of Finance.

3.10 **"Authorization"** shall mean the non-exclusive contractual privilege, authorization license or easement granted as provided in this ordinance to occupy or use the streets and/or public rights-of-way within the City for the construction, operation and maintenance of any Public Works or Utility System within all or a portion of the City.

3.11 **"Right of Way Agreement"** shall mean a fully executed and notarized authorization, license, contract, permit or easement issued or made pursuant to the provisions of this Ordinance and any subsequent Franchise Licensing Ordinances adopted by the Council by and between the City and Grantee in form and substance agreeable to the City, wherein the City grants certain non-exclusive

revocable rights to use and occupy its streets and rights-of-way and wherein Grantee accepts and agrees to be bound by the terms and provisions of this ordinance.

3.13 “**Grantee**” shall mean any public or private utility or any company, other than a utility provider, operating Public Works or Utility Systems using facilities either constructed, owned or leased within the Public Right-of-Way for any purpose.

3.14 “**Public Right-of-Way**” shall mean real property surface, subsurface and air rights (appurtenant to surface rights) acquired by the City by any lawful means and devoted to transportation of people, goods or information and to the provision of governmental services and includes the surface and that area below the surface which is necessary to support the public street, alley, path, bridge, tunnel, sidewalk, planting strip, median, waterway, dock, wharf, pier, public ground, utility easement or other public right-of-way. Public right-of-way also includes the surface of any public street, alley, public ground or other public right-of-way acquired by the City. No reference herein or in any Authorization for use of any public right-of-way shall be deemed to be a representation or guarantee by the City that its title to any public right-of-way or any improvement or object located therein is sufficient to permit or authorize its use by the Grantee. Public Right-of-Way shall not include any real or personal property, buildings, infrastructure, such as sewers, conduits, poles and bridges, owned by the City that is not a utility, easement or right-of-way.

3.15 “**Public Works**” shall mean any water, gas or electric heat, light or power works, plants and systems as defined in Tennessee Code Annotated § 7-34-102 and any such systems owned and operated by privately owned utility companies or public utilities, as defined herein.

3.16 “**Public Right of Way Administrator**” shall mean who shall be a person designated by the Mayor within the Office of the City's Chief Administrative Officer, whose responsibility shall be to coordinate with all divisions of City government having any responsibility for managing, supervising or inspecting any construction or use of the City’s Public Rights of Way by private or public entities.

3.17 "**System**" or "**Utility System**" shall mean Grantee's network of cables, wires, lines, conduits, innerducts, wave guides, optic fiber, microwave, laser beams, and any associated converters, equipment, or facilities that are placed in, on, across or over the public rights-of-way that are designed and constructed for the purpose of producing, receiving, amplifying or distributing by audio, video or other forms of electronic signals to or from subscribers or locations within the City, but not including cable television services as defined under the Cable Communications Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, and/or any Authorization granted by the City pursuant to said Act.

3.18 "**TRA**" shall mean the Tennessee Regulatory Authority or any successor agency.

3.19 "Utility Company" means any telephone or telegraph company as defined and contemplated by Title 65, Chapter 21, Parts 1 and 2 of Tennessee Code Annotated and governed by City Ordinance No. 5551, as amended.

3.20 "Term" means the duration of the Right of Way Agreement under which a public or private utility locates, installs and maintains utility facilities within the City's rights-of-way.

3.21 "Cover". Depth of Lop of pipe, conduit, casing or gallery below grade of roadway, ditch or other utility facilities.

3.22 "Encasement." Structural element surrounding a pipe.

3.23 "Encroachment." Unauthorized use of the City's streets and rights-of-way or easements for signs, fences, utilities, parking, storage, etc.

3.24 "Gallery. An underpass for two or more utility lines.

3.25 "Manhole. An opening in an underground system which workmen or others may enter for

the purposes of making installations, inspections, repairs, connections and tests.

3.26 “Median. The portion of a divided highway or street separating the Traveled Ways for traffic in opposite directions.

3.27 “New Utility Installation. An initial installation on the City’s streets and rights-of-way and the replacement of existing facilities with those of a different type, capacity or design of replacement at a new location on the right-of-way.

3.28 “Normal. Crossing at a right angle.

3.29 “Oblique. Crossing at an acute angle.

3.30 “Pavement structure. The combination of subbase, base course, and surface course placed on a subgrade to support the traffic load and distribute it to the roadbed.

3.31 “Pipe. A tabular product made as a production item for sale as such. Cylinders formed from plate in the course of the fabrication of auxiliary equipment are not pipe as defined here.

3.32 “Plowing. Direct burial of utility lines by means of a “plow” type mechanism which breaks the ground, places the utility line and closes the break in the ground in a single operation.

3.33 “Private lines. Privately owned facilities which convey or transmit intelligence or information but are devoted exclusively to private use.

3.34 “Public utility” means every individual, co-partnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any gas, electric light, heat, power, water, gas pipeline, gasoline or fuel pipeline and crude oil pipeline, or any other like system, plant or equipment, affected by and



dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof. "Public utility" as defined in this section shall not be construed to include the following non-utilities:

- (i) Any corporation owned by or any agency or instrumentality of the United States;
- (ii) Any county, municipal corporation or other subdivision of the state of Tennessee;
- (iii) Any corporation owned by or any agency or instrumentality of the state;
- (iv) Any corporation or joint stock company more than fifty percent (50%) of the voting stock or shares of which is owned by the United States, the state of Tennessee or by any nonutility referred to in subdivisions (a)(1), (2), and (3)

3.34 "Roadway. The portion of a street or highway, including shoulders, for vehicular use. A divided street or highway has two or more roadways.

3.35 Specifications. Standard Specifications for Road and Bridge Construction approved by the City Engineer.

3.36 "Surety. The corporation, partnership or individual other than the utility owner, executing a bond furnished the City by the utility owner.

3.37 "Traveled Way. The portion of the roadway for the movement of vehicles, exclusive of shoulders, auxiliary lanes and rights of way designed for placement of utilities.

3.38 "Trenched. Installed in a narrow open excavation.

3.39 "Untrenched. Installed without breaking ground or pavement surface, such as by jacking or boring.

3.40 "Utility Systems" include, but are not limited to any one (1) or any combination of the following: culverts; curbs; dispensaries; drainage systems, including storm water sewers and drains; gas and natural gas systems and storage facilities; highways; highway and street equipment; levees; port facilities; docks and dock facilities, including any terminal storage and transportation facilities incident

thereto; sewers; sewage and waste water systems, including, but not limited to, collection, drainage, treatment, and disposal systems; streets; gas, gasoline, fuel or crude oil distribution, transmission and /or storage systems; tunnels; viaducts; water treatment distribution and storage systems.

3.41 Utility Owner. The public agency or cooperative and any private cooperative, corporation, company or individual named in the Right of Way Agreement and responsible for the construction, operation and maintenance of utility facilities or private lines.

## **Article V. Administration**

The administration of the access, use and occupation of the City's Public Right of Way by private and public utilities shall be under the supervision of the Chief Administrative Officer of the City. The Mayor shall designate a person within the Office of the City's Chief Administrative Officer, whose responsibilities shall be:

- 1) To coordinate with all divisions of City government who perform services, functions or activities in all or a portion of the City's Public Rights of Way;**
- 2) To coordinate with all divisions of City government having any responsibility for managing, supervising or inspecting any construction, use, operation or maintenance of utility systems within all or a portion of the City's Public Rights of Way by private or public entities;**
- 3) To manage the application process;**
- 4) To insure that all requirements, limitations and conditions imposed by this Ordinance and other laws, ordinances, rules and regulations are satisfied before any authorization to access the City's Public Rights of Way is granted;**
- 5) To insure that all statutes, laws, ordinances, rules and regulations pertaining to the City's Public Rights of Way are observed by Grantees;**

- 6) To develop a system for preserving, recording and maintaining all contracts, licenses, permits or easements granted under this ordinance to occupy or use the streets and/or Public Rights-of-Way for the construction, operation and maintenance of any utility systems within all or a portion of the City.**

## **Article VI. Conditions for Access to the City's Rights of Way**

(a) No private or public utility company or utility owner shall be permitted to install underground any Utility System or related facilities within the City's rights-of-way without first obtaining approval from the Memphis City Council and if approved without executing a Right of Way Agreement or a permit. Any such Utility company or utility owner shall be permitted to continue to occupy the City's streets and rights of way pursuant to any extended or unexpired Specific Route or Encroachment Agreement as long as any such company is not in default thereunder.

(b) Upon making application to the Chief Administrative Officer for a Right of Way Agreement under this Ordinance, the Utility company shall pay an application fee to the City for processing the application, reviewing plans, and other administrative services, but not including inspection services, which shall be separately charged as herein provided. The total amount of the required application fee shall include a base fee of \$350 plus \$10 for each mile of the proposed installation within all or a portion of the City's Public Rights of Way. The application shall be reviewed by the City Engineer, the Director of the Division of Public Works and by MLGW, who shall each make a recommendation to the Council regarding the proposal in a report to be provided to the City Council by the Chief Administrative Officer.

(c) Upon receipt of said report the Council shall refer the application to the Public Works Committee for consideration by the Council. After the matter has been considered by the

Council in the Public Works Committee, the application shall be considered by the full council at a regular council meeting within a reasonable time as and when the Council deems appropriate. The Council may approve, deny or approve the application with such conditions as the Council deems appropriate.

(d) If the application is approved, the Mayor or his designee shall prepare and present a Franchising Licensing Ordinance for approval by the Council, which shall contain a proposed Right of Way Agreement with the terms, conditions and provisions to apply to the use and occupancy of the City's Rights of Way by said utility company

(e) All utility installations within the City's streets and rights-of-way and all work performed within the City's streets and rights-of-way or otherwise, including without limitation any work performed for the City, shall be subject to inspection by the City Engineer to insure conformity with all City engineering and construction standards which standards shall be deemed a part of the Right of Way Agreement by reference. When new utility installations within the City's streets and rights-of-way are of such magnitude and complexity as to require extensive inspectional services by the City Engineer to ascertain that all provisions of the City's requirements are carried out, the City Engineer shall assign one or more inspectors, either City employees or specially employed engineering contractors, to inspect the installation periodically and if necessary place one or more inspectors on the site for the duration of construction activities. The utility in accepting the Right of Way Agreement shall agree to reimburse the City for said inspector's salary, inclusive of benefits, or compensation, equipment used and miscellaneous expenses incurred applicable to the installation of the utility facilities. The necessity for such inspectional services will be determined by the City Engineer on a case by case basis and his decision shall be conclusive and final.

(f) The City Engineer shall have the authority to reject substandard work or materials and/or to suspend or stop work, in whole or part, where the Utility company fails to comply with any requirement of this Ordinance or the terms of the Right of Way Agreement or where any unsafe or hazardous condition exists unless and until corrective measures have been made to the satisfaction of the City Engineer.

(g) Notwithstanding any provision of this Ordinance or any other Ordinance applicable to the City to the contrary, the requirements of this ordinance shall not apply to existing oil pipelines jet fuel lines, including any activities related to the maintenance, repair, or replacement thereof, or construction of new oil or jet fuel pipelines in existing rights-of-way or easements for existing oil or jet fuel pipelines even if such pipelines, easements or rights-of-way are within any existing or future zoning setbacks. This ordinance does not apply to any new or existing pipeline that is located within the property boundaries of an oil refinery, oil terminal, associated docks or processing facilities, or a retail service station and providing service to that oil refinery, oil terminal, associated docks or processing facilities, or retail service station.

(h) Any inspection or control exercised by the City over the construction activities of the utility owner shall in no way relieve the utility owner of any duty or responsibility to the general public nor shall such services and/or control by the City relieve the utility owner from any liability for loss, damage or injury to persons or adjacent properties.

## **Article VII. Right of Way Agreement Requirements**

Each Right of Way Agreement for the installation of utility facilities within City's rights-of-way shall be subject to this Ordinance and specifically, but without limitation, to the following terms and conditions:

(a) Assignment. The Utility company and/ or utility owner may not assign or transfer its rights or obligations under the Right of Way Agreement to another Utility company or other entity or person without first giving written notice to, and obtaining the consent of, the City, which consent shall not be unreasonably withheld.

(b) Indemnification and Hold Harmless.

- 1) The Utility company and/ or utility owner shall indemnify the City of Memphis and their officers, employees and agents, and hold them harmless to the maximum extent allowed under Tennessee law for any and all claims arising from the Utility company's use of the City's right-of-way to install, operate and/or maintain utility facilities, including claims by third parties, and including attorneys' fees and all other costs of preparing for and defending against such claims, regardless of any negligence or fault of the City of Memphis.**
- 2) Without limiting the foregoing, the Utility company shall hold the City of Memphis, and their officers, employees and agents, harmless, to the maximum extent allowed under Tennessee law, for any personal injury or property damage, including interruption of service or loss of business, incurred by the Utility company, or its officers, employees or agents, arising from the City of Memphis' construction, reconstruction, operation or maintenance of the City's right-of-way, regardless of any negligence or fault of the City of Memphis.**
- 3) The City agrees to give Grantee prompt and reasonable notice of any claims or lawsuits; and Grantee shall have the right to investigate, compromise, intervene and defend same to the extent of its own interest. The above indemnification shall not apply to any judgment of liability resulting from the gross negligence or willful misconduct of the City. The terms and provisions contained in this Section are intended to be for the benefit of the City and Grantee, and are not intended to be for the benefit of any third party. The City shall have the right to participate or conduct the defense of its interests in any proceeding, and thereby assume risks and liabilities for its own acts or omissions.**

(c) Insurance. The Utility company shall at all times have and maintain, and upon the request of the City shall provide written proof of, liability insurance policies containing, at a minimum, the following insurance coverage:

- 1) All such liability insurance policies shall provide liability coverage sufficient, at a minimum, to match the City limits of liability under City Ordinances. These limits are currently set at One Million Dollars (\$1,000,000.00) combined single limit, bodily injury and for real property damage in any one occurrence and Five Million Dollars (\$5,000,000.00) aggregate.**
- 2) Grantee shall also file with the City a certificate of insurance for a comprehensive automobile liability insurance policy written by a company authorized to do business in the State of Tennessee, for all owned, non-owned, hired and leased vehicles operated by Grantee, with limits no less than One Million Dollars (\$1,000,000.00) each accident, single limit, bodily injury and property damage combined, or evidence of self-insurance.**
- 3) Grantee shall also maintain and specifically agrees that it will maintain throughout the term of the Authorization, workers compensation and employers liability, valid in the State, in the minimum amount of the statutory limit for workers compensation.**
- 4) All liability insurance required pursuant to this section shall be kept in full force and effect by Grantee during the term of any Right of Way Agreement or other Authorization and until after the removal of utility systems installed by Grantee in the Public Rights-of-Way incident to the maintenance and operation of the Utility System as defined in this Ordinance.**
- 5) All policy limits set forth herein are subject to change by order of the City's Chief Administrative Officer without amendment of this Ordinance.**

**6) All such liability insurance policies shall name the City of Memphis as an additional insured for the purposes of fulfilling the Utility company's obligations under the Use and Occupancy Agreement, including without limitation any and all obligations to indemnify and hold harmless the City of Memphis, and their officers, employees and agents. All policies shall be endorsed to give the City thirty (30) days written notice of the intent to amend or cancel by either Grantee or the insuring company.**

(d) Surety Bond. The Utility company or utility owner shall furnish a surety bond, issued by a company licensed to do business in the State of Tennessee, and in such form and amount acceptable to the City, guaranteeing full and faithful performance of the terms and conditions of the Right of Way Agreement, including without limitation the repair and restoration of the right-of-way premises, the payment of any monetary compensation remaining due to the City for use of the City's Streets and rights-of way, and the completion of any installation or relocation of utility facilities.

(e) **Relocation or Removal.**

**1) If, at any time, the City determines that any utility facilities need to be relocated within, or removed from, the City's streets and rights-of-way for any reason related to the use, operation, maintenance, construction, reconstruction, modification or redesign of any such streets and rights-of-way, the Utility company or utility owner shall relocate or remove the facilities as directed by written notice from the City Engineer.**

**2) All such costs of relocation or removal shall be borne solely by the Utility company or utility owner and not by the City, except as the City may otherwise agree in accordance with a special condition of the Right of Way Agreement executed prior to the installation, or as the City may subsequently agree in writing under a utility relocation contract.**



**3) The Utility company or utility owner shall complete the relocation or removal within such time as the City shall specify by written notice, or within such additional time as the City Engineer may authorize in writing. Upon the failure of the Utility company or utility owner to relocate or remove the utility facilities within the specified time, or such additional time as the City Engineer may authorize in writing, the utility facilities shall be deemed to be abandoned by the Utility company or utility owner, and the City shall be deemed the owner thereof; provided, however, that the City, in its sole discretion, may refuse ownership of the abandoned utility facilities at any time within one year after the abandonment and thereupon hold the Utility company or utility company liable for the costs of removing such facilities from the City's streets and rights-of-way.**

**4) To the extent that the Utility company or utility owner is required to remove utility cable facilities from the City's streets and rights-of-way, the Utility company shall to that extent be relieved of any further obligation under the Right of Way Agreement to compensate the City for the use of the City's streets and rights-of-way. To the extent that the Utility company is allowed to relocate utility facilities to another location within the City's streets and rights-of-way, the Utility company or utility owner may elect either to remain under the terms of compensation specified in the Right of Way Agreement, or the Utility company or utility owner may choose to enter into a new Right of Way Agreement for the new location.**

**(f) Duration and Renewal of Right of Way Agreements.**

**1) Initial Term. The Right of Way Agreement for the installation of utility facilities within City's streets and rights-of-way shall have an initial term of up to 20 years as the Council may approve.**

**2) Renewal Options. Upon the expiration of the initial term of the Use and Occupancy Agreement, the Utility company shall have an option to renew the Right of Way Agreement for one (1) additional term of 5 years, or longer term approved by the City Council, but shall be subject to the applicable rate of compensation in effect as**

*of the date of renewal. In no event shall any initial term or any successive renewal term exceed a combined total of 30 years.*

## **Article VIII. Compensation.**

### **(a) Compensation Requirement.**

- 1) *No Utility company or utility owner shall be permitted to install underground utility facilities within City's streets and rights-of-way except upon the payment of compensation for the use and occupation of such rights-of-way, as adopted by the Memphis City Council from time to time.***
  
- 2) *The City may, at its option, may receive the compensation for use of City's streets and rights-of-way in the form of money or as in-kind compensation in the form of Utility facilities or services, or both.***

### **(b) Rate and Method of Compensation.**

- 1) *The rate of monetary compensation shall be as established by the Memphis City Council from time to time by Ordinance for such time periods determined by the Council by affixing an addendum to this Ordinance. In establishing the monetary rate of fair and reasonable compensation for use and occupation of City's streets and rights-of-way, the City Council shall consider the following factors:***
  - i) *The City's costs in regulating the right of way activities of Utility companies and utility owners,***
  - ii) *the extent the City's streets and rights-of-way are used and occupied by such companies and owners,***
  - iii) *the proportionate share of the City's cost of making and keeping in repair and policing the City's streets and rights-of-way to be assigned to such companies and owners in order to***

defray the total amount of the City's right of way costs to provide right of way services to such companies and owners,

- iv) the cost of providing the benefit to such companies and owners of the use and occupation of the City's streets and rights-of-way for installation of their Utility facilities, including, but not limited to, savings on construction costs due to ease of installation in established rights-of-way conveniently located in close proximity to their customers and businesses, comparable rates charged for the use and access, the amount of right-of-way available in certain locations and demand for certain locations. Information pertaining to these factors shall be presented to the City administration and by any other interested parties.
  - v) any other factors the Council deems relevant.
- (c) Total Amount of Compensation. The total amount of compensation due for use of the right-of-way for a shall be fixed as of the date of execution of the Right of Way Agreement, in accordance with the rate and method of valuation of in-kind compensation established by the City Council and in effect at that time.
- (d) Unit Measure of Compensation.

**1) Compensation shall be stated and computed on a measured unit of right of way used by a Utility Company and may be based (i) on the cubic feet of right-of-way such provider occupies in the public right-of-way, including clearance zones required by this Ordinance or by applicable industry and safety standards or (ii) on a unit charge for each linear foot of pipe five (5) inches or less in diameter that such provider occupies in the public right-of-way, including clearance zones required by this Ordinance or by applicable industry and safety standards as the City may elect.**

**2) The linear foot charge shall be calculated on a pro rata basis. For example, the charge for a ten inch pip in diameter shall be 2 times the charge for one five inch pipe.**

## **Article IX. General Installation Policies and Procedures.**

(a) Timing of Installations. To minimize interference with the safe use, operation and maintenance of the freeway, and as reasonably necessary to manage the right-of-way, the City Engineer

may limit the timing of access so that, to the extent possible, there is no more than one utility cable installation project underway at any given time on any particular segment of a state freeway.

**(b)** Location and Alignment Criteria.

- 1) General Location Policy.** *To minimize interference with the safe use, operation and maintenance of the City's streets, longitudinal installations of Utility Systems and facilities shall be located outside the Travelled Way and as near to the outer edge of the right-of-way line as is reasonably practical; provided, however, that alternative locations within the right-of-way, including the Travelled Way, may be permitted where the City Engineer determines that it is not reasonably practical to locate the Utility Systems and facilities along the outer edge of the right-of-way and that the use of the alternative location is consistent with the City's goal to minimize interference with the safe use, operation and maintenance of the streets and highways.*
- 2) Horizontal and Vertical Clearance Zones.** *As a general rule, subsequent installations of underground Utility Systems and facilities outside the Travelled Way shall be located not less than three feet (3') from any previously installed Utility System or other utility installation, if any, within the City's right-of-way or such greater clearance zones required by utility codes as they relate to electrical, water, gas or sewer systems. Exceptions may be considered on a case-by-case basis and as may be reasonably necessary to manage the City's right-of-way.*
- 3) Depth.** *All underground Utility Systems and facilities shall be located and installed in accordance with a minimum depth of thirty six inches (36"), or at such greater depths as the City Engineer may require as a special condition of a Right of Way Agreement or as shall be necessary to comply with the Horizontal and Vertical Clearance Zone requirement.*

- 4) ***Access Points. Devices for accessing underground Utility Systems and facilities for routine service or site visits shall not be allowed within the Travelled Way, except as the City Engineer may otherwise expressly permit or require.***
- 5) ***Support Facilities. All above-ground support facilities for underground Utility Systems and facilities shall be located outside the Travelled Way and as near to the outer edge of the right-of-way line as is reasonably practical. No above-ground facility may be located on the City's right-of-way without the express written approval of the City Engineer.***
- 6) ***Attachment to Roadway and Roadside Structures. The attachment of Utility Systems and facilities to Roadway and Roadside Structures -- including without limitation bridges, overpasses, underpasses, culverts and tunnels -- shall be permitted only with the prior written approval of the City Engineer.***

## **Article X. Installation and Maintenance Requirements.**

### **(a) General Standards of Care.**

- 1) ***The utility company shall take care not to install any Utility System in such a manner as to create a potential hazard to life, health or property or in such a manner as to impair the use, operation and maintenance of the City's rights of way.***
- 2) ***The utility company shall cooperate with the City Engineer to identify locations for its Utility System or facilities within the City's right-of-way that will, to the extent it is reasonably practical, minimize any potential conflict with the future expansion or reconstruction of the right-of-way.***

(b) Tennessee One-Call Service. Utility companies, utilities and private entities accessing the City's rights of way shall comply with the Tennessee One-Call Service as provided in Section 65-31-107 of the Tennessee Code, or as it may be amended.

(c) Permits and Approvals. The utility company shall be responsible for obtaining all approvals and/or permits that may be required for activities authorized under this Rule, including without limitation all environmental permits and federal regulatory approvals or permits, if applicable.

## **Article XI. Minimum Installation and Maintenance Controls.**

The following minimum controls shall apply to the installation, servicing and maintenance of all utility cable facilities within state freeway rights-of-way, in addition to such other requirements as the City Engineer may provide as a general or special condition of the Right of Way Agreement:

(a) Installation and Maintenance Plan. Before commencing any installation, servicing or maintenance of a utility cable facility, the utility company shall submit an installation and maintenance plan to the City Engineer for review and approval, and upon approval such plan shall be made a part of the Right of Way Agreement. At a minimum, the installation and maintenance plan shall specify:

- 1) *The location and method of installing each part of the Utility Systems and facilities within the right-of-way;*
- 2) *The means by which access to and within the right-of-way shall be accomplished for the purpose of installing, servicing and maintaining each part of the Utility Systems and facilities, including provisions for ingress and egress, parking of vehicles and equipment, and storage of materials;*

- 3) *The means by which the utility company will provide for the control of traffic on the Travelled Way, if needed, in the course of installing, servicing or maintaining any part of the Utility Systems and facilities;*
- 4) *The schedule for completing the installation of the Utility Systems and facilities, or parts thereof, within the right-of-way; and*
- 5) *The procedure by which the utility company will conduct emergency maintenance operations within the right-of-way.*

(b) **Preservation of Pavement Structure.** Open cutting or trenching of the pavement structure of a street, highway or roadway, including without limitation the Traveled Way and shoulders, if any, shall not be permitted. Wherever the City Engineer permits a crossing of the pavement structure of a street, highway or roadway in accordance with this Ordinance, the crossing shall be accomplished by boring or other untrenched method as approved by the City Engineer.

(c) **Access to Right-of-Way for Installation and Maintenance.**

- 1) *As far as it is reasonably practical, all utility facilities should be designed and located in such a manner that they can be installed, serviced and maintained without direct access thereto from the traveled way. Such direct access may be permitted in special circumstances where there is no reasonably practical alternative means of access and the utility company has made adequate provisions for controlling access to the work zone, directing traffic, and protecting the safety of workers and the traveling public, as specified in the installation and maintenance plan approved by the City Engineer.*

(d) **Parking of Vehicles.** The utility company shall not be permitted to park vehicles and equipment or to store materials on the right-of-way without express prior approval by the City Engineer. In no case shall the utility company be permitted to park vehicles and equipment or store materials

within the clear zone of the right-of-way, except as may be required during actual installation operations within the clear zone and while all required traffic control is present and in place.

(e) Traffic Control.

- 1) *All traffic control signs or other traffic control devices that the utility company may use in the course of any installation, servicing or maintenance of a utility facility shall comply with the procedures used by the City Engineer regarding Traffic Control Devices.*
- 2) *In addition, the utility company shall arrange for law enforcement officers having appropriate enforcement authority to be present to ensure the safe flow of traffic whenever any installation, servicing or maintenance of a utility facility occurs within the clear zone of the freeway or as may be required in the installation and maintenance plan approved by the City Engineer where access to the work zone has been permitted from the traveled way, shoulders or access ramps of the freeway. The utility company may not conduct any such work within the right-of-way without giving specific advance notice thereof to the City Engineer.*
- 3) *Advance Notice of Installation or Maintenance Work. Before performing any non-emergency servicing or maintenance of a utility facility at any location within the freeway right-of-way and before performing any installation of a utility facility within the clear zone or where access to the utility work zone has been permitted from the traveled way, shoulders or access ramps of the freeway, the utility company shall give at least five (5) work days advance notice thereof to the City Engineer.*



(f) Emergency Maintenance or Repair. The utility company shall notify the appropriate Regional Director of the City Engineer as soon as possible, and in any event not more than twenty-four (24) hours, after the occurrence of an event requiring emergency maintenance or repair of a utility facility within the City's right-of-way, or as otherwise specified in the installation and maintenance plan approved by the City Engineer.

(g) Cessation of Work for Public Safety. If the utility company fails to comply with the traffic control plan or any other provision of the installation and maintenance plan, or if any activity of the utility company within the City's right-of-way interferes with the safe and efficient use of the travelled way as determined by the City Engineer, the utility company shall immediately cease such activity upon notice being given by the City Engineer, and the utility company shall thereafter work with the City Engineer to bring its activities into compliance with the installation and maintenance plan and/or implement such additional safety requirements as may be specified by the City Engineer.

(h) Trees. The cutting or removal of trees along the freeway right-of-way shall not be permitted without the express approval of the City Engineer.

(i) Hazardous Substances. The utility company shall not place, install or deposit any hazardous substance or hazardous waste within or on any part of the state freeway or state freeway right-of-way. If at any time the utility company causes or allows a spill of a hazardous waste or substance within the freeway right-of-way, the utility company shall remain solely liable for the clean-up and removal of such hazardous waste or substance. The utility company shall indemnify the State of Tennessee and City Engineer, and their officers, employees and agents, and shall hold them harmless against any and all claims or expenses of any kind related to the deposit, spillage and/or clean-up of any such hazardous wastes or substances.

(j) Above-Ground Markers. The utility company shall install permanent above-ground markers indicating the location of its underground Utility Systems and facilities at such intervals as the City Engineer may approve or require in the installation and maintenance plan. These markers shall not interfere with the safe use, operation and maintenance of the freeway, nor shall they constitute a hazard to the traveling public.

(k) Repair and Restoration of Premises.

- 1) *The utility company shall, as directed by and in a manner satisfactory to the City Engineer, promptly replace or repair any portion of the pavement, shoulders, structures, ramps, guardrail, drainage, or any other part of the right-of-way that may have been damaged in the course of any work within the right-of-way.*
- 2) *Upon the completion of any installation, replacement, repair or relocation of utility facilities within the rights-of-way, the utility company shall promptly restore the premises to a*

*condition similar to that which existed prior to such work, in a manner satisfactory to the City Engineer.*

- 3) *The utility company shall remain responsible for maintaining any excavation or trench on or along the state freeway right-of-way, as directed by and in a manner satisfactory to the City Engineer.*

(l) As-Built Drawings. “As-built” drawings that adequately demonstrate the location, size length and nature of all underground and aboveground Utility Systems located on, over or under the City’s right-of-way shall be submitted by a Utility Company to the City Engineer in such format as he shall direct within one hundred twenty days after completion of construction of such systems. A Utility Company shall update such drawings within sixty days whenever material changes are made to such company’s system which impact the public right-of-way. Said drawings, set forth by utility quarter sections, shall at a minimum include cable routings and the location of amplifiers, power supplies and system monitor test points.

(m) Completion of any installation or relocation. It shall be the responsibility of the Utility Company to seasonably submit “as built” drawings of its facilities in the City’s right-of-way and to provide other information upon request.

## **Article XII. Compliance and Revocation.**

(a) In the event that the City Engineer determines that the utility company is in violation of any provision of this Ordinance or any Right of Way Agreement, the City Engineer may order the utility company to comply.

(b) In any case not presenting any imminent threat to public safety, as determined by the City Engineer, the utility company shall be given thirty (30) days, or such other reasonable time as the City Engineer may provide, within which to correct the noncompliance.

(c) In any case presenting an imminent threat to public safety, as determined by the City Engineer, the utility company shall correct the noncompliance promptly as directed by the City Engineer.

(d) If a Utility Company fails to comply with any order or directive given by the City Engineer or otherwise violates any provision of this Ordinance, after the above-stated notice and opportunity to cure, then the City may take any action authorized by law, including revocation, withholding of all other licenses and permits until the violation is cured, or repeal of any permit or Authorization previously granted or filing a suit in court to compel compliance. If, in any such proceeding, default is finally established, the Utility Company shall be required to pay to the City the reasonable expenses incurred in the prosecution of such suit and all the City's damages and costs (including attorneys' fees). A Utility Company that in good faith disputes a finding that it is in default, and that promptly files a court proceeding challenging the determination may continue to provide service pursuant to the terms of any permit or Authorization unless otherwise ordered by the court.

(e) A violation of the provisions of this Article after the above-stated notice and opportunity to cure shall subject the offending Utility Company to an initial fine of \$50. Each day of continued violation of this Ordinance constitutes a separate offense and will subject the offending Utility Company

to continuing fines, above the initial fine, of \$50 per day for each day that the a Utility Company fails to comply with any order or directive given by the City Engineer to comply with any provision of this Ordinance.

(f) The utility company shall not be entitled to any compensation, lost profits, consequential damages or reimbursement of suit expenses or attorney’s fees in the event of a revocation of a Right of Way Agreement or enforcement action taken by the City to enforce this Ordinance.

(g) Upon the revocation of a Right of Way Agreement, the utility company shall promptly remove any Utility Systems located on, over or under the City’s right-of-way, in such manner and within such time as the City Engineer may direct. If the utility company fails to remove the Utility Systems within the time directed, the Utility Systems may be deemed to be abandoned by the utility company, and the City shall be deemed the owner thereof; provided, however, that the City Engineer, in its sole discretion, may refuse ownership of the abandoned Utility Systems at any time within one year after the abandonment and thereupon hold the utility company liable for the costs of removing such facilities from the City’s right-of-way.

### **Article XIII. RIGHT OF WAY FUND**

(a) There is hereby created a right-of-way fund, which shall be used exclusively to help defray the costs associated with the management of the rights of way, including but not limited to the costs of preparing studies of the right-of-way and costs of any special committee and the costs of staff and other reasonable expenses necessary to administer the provisions of this Ordinance.

(b) All payments for the use of the right-of-way made pursuant to this Ordinance shall be deposited into the fund, less reasonable administrative costs incurred by the City in connection with the collection of fees owed.

(c) Operating transfers shall be made from this fund to other funds of the City incurring costs associated with Right of Way management. Such operating transfers will be established in accordance with the City's annual Appropriation Ordinance.

SPONSOR:

FRANK COLVETT  
CHAIRMAN

#### **Article XIV. SEVERABILITY**

If any section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Authorization ordinance is for any reason held invalid or unenforceable by any court of competent jurisdiction, the remainder of this Authorization ordinance shall not be affected thereby, but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant and portion of this Authorization ordinance shall be valid and enforceable to the fullest extent permitted by law.

#### **Article XV. ENACTMENT CLAUSE**

Be it ordained, that this ordinance shall take effect from and after the date it shall have been passed by the Council, signed by the chairman of the council, certified and delivered to the office of the Mayor in writing by the comptroller, and become effective as otherwise provided by law.