

ORDINANCE NO. 5-1994

AN ORDINANCE WHEREBY THE CITY OF PENITAS, TEXAS, AND SOUTHWESTERN BELL TELEPHONE COMPANY AGREE THAT, FOR THE PURPOSE OF OPERATING ITS TELECOMMUNICATIONS BUSINESS, THE TELEPHONE COMPANY SHALL MAINTAIN AND CONSTRUCT ITS POLES, WIRES, ANCHORS, FIBER, CABLES, MANHOLES, CONDUITS AND OTHER PHYSICAL PLANT AND APPURTENANCES IN, ALONG, ACROSS, ON, OVER, THROUGH, ABOVE AND UNDER ALL PUBLIC STREETS, AVENUES, HIGHWAYS, ALLEYS, SIDEWALKS, BRIDGES OR PUBLIC PROPERTY IN SAID CITY; PRESCRIBING THE ANNUAL COMPENSATION DUE THE CITY UNDER THIS ORDINANCE; PRESCRIBING THE CONDITIONS GOVERNING THE USE OF PUBLIC RIGHTS-OF-WAY AND THE PERFORMANCE OF CERTAIN CONSTRUCTION WORK ON PUBLIC RIGHTS-OF-WAY FOR THE TELEPHONE COMPANY'S TELECOMMUNICATIONS BUSINESS; PROVIDING AN INDEMNITY CLAUSE; SPECIFYING GOVERNING LAWS; PROVIDING FOR A RELEASE OF ALL CLAIMS UNDER PRIOR ORDINANCES; PROVIDING FOR FUTURE CONTINGENCIES; PROVIDING FOR WRITTEN ACCEPTANCE OF THIS ORDINANCE BY THE TELEPHONE COMPANY; AND PROVIDING FOR A TERM AND AN EFFECTIVE DATE.

WHEREAS, Southwestern Bell Telephone Company (hereinafter referred to as the "TELEPHONE COMPANY") is now and has been engaged in the telecommunications business in the State of Texas and in furtherance thereof, has erected and maintained certain items of its physical plant in the City of PENITAS, Texas (hereinafter referred to as the "CITY") for many years pursuant to such rights as have been granted it by and under the laws of the State of Texas, and subject to the reasonable exercise of the police powers granted by and under said laws to the CITY; and

WHEREAS, the TELEPHONE COMPANY has operated its telecommunications business in the CITY under successive ordinances of the CITY, the last of which was Ordinance Number ~~2-11-55~~, adopted _____, which provided compensation to the CITY for the superintendence of that agreement based upon a percentage of gross receipts received by the TELEPHONE COMPANY from certain local services rendered within the corporate limits of the CITY; and

WHEREAS, it is recognized by the parties that changes in the telecommunications industry, changes in technology, changes in state and federal law, and changes in the accounting practices mandated by the Uniform System of Accounts promulgated by the Federal Communications Commission ("FCC"), along with regulatory requirements of the Texas Public Utility Commission ("PUC"), have caused the traditional method of determining the amount of compensation to municipalities to become administratively impractical for telecommunications utilities. In order to resolve these issues in a manner satisfactory to both the CITY and the TELEPHONE COMPANY, the CITY and the TELEPHONE COMPANY have chosen the method of determining the amount of compensation provided for in this Ordinance to eliminate the expense and time related to audits, to achieve administrative simplicity, to provide the CITY with predictable revenues and an opportunity for growth and to avoid the expense and delays of litigation which could be necessary to resolve any issues in controversy between the parties; and

WHEREAS, it is to the mutual advantage of both the CITY and the TELEPHONE COMPANY that an agreement should be entered into between the TELEPHONE COMPANY and the CITY establishing the conditions under which the TELEPHONE COMPANY shall maintain and construct its physical plant in the CITY in the future;

NOW, THEREFORE, BE IT ORDAINED BY THE
CITY COUNCIL OF THE CITY OF PENITAS,
TEXAS, THAT:

SECTION 1 - PURPOSE

Pursuant to the laws of the State of Texas and this Ordinance, the TELEPHONE COMPANY has the NON-EXCLUSIVE right and privilege to USE the public RIGHTS-OF-WAY in the CITY for the operation of a telecommunications system subject to the restrictions set forth herein. The TELEPHONE COMPANY may USE such RIGHTS-OF-WAY for its telecommunications FACILITIES. The TELEPHONE COMPANY'S FACILITIES and TRANSMISSION MEDIA used in or incident to the provision of telecommunications service and to the maintenance of a telecommunications business by the TELEPHONE COMPANY in the CITY shall remain as now constructed, subject to such changes as under the conditions prescribed in this Ordinance may be considered necessary to the public health and safety by the CITY in the

exercise of its lawful police powers and such changes and extensions as may be considered necessary by the TELEPHONE COMPANY in the pursuit of its telecommunications business. The terms of this Ordinance shall apply throughout the CITY, and to all operations of the TELEPHONE COMPANY within the CITY, and shall include all operations and FACILITIES used in whole or in part in the provision of telecommunications services in newly annexed areas upon the effective date of any annexation.

SECTION 2 - ADDITIONAL AUTHORITY REQUIRED

The TELEPHONE COMPANY is not authorized to provide cable television service as a cable operator in the CITY under this Ordinance, but must first obtain a franchise from the CITY for that purpose, under such terms and conditions as may be required by law.

SECTION 3 - DEFINITIONS

Whenever used in this Ordinance, the following words and terms shall have the definitions and meanings provided in this Section:

- (a) FACILITIES: all TELEPHONE COMPANY duct spaces, manholes, poles, conduits, underground and overhead passageways, and other equipment, structures and appurtenances and all associated TRANSMISSION MEDIA.
- (b) USE: any TELEPHONE COMPANY acquisition, construction, reconstruction, maintenance or operation of any FACILITIES in, over, under, along, through or across the public RIGHTS-OF-WAY for any purpose whatsoever.
- (c) CITY: The City of PENITAS, Texas.
- (d) RIGHTS-OF-WAY: all present and future streets, avenues, highways, alleys, bridges and public property within the city limits of the CITY.
- (e) DIRECTION OF THE CITY: all ordinances, laws, rules, and regulations of the CITY now in force or that may hereafter be passed and adopted which are not inconsistent with this Ordinance.
- (f) TRANSMISSION MEDIA: all TELEPHONE COMPANY cables, fibers, wires or other physical devices used to transmit and/or receive communication signals, whether analog, digital or of other characteristics, and whether for voice, data or other purposes.
- (g) NON-EXCLUSIVE: no rights agreed to in this Ordinance by the CITY shall be exclusive, and the CITY reserves the right to grant franchises, licenses, easements or permissions to use the public RIGHTS-OF-WAY within the CITY to any person or

entity as the CITY, in its sole discretion, may determine to be in the public interest.

(h) TELEPHONE COMPANY: Southwestern Bell Telephone Company.

SECTION 4 - TERM

This Ordinance shall continue for a period of _____ years from the effective date hereof; provided that at the expiration of the initial period, such term may be extended by mutual written agreement of the CITY and TELEPHONE COMPANY.

SECTION 5 - SUPERVISION BY CITY OF LOCATION OF POLES AND CONDUITS

All poles placed shall be of sound material, and reasonably straight, and shall be set so that they will not interfere with the flow of water in any gutter or drain, and so that the same will not unduly interfere with ordinary travel on the streets or sidewalks. The location and route of all poles, stubs, guys, anchors, conduits, fiber and cables placed and constructed by the TELEPHONE COMPANY in the construction and maintenance of its telecommunications system in the CITY shall be subject to the lawful, reasonable and proper control and DIRECTION OF THE CITY.

SECTION 6 - ATTACHMENTS TO POLES AND SPACE IN DUCTS

Nothing contained in this Ordinance shall be construed to require or permit any pole attachments for electric light or power wires or communications facilities or systems not provided by the TELEPHONE COMPANY to be attached to the TELEPHONE COMPANY'S poles or other physical plant or placed in the TELEPHONE COMPANY'S conduit. If the CITY desires pole attachments for electric light or power wires or communications facilities or systems not provided by the TELEPHONE COMPANY, or if the CITY desires to place communications facilities or systems not provided by the TELEPHONE COMPANY in any TELEPHONE COMPANY duct, then a further separate, noncontingent agreement shall be prerequisite to such attachment(s) or such use of any duct by the CITY. Nothing contained in this Ordinance shall obligate or restrict the TELEPHONE COMPANY in exercising its rights voluntarily to enter into pole attachment, pole usage, joint ownership or other wire space or facilities agreements with light and/or power companies or with other wire-using companies which are authorized to operate within the CITY.

SECTION 7 - STREETS TO BE RESTORED TO PRE-EXISTING CONDITION

The surface of any public street, avenue, highway, alley or public place disturbed by the TELEPHONE COMPANY in the construction or

maintenance of its telecommunications system shall be restored within a reasonable time after the completion of the work to as good a condition as before the commencement of the work. Should the CITY reasonably determine, within one year from the date of such restoration, that such surface requires additional restoration work to place it in as good a condition as before the commencement of the work, the TELEPHONE COMPANY shall perform such additional restoration work to the reasonable satisfaction of the CITY. No public street, avenue, highway, alley or public place shall be encumbered for a longer period than shall be reasonably necessary to execute all work.

SECTION 8 - TEMPORARY REARRANGEMENT OF AERIAL WIRES

Upon request, the TELEPHONE COMPANY shall remove or raise or lower its aerial wires, fiber or cables temporarily to permit the moving of houses or other bulky structures. The expense of such temporary rearrangements shall be paid by the party or parties requesting them, and the TELEPHONE COMPANY may require payment in advance. The TELEPHONE COMPANY shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary rearrangements.

SECTION 9 - TREE TRIMMING

The right, license, privilege and permission is hereby granted to the TELEPHONE COMPANY, its contractors and agents, to trim trees upon and overhanging the streets, avenues, highways, alleys, sidewalks and public places of the CITY so as to prevent the branches of such trees from coming in contact with the aerial wires, fiber or cables of the TELEPHONE COMPANY, and when so directed by the CITY, said trimming shall be done under the supervision and direction of the CITY or of any CITY official to whom said duties have been or may be delegated.

SECTION 10 - INDEMNITY

The TELEPHONE COMPANY shall indemnify and hold the CITY harmless from all costs, expenses (including attorney's fees) and damages to persons or property arising directly or indirectly out of the construction, maintenance or operation of the TELEPHONE COMPANY'S FACILITIES located within the public RIGHTS-OF-WAY found to be caused solely by the negligence of the TELEPHONE COMPANY. This provision is not intended to create a cause of action or liability for the benefit of third parties but is solely for the benefit of the TELEPHONE COMPANY and the CITY.

SECTION 11 - ADMINISTRATION OF ORDINANCE

(a) The CITY may, at any time, make inquiries pertaining to this Ordinance and the TELEPHONE COMPANY shall respond to such inquiries on a timely basis by providing information which is prepared, maintained and available in the ordinary course of business.

(b) Copies of specifically identified petitions, applications, communications and reports submitted by the TELEPHONE COMPANY to the Federal Communications Commission or the Public Utility Commission of Texas shall be provided to the CITY upon request.

(c) The CITY may establish, after reasonable notice, such rules and regulations as may be appropriate for the administration of this Ordinance and the construction of the TELEPHONE COMPANY'S FACILITIES on CITY property to the extent permitted by law.

SECTION 12 - COMPENSATION TO THE CITY

(a) As compensation for the use, occupancy, oversight, supervision and regulation of the CITY'S RIGHTS-OF-WAY, and in lieu of and in full compensation for any lawful tax or license or charge or RIGHT-OF-WAY permit fee or inspection fee, whether charged to the TELEPHONE COMPANY or its contractor(s), or any RIGHT-OF-WAY

easement or street or alley rental or franchise tax or other character of charge for use and occupancy of the RIGHTS-OF-WAY within the CITY, except the usual general ad valorem taxes, special assessments in accordance with State law or sales taxes now or hereafter levied by the CITY in accordance with State law, the CITY hereby imposes a Charge upon the Gross Receipts (as hereinafter defined) of the TELEPHONE COMPANY. The amount of the Charge for the first year this Ordinance is in effect shall be \$_____. In no event shall such Charge be less than the above amount for each year this Ordinance is in effect, except as provided in the case of disannexation as set forth in paragraph 12(e), or as provided in Section 16 herein.

The TELEPHONE COMPANY will, according to tariff, bill such Charge to the customers billed the customer service charges included within the term "Gross Receipts," as defined herein. Gross Receipts, for purposes of this Charge, shall include only customer service charges which meet all four of the following conditions: (1) such charges are for TELEPHONE COMPANY services provided within the CITY; (2) such charges are billed through the TELEPHONE COMPANY'S Customer Records Information System ("CRIS"); (3) such charges are the recurring charges for the local exchange access rate element specified in the TELEPHONE COMPANY'S tariffs filed with the PUC; and (4) such charges are subject to an interstate end

user common line ("EUCL") charge as imposed by the Federal Communications Commission ("FCC").

For the second and subsequent years while this Ordinance remains in effect, the above Charge is subject to adjustment by application of the Growth Factor set out in paragraph 12(c). This adjustment for the Growth Factor will be made effective as of each anniversary date of this Ordinance.

The TELEPHONE COMPANY shall adjust its billings to customers to account for any undercollection or overcollection of the Charge due the CITY.

(b) The Charge for each year shall be paid in four (4) equal payments. The dates shall be February 28, May 31, August 31 and November 30, with the first payment under this Ordinance due on the last day of the fifth month following the effective date hereof. In the event of any over or undercollection from customers at the expiration of this Ordinance, the TELEPHONE COMPANY may make a pro rata one-time credit or charge to the customer billing for affected customers who are billed for a service included within Gross Receipts, as defined in paragraph 12(a). This will be accomplished within 150 days following the date of expiration of this Ordinance. If however, it is impractical to credit any overcollection to customers, then such overcollection shall be paid to the CITY.

(c) The Growth Factor shall be calculated by dividing the TELEPHONE COMPANY'S revenues within the corporate limits of the CITY subject to state sales taxes ("Sales Tax Revenues") for the twelve month period ending three (3) months prior to the next anniversary date of this Ordinance by the Sales Tax Revenues for the twelve month period ending three (3) months prior to either the initial effective date or the preceding anniversary date of this Ordinance as applicable. The Growth Factor calculated by the method set forth in the preceding sentence, if greater than one, shall be multiplied by the current year's Charge to determine the dollar amount of the Charge for the next year. If the Growth Factor calculated above is one or less, the Charge for the next year shall be equal to the current year's Charge. The TELEPHONE COMPANY will adjust its customer billing to account for the Growth Factor calculated above.

Once the Growth Factor calculation is completed, the TELEPHONE COMPANY will provide the CITY with the Sales Tax Revenues upon which the Growth Factor calculation was based.

The CITY agrees to rely upon audits by the Texas Comptroller of Public Accounts of state sales taxes as reported by the TELEPHONE COMPANY which are performed in compliance with Sections 151.023 and 151.027 of the Texas Tax Code Annotated. The Growth Factor shall be recomputed to reflect any final, nonappealable adjustments made

pursuant to an audit finding by the Texas Comptroller of an inaccuracy in the TELEPHONE COMPANY'S reports of revenues subject to state sales taxes. The Charge shall be recalculated using the Growth Factor recomputed as specified in the preceding sentence, and the recalculated Charge shall be used for all future calculations required by this Ordinance. Any overpayment or underpayment resulting from such recalculation shall be subtracted from or added to the first installment due the following year. If any overpayment or underpayment shall be due during the final year of this Ordinance, then payment shall be made as follows. In the case of overpayment by the TELEPHONE COMPANY, the CITY shall pay such overpayment to the TELEPHONE COMPANY within 150 days following the expiration of this Ordinance and, in the case of underpayment by the TELEPHONE COMPANY, the TELEPHONE COMPANY shall pay such underpayment to the CITY within 150 days following the expiration of this Ordinance.

(d) Such payments shall not relieve the TELEPHONE COMPANY from paying all applicable municipally-owned utility service charges. Should the CITY not have the legal power to agree that the payment of the foregoing Charge shall be in lieu of the taxes, licenses, charges, RIGHTS-OF-WAY permit or inspection fees, rentals, RIGHTS-OF-WAY easements or franchise taxes aforesaid, then the CITY agrees that it will apply so much of such payments as may be necessary to the satisfaction of the TELEPHONE COMPANY'S

obligation, if any, to pay any such taxes, licenses, charges, RIGHTS-OF-WAY permit or inspection fees, rentals, RIGHTS-OF-WAY easements or franchise taxes.

(e) In the event that either (1) territory within the boundaries of the CITY shall be disannexed and a new incorporated municipality created which includes such territory or (2) an entire, existing incorporated municipality shall be consolidated or annexed into the CITY, then notwithstanding any other provision of this Ordinance, the Charge shall be adjusted. To accomplish this adjustment, within thirty days following the action effecting a disannexation/annexation as described above, the CITY shall provide the TELEPHONE COMPANY with maps of the affected area(s) showing the new boundaries of the CITY.

In the event of an annexation as described above, the Charge for the CITY will be adjusted to include the amount of the payment by the TELEPHONE COMPANY to the existing incorporated municipality being annexed. In the event that the annexed municipality had no ordinance imposing a Charge or in the event of a disannexation, then the adjustment to the Charge will be calculated using the effective date of the imposition of Local Sales Taxes as determined by the Texas Comptroller of Public Accounts. The adjustment shall be the percent increase/decrease in the TELEPHONE COMPANY'S Gross Receipts as defined herein for the CITY for the first calendar

month following the Local Sales Tax effective date compared to the last month prior to such effective date. This adjustment to the Charge will be made on the first day of the second month following the Local Sales Tax effective date and the adjusted Charge shall be prorated from that date through the remainder of the payment year. The Charge as adjusted shall be used for all future calculations required by this Ordinance.

SECTION 13 - ASSIGNMENT OF ORDINANCE

This Ordinance and any rights or privileges hereunder shall not be assignable to any other entity without the express consent of the CITY. Such consent shall be evidenced by an ordinance which shall fully recite the terms and conditions, if any, upon which such consent is given.

SECTION 14 - MUTUAL RELEASES

The CITY hereby fully releases, discharges, settles and compromises any and all claims which the CITY has made or could have made arising out of or connected with Ordinance Number _____, adopted _____, and renewed or extended from time to time thereafter, and its predecessor ordinances, if any, (hereinafter

referred to collectively as "Ordinance _____"). This full and complete release of claims for any matters under Ordinance _____ shall be for the benefit of Southwestern Bell Telephone Company; its parent; its affiliates; their directors, officers and employees; successors and assigns; and includes any and all claims, actions, causes of action and controversies, presently known or unknown, arising directly or indirectly out of or connected with the TELEPHONE COMPANY'S obligations to the CITY pursuant to the provisions of Ordinance _____. Southwestern Bell Telephone Company, its parent, its affiliates, successors and assigns hereby fully release, discharge, settle and compromise any and all claims, actions, causes of action or controversies heretofore made or which could have been made, known or unknown, against the CITY, its officers or its employees, arising out of or connected with any matters under Ordinance _____.

It is the intent of the CITY and the TELEPHONE COMPANY to enter into the foregoing mutual releases in order to reach a compromise that is acceptable to both the CITY and the TELEPHONE COMPANY. This Ordinance and the mutual releases set forth in this Section represent a compromise of each party's claims as well as each party's defenses, and is not intended to be and is not an admission of liability or vulnerability by either party to the other with respect to either the claims or the defenses asserted against the other.

SECTION 15 - REPEAL OF CONFLICTING ORDINANCES AND AGREEMENTS

Ordinance Number 5-1994 adopted APRIL 26, 1994, is hereby repealed; provided, however, such repeal shall take effect at 11:59 p.m. on the day immediately preceding the effective date specified in the Section of this Ordinance entitled "ACCEPTANCE OF AGREEMENT AND EFFECTIVE DATE". All other ordinances and agreements and parts of ordinances and agreements in conflict herewith are also repealed, which repeal shall take effect at the time and on the date specified in the preceding sentence.

SECTION 16 - FUTURE CONTINGENCY

(a) Notwithstanding anything contained in this Ordinance to the contrary, in the event that (a) this Ordinance or any part hereof, (b) any tariff provision by which the TELEPHONE COMPANY seeks to collect the Charge imposed by this Ordinance, or (c) any procedure provided in this Ordinance, or (d) any compensation due the CITY under this Ordinance, becomes, or is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unrecoverable, unenforceable, void, unlawful or otherwise inapplicable, in whole or in part, the TELEPHONE COMPANY and CITY shall meet and negotiate a new ordinance that is in compliance with the authority's decision or enactment

and, unless explicitly prohibited, the new ordinance shall provide the CITY with a level of compensation comparable to that set forth in this Ordinance provided that such compensation is recoverable by the TELEPHONE COMPANY in a mutually agreed manner permitted by law for the unexpired portion of the term of this Ordinance.

(b) Notwithstanding anything contained in the preceding paragraph to the contrary, the CITY and TELEPHONE COMPANY agree that in the event this ordinance is submitted for review to any court in which the currently existing case styled City of Port Arthur, et al v. Southwestern Bell Telephone Company, et al, Cause No. D142176 in the 136th Judicial Court, Jefferson County, Texas is pending, the CITY and TELEPHONE COMPANY agree to take any and all actions reasonably necessary to obtain approval and ratification of the ordinance by the court.

SECTION 17 - GOVERNING LAW

(a) This Ordinance shall be construed in accordance with the CITY Code(s) in effect on the date of passage of this Ordinance to the extent that such Code(s) are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas.

(b) This Ordinance shall be construed and deemed to have been drafted by the combined efforts of the CITY and the TELEPHONE COMPANY.

SECTION 18 - ACCEPTANCE OF AGREEMENT AND EFFECTIVE DATE

The CITY shall deliver a properly certified copy of this Ordinance to the TELEPHONE COMPANY within three (3) working days of its final passage. The TELEPHONE COMPANY shall have thirty (30) days from and after the final passage of this Ordinance to file its written acceptance of this Ordinance with the CITY Secretary. This Ordinance shall become effective beginning the first day of the quarter not less than thirty (30) days after its final passage by the CITY.

Passed and approved following the _____ reading hereof this
26 day of APRIL, A.D., 1994.



Mayor,
City of PENITAS, Texas

ATTEST:

Maria B. Leal
City Secretary

I, MARIA B. LEAL, City Secretary of the City of PENITAS, Texas, do hereby certify that the foregoing is a true and correct copy of Ordinance Number 5-1994, finally passed and approved by the CITY COUNCIL of PENITAS, Texas, following the _____ reading thereof at a regular meeting held on the 26 day of APRIL, 1994.

Maria B. Leal
City Secretary