

ORDINANCE NO. 98-05

AN ORDINANCE GOVERNING USE AND OCCUPANCY OF THE CITY'S RIGHTS-OF-WAY FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES, INCLUDING THE ESTABLISHMENT OF COMPENSATION FOR THAT USE AND OCCUPANCY.

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

SECTION 1.0 - PURPOSE

The purpose of this Ordinance is to:

- (a) Assist in the management of the Rights-Of-Way;
- (b) Govern the use and occupancy of the Rights-Of-Way by Telecommunications

Service Providers;

- (c) Secure fair and reasonable compensation for the use and occupancy of the Rights-Of-Way by Telecommunications Service Providers in a non-discriminatory and competitively neutral manner.

SECTION 2.0 - DEFINITIONS

Whenever used in this Ordinance, the following terms, as well as their singulars, plurals and possessives, shall have the following definitions and meanings, unless the context of the sentence in which they are used indicates otherwise:

2.01 Access Line: (1) each switched transmission path of the transmission media within the Rights-Of-Way extended to the end-user customer's premises network interface

within the City that allows delivery of Telecommunications Service; (2) each loop provided as an unbundled network element to a Person pursuant to an Agreement under Section 252 of the Federal Telecommunications Act of 1996; and (3) each termination point of a non-switched telephone circuit consisting of Transmission Media connecting specific locations identified by, and provided to, the end user for the delivery of non-switched Telecommunications Service within the City.

2.02 Cable Service: “cable service” as defined in the “Cable Communications Policy Act of 1984”, as amended, 47 U.S.C. § 532 *et seq.*

2.03 City: The City of Penitas, Texas.

2.04 Direction of the City: all ordinances, laws, rules, resolutions, and regulations of the City that are not inconsistent with this Ordinance and that are now in force or may hereafter be passed and adopted.

2.05 Facilities: any and all of the duct spaces, manholes, poles, conduits, underground and overhead passageways, and other equipment, structures, plant, and appurtenances and all associated Transmission Media used for the provision of Telecommunications Service.

2.06 Line Fee: a monthly fee to be applied to each Access Line for the calculation of the total amount to be paid to the City as a Rights-Of-Way Fee.

2.07 Permit Holder: any Telecommunications Service Provider issued a Permit pursuant to the terms of this Ordinance.

2.08 Person: a natural person (an individual), corporation, company, association, partnership, firm, limited liability company, joint venture, joint stock company or association, and other such entity.

2.09 Public Utility: a Public Utility as that term is used in the Public Utility Regulatory Act of 1995, Tex. Utilities Code Ann. § 11.004, including municipally owned and/or operated utilities.

2.10 Rights-Of-Way: all present and future public streets, avenues, highways, alleys, sidewalks, boulevards, drives, tunnels, easements, bridges, and other such similar passageways, thoroughfares, and public ways within the City.

2.11 Rights-Of-Way Fee: the total amount paid to the City on a quarterly basis for the Use and Occupancy of the Rights-Of-Way.

2.12 Telecommunications Service: the transmittal of voice, data, image, graphics and other communications between or among points by wire, fiber optics, or other similar facilities, as well as the rental, lease, or furnishing of the facilities to accomplish such transmittal, but does not include transmissions for long distance purposes (interLATA and intraLATA) or any “wireless service” as defined by law.

2.13 Telecommunications Service Provider: any Person that supplies Telecommunications Service to others within the corporate limits of the City in exchange for money or other value.

2.14 Telecommunications Utility: “telecommunications utility” as used in the Public Utility Regulatory Act of 1995, Tex. Utilities Code Ann. § 51.002(11).

2.15 Transmission Media: any and all of the cables, fibers, wires or other physical devices owned, maintained or placed by a Permit Holder to transmit and/or receive communication signals, whether analog, digital or of other characteristics, and whether for voice, data or other purposes.

2.16 Use and Occupancy: the Permit Holder's acquisition, installation, construction, reconstruction, maintenance, repair, control, or operation of any Facilities within the Rights-Of-Way for any purpose whatsoever.

SECTION 3.0 - REQUIREMENT FOR PERMIT AND GRANTING CLAUSE

Any Person that owns, places, or maintains Facilities within the Rights-Of-Way shall first obtain a permit pursuant to the terms of this Ordinance. Subject to the restrictions set forth herein, the City under this Ordinance shall issue permits to Telecommunications Service Providers for the purpose of regulating the Use and Occupancy of the public Rights-of-Way in the City for the provision of Access Lines. By acceptance of the permit, the Permit Holder agrees to abide by the reasonable terms of this Ordinance in all its operations within the City, including all operations and facilities and Transmission Media used in whole or in part in the provision of Access Lines in any newly annexed areas as specified in Subsection 5.03 of this Ordinance.

SECTION 4.0 - GENERAL TERMS OF THE ORDINANCE

4.01 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 Rights-Of-Way within the City to any Person as the City, in its sole discretion, may determine to be in the public interest.

4.02 A Permit Holder is not authorized to provide Cable 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.

4.03 The initial term of each Permit issued under this Ordinance shall be three (3) years from the date of issuance, unless terminated earlier by mutual written agreement of the City and the Permit Holder or pursuant to law. At the expiration of the initial permit period, the permit shall be automatically extended for successive periods of one (1) year, unless written notice of intent to terminate the permit is given not less than ninety (90) days prior to the termination of the then current period by the City to Permit Holder. When such notice is given, the Permit shall terminate at the expiration of the then current period.

4.04 The rights granted by this Ordinance inure to the benefit of the Permit Holder licensed hereunder. The Ordinance rights granted by permit shall not be assigned, transferred, or sold to another by the Permit Holder without the express written consent of the City. For the purposes of this Section, assignment, transfer or sale means a change of operating control of the Permit Holder, expressly excepting an assignment or transfer to entities that control, are controlled by or are under common control with Permit Holder. Any such consent by the City shall not be withheld unreasonably.

SECTION 5.0 - COMPENSATION

5.01 Rights-of-Way Fee: the Permit Holder shall pay to the City a Rights-of-Way Fee that is calculated as of month-end by applying the appropriate Line Fee to each Access Line owned, placed, or maintained by Permit Holder that is activated for use by an end-user or for another Telecommunications Service Provider that uses Permit Holder's services or Facilities for the provision of Telecommunications Service within the City. The Line Fee to be applied to

each Access Line on a monthly basis shall be:

<u>Access Line</u>	<u>Monthly Fee per Access Line</u>
Residential.....	\$ _____
Non-Residential.....	\$ _____

5.02 Number of Access Lines: subject to City's agreement not to disclose this information, each Permit Holder must provide annually, within a reasonable time after receipt of the City's written request, a report showing the number of each type of Access Line owned or placed and maintained by Permit Holder within the City that are activated for end-user customers and other Telecommunications Service Providers at month's end for each of the preceding twelve (12) months. The City agrees that the report shall be used solely for the purpose of verifying the number of the Permit Holder's Access Lines within the City that are activated for end-user customers and Telecommunications Service Providers. Upon written request, the Permit Holder shall verify the information in the report and, upon reasonable advance notice, produce to the City and permit inspection by the City of all non-customer-specific records and documents reasonably calculated to verify the information. For purposes of payment of fees for use of the Rights-Of-Way, lines terminating at customer's premises that are billed as "Lifeline," "Tel-Assistance," or other service that is required to be similarly discounted pursuant to state or federal law or regulation for the purpose of advancing universal service to the economically disadvantaged shall not be included in the lines upon which the fee is calculated.

5.03 Annexation and Disannexation: within thirty (30) days following the date of the passage of any action effecting the annexation of any property to or the disannexation of any property from the City's corporate boundaries, the City agrees to furnish Permit Holder written

notice of the action and an accurate map of the City's corporate boundaries showing, if available, street names and number details. For the purpose of compensating the City under this Ordinance, a Permit Holder shall start including or excluding Access Lines within the affected area in the Permit Holder's count of Access Lines on the effective date designated by the Comptroller of Public Accounts - Texas for the imposition of State local sales and use taxes; but in no case less than thirty (30) days from the date the Permit Holder is notified by the City of the annexation or disannexation.

5.04 Confidential Records: if the Permit Holder notifies the City of the confidential nature of any information, reports, documents, or writings, the City agrees to maintain the confidentiality of the information, reports, documents, and writings to the extent permitted by law. Upon receipt by the City of requests for the Permit Holder's confidential information, reports, documents, or writings, the City shall notify the Permit Holder of the request in writing by facsimile transmission. The City shall request an Attorney General's Opinion before disclosing any confidential information, reports, documents or writings and will furnish the Permit Holder with copies of Attorney General opinion requests it makes pertaining to the Permit Holder's confidential information, reports, documents or writings.

5.05 No Other Fees: the payments due hereunder shall be in lieu of any permit, license, approval, inspection, or other similar fees or charges, including, but not limited to, all general business license fees customarily assessed by the City for the use of the Rights-Of-Way against Persons operating businesses similar to that of the Permit Holder. Further, such Rights-Of-Way Fee shall constitute full compensation to the City for all of Permit Holder's facilities located within the Rights-Of-Way, including interoffice-transport and other Transmission Media

that do not terminate at an end-user customer's network interface device, even though those types of lines are not used in the calculation of the Rights-Of-Way Fee.

5.06 Timing of Payment: Permit Holder shall remit the Line Fee on a quarterly basis. The payment shall be due on the forty-fifth (45th) day following the close of each calendar quarter for which the payment is calculated.

5.07 Uncollectibles: Permit Holder has a statutory right to pass through to its customers on a pro rata basis any compensation paid to the City for access to the Rights-Of-Way. Any other provision of this Ordinance notwithstanding, Permit Holder shall not be obligated to pay the City for any Access Lines for which revenues remain uncollectible.

5.08 Facilities Provided to Other Telecommunications Service Providers: to the extent allowed by applicable state and federal law, any Telecommunications Service Providers that purchase unbundled network elements or other Facilities for the purpose of rebundling those Facilities to create Telecommunications Service for sale to persons within the City shall pay to the City a Rights-Of-Way Fee that is calculated as of month-end by applying the appropriate Line Fee, as specified in Section 5.01 above, to each Access Line created by rebundling services or Facilities. Such direct payment to the City is necessary because it is only the Person creating the services for resale that will be able to determine the number of Access Lines being provided, so that the Rights-Of-Way Fee imposed herein can be applied on a non-discriminatory basis to all Telecommunications Service Providers that sell Telecommunications Service within the City. Other provisions of this Ordinance notwithstanding, the Permit Holder shall not include in its monthly count of Access Lines any unbundled network elements or other Facilities provided to other Telecommunications Service Providers for rebundling into Telecommunications Services,

if the Telecommunications Service Provider that is rebundling those Facilities for resale has provided a signed statement to the Permit Holder that the Telecommunications Service Provider is paying the Access Line fees applicable to those rebundled services directly to the City. If Permit Holder provides a copy of the signed statement to the City, then Permit Holder is absolved of all responsibility for the Line Fees payable on the Telecommunications Service, unbundled network elements, and other Facilities rebundled for the creation of Telecommunications Service for sale within the City.

5.09 Fee Application to Leased Facilities: pursuant to Tex. Utilities Code § 54.206, a Permit Holder may collect the Line Fee imposed by the City pursuant to this Ordinance through a pro rata charge to the customers in the boundaries of the City, including any other Persons who are leasing, reselling or otherwise using the Permit Holder's Access Lines to provide Telecommunications Service. With respect to any Person leasing, reselling, or otherwise using a Permit Holder's Access Lines, if a Permit Holder believes it does not have sufficient information to determine the appropriate rate to apply, then the higher Line Fee shall apply until such time as the Person using the Access Lines provides to the Permit Holder sufficient written information to determine the correct Line Fee. If a Person provides sufficient written information for the application of the Line Fee, Permit Holders may bill the Person on the basis of the information provided. Permit Holder shall provide to the City any information regarding the locations to which it is providing service or facilities for use by another Person for the provision of Telecommunications Service to end-user customers, so long as City first obtains written permission of such other Person for Permit Holder to provide the information to the City. Any other provision of this Ordinance notwithstanding, however, a Permit Holder shall not be liable

for underpayment of Line Fees resulting from the Permit Holder's reliance upon the written information provided by any Person that uses Permit Holder's service or facilities for the provision of Telecommunications Service to end-user customers.

SECTION 6.0 - CONSTRUCTION AND MAINTENANCE OF FACILITIES

6.01 The location and route of all Facilities and Transmission Media placed and constructed in the Rights-Of-Way shall be subject to the lawful, reasonable and proper control and direction of the City.

6.02 Nothing contained in this Ordinance shall be construed to require or permit the attachment on or placement in the Permit Holder's Facilities of any electric light or power wires or communications facilities or other systems not owned by the Permit Holder. If the City desires to attach or place electric light or power wires, communications facilities or other similar systems or facilities in or on the Permit Holder's Facilities, then a further separate, noncontingent agreement with the Permit Holder shall be required. Nothing contained in this Ordinance shall obligate the Permit Holder to exercise or restrict the Permit Holder from exercising its right to enter voluntarily into pole attachment, pole usage, joint ownership or other wire space or facilities agreements with any Person authorized to operate as a Public Utility or a Telecommunications Utility or authorized to offer Cable Service within the City.

6.03 The surface of the Rights-Of-Way disturbed by the Permit Holder 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. The Permit Holder shall endeavor to minimize disruptions to the

efficient use of the Rights-Of-Way by pedestrian and vehicular traffic, and Rights-Of-Way shall not be blocked for a longer period than shall be reasonably necessary to execute all construction, maintenance and/or repair work.

6.04 Upon request, the Permit Holder 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 Permit Holder may require payment in advance. The Permit Holder shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary rearrangements.

6.05 The Permit Holder, its contractors and agents have the right, permission and license to trim trees upon and overhanging the Rights-Of-Way to prevent trees from coming in contact with the Permit Holder's Facilities and Transmission Media. When directed by the City, tree trimming shall be done under the supervision and direction of the City or under the supervision of the City's delegated representative.

SECTION 7.0 - RELOCATION AND REMOVAL OF FACILITIES

7.01 In accordance with Tex. Utilities Code Ann. § 54.203(c), upon thirty (30) days notice by the City, Permit Holder shall begin relocation of its Facilities within the Rights-Of-Way at its own expense to permit the widening or straightening of streets. The notice by the City shall include a specification of the new location for the Permit Holder's Facilities along the Rights-Of-Way.

7.02 The City retains the right to move any Facilities within the Rights-Of-Way to cure or otherwise address a public health or safety emergency. The City shall cooperate to the extent

possible with the Permit Holder in such instances to assure continuity of service and to afford to the Permit Holder the opportunity to make such relocation itself.

SECTION 8.0 - INDEMNIFICATION

The Permit Holder shall indemnify and hold the City harmless from all costs, expenses, and damages to persons or property arising directly or indirectly from the construction, maintenance, repair, or operation of the Permit Holder's Facilities located within the Rights-Of-Way found to be caused solely by the negligence of the Permit Holder. Expenses shall include any reasonable and necessary attorney's fees and court costs. The City shall give the Permit Holder prompt written notice of any claim for which the City seeks indemnification. The Permit Holder shall have the right to investigate, defend and compromise any such claim. This provision is not intended to create a cause of action or liability for the benefit of third parties, but rather this provision is solely for the benefit of the Permit Holder and the City.

SECTION 9.0 - ADMINISTRATION OF ORDINANCE

9.01 The City may, at any time, make reasonable inquiries pertaining to the terms, conditions, rights and obligations of this Ordinance, and the Permit Holder shall respond to such inquiries on a timely basis.

9.02 Copies of petitions, applications, and reports submitted by the Permit Holder to the Federal Communications Commission or the Public Utility Commission of Texas shall be provided to the City upon specific request.

9.03 After reasonable notice to the Permit Holder, the City may establish, to the extent

permitted by law, such reasonable and non-discriminatory rules and regulations as may be appropriate for the administration of this Ordinance and the construction of the Permit Holder's Facilities in the Rights-Of-Way, so long as those rules and regulations are competitively neutral.

SECTION 10.0 - FUTURE CONTINGENCY

In the event this Ordinance or any tariff or other provision that authorizes Permit Holders to recover the fee provided for in this Ordinance, becomes unlawful or is declared or determined by a judicial or administrative authority exercising its jurisdiction to be excessive, unenforceable, void, or illegal, in whole or in part, then the City and all Permit Holders shall negotiate a new compensation arrangement that is in compliance with the authority's decision. Unless explicitly prohibited, the new compensation arrangement shall provide the City with a level of compensation comparable to that set forth in this Ordinance, as long as that compensation is recoverable by Permit Holders in a manner permitted by law for the unexpired portion of the term of this Ordinance.

SECTION 11.0 - GOVERNING LAW

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

SECTION 12.0 - NON-DISCRIMINATION AND COMPETITIVE NEUTRALITY

The City hereby recognizes that it has the legal duty to obligate, on a going-forward basis,

all Permit Holders to abide by the same terms and conditions imposed by this Ordinance, including, but not limited to, the payment of the Line Fee, and to apply substantively same requirements governing their use and occupancy of the Rights-Of-Way.

SECTION 13.0 - PERMIT

Any Telecommunications Service Provider that owns facilities already located within the Rights-Of-Way on the date this Ordinance is enacted is hereby granted a Permit hereunder; however, within thirty (30) days from the effective date of this Ordinance all such Telecommunications Service Provider shall provide to the City a Notice of Pre-existing Facilities. All prospective Permit Holders shall file a Permit Application Form at least thirty (30) days before placing any facilities in the Rights-Of-Way. A Permit Application Form will not be accepted and a Permit granted unless the Applicant provides on that form the name and address of the person to whom notices hereunder are to be sent, the date on which the Applicant expects to begin providing service within the City, a 24-hour per day contact number for the Applicant, and the certificate number of the Applicant's certificate issued by the Public Utility Commission of Texas or a notarized statement from a principal or officer of the Applicant that no certification by the Public Utility Commission is required for the type of service to be offered by Applicant.

SECTION 14.0 - ISSUANCE AND EFFECTIVE DATE OF PERMIT

The City shall deliver a properly certified copy of this Ordinance to the Permit Holder, along with a Permit hereunder, within fourteen (14) days after receipt of the Notice of Pre-Existing Facilities or the Permit Application Form.

The effective date for any Permit shall be the date of issuance, however, the assessment of the Line Fee shall not begin until the first day of the second month after the date of issuance of the Permit. Permit Holders with pre-existing facilities may continue the pre-existing compensation arrangement until the first day of the second month following the issuance of the Permit.

SECTION 15.0 - EFFECTIVE DATE OF ORDINANCE

This Ordinance shall take effect and be in force immediately upon final passage by the City.

Passed and approved following the ___ reading hereof this 17th day of Nov., A.D., 1998.



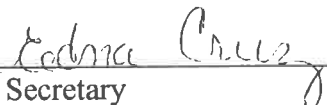
Mayor, City of Penitas, Texas

ATTEST:



City Secretary

I, Edna Cruz, City Secretary of the City of Penitas, Texas, do hereby certify that the foregoing is a true and correct copy of Ordinance Number 98-05, finally passed and approved by the Board of Aldermen of Penitas, Texas, following the ___ reading thereof at a regular meeting held on the 17th day of Nov., 1998.



City Secretary

