

ORDINANCE NO. 000928-33

AN ORDINANCE AMENDING ORDINANCE NUMBER 850627-Z, GRANTING AT&T CORP. A RENEWAL LICENSE UNDER CHAPTER 15-12 OF THE CITY CODE FOR PRIVATE USE OF THE PUBLIC RIGHTS OF WAY.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. GRANT OF RENEWAL LICENSE.

SECTION 1. PURPOSE.

- (A) This ordinance renews a previous license granted to AT&T Corp. in 1985 for the placement of long distance transmission service facilities in the public rights-of-way within the specific areas shown on Exhibit A.
- (B) AT&T agrees to comply with the provisions of this ordinance. No services other than long distance transmission services will be provided without the express consent of the City.

SECTION 2. DEFINITIONS.

FACILITIES means wires, cables, underground conduits, manholes or other structures or appurtenances that allow delivery of long distance transmission services.

LONG DISTANCE TRANSMISSION SERVICES means transport across AT&T facilities located within the City of Austin corporate limits of analog or digital signals for telecommunications originated or terminated outside of the Austin local service area; excluding local exchange service or delivery of any ancillary service by means of the local networks.

PUBLIC-RIGHTS-OF-WAY means the surface, the air space above the surface, and the area below the surface of a public street, highway, lane, path, alley, sidewalk, boulevard, drive, bridge, tunnel, easement or similar property in which the City holds a property interest or exercises rights of management or control.

SECTION 3. CONSTRUCTION OBLIGATIONS.

- (A) AT&T is subject to the police powers of the City, other governmental powers, and the City's rights as a property owner under state and federal laws. AT&T is subject to City requirements and federal and state rules in connection with the construction, expansion, reconstruction, maintenance or repair of facilities in the public rights-of-way.
- (B) AT&T shall place certain facilities underground according to applicable City requirements.
- (C) At the City's request, AT&T shall furnish the City accurate and complete information relating to the construction, reconstruction, removal, maintenance, operation and repair of the facilities performed by AT&T in the public rights-of-way. If any information furnished is erroneous as to the location of facilities, and reliance on this information results in construction delays or additional expenses, AT&T shall be liable for the cost of delays and the additional expenses.
- (D) The construction, expansion, reconstruction, excavation, use, maintenance and operation of AT&T's facilities and property are subject to applicable City requirements.
 - (1) AT&T shall perform excavations and other construction in the public rights-of-way in accordance with all applicable City requirements, including the obligation to use trenchless technology whenever possible. The Director of Public Works shall waive the requirement of trenchless technology if he determines that the field conditions warrant the waiver. AT&T shall minimize interference with the use of public and private property and shall follow the construction directions given by the City.
 - (2) When AT&T completes construction work, AT&T shall promptly restore the public rights-of-way in accordance with applicable City requirements. AT&T may excavate only for the construction, installation, expansion, repair, removal, and maintenance of AT&T's facilities.
 - (3) The City may require AT&T to allow attachment of another provider's facilities to its poles and conduits, in accordance with the City charter, state and federal law. The City shall require to other provider to give notice to AT&T no later than 14 days prior to the attachment by the provider and these attachments shall (1) be subject to space availability, (2) require that reasonable compensation be

paid to AT&T, and (3) not interfere with AT&T's use of its facilities. Nothing in this section shall relieve any other person, agency or utility from liability for damage to the AT&T facilities.

- (4) AT&T shall furnish the Director of Public Works and the Director with construction plans and maps showing the routing of new construction at least 45 days before beginning construction that involves an alteration to the surface or subsurface of the public right-of-way. AT&T may not begin construction until the plans and drawings have been approved in writing by the Director of Public Works. The Director of Public Works will respond in writing to AT&T with an approval or requested changes to the proposed plans and drawings within 10 days after receipt of such plans and drawings. In the event the Director of Public Works fails to respond to AT&T within such 10 day period, then the plans and drawings as submitted shall be deemed approved.
- (5) AT&T shall participate in the Austin Area Utility Coordination Council ("AAUCC") meetings for the coordination of all new construction affecting the public rights-of-way. AT&T shall identify its facilities on submitted plans and drawings with marks established by the AAUCC.
- (6) For construction that involves a minor alteration to the surface or subsurface of the public rights-of-way, and does not involve the routing of new facilities, the Director of Public Works shall implement a streamlined permitting process of less than 5 days.
- (7) If the Director declares an emergency and requests the removal or abatement of facilities, by written notice, AT&T shall remove or abate AT&T's facilities by the reasonable deadline provided in the Director's request. AT&T and the City shall cooperate to the extent possible to assure continuity of service. If AT&T, after facsimile or telephone notice, fails or refuses to remove or abate AT&T's facilities by the date provided in the Director's request, the City may remove or abate the Facility, at the sole cost and expense of AT&T, without paying compensation to AT&T and without the City incurring liability for damages.
- (8) Except in an emergency, AT&T may not excavate the pavement of a street or public right-of-way without first complying with City requirements.

- (E) The Director of Public Works shall charge applicable permitting and inspection fees established by ordinance at the time of construction related to AT&T's construction in the public rights-of-way. AT&T may prepay all permitting and inspection fees on a yearly basis. Payments shall be based upon the prior year's experience and shall be reconciled at year's end.
- (F) AT&T may utilize, if feasible, existing or abandoned conduit of other utilities, subject to approval of the utility.

SECTION 4. CONDITIONS OF RIGHTS-OF-WAY OCCUPANCY.

- (A) In the exercise of governmental functions, the City has first priority over all other uses of the public rights-of-way. The City reserves the right to lay sewer, gas, water, and other pipe lines or cables and conduits, and to do underground and overhead work, and attachment, restructuring or changes in aerial facilities in, across, along, over or under a public street, alley or right-of-way occupied by AT&T, and to change the curb, sidewalks or the grade of streets.
- (B) The Director of Public Works shall assign priorities among competing uses of the public rights-of-way according to the order completed permit applications are received.
- (C) If, during the term of the license, the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or rights-of-way, the grant to an abutting landowner shall be subject to the rights of AT&T described in this ordinance. If the City closes or abandons a public rights-of-way that contains a portion of AT&T's facilities, the City shall convey the land in the closed or abandoned public rights-of-way subject to the rights of AT&T described in this ordinance .
- (D) If the City gives written notice, AT&T shall, at AT&T's expense, temporarily or permanently, remove, relocate, change or alter the position of AT&T's facilities that are in the public rights-of-way within 120 days. The City shall give notice whenever the City has determined that removal, relocation, change or alteration is reasonably necessary for the construction, operation, repair, maintenance or installation of a City or other governmental entity's public improvement in the public rights-of-way. This section shall not be construed to prevent AT&T's recovery of the cost of relocation or removal from private third parties who initiate the request for relocation or removal or from governmental entities

that have funds authorized for the payment of the relocation or removal costs. In the event of joint relocation projects, AT&T shall be responsible for its proportionate share of the relocation costs.

- (E) During the term of the license, AT&T may trim trees in or over the rights-of-way for the safe and reliable operation, use and maintenance of its network. All tree trimming shall be performed in accordance with standards promulgated by the City. When ordered by the City Manager, tree trimming shall be done under the supervision of the City.
- (F) AT&T shall temporarily remove, raise or lower its aerial facilities to permit the moving of houses or other bulky structures, if the City gives written notice of no less than 48 hours. The expense of the temporary rearrangement shall be paid by the party or parties requesting and benefiting from the temporary rearrangement. AT&T may require prepayment or prior posting of a bond from the party requesting the temporary move.

SECTION 5. INDEMNITY AND INSURANCE.

- (A) During the term of this ordinance, AT&T shall be liable for the acts or omissions of an entity used by AT&T, including an affiliate, when the entity is involved directly or indirectly in the construction and installation of AT&T's facilities. The acts or omissions of the entity shall be considered the acts or omissions of AT&T.
- (B) AT&T shall, and agrees to, defend, indemnify and hold the City harmless against all damages, cost, loss or expense arising out of, incident to, concerning or resulting from the negligence or willful misconduct of AT&T, its agents, employees, or subcontractors, in the performance of activities under this ordinance for:
 - (1) the repair, replacement, or restoration of City property, equipment materials, structures and facilities which are damaged, destroyed or found to be defective; and
 - (2) any and all claims, demands, suits, causes of action, and judgments for:
 - (3) damage to or loss of the property of any person including, but not limited to AT&T, its agents, officers, employees and subcontractors, the City's agents, officers and employees, and third parties; and

- (4) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person including but not limited to the agents, officers and employees of AT&T, AT&T's subcontractors, the City, and third parties, no matter how, or to whom, the loss may occur.
- (C) The Director shall give prompt written notice to AT&T of any claim for which the City seeks indemnification. AT&T shall have the right to investigate and defend these claims with written notice to the City Attorney. Settlement or compromise of any such claim must have prior approval of the City Attorney.
- (D) AT&T shall, at its sole expense, provide (1) extended public liability insurance coverage, in an amount not less than \$600,000 for personal injury and \$600,000 for property damage, specifically naming the City of Austin as co-insured, or (2) an equivalent means of providing protection acceptable to the City and covering all liabilities arising from the activities of AT&T, its officers, employees, agents, or contractors, relative to this license. A copy of the instruments effecting this coverage shall be delivered to the Director of Public Works of the City within forty-five days after the execution date of this license.

SECTION 6. RECORDS.

- (A) AT&T shall keep complete and accurate maps, construction drawings and specifications describing the location of facilities. The maps, construction drawings and specifications shall provide for separate and specific identification of those facilities located in the public rights-of-way and shall be kept and maintained within the city limits of Austin.
- (B) The City shall have the right, at reasonable times and with reasonable notice, to inspect the maps, construction drawings and specifications. AT&T shall fully cooperate in making available its maps, construction drawings, and specifications for inspection by authorized representatives of the City.
- (C) The City shall maintain confidentiality of all competitively sensitive information to the extent allowed by law. Prior to releasing any information designated as confidential or proprietary by AT&T, the City shall make an opinion request to the Attorney General to determine

whether the requested information should be released and provide AT&T with a copy of the request.

SECTION 7. NOTICE.

- (A) The Director of Financial Services is the City official responsible for the administration of this ordinance. AT&T shall direct questions regarding the interpretation or application of this ordinance to the Director of Financial Services.
- (B) All notices to the City shall be sent by certified or registered United States mail, return receipt requested, or by a recognized overnight delivery service, or by hand delivery, postage or delivery charges prepaid, and addressed to:

REGULATORY AFFAIRS
City Of Austin
P.O. Box 1088
Austin, Texas 78767

with copy to:

City of Austin - Department of Law
P.O. Box 1088
Austin, Texas 78767-8828

or to any other address as the CITY may designate from time to time by written notice.

- (C) All notices to AT&T shall be sent by certified or registered United States mail, return receipt requested, or by a recognized overnight delivery service, or by hand delivery, postage or delivery charges prepaid, and addressed to:

AT&T Corp.
5501 LBJ Freeway, Suite 445
Dallas, Texas 75240
Attn: _____, Real Estate and ROW
TEL: (972) _____
FAX: (972) _____

with copy to:

AT&T Corp.
5501 LBJ Freeway, Suite 445
Dallas, Texas 75240
Attn: General Counsel
TEL: (972)
FAX: (972) _____

or to any other address AT&T may designate from time to time by written notice.

SECTION 8. ASSIGNMENT.

This license shall not be assigned without the express consent of the City Council of the City of Austin, except that AT&T may assign its rights under this ordinance to another provider who has a municipal consent from the City or to a parent, subsidiary, affiliate or successor entity without the City's consent, so long as the parent, subsidiary, affiliate or successor (1) assumes all obligations of AT&T under this ordinance; (2) is bound to the same extent as AT&T; and (3) is under common ownership and control with AT&T. Consent to a transfer of interest which is made in the ordinary course of business shall not be unreasonably denied by the City.

SECTION 9. TERMINATION.

- (A) This Agreement may be terminated by AT&T by delivering written notice to the City Manager at least sixty days before the effective date of termination, provided AT&T ceases provision of Long Distance Transmission Services within the sixty-day period.
- (B) In the event of termination by AT&T under this section, AT&T may remove its facilities from the licensed public properties provided the street areas are left in the same condition as before.
- (C) If AT&T fails to abide by the City's rights-of-way management rules or by the terms of this Agreement, the City will deliver written notice to AT&T setting forth such failure. AT&T shall have 45 days after receipt of such default notice to cure the failure and if AT&T does not cure such failure within such 45 day period, then the City may terminate this Agreement by delivering written notice to AT&T at least 15 days prior to the effective date of such termination. If AT&T is found to be offering services not allowed by this license and does not cease to offer such services within 45 days after receipt of written notice from the City the City may terminate

this Agreement by delivering written notice to AT&T at least 15 days prior to the effective date of such termination.

SECTION 10. TERM, RENEWAL AND AMENDMENTS.

- (A) This license is granted for a term of ten (10) years, beginning on the effective date of this ordinance.
- (B) AT&T has an option to renew this license for an additional three years on the same terms and conditions, provided AT&T has fully complied with all material terms and conditions in this ordinance. AT&T must file a written notice to the City of its election to exercise the renewal option at least six (6) months prior to the expiration of the original term of this license.
- (C) AT&T or its successors or assignees and the City agree to begin good faith negotiations for a new license no later than six (6) months before the expiration of this license. If, on the expiration date of this license, no new licensing agreement has been executed, the City of Austin may (1) purchase the facilities at the fair market value, as described in Section 11; (2) request AT&T to remove the facilities; or (3) allow AT&T to abandon the facilities.
- (D) If AT&T requests changes to the specific routing of the facilities described in Exhibit A, the changes may be approved administratively by the City's Manager of Real Estate Services, and the license fee adjusted at the rate of \$2.845 per linear foot, indexed in accordance with Part 2 of this ordinance. All other fees shall be assessed in accordance with the City Code.

SECTION 11. CITY'S RIGHT TO PURCHASE AT&T'S FACILITIES.

- (A) In accordance with the City Charter, the City shall have the right to purchase AT&T's facilities in the public rights-of-way.
- (B) If the City elects to exercise its right to purchase AT&T facilities, the City shall notify AT&T in writing at least 90 days before the effective date of the purchase. AT&T and the City shall each designate an appraiser experienced and knowledgeable in the valuation of similar networks. The two appraisers shall designate a third appraiser. Each appraiser shall conduct an independent appraisal of the fair market value of AT&T facilities as a going concern as of the effective date of the purchase by the City. AT&T and the City shall be responsible for the appraisal fees of its

own appraisers and pay an equal share of the appraisal fee of the third appraiser. The appraisers shall consider, among other factors, the book value of the assets constituting AT&T facilities, the age and condition of the physical plant and equipment and the discounted future revenue stream considering the customer base, discounted in accord with general appraisal practice, for the remaining useful life of the assets constituting AT&T facilities. The appraisers may not consider value of the unexpired term or the potential renewal of the license itself. The purchase price to be paid by the City shall be the price agreed to by at least two of the three appraisers and in the event none of the appraisal values are the same, then the price will be the average of the two closest values established by the three appraisers.

- (C) AT&T recognizes that the provisions of the City charter require inclusion of this section in this ordinance. AT&T, however, does not waive but reserves the right to challenge the charter provision, this Section, or any application of this Section on any basis, including as a violation of the Constitution and laws of the United States and/or the State of Texas.

PART 2. ESTABLISHING AN ANNUAL LICENSE FEE.

- (A) AT&T shall pay an annual license fee for the right to use the public rights-of-way as described in this ordinance. The first annual license fee payment of \$118,741.76 corresponding to a fee of \$2.845 per linear foot, shall be tendered on the effective date of this ordinance.
- (B) Subsequent annual fees shall be paid on the anniversary date of this ordinance. The fee shall be determined in the following manner: The fee payment of \$118,741.76 shall be increased by the percentage increase in the telecommunications sales tax base for the prior year reported for the City of Austin to the State Comptroller of Public Accounts.
- (C) Each past due payment shall bear interest at the rate of nine percent (9%) a year until fully paid or legally discharged.
- (D) Payment shall be made to: Financial Services Department - Controller's Office, P.O. Box 1088, Austin, Texas 78767.

PART 3. ACCEPTANCE OF LICENSE.

AT&T shall file with the City Clerk a statement accepting the terms of this license prior to the effective date of this ordinance.

EXHIBIT "A"

The exhibit referenced contains proprietary information.
The City is required by statute for the confidentiality of the information.

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