

ORDINANCE NO. 040812-6

AN ORDINANCE GRANTING CENTURY TEL FIBER COMPANY II, LLC (D/B/A LIGHTCORE COMPANY) A LICENSE UNDER CHAPTER 14-11 (USE OF RIGHT-OF-WAY) OF THE CITY CODE FOR PRIVATE USE OF PUBLIC RIGHTS OF WAY.

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

PART 1. GRANT OF LICENSE.

SECTION 1. DEFINITIONS.

- (1) *CITY* means the City of Austin.
- (2) *DEPARTMENT* means the City of Austin Public Works Department.
- (3) *DIRECTOR* means the Director of the City of Austin Public Works Department.
- (4) *FACILITIES* means all of Grantee's plant and equipment, including tangible and intangible property owned, operated, leased, used, controlled or supplied for, by or in connection with the business of the Grantee.
- (5) *GRANTEE* means Century Tel Fiber Company II, LLC (d/b/a LightCore Company).
- (6) *LICENSE HOLDER* means anyone with a license from the City to use the public rights of way.
- (7) *PUBLIC RIGHTS OF WAY* means the total surface area, and the area above and below the surface, between property lines that is dedicated, deeded, reserved by plat or otherwise owned or controlled by the City, for use by the public for pedestrian or vehicular travel.

SECTION 2. LICENSE AND TERM.

- (A) The Council grants Century Tel Fiber Company II, LLC (d/b/a LightCore Company) a license to place fiber optic lines and network facilities in the public rights of way in the areas shown on Exhibit A attached to this ordinance. No other service may be provided, nor any other facilities installed, under this license.
- (B) This license is granted for a term of seven years, beginning on the effective date of this ordinance.

SECTION 3. RULES GOVERNING OPERATION IN THE RIGHTS OF WAY.

- (A) Grantee is subject to the police powers of the City and other governmental powers in connection with the construction, expansion, reconstruction, maintenance or repair of facilities in the public rights of way. Grantee is subject to the City's rights as a property owner under state and federal laws.
- (B) The construction, expansion, reconstruction, excavation, use, maintenance and operation of Grantee's network facilities are subject to Chapter 14-11 (Use of Right-of-Way) of the City Code and rules adopted under the Chapter.
- (C) Removal of and maintenance on trees and shrubs in the public rights of way may only be performed in accordance with Chapter 6-3 (Trees and Vegetation) of the City Code, and only to insure the safe, reliable use and maintenance of Grantee's facilities.

SECTION 4. CONDITIONS FOR USE AND OCCUPANCY OF RIGHTS OF WAY.

- (A) The City has priority over all uses of the public rights of way. The City reserves the right to conduct all forms of work in the rights of way occupied by the Grantee, including:
 - (1) the installation of sewer, gas, water, and other pipe lines;
 - (2) the installation of cables and conduits;
 - (3) performing underground and overhead work; and,

- (4) changing the curbs, sidewalks, or the grade of streets.
- (B) Grantee may perform excavation in the rights of way only for the construction, expansion, reconstruction, use, maintenance and operation of its own facilities.
- (C) Grantee shall furnish the City information relating to the construction, reconstruction, removal, maintenance, operation and repair of the network facilities performed by Grantee in the public rights of way. Grantee shall be liable for the cost of delays and the additional expenses of the City's reliance on erroneous information regarding the location of Grantee's network facilities.
- (D) The City may require the Grantee to permit attachment of another license holder's facilities to Grantee's poles and conduits.
 - (1) The City shall require a license holder seeking use of Grantee's facilities to provide notice at least 14 days before the attachment.
 - (2) A license holder's attachment to Grantee's facilities:
 - (a) is subject to space availability;
 - (b) requires payment of reasonable compensation to Grantee; and,
 - (c) may not interfere with Grantee's use of its facilities.
 - (3) Nothing in this section relieves any person, agency, or utility from liability for damage to Grantee's facilities.
- (E) Nothing in this license prohibits Grantee from using, with permission of the owner, existing or abandoned conduit of other license holders.

SECTION 5. REMOVAL OR RELOCATION OF FACILITIES.

- (A) If the Director determines that removal, relocation, or change to Grantee's facilities is reasonably necessary for the construction or repair of any City or other governmental entity's public improvement in the public rights of way, the Grantee shall completely remove or relocate its facilities at its own expense no later than the 120th day after written notice is sent by the City. If the Director declares an emergency, the removal, relocation, or change shall be performed by the deadline provided in the Director's request.
 - (1) The Director may require that the removal or relocation be either temporary or permanent.

- (2) The Grantee and the City shall cooperate to the extent possible to assure continuity of service during relocation.
 - (3) Nothing in this section shall be construed as preventing the Grantee from recovering the cost of removal or relocation of its facilities from a non-governmental third party responsible for the request.
 - (4) If the Grantee fails to remove or relocate its facilities to the satisfaction of the Director by the 120th day after the date of notice, or, in case of emergency, by the date provided in the Director's request, the City may remove or relocate the facilities at the expense of Grantee and without liability to the City.
- (B) The Grantee shall temporarily remove, raise, or lower aerial facilities to permit the passage of oversize or special mobile equipment, as defined in the Texas Transportation Code, over rights of way.
- (1) The City shall provide written notice to Grantee no later than 48 hours before scheduled passage.
 - (2) The expense of temporarily removing, raising, or lowering of facilities shall be paid by the person or entity requesting or benefiting from the service.
 - (3) The Grantee may require the person or entity to make a deposit or post a bond to guarantee the payment of expenses associated with temporarily removing, raising, or lowering of its facilities.

SECTION 6. ACTS OF THE CITY.

- (A) The Director shall assign priorities among competing private uses of the public rights of way according to the order completed permit applications are received.
- (B) If the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or right of way, the grant shall be subject to the rights of Grantee.
- (C) If the City vacates public rights of way containing the Grantee's facilities, the conveyance shall be subject to the rights of the Grantee under this license.

SECTION 7. ADDING FACILITIES OR SERVICES.

- (A) Any changes to the specific routing of the facilities described in Exhibit A may be approved administratively by the Director. The license fee may then be adjusted at the rate of \$3.20 per linear foot, indexed in accordance with Part 2 (Establishing an Annual License Fee) of this ordinance.
- (B) Grantee must obtain additional licenses or agreements under other provisions of the City Code if Grantee wishes to offer services not allowed under this license.

SECTION 8. INDEMNITY REQUIREMENTS.

- (A) Grantee shall be liable for the acts and omissions of any contractor, subcontractor, or any party involved directly or indirectly in the construction and installation of Grantee's facilities. Any act or omission of such party shall be considered an act or omission of the Grantee.
- (B) Grantee shall defend, indemnify and hold the City harmless against all damages, claims, losses, demands, suits, judgments and costs, including reasonable attorney fees and expenses, arising out of, or resulting from the negligence or willful misconduct of Grantee, its agents, employees, or subcontractors in the performance of activities under this license for:
 - (1) the repair, replacement, or restoration of City property, equipment, materials, structures, and facilities which are damaged, destroyed, or found to be defective;
 - (2) damage to or loss of the property of any person including, but not limited to Grantee, its agents, officers, employees and subcontractors, the City's agents, officers and employees, and third parties; and
 - (3) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person no matter how, or to whom, the loss may occur.
- (C) The terms of each contract awarded by the Grantee for activities under this license shall contain indemnity provisions requiring the contractor to indemnify the City to the same extent as described in this section.
- (D) The Director shall give prompt written notice to Grantee of any claim for which the City seeks indemnification. Grantee shall have the right to investigate, defend, and compromise these claims subject to the City Attorney's prior approval.

SECTION 9. INSURANCE REQUIREMENTS.

- (A) Grantee shall, at its sole expense, provide either:
- (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 a named insured; or
 - (2) an equivalent means acceptable to the City, covering all liabilities arising from the activities of Grantee, its officers, employees, agents, or contractors, under this license.
- (B) A copy of all instruments effecting this coverage shall be delivered to the Director not later than the 45th day after the execution date of this license.
- (C) The City's Risk Manager shall be entitled, upon request and without expense, to receive copies of certificates of insurance evidencing coverage stated above. The City's Risk Manager may make any reasonable requests for deletion, revision or modification of particular policy terms, conditions, limitations or exclusions, except where policy provisions are established by law or regulation binding upon either City or the Grantee or upon the underwriter for any of the policies. Upon request for deletion, revision, or modification by the City's Risk Manager, the Grantee shall make the requested changes and pay any additional costs.
- (D) All insurance certificates shall:
- (1) name the City of Austin and its officers, employees, board members and elected representatives as additional insured parties under all coverage except worker's compensation;
 - (2) provide at least 30 days notice to the City of any cancellation, non-renewal, or material change in coverage; and
 - (3) provide notice to both the Director and the Office of Risk Management by certified mail.

SECTION 10. SURETY.

- (A) The Grantee shall obtain and maintain at its sole cost a corporate surety bond securing performance of its obligations and guaranteeing faithful adherence to the requirements of this license, including payment of the annual license fee established by Part 2 (Establishing an Annual License Fee) of this ordinance. The surety bond must be:
- (1) in the amount of \$10,000.00, or two times the initial annual license fee established by Part 2 (Establishing an Annual License Fee) of this ordinance, whichever is greater;
 - (2) issued by a surety company licensed to do business in the State of Texas; and
 - (3) acceptable to the City Attorney.
- (B) The Grantee shall obtain this bond no later than the 30th day after the effective date of this license.
- (C) The rights reserved to the City under the bond are in addition to all other rights. No action, proceeding or exercise of a right regarding the bond shall affect the City's rights to demand full and faithful performance under this license or limit the Grantee's liability for damages.
- (D) The bond shall contain the following endorsement: "This bond may not be canceled nor subject to non-renewal by the surety until the 31st day after the Director receives notice of intent by certified mail."

SECTION 11. RECORDS.

- (A) Grantee 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 facilities located in the public rights of way and shall be kept and maintained within the city.
- (B) The City has the right to inspect, after giving reasonable notice, all maps, construction drawings and specifications. Grantee shall fully cooperate in making available its maps, construction drawings, and specifications for inspection.

- (C) The City shall maintain confidentiality of all competitively sensitive information to the extent allowed by law.

SECTION 12. NOTICE.

- (A) The Director of Public Works and the Director of Financial Services are jointly responsible for the administration of this license. Grantee 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 delivered to:

TELECOMMUNICATIONS & REGULATORY AFFAIRS
City of Austin
P.O. Box 1088
Austin, Texas 78767
Telephone: (512) 974-2999
Fax: (512) 974-2416

PUBLIC WORKS DEPARTMENT
City of Austin
P.O. Box 1088
Austin, Texas 78767
Telephone: (512) 974-7065
Fax: (512) 974-7084

With a copy to:

CITY OF AUSTIN LAW DEPARTMENT
P.O. Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-2268
Fax: (512) 974-2894

- (C) All notices to Grantee shall be delivered to:

Century Tel Fiber Company II, LLC (d/b/a LightCore Company)
14567 North Outer Forty Road, Suite 500
Chesterfield, Missouri 64017
Attn: General Counsel

Telephone: 314-880-1000

Fax: 314-880-1999

SECTION 13. ASSIGNMENT.

- (A) Except as otherwise provided by this section, Grantee may not sell, assign, transfer, or convey this license, the network facilities held by the Grantee, or any other right or privilege of the Grantee to any other person, firm or entity, without the prior written consent of the Council by ordinance. The Council's approval shall not be unreasonably withheld.
- (B) Grantee may assign its rights under this license without prior consent of the Council only to:
 - (1) another license holder; or
 - (2) a parent, subsidiary, affiliate, or successor to Grantee.
- (C) Except as provided in Subsection (B), the Council may revoke this license if the Grantee sells, assigns, transfers, conveys or otherwise disposes of its rights or interests under this license, or attempt to do so, without the Council's prior written consent. All rights and interest of the Grantee shall cease if this license is revoked.
- (D) A transfer in violation of this section is void.
- (E) The Council may deny consent to a transfer of interest if the transferee is not legally authorized to install facilities in the public rights of way.

SECTION 14. TERMINATION.

- (A) This license may be terminated by Grantee on written notice to the City at least sixty days before the desired termination date only if Grantee:
 - (1) ceases providing the network facilities; or
 - (2) assigns the license after Council approval.
- (B) If Grantee terminates this license, Grantee may remove its network facilities from the public rights of way only if street areas are replaced to meet the same or better grade as before removal.

- (C) This license may be terminated by the City on written notice to the Grantee at least 15 days before the desired termination date if:
 - (1) Grantee fails to abide by the City's rights of way management rules and does not cure a failure before the 45th day after written notice is sent by the City; or
 - (2) Grantee offers any service not permitted under this license and does not cease to offer the service before the 45th day after written notice is sent by the City.
- (D) This license may be terminated by the City for any other reason not earlier than the 91st day after written notice is sent to the Grantee and to any affected adjoining land owner.
- (E) Grantee may not assign or terminate this license for the purpose of evading fees.

SECTION 15. RENEWAL AND AMENDMENTS.

- (A) Grantee has an option to renew this license for an additional three years under the same terms and conditions, if Grantee has fully complied with all terms and conditions of this license. If Grantee exercises the renewal, it must file written notice with the City at least six months before the expiration of the original license term.
- (B) Grantee must begin negotiating a new license in good faith at least six months before the final expiration of this license. If no new license agreement has been executed on the final expiration date of the license, the City may:
 - (1) purchase the facilities at fair market value;
 - (2) request Grantee to remove the facilities; or,
 - (3) allow Grantee to abandon the facilities.

SECTION 16. CITY'S RIGHT TO PURCHASE GRANTEE'S FACILITIES.

- (A) The City may purchase Grantee's facilities.

- (B) The City shall notify Grantee of its intent to purchase in writing not later than the 90th day before the effective date of the purchase.
- (C) The grantee and the City shall each appoint an appraiser experienced in the evaluation of similar facilities. The appointed appraisers shall agree on the appointment of a third appraiser.
- (D) Each of the three appraisers shall conduct an independent appraisal of Grantee's facilities, and shall consider the following in arriving at a fair market value for Grantee's facilities:
 - (1) the book value of the assets constituting Grantee's facilities;
 - (2) the age and condition of the physical plant and equipment;
 - (3) the discounted future revenue stream generated from the customer base; and
 - (4) the remaining useful life of Grantee's facilities.
- (E) The appraisers may not consider the value of the unexpired term of this license, or the potential for renewal.

PART 2. ESTABLISHING AN ANNUAL LICENSE FEE.

- (A) During the first year of this license, Grantee shall pay an annual license fee of \$3.20 per linear foot for the use of public rights of way described in Exhibit A.
- (B) Payment shall be made to: Financial Services Department - Controller's Office, P.O. Box 1088, Austin, Texas 78767.
- (C) Fees for the upcoming year shall be paid in advance on or before the anniversary date of this ordinance.
- (D) The fee payment of \$3.20 per linear foot shall be increased by four percent per annum.
- (E) Each past due payment shall bear interest at the rate of nine percent per annum until fully paid or legally discharged.

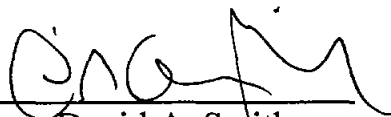
PART 3. ACCEPTANCE OF LICENSE.

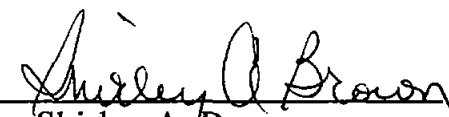
Grantee shall file with the City Clerk a statement accepting the terms of this license before the effective date of this ordinance. Acceptance of this license constitutes an acknowledgement and admission that Grantee is not a local exchange provider as defined in Chapter 283 (Management of Public Right-of-Way Used by Telecommunications Provider in Municipality), Texas Local Government Code.

PART 4. This ordinance takes effect on August 23, 2004.

PASSED AND APPROVED

August 12, 2004 §
 §
 §

APPROVED:  David A. Smith
 City Attorney

ATTEST:  Shirley A. Brown
 City Clerk

Will Wynn
Mayor