

PART 5: BROOKS FIBER COMMUNICATIONS OF NEW MEXICO,
INC. FRANCHISE

§ 13-4-5-1 SHORT TITLE.

Sections 13-4-5-1 et seq. may be cited as the “Brooks Fiber Communications of New Mexico, Inc. Franchise Ordinance.”

(Ord. 45-1995)

§ 13-4-5-2 DEFINITIONS.

For the purpose of this ordinance, the following terms, phrases, words and their derivations shall have the meaning given in this section. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is mandatory and "may" is permissive. Words not defined in this section shall be given their common and ordinary meaning.

CITY. The City of Albuquerque, a municipal corporation of the State of New Mexico.

CITY CLERK. The City Clerk of the City of Albuquerque or a designated representative.

COMPANY. Is and refers to Brooks Fiber Communications of New Mexico, Inc. ("Brooks").

COUNCIL. The legislative body of the City of Albuquerque sometimes referred to as "City Council."

DIRECTOR. The Director of the Public Works Department of the City of Albuquerque or his\her designee.

FACILITIES. Are and refer to and include, but are not limited to, plant, works, systems, improvements and equipment owned, leased or otherwise used by the company such as poles, wires, fixtures, equipment, underground circuits and conduit in public rights-of-way and other property necessary or convenient for the transmission and distribution of telecommunication service where such poles, wires, fixtures, equipment, underground circuits and conduit and other property necessary or convenient for the transmission and distribution of telecommunication service are located within rights-of-way and public places.

FRANCHISE. The authorization granted herein to rent and use rights-of-way and public places to construct, operate, and maintain company facilities in the city or any portion or portions thereof.

GROSS REVENUE.

(1) Includes any and all revenue, exclusive of gross receipts tax and exclusive of any tax passed through to consumers on behalf of governmental agencies, received by the company for services provided to customers through use of the facilities, provided by the company, including but not limited to:

(a) All telecommunications service revenues charged on a flat rate basis over facilities;

(b) One half of all telecommunications service revenues charged on a flat rate basis over facilities outside the city limits, but within Bernalillo County;

(c) All telecommunications service revenues charged on a usage sensitive or mileage basis over facilities;

- (d) One half of all telecommunications service revenues charged on a usage sensitive or mileage basis over facilities outside the city limits, but within Bernalillo County;
- (e) All revenues from installation service charges;
- (f) All revenues from connection or disconnection fees;
- (g) All revenues from penalties or charges to customers for checks returned from banks, net of back costs paid;
- (h) All revenues from equipment sold or rented to customers upon customers' premises;
- (i) All revenues from joint pole or conduit use;
- (j) All revenues from charges for access to local and long distance networks. However, gross revenue shall not include such access revenues if a local exchange carrier has paid a franchise fee on any such revenue;
- (k) All revenues from authorized rental, lease, resale or use of any portion of the company's network in the city, including plant, facilities or capacity leased to others;
- (l) Recoveries of bad debts previously written off and revenues from the sale or assignment of bad debts. Gross revenues may be adjusted for net write-off of uncollectible accounts computed on the average annual rate for the entire company;

(m) All revenues from enhanced data service;

(n) All interconnect revenues from interexchange carriers.

However, gross revenue shall not include interconnection services revenues received from any source if a local exchange carrier has paid a franchise fee on any such revenue;

(o) All revenues from co-location connection fees; and

(p) The company acknowledges that transport services provided to an affiliate or subsidiary will be subject to an actual or imputed charge comparable to charges to nonaffiliated customers. Such actual or imputed charges to affiliates or subsidiaries shall be reflected in gross revenues of the company for purpose of calculating the franchise fee owed. This ordinance does not authorize affiliates or subsidiaries to undertake telecommunication services as contemplated by this ordinance.

(2) The company is not required to measure each category of revenues separately; however, in the event of an audit by the city, the company will be required to provide an appropriate justification for amounts reported as gross revenues under this section.

(3) **GROSS REVENUE** shall not include proceeds from the sale of bonds, mortgages or other evidence of indebtedness, securities or stocks. Gross receipts taxes are not included in the above definition of gross revenue, and, therefore, are not included in the calculation of the franchise fee due under this ordinance.

(4) The company warrants that, as of the effective date of this ordinance, all services of the company will be provided through facilities located within the limits of the city or Bernalillo County. In accordance with this section and § 13-4-5-13 herein, the company agrees to give the city not less than 60 days notice of its intent to extend its facilities, and thus its services, outside of Bernalillo

County.

(5) Gross revenue shall be measured and monitored periodically as set out in §§ 13-4-5-13 and 13-4-5-15 below.

LINE EXTENSION. Any extension of distribution or transmission facilities into areas within the boundaries of the city not then served by the company.

MAYOR. The Mayor of the City of Albuquerque or his/her designated representative.

PUBLIC PLACES. All sidewalks, alleys, or other public ways and any and all public sources, spaces, grounds and buildings of the city within the city limit.

REASONABLE ATTORNEY FEES. Charges for legal representation as may be incurred by the city.

RIGHTS-OF-WAY. All present and future streets, avenues, highways, alleys, bridges and public ways, (excluding railroad rights-of-way, parks and airport property) of the city within the city limit.

TELECOMMUNICATIONS SERVICE.

(1) Any switched or other one-way or two-way transmission of voice or data, including but not necessarily limited to:

(a) Services interconnecting interexchange carriers for the purpose of any one-way or two-way transmission of voice or data;

(b) Services connecting interexchange carriers or competitive access carriers to local exchange providers for the purpose of any one-way or two-way transmission of voice or data;

(c) Services connecting interexchange carriers to any entity, other than another interexchange carrier or the local exchange provider for the purpose of any one-way or two-way transmission of voice or data;

(d) Service providing private line point-to-point service for end users for the purpose of any one-way or two-way transmission of voice or data;

(e) Nonentertainment video, video conferencing or point-to-point private line service; or

(f) Subject to the exclusions in divisions (2) through (4) below, any service regulated by state regulatory agencies or the Federal Communications Commission ("FCC") which the state agency or FCC has authorized the company to provide, if the company has provided advance notice of same to city.

(2) **TELECOMMUNICATIONS SERVICE** shall not include local exchange telephone services or other services directly regulated by the New Mexico State Corporation Commission ("SCC"). Before proposing to provide local exchange telephone services in the city, the company agrees to obtain prior SCC approval to provide that service, and to obtain a separate franchise from the city for the provision of such local exchange telephone service.

(3) **TELECOMMUNICATIONS SERVICE** shall not include cable services as defined in Title 47, Chapter 5, Subchapter V-A of the United States Code, as amended (47 USCA § 521, et seq.) or as recognized by the FCC. Before proposing to provide such cable services in the city, the company agrees to obtain a separate franchise from the city for the provision of this service.

(4) TELECOMMUNICATIONS SERVICE shall not include video dial tone or personal communication service. However, in the event the company desires to provide such service, it agrees to, as part of any franchise authorizing provision of that service, to pay a separate fee to the city for the provision of video dial tone, personal communication service or like service. Notwithstanding the above, and subject to the payment of franchise fees, the company shall have the right under this ordinance to provide, by means of its facilities, transport services for the bulk transport of transmissions signals, whether digital or analog, and whether voice, video or data, that are in part or in whole a local exchange telephone service, a cable service, as defined above, a video dial tone and a personal communication service, to any company authorized to provide such services by the city, the State of New Mexico, or federal government authority having jurisdiction over such services.

TREASURER. The Treasurer of the City of Albuquerque.

(Ord. 45-1995)

§ 13-4-5-3 GRANT OF FRANCHISE.

(A) The city hereby grants to Brooks Fiber Communications of New Mexico, Inc., a New Mexico corporation, subject to the terms, conditions, and limitations contained in this ordinance, permission to rent, use and occupy rights-of-way and public places and a nonexclusive franchise, to provide telecommunication service, and right and privilege to erect, construct, maintain and operate a telecommunication system within the corporate limits of the city as the same now exist or may be extended in the future; and a nonexclusive franchise, right and privilege to erect, construct, maintain and operate poles, wires, fixtures, equipment, underground circuits and conduits and other property necessary or convenient for the transmission and distribution of telecommunication service to the city and its inhabitants and to other customers and territory beyond the limits of the city; and to transmit, distribute and sell telecommunication service, upon, over, along, under and across the streets, alleys, roads and other public ways and places, including, but not limited to private property on which a preliminary

subdivision plat has been approved by the city for the provision of public utilities within the corporate limits of the city as the same now exist or may be extended in the future.

(B) All facilities of the company used in connection with the transmission and distribution of telecommunication service and presently located within the corporate limits of the city, or hereafter located within the corporate limits of the city, shall be deemed to be covered by the terms of this ordinance.

(Ord. 45-1995)

§ 13-4-5-4 DURATION; COMPANY OFFICES.

(A) This franchise is granted for a period of seven years from and after the effective date of the franchise granted through this ordinance, which commences on the effective date of this ordinance. If the company has complied with all material provisions of this ordinance this franchise agreement will be renewed, by ordinance, for an additional three years on the date of expiration, unless one party gives notice, in writing to the other, at least 240 days prior to the date of expiration of such party's intent to terminate the franchise agreement. Assuming notice to terminate has not been tendered by the city, at least 180 days prior to the end of the term of this ordinance, the company shall notify the city in writing of its intention to seek renewal of this ordinance.

(B) Within one year of the effective date of this franchise or upon commencement of operation and throughout the duration of this franchise, or any extension thereto, the company shall be required to establish and maintain offices within the city for customer service. The company shall make available at such offices, at a minimum, documents required by this franchise at §§ 13-4-5-5, 13-4-5-15 and 13-4-5-16 with reasonable notice by the city to the company.

(Ord. 45-1995)

§ 13-4-5-5 CONSTRUCTION PLANS AND DRAWINGS.

(A) Before the company may conduct underground work involving excavation, new construction or major relocation work in any rights-of-way or public place, the company shall first notify the city and shall comply with any special conditions relating to location, scheduling, coordination and public safety; and the company shall file maps and drawings with the Director showing the location of any construction or extension of its facilities and services in any rights-of-way or public place of the city. For multi-conduit duct banks, maps and drawings shall show overall size, material and configuration of the duct bank. As further set out at § 13-4-5-16, upon request from the city the company shall provide the city with updates of the maps and drawings showing the location of any new construction, extension or relocation of its facilities. All materials provided pursuant to this section shall be kept confidential to the fullest extent possible under the law.

(B) Such proposed construction work to be done by the company shall be performed in a safe manner subject to the approval of the Director and in accordance with applicable federal and state laws and city ordinances, regulations and permit requirements now or hereafter existing including the Street Excavation Ordinance, as that ordinance may be amended from time to time, of the city requiring a Sidewalk, Drive-pad, Curb and Gutter Bond, a bond securing payment of permit fees and evidence of at least \$1,000,000 in the requisite insurance coverage(s).

(C) Prior to initiating any construction or extension of the backbone network and contemporaneous with the filing of maps and drawings, the company shall tender a review/location fee, in addition to the franchise fee, with the Director. Such preconstruction review/location fee shall be \$1.50 per linear foot of fiber laid as diagramed and mapped; however, in no event shall such fee exceed \$30,000 on an annual basis. Such review/location fee shall apply to subsequent additions or extensions of the company's backbone network as may be proposed from time to time and shall be due each January 15.

(Ord. 45-1995)

§ 13-4-5-6 INSTALLATIONS, EXCAVATIONS AND RESTORATIONS.

(A) (1) The company shall have the right to excavate in, occupy and use any and all rights-of-way and public places for the purpose of installing, erecting, constructing, repairing, maintaining, removing, relocating and operating its facilities after obtaining any and all appropriate permits from the city, provided, however, that:

(a) The company shall not, pursuant to this franchise, place any of its facilities, on, over, under or within any city park, duly designated as such by the city, but nothing herein contained shall preclude the city from granting a revocable permit therefor;

(b) The company shall not place any of its facilities, on, over, or within the median portion of any boulevard or parkway without first having obtained the written permission of the city;

(c) Where appropriate and as may be required by the city through any permit process, installation, excavations and restorations affecting street and/or lane closures shall, as often as practicable, be performed after 6:30 p.m. and before 6:00 a.m., but in no event shall any such work be performed from 7:00 a.m. to 9:00 a.m. and from 4:00 p.m. to 6:00 p.m.;

(d) The city reserves the right to assist in the coordination and scheduling of any company projects where such project may be reasonably coordinated with the placement of other franchisee facilities. Otherwise, and subject to city permit processes and approvals, it is recognized that, notwithstanding the foregoing, the company retains discretion over the timing of the company's proposed projects; and

(e) The company shall, to the extent feasible, employ "trenchless" technology in the placement of its facilities.

(2) Except in an emergency, not less than five working days prior to the commencement of any work by the company which involves excavation in any rights-of-way or public place, the company shall notify the Director and any appropriate utility coordinating committee for purposes of utility location. Minimum notice to the city shall be by telephone communication or in person prior to any work, followed by notice in writing as soon as practical. The company will provide advance notice so as not to disrupt services of the city or any other person or utility using any rights-of-way and public places in the city and allow the city to place any inspector it may deem necessary at the site of the project.

(B) Whenever work is performed in any rights-of-way or public place, the company shall take all reasonable precautions to minimize interruption to traffic flow, damage to property or creation of a hazardous condition.

(C) After any excavation shall be made and after work is completed pursuant to the provisions of this ordinance, the company, at company expense shall as soon as practicable, but not longer than one day, remove all surplus material in compliance with specifications, requirements and regulations of the city in effect at the time of such restoration and restore the portion of the rights-of-way or public place to the same condition in which it was prior to the excavation thereof. If the company fails to restore promptly the affected portion of the rights-of-way or public place, following written notice to the company, the city may make the restoration in a manner satisfactory to the city and all costs incurred for such restoration, whether done with city work forces and equipment or otherwise, shall be paid by the company, including the cost of any inspectors the city may assign to the project.

(D) The company shall be responsible for the maintenance of all rights-of-way impacted by the presence of the company's facilities and within reasonable proximity of and upon which the company maintains aboveground facilities, including the removal of weeds and litter.

(E) The company shall ensure its facilities in rights-of-way and public places are located and constructed in a manner such that access is not impaired in

compliance with the Americans with Disabilities Act (ADA). Following notice by the city of an ADA construction problem, the company shall have 30 days or other reasonable time to remedy the problem. In the event the city and the company cannot agree that a problem exists, any dispute shall be submitted to nonbinding mediation, with the assistance and through the city's Alternative Dispute Resolution ("ADR") Coordinator.

(F) Execution of this franchise requires the company to become a member of a local utility coordinating committee, e.g. New Mexico One-Call System. The company further agrees to participate in such organization(s) and abide by their articles of incorporation, bylaws, and other requirements.

(Ord. 45-1995)

§ 13-4-5-7 LOCATION AND RELOCATION OF FACILITIES.

(A) All facilities of the company shall be placed so that they do not interfere with the use of rights-of-way and public places by the city and shall only be placed after approval of the location by the Director and in accordance with any specifications adopted by the city governing the location of facilities. The city reserves the right to construct, install, maintain and operate any public improvement, work or facility, do any work that the city may find desirable on, over or under any rights-of-way and public places, and vacate, alter or close any rights-of-way and public places. All such work shall be done, if possible, in such manner as not to obstruct, injure or prevent free use and operation of the company's facilities. The company agrees to obtain the city's express written approval before placing any new poles in rights-of-way and other public places, that do not currently exist in rights-of-way and other public places.

(B) (1) The city shall have the right to require the removal or relocation of facilities used by the company in any rights-of-way or public place as may reasonably be required by the city for any reason, after notice to the company, or caused or occasioned by any city project including, but not limited to, the installations of water, sanitary sewer, storm drainage, landscaping, or traffic signal

facilities, road reconstruction and construction, and the company shall remove and relocate such facilities within 30 days following notice to do so from the city. Prior to any such relocation the city agrees to provide for suitable location for such relocated facilities sufficient to maintain service. The cost of any removal or relocation of its facilities shall be paid by the company. Notwithstanding the foregoing the company shall not be required by the city to relocate its facilities to accommodate another franchisee in the city. The costs of any relocations occasioned by another franchisee of the city in no event shall be the responsibility of the city.

(2) The company shall reconstruct, replace or restore any street, alley, or public way or place, in a timely fashion, and any water, sewer, sanitary sewer, storm drainage, traffic signalization facilities, or other facility of the city disturbed by the company, without cost to the city, to a condition acceptable to the city consistent with reasonable standards of safety and appearance. Any facility so disturbed by the company shall be reconstructed, replaced, or restored only under the supervision of city personnel.

(3) Subject to the provisions of § 13-4-5-5 herein and upon notice to the city, the company may remove or relocate transmission and distribution facilities maintained by the company on its own initiative.

(C) Where the city, acting through itself, an agent, contractor or permit holder, proposes to improve a street, including but not limited to landscaping and traffic signalization, water line, storm sewer or sanitary sewer within the rights-of-way or other public place under its jurisdiction or control, and such improvements include excavation and the placement of underground utilities vaults and conduit sufficient for the company's telecommunication service distribution purposes, by and at the expense of someone other than the company, then upon notification by the city and upon such reasonable scheduling as may be required by the city's ordinances and policies, the company shall replace such overhead distribution facilities as are then within the affected right-of-way with underground facilities within the vaults and conduits provided therefor. All such placement shall be at company expense. The conversion from overhead to underground shall be conditioned upon the city requiring the undergrounding in the area in which both

the existing and new facilities are and will be located and the city shall require:

- (1) That all existing overhead communication and electric distribution facilities in such area be removed;
- (2) That each customer served from such existing overhead distribution facilities shall, in accordance with the company's rules for underground service, make all facility changes on customer's premises necessary to receive service from the underground facilities of the company as soon as it is available; and
- (3) That the company is authorized to discontinue its overhead service on completion of the underground facilities.

Such replacement of overhead with underground distribution facilities shall be paid for by the company.

(Ord. 45-1995)

§ 13-4-5-8 PUBLIC WORKS AND IMPROVEMENTS.

(A) The city reserves the right to construct, install, maintain and operate any public improvement, work or facility and do any work that the city may find desirable on, over or under any rights-of-way or public place. All such work shall be done, if possible, in such manner as not to obstruct, injure or prevent free use and operation of the company's facilities.

(B) Whenever the city shall excavate or perform any work in any present and/or future rights-of-way or public place of the city, or shall contract for such excavation or work, where such excavation or work may disturb but not require removal or relocation of company's facilities, the city shall notify the company sufficiently in advance of such contemplated excavation or work to enable the company to take such measures as may be deemed necessary to protect

such facilities from damage and possible inconvenience or injury to the public or the city's rights-of-way or public place. If the company cannot take such measures, the company shall be required to relocate its facilities in accordance with § 13-4-5-7. In such case, the company, upon request, shall furnish field markings to the city or contractor, as the case may be, showing the location of all its facilities in the area involved in such proposed excavation or other work.

(C) Whenever the city shall vacate any rights-of-way or public place for the convenience or benefit of any person or governmental agency or instrumentality, the company's rights shall be preserved as to any of its facilities then existing in such rights-of-way or public place.

(Ord. 45-1995)

§ 13-4-5-9 MOVING OF BUILDINGS.

Whenever it becomes necessary to temporarily rearrange, remove, lower or raise the aerial cables or wires or other apparatus of the company to permit the passage of any building, machinery or other object, the company shall perform such rearrangement upon the receipt of written notice from the person or persons desiring to move said building, machinery or other object. The written notice shall detail the route of movement of the building, machinery or other object. The costs incurred by the company in making such rearrangements of its aerial plant will be borne, excepting the city, by the person or persons seeking such rearrangement, unless the aerial plant is placed or maintained in violation of the applicable rules of any local, state, or federal regulatory agency and thereby interferes with the movement.

(Ord. 45-1995)

§ 13-4-5-10 SAFETY STANDARDS.

The facilities of the company shall at all times be constructed, operated

and maintained so as to protect and safeguard the health and safety of the public and to this end the company shall observe all rules pertaining thereto prescribed by any local, state, or federal regulatory authority.

(Ord. 45-1995)

§ 13-4-5-11 JOINT USE AGREEMENTS.

The company is authorized to enter into joint use agreements with any person or entity franchised by the city with respect to the placement of facilities. The company may require any such person or entity to furnish evidence of adequate insurance covering the company and adequate bonds covering the performance of the person or entity attaching to the company's facilities as a condition precedent to granting permission to any such person or entity to attach transmission facilities to the company's facilities; provided that the company's requirements for such insurance shall be reasonable.

(Ord. 45-1995)

§ 13-4-5-12 INTERFERENCE.

Subject to § 13-4-5-13(H) herein, the company shall not be required to attach its facilities to the facilities of any other person or entity or to permit the facilities of any other person or entity to be attached to the company's facilities if it can be shown satisfactorily to the city that the company will be subjected to increased risks of interruption of service or to increased liability for accidents, or if the facilities of such other person or entity are not of the character, design, and construction required by, or are not being maintained in accordance with industry standards of practice.

(Ord. 45-1995)

§ 13-4-5-13 FRANCHISE FEE; CONDITIONS.

(A) As consideration for this franchise, which provides for the rental and use by the company of the rights-of-way and other public places within the boundaries of the city, which are valuable public properties acquired and maintained by the city at great expense to its taxpayers and citizens, the company shall pay to the city an amount equal to 3% of the gross revenue, as defined in § 13-4-5-2, collected by the company for the first year from the effective date of this franchise ordinance. Thereafter, for the next one-year term the company shall pay to the city an amount equal to 4% of the gross revenue collected by the company. For the remaining five-year term of this franchise, the company shall pay to the city an amount equal to 5% of the gross revenue collected by the company. Provided, however, in accordance with this section and the provisions contained in the definition of GROSS REVENUE in § 13-4-5-2, after notice by the company to the city of the company's intent to extend its facilities, or services, outside of Bernalillo County, and upon the company's commencement of services across facilities outside Bernalillo County, the fee under this ordinance shall escalate to 5% of gross revenue. Such 5% fee shall become due the month following the month the extended facilities are placed in service. The city shall use its best efforts to ensure that any company providing services substantially similar to those provided by the company (i.e., "Brooks") shall pay an equivalent fee measured as a percentage of gross revenues equal to or greater than that paid by the company.

(B) In consideration of the agreement of the company to make such franchise payments, the city agrees that no license, tax, or charge on the business, occupation or franchise of the company shall be imposed upon or required of the company by the city during the term of this ordinance. This provision shall not exempt the property of the company from lawful property, ad valorem taxes and local improvement district assessments. This provision shall also not exempt the company from conditions, exactions, fees and charges, which are generally applicable during the company's real property development or use as required by the city's ordinances.

(C) Commencing the month following the month this franchise ordinance becomes effective, the franchise fee shall be paid monthly on the 25th day of each month; such fee shall be for gross revenues received by the company

for the preceding month. The company shall furnish to the city with each payment of compensation required by this section a written statement, showing the amount of gross revenue of the company within the city for the period covered by the payment. Upon receipt of such payment the city shall issue a receipt to the company. To facilitate the city's annual budget process, on or before December 31, 1995, and each succeeding December 31st thereafter during the term of this franchise ordinance, the company will provide the city with an estimate of the gross revenue and resultant franchise fee for the following calendar year. Nothing herein shall preclude the company and the city from agreeing to a revised payment schedule.

(D) On or before the first day of February of each succeeding year, the company shall submit to the City Treasurer a statement of the franchise fee actually due to the city based upon the actual gross revenue for the previous calendar year, together with a check for any amount due from the company or a statement for any amount due from the city. Within 30 days from the submission of the statement of franchise fee owing, or within such reasonable additional time as he may request, the Treasurer shall investigate the statement and determine the accuracy of the amounts reported. However, neither payment of the franchise fee nor failure to make such investigation shall estop the city in any way or prevent subsequent investigation, collection or return of any amount properly due.

(E) In the event it is claimed by the city that the amount of the franchise fee paid hereunder for any calendar year is insufficient, or in the event the company claims that the amount is excessive, and the parties cannot agree, the city and the company shall attempt to informally negotiate a resolution. In the event that negotiations fail, the dispute shall, before any other remedies are invoked, be submitted to nonbinding mediation with the assistance of and through the city's ADR Coordinator.

(F) In the event that the franchise fee set forth in this franchise ordinance is declared illegal, unconstitutional or void for any reason by any court or proper authority, the company shall be contractually bound to pay the city, at the same times and in the same manner as provided for herein, an aggregate amount equal to the amount which would have been paid as a franchise fee. This section, however, shall not constitute a waiver of any claim the company may assert

against the city.

(G) Acceptance by the city of any payment due under this section shall not be deemed to be a waiver by the city of any breach of this franchise occurring prior thereto, nor shall the acceptance by the city of any such payments preclude the city from later establishing that a larger amount was actually due, or from collecting any balance due to the city.

(H) (1) In consideration of the rights and privileges hereby granted, the city shall have and the company hereby grants to it, the right and privilege at the city's expense to suspend and maintain wires and necessary control boxes on poles placed by the company in the streets and other places aforesaid, or if such wires are placed underground, to place and maintain in the pipes or conduits of company, if space therein is available, wires which the city may require for fire, police, emergency or other municipal purposes. All such wires shall be placed on the poles or in the conduits so as not to interfere with the service of the company and shall not pose a danger to the company's facilities, customers, or customers' property. However, nothing in this franchise shall limit the company's right to reserve conduit space and/or pole space which in its sole discretion it retains for purposes of assuring the safety of or servicing of the facilities. The city agrees in consideration of the establishment of this service and the furnishing of such facilities to hold the company free and harmless from all claims or liability for damage which may arise out of the city's operation of such wires and control boxes.

(2) As further consideration of the rights and privileges hereby granted, and upon reasonable request by the city and to the extent the company can reasonably do so, pursuant to its leases and agreements with other right-of-way providers, the company will grant joint use of rights-of-way which it now, or in the future, has an interest in to the city for purposes including but not limited to parks, drainage facilities, bikeways, traffic conduits, mass transit corridors, sanitary sewer lines, pedestrian area parking, open spaces and electric, cable, natural gas and water service distribution, provided that the company shall not be required to make such an offer in any circumstance where such offer would unreasonably interfere with the company's use of the rights-of-way. Compensation for such joint use shall be as negotiated by the city and the company. If the city's joint use is accepted by

the company, then any improvements deemed appropriate by the city shall be made by the city at its sole expense.

(I) The company agrees that any franchise or other fee paid by the company to the city shall not be reflected as a line item or separate fee on invoices to ultimate consumers of the company. Any fee paid to the city is a cost of doing business to the company and shall be embedded in the rates charged to consumers.

(J) The compensation paid by the company for this franchise includes compensation for the rental and use of any rights-of-way and public place located within the city as authorized.

(Ord. 45-1995)

§ 13-4-5-14 FACILITIES FOR EXCLUSIVE CITY USE.

(A) Within six months of the effective date of this ordinance, the city will select one company, after informal competitive bid among the companies authorized to provide telecommunication services, to provide a downtown backbone network comprised of the following designated facilities. The company and other companies contemporaneously franchised and authorized to provide telecommunication services, shall provide to the city an indefeasible right to use ("IRU") and will proportionately contribute to the reasonable and necessary cost of:

(1) A three pair dark fiber backbone in that company's then existing backbone;

(2) Lateral connections from the backbone to the following facilities, at the U.S. West/City network interface (i.e., the telephone room);

(a) Albuquerque Bernalillo County Government Center;

- (b) Fire Station No. 1;
- (c) East Convention Center; and
- (d) The city's long distance carrier's point of presence.

(B) In addition to the downtown network, the city may, within two years of the effective date of this ordinance, select a second backbone network, either the company's or that of another company franchised and authorized to provide telecommunication services, of three pair of dark fibers for the city's IRU in such company's backbone network. The company so selected will be reimbursed proportionately by the companies not chosen, including companies then franchised to provide similar services, for the incremental cost of adding the fiber and the incremental cost of maintaining it in the future.

(C) The company and any other company franchised and authorized to provide telecommunication services will proportionately contribute to the cost of connecting the following city facilities to a network of the city's choice:

- (1) Piño Yards; and
- (2) Old Albuquerque High School.

(D) The company shall provide the city three additional lateral connections at locations of the city's choice either connecting to the city's then existing dark fiber networks or the then existing network of any company then authorized to provide telecommunication services. If a lateral connection is made to a lighted network, the city or the new end-user customer will be expected to pay service charges to the network owner. Lateral connections will be limited to 100 feet. Anything greater than the 100 feet will be paid for by the city or the end-user customer.

(E) All facilities placed for the city's use pursuant to divisions (A) through (D) above shall be for the city's internal and noncommercial purposes, not for resale, and for the city's sole and exclusive use. In the event of a sale of the company's network, the city will retain an indefeasible right to use the above facilities.

(F) The company agrees to bear its pro rata share of any maintenance of fiber dedicated to the city. Except that the city shall pay only actual incremental labor costs to the company to repair the city's share of dark fibers within any cable that is damaged as the result of any natural disaster.

(G) The city will not allow or direct any third party to access fiber optic cable or other company facilities, if any, in city rights-of-way without notice to the company sufficient to allow the company to supervise and direct such access.

(H) The city recognizes that the company's agreements, if any, to occupy rights-of-way or for pole attachments may be subject to the control of third parties who may require the company to relocate its cable. In the event of such required relocation by the company, the company shall provide notice thereof to the city as soon as reasonably possible. The company shall provide replacement dark fibers to the city in any company replacement cable as soon as reasonably possible.

(I) The city agrees in consideration for the provision of such dark fiber and lateral connections to hold the company free and harmless from all claims or liability for damage which may arise out of the city's operation of such dark fiber and lateral connections.

(Ord. 45-1995)

§ 13-4-5-15 BOOKS OF ACCOUNT AND REPORTS.

(A) The city shall have the right to review or audit the company's books and records in accordance with regularly accepted accounting and audit standards regarding any amounts which may be owed under this franchise ordinance. This right includes the right to review and audit all books and records of revenue not included in the calculation of the fee paid, but which may be reasonably considered by the city to be subject to a franchise fee. The city shall give written notice to the company of any additional amount claimed to be due to the city as a result of the city's review. The additional amount due the city, if any, shall be paid within 30 days following determination by the city that such amount is due and payable.

(B) The company shall keep complete and accurate books and records of its business and operations pursuant to this franchise ordinance in accordance with generally accepted accounting principles and in accordance with the rules and regulations of any state regulatory authority. The company shall keep its books of account and records in such a way that breakdowns of revenues are available by journal code within the city.

(C) In the event of an audit, the company shall provide the city specific books, records, contracts, accounts, documents and papers for its operations within the city.

(D) All such books, records, and accounts of the company shall be retained by the company for a period of six years, in accordance with § 37-1-3, NMSA 1978. The company shall make such records, as are necessary for the city to complete its audit, and be available for inspection by the city, in the city, upon 30 days notice from the city.

(E) All audits will take place on company premises within the city. The city's auditors may review all directly relevant materials and may make copies of any materials with the approval from the company. Such approval will not be unreasonably withheld.

(F) Upon request by the city, the company shall provide to the city by U.S. mail, postage prepaid, a copy of all papers filed by the company with any federal or state regulatory agency on the same day of filing that pertain to the company's facilities located in New Mexico.

(Ord. 45-1995)

§ 13-4-5-16 SUPPLYING MAPS UPON REQUEST.

The company shall maintain on file maps and operational data pertaining to its operations in the city. The city may inspect the maps and data at any time during business hours. Upon request of the city the company shall furnish to the city as soon as practicable, without charge, current maps either in a "hard copy" printed form or in the city's AGIS format or compatible data base, showing the location and dimension of any facilities, but not other proprietary information, used in operating the company's facilities within the city served by the company.

(Ord. 45-1995)

§ 13-4-5-17 RATES.

(A) The rates to be charged by the company for telecommunication service shall comply with the appropriate local, state or federal regulatory authority, or any other governmental official, commission or body having jurisdiction. If no governmental official, commission or body has rate setting jurisdiction, the company may set rates to be charged at its sole discretion.

(B) To the extent that the city is, or may in the future become, entitled to set fees and charges for the services provided pursuant to this franchise, the city reserves the right to regulate the rates, fees, charges, deposits and associated terms and conditions for any service provided pursuant to this franchise to the fullest extent permitted by applicable law with appropriate procedural due process.

(Ord. 45-1995)

§ 13-4-5-18 FRANCHISE NOT EXCLUSIVE.

The franchise hereby granted shall not be exclusive and shall not be construed as any limitation on the city to grant rights, privileges and authority to other persons or corporations similar to or different from those herein set forth or to construct, install, operate or maintain a public utility.

(Ord. 45-1995)

§ 13-4-5-19 LIMITATION ON PRIVILEGES.

All rights, authority and grants herein contained or conferred are also conditioned upon the understanding and agreement that these privileges in the rights-of-way and other public places of the city are not to operate in any way so as to be an enhancement of the company's properties or values or to be an asset or item of ownership in any appraisal thereof. In the event that the city shall at any time hereafter acquire the property of the company, by purchase, or otherwise, the value of this franchise shall be fixed and determined at \$1.

(Ord. 45-1995)

§ 13-4-5-20 ASSIGNMENT OF FRANCHISE.

(A) The company shall not transfer or assign any rights under this franchise or lease total capacity of its system or network to another entity unless the city shall first review the financial, technical and operational qualifications of such entity and give its approval, in writing, in 60 days which approval shall not be unreasonably withheld. This prohibition shall not apply in the instance that the company is transferred, assigned, or sold to an affiliated interest as that term is

defined at § 62-3-3.A, NMSA 1978, or successor statute, nor shall this prohibition apply to assignments made or security interests granted in order to secure financing. However, the company agrees to provide at least 30 days advance notice of any affiliate transfer, assignment or sale. The city shall have the discretion to review the financial, technical and operational qualifications of the affiliate.

(B) In order that the city might share in the value this franchise adds to the company's operation, any such transfer or assignment of any rights under this franchise by the company, subject to the exceptions listed in division (A) above, shall be subject to the conditions that the transferee promptly pay the city 20% of any and all fees paid to the city including the franchise fee paid to the city in the previous calendar year, which amount the company and the city agree is reasonable, and that such transfer fee shall not be recovered from the city or from city residents or property owners through rates or surcharges of the company.

(Ord. 45-1995)

§ 13-4-5-21 ADDITIONAL CITY RIGHTS.

The right and privilege of the city to construct, purchase or condemn a public utility or telecommunication provider located within or without the boundaries of the city is expressly recognized herein.

(Ord. 45-1995)

§ 13-4-5-22 EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION.

The company is committed to stimulating and strengthening the participation of minorities and women within the company and is also committed to the principle that the success and economic well-being of the company are related closely to the economic strength and vigor of the communities and people it serves.

(Ord. 45-1995)

§ 13-4-5-23 AGREEMENT TO REOPEN NEGOTIATIONS.

(A) The city and the company agree that the services provided pursuant to this ordinance are in an area of law undergoing significant review by state and federal authorities and that there is a real possibility that some of the terms of this ordinance may be preempted by state or federal law during the term of this ordinance. Therefore, the city and the company expressly agree that:

(1) The preempted terms of this ordinance, including the terms relating to the compensation to be paid, shall, in the sole discretion of the city, be subject to renegotiation one year from the effective date of this ordinance, and again, if the city desires, two years and three years from the effective date of this ordinance.

(2) In addition to and separate and apart from the provisions of division (1) above, in the event an earlier negotiation must occur in order to comply with newly enacted or decided federal or state law, such negotiation shall occur within a reasonable time after any request for renegotiation is issued by either the city or the company, or at such time as it becomes apparent that a portion of this ordinance has been preempted by state or federal law.

(B) By execution of this ordinance, the company agrees that upon the conclusion of any such renegotiations, the company will enter into any reasonably necessary amendments to this ordinance, and the company expressly agrees to waive any rights it may have under state law to refuse to renegotiate this ordinance as set forth in this section. It is further expressly agreed that any renegotiation and subsequent amendment shall not reduce the initial term of this franchise ordinance. In no event shall such renegotiations impose obligations on the company that similar service providers would not also be subject to. Further, if the city's right to impose a franchise is totally preempted, this ordinance is null and

void.

(Ord. 45-1995)

§ 13-4-5-24 INDEMNIFICATION.

(A) The company, as a condition of the grant of this franchise, and in consideration thereof, shall protect, indemnify, and hold the city harmless against all claims for damages to persons or property by reason of the construction, maintenance and operation of its facilities, and conduct of business, or in any way arising out of performance under this franchise, directly, or indirectly, when or to the extent injury is caused, or alleged to have been caused, wholly or in part, by any act, omission, negligence, or misconduct of the company or any of its contractors, subcontractors, officers, agents, or employees, or by any person for whose act, omission, negligence, or misconduct, the company is by law responsible. This provision is not intended to create liability for the benefit of third parties but is solely for the benefit of the company and the city. In the event any claim is made against the city that falls under this indemnity provision and a court of competent jurisdiction should adjudge, by final decree, that the city is liable therefor, the company shall indemnify and hold the city harmless of and from any such liability, including any court costs, expenses, and reasonable attorney fees incurred by the city in defense thereof and incurred at any stage. Upon commencement of any suit, proceeding at law or in equity against the city relating to or covering any matter covered by this indemnity, wherein the company has agreed by accepting this franchise, to indemnify and hold the city harmless, or to pay said settlement, final judgment and costs, as the case may be, the city shall give the company immediate notice of such suit or proceeding. Whereupon the company shall provide a defense to any such suit or suits, including any appellate proceedings brought in connection therewith, and pay as aforesaid, any settlement, costs or judgments that may be rendered against the city by reason of such damage suit. Upon failure of the company to comply with the "defense of suit" provisions of the franchise, after reasonable notice to it by the city, the city shall have the right to defend the same and in addition to being reimbursed for any settlement or judgment that may be rendered against the city, together with all costs incurred therein, the company shall reimburse the city for reasonable attorney fees, including those employed by the city in such case or cases, as well as all expenses

incurred by the city by reason of undertaking the defense of such suit or suits, whether such suit or suits are successfully defended, settled, compromised, or fully adjudicated against the city.

(B) In the event the city is compelled to undertake the defense of any such suit by reason of the company's failure to perform as hereinabove provided, the city shall have the full right and authority to make or enter into any settlement or compromise of such adjudication as the governing body shall deem in the best interest of the city, this without the prior approval or consent of the company with respect to the terms of such compromise or settlement.

(Ord. 45-1995)

§ 13-4-5-25 REMEDIES AND PENALTIES NOT EXCLUSIVE;
DEFAULT.

(A) All remedies and penalties under this ordinance are cumulative and not exclusive, and the recovery or enforcement by one available remedy or imposition of any penalty is not a bar to recovery or enforcement by any other such remedy or imposition of any other penalty. The city reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon the company by or pursuant to this ordinance. A specific waiver of a particular breach of any term, condition or obligation imposed upon the company by or pursuant to this ordinance shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

(B) The company agrees that an Event of Default shall include, but shall not be limited to, any of the following acts or failure to act by the company:

- (1) Failure to obtain any applicable permits from the city pursuant

to this ordinance.

(2) Failure to comply with the terms of § 13-4-5-20 which limits the assignment of the franchise, or transfer of control of the franchise.

(3) Failure to supply the capital items or other support for the governmental facilities as specified in § 13-4-5-14.

(4) Failure to supply bonds, as may be required by the city to assure the proper completion of any construction performed pursuant to the franchise.

(5) Failure to comply with any local, state or federal law that prohibits discrimination in employment, or prohibits the creation of hostile working environments for an employee of the company.

(6) Failure to make any of the payments set forth in §§ 13-4-5-5 or 13-4-5-13 of this franchise.

(7) Failure to pay any permit fees, or failure to comply with any rules, regulations, orders or directives of the city as set forth in this ordinance.

(8) Substantial or repeated failure to comply with § 13-4-5-6 concerning installations, excavations and restorations.

(9) Refusal to renegotiate the terms and conditions of this ordinance in accordance with § 13-4-5-23.

(C) Upon the occurrence of an Event of Default, then, in accordance with the procedures provided for in this franchise, the city may:

(1) Require the company to take such actions as the city deems are appropriate; or

(2) Seek money damages from the company as compensation for such Event of Default; or

(3) Accelerate the expiration of the term of this franchise by decreasing the term of the franchise provided in § 13-4-5-4; the extent of such acceleration shall be determined by the city and may include any period of time, but not less than six months provided that six months remain under this ordinance; or

(4) As a last measure only, revoke the franchise by termination of this ordinance.

(D) The city shall exercise the rights set forth in this section in accordance with the following procedures:

(1) The Director shall notify the company, in writing, of an alleged Event of Default. This written notice shall set forth with reasonable specificity the facts the city believes are the basis for declaring that an Event of Default has occurred. The company shall, within 30 calendar days of the date the notice is postmarked, or such additional time as the Director may specify in the notice, cure the alleged Event of Default, or, in writing, present for review by the Director a reasonable time frame and method to cure the Event of Default. The company, in lieu of the cure of the Event of Default as set forth herein, may, in writing, present facts and arguments as to why the company disagrees that an Event of Default has occurred.

(2) If the company presents a written response that challenges whether an Event of Default has occurred, the Director shall within ten days review the submitted materials and determine again whether an Event of Default has occurred. If the Director reaffirms that an Event of Default has occurred, the

company shall be notified in writing of this decision and shall, within 30 calendar days, cure the alleged Event of Default. The period to cure is tolled in the event one party demands mediation until such time as mediation is completed.

(3) If the company fails to cure the Event of Default so declared pursuant to this section within the time permitted by the Director, the Director shall prepare a written report to the Council and recommend action to be taken. If the Council, after consideration of this report and hearing, agrees that an Event of Default has occurred, it may order an appropriate remedy as set forth in division (C) of this section.

(E) In addition to the rights under this section, the city, upon any termination, may, at its sole discretion, direct the company to remove, at the company's sole cost and expense, any or all of the facilities from all rights-of-way and other public places within the city, subject to the following:

(1) The city may determine that removal of buried fiber optic cable, or conduit, is not necessary;

(2) In removing any part of the facilities, the company shall refill and compact, at its own expense, any excavation that shall be made by it and shall leave all rights-of-way and other public places in as good a condition as that prevailing prior to the company's removal of the facilities;

(3) The city shall have the right to inspect and approve the conditions of the streets and public property after removal has occurred;

(4) The removal shall commence within 30 days of an order to remove being issued by the Director at the direction of the Council;

(5) The company shall be responsible for all necessary removals of the facilities, and maintenance of the street area in the same manner and degree as if the facilities were in active use, and the company shall retain all liability

associated with such removals;

(6) As an alternative to removal, the company may, subject to the city's approval, abandon its facilities in place and transfer ownership of the installed facilities to the city. Nothing herein shall cause the city to incur any costs related to the removal of the company's facilities or the transfer of ownership of said facilities to the city.

(Ord. 45-1995)

§ 13-4-5-26 ACCEPTANCE.

The company shall, within 90 days after adoption by the Council of this ordinance, file with the City Clerk, its written, unconditional acceptance of this franchise and if the company fails so to do, this ordinance shall be void. The company agrees to bear the entire expense of publishing this ordinance regardless of acceptance.

(Ord. 45-1995)

§ 13-4-5-27 SEVERABILITY CLAUSE.

If any section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this ordinance is for any reason held invalid, unenforceable or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity or enforceability of the remaining portions of this ordinance. The Council hereby declares that it would have passed this ordinance and each portion thereof irrespective of any provision being declared unconstitutional or otherwise invalid.

(Ord. 45-1995)

§ 13-4-5-28 NOTICE.

For the purpose of this ordinance, notice to the city will be to:

Office of the Mayor

Attn: Chief Administrative Officer

Post Office Box 1293

Albuquerque, New Mexico 87103

(505) 768-3000

With a copy to:

City Attorney

City of Albuquerque

Post Office Box 1293

Albuquerque, New Mexico 87103

(505) 768-4500

Notice to the Company will be to:

Brooks Fiber Properties

425 Woods Mill Road South / Suite 300

Town and Country, Missouri 63017

With a copy to:

George R. Bryan, III

500 Copper, N.W.

Albuquerque, New Mexico 87102

Notice shall be by overnight delivery. Notice will be effective upon delivery to the Mayor or the company, until the city or company notifies the other, in writing, of a change in the address.

(Ord. 45-1995)

§ 13-4-5-29 PUBLIC PURPOSE.

All of the regulations provided in this ordinance are hereby declared to be for a public purpose and the health, safety, and welfare of the general public. Any member of the governing body or city official or employee charged with the enforcement of this ordinance, acting for the city in the discharge of his duties, shall not thereby render himself personally liable; and he is hereby relieved from all personal liability for any damage that might accrue to persons or property as a

result of any act required or permitted in the discharge of his said duties. Neither the city nor the company by accepting this franchise waives its right to seek all appropriate legal and equitable remedies as allowed by law upon violation of the terms of this franchise, including seeking injunctive relief in a court of competent jurisdiction. Such right to injunctive relief is expressly reserved and all terms and provisions hereof shall be enforceable through injunctive relief.

(Ord. 45-1995)

§ 13-4-5-30 PUBLIC MEETING.

It is hereby officially found and determined that the meeting at which this ordinance is passed is open to the public as required by law and that public notice of time, place, and purpose of said meeting was given as required.

(Ord. 45-1995)

§ 13-4-5-31 APPLICABLE LAW.

This ordinance is governed by and construed and enforced in accordance with the laws of the State of New Mexico.

(Ord. 45-1995)

§ 13-4-5-32 EFFECTIVE DATE.

This ordinance shall become effective from and after its passage and publication provided by § 3-42-1 NMSA 1978, or successor statute; provided that the company, within the specified 30 days shall have filed with the City Clerk an unconditional acceptance thereof. Within ten days after the filing of the acceptance, the City Clerk shall acknowledge in writing the receipt of the

company's acceptance. All costs of any publication required by law shall be at the expense of the company in addition to other charges provided for herein.

(Ord. 45-1995)