

**ORDINANCE NO. \_\_\_\_\_, SERIES 2018**

**AN ORDINANCE REPEALING AND REPLACING CHAPTER 116 OF THE LOUISVILLE METRO CODE OF ORDINANCES RELATING TO COMMUNICATIONS SERVICES (AMENDMENT BY SUBSTITUTION).**

**SPONSORED BY: COUNCIL MEMBERS HOLLANDER, KRAMER, AND MULVIHILL**

**WHEREAS**, Louisville Metro Government seeks to repeal and replace Louisville Metro Code of Ordinances (“LMCO”) Chapter 116 to reflect the changing landscape of Communications Service in Louisville Metro; and

**WHEREAS**, Louisville Metro Council seeks to modify the regulation contained in LMCO Chapter 116 so that all Communications Service providers are treated equally and subject to the same rights and obligations when operating in Louisville Metro’s Rights-Of-Way.

**NOW, THEREFORE, BE IT ORDAINED BY THE LEGISLATIVE COUNCIL OF THE LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT (“METRO COUNCIL”) AS FOLLOWS:**

**SECTION I.** LMCO Chapter 116 is hereby repealed in its entirety and replaced as follows:

**CHAPTER 116: COMMUNICATIONS SERVICE**

- 116.01 General provisions
- 116.02 Franchise requirements and characteristics
- 116.03 Rights-Of-Way management and Facilities requirements
- 116.04 Miscellaneous
- 116.05 Transitional provisions
- 116.06 Franchisees providing Communications Service to Customers
- 116.07 Private Communications Facilities

- 116.08 Liabilities and penalties
- 116.09 Remedies not exclusive
- 116.10 Review, termination, and cancellation
- 116.11 Foreclosure-receivership
- 116.12 Reports
- 116.13 Books and records of the Franchise
- 116.14 Time of essence
- 116.15 Equal employment opportunity
- 116.16 Violations

**§ 116.01 GENERAL PROVISIONS.**

(A) *Declaration of findings.* Louisville/Jefferson County Metro Government hereby declares as a legislative finding that the Rights-Of-Way controlled by Louisville/Jefferson County Metro Government:

- (1) Are a unique and physically limited resource;
- (2) Are critical to the travel and transport of persons and property in Louisville Metro;
- (3) Are intended for public uses and must be managed and controlled consistent with that intent;
- (4) Can be partially occupied by the Facilities of providers of Communications Service, to the enhancement of the health, welfare, and general economic well-being of Louisville Metro and its citizens; and
- (5) Should be subject to specific additional regulations imposed in a competitively neutral and non-discretionary manner as established by this chapter to ensure

coordination of providers of Communications Service, maximize available space, and facilitate entry of a maximum number of providers of Communications Service and other services in the public interest.

(B) *Title.* This chapter may be referred to and cited as the “Communications Service Franchise Ordinance”.

(C) *Applicability.* The requirements of this chapter shall apply to the full extent of the terms herein and shall be limited in scope or application only to the extent as may be required by applicable federal or State law, including such changes in applicable law as may be hereinafter enacted. No provisions of this chapter shall be disregarded pursuant to this subsection except on express application to and determination by Louisville Metro to such effect based on the specific factual circumstances demonstrated. The provisions of this chapter shall be deemed incorporated in each Franchise granted.

(D) *Preservation of authority.* Any rights granted pursuant to this chapter and pursuant to any Franchise authorized hereunder are subject to the authority of Louisville Metro to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Franchisees and other holders of Franchises shall be subject to and comply with all applicable laws enacted by Louisville Metro pursuant to its Home Rule or statutory powers and the Public Works and Assets Utility Policy as may be amended from time to time (to the extent not in conflict with Kentucky or federal law). Nothing in this chapter shall be deemed to waive a right, if any, that any party may have to seek judicial or regulatory review as to the provisions herein or as to actions of the parties

under applicable federal, State, or local law currently in effect or as may hereinafter be amended.

(E) *Public inspection of records.* Certain information required to be filed with Louisville Metro pursuant to this chapter is subject to inspection and copying by the public pursuant to the provisions of the Kentucky Open Records Act, KRS 61.870 *et seq.*

(F) *Indemnification.* As a condition of use of the Rights-Of-Way, each Franchisee at its sole cost and expense, shall indemnify, protect, defend (with counsel acceptable to Louisville Metro) and hold harmless Louisville Metro, its elected officials, officers, employees, and agents, from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and expenses of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of or in relation to Louisville Metro's award of the Franchise to that Franchisee, the rights granted to the Franchisee, or the activities performed, or failed to be performed, by such Franchisee under the Franchise or use of the Rights-Of-Way, except to the extent such acts or use arise from or are caused by the gross negligence or willful misconduct of Louisville Metro, its elected officials, officers, or employees. This indemnification shall survive the expiration or termination of any Franchise or use of the Rights-Of-Way.

(G) *Compliance with laws.* In performing activities and exercising rights and obligations under any Franchise, each Franchisee and other holder of a Franchise shall comply with all applicable federal, State and local laws, ordinances, regulations and

policies, including, but not limited to, all laws, ordinances, regulations and policies relating to construction and use of Rights-Of-Way.

(H) *Enforcement; attorneys' fees.* Louisville Metro shall be entitled to enforce this chapter and any Franchise granted hereunder through all remedies lawfully available, and each Franchisee shall pay Louisville Metro its costs of enforcement, including but not limited to reasonable attorneys' fees, in the event that Franchisee is determined judicially to have violated the terms of this chapter or any Franchise.

(I) *Relationship of the parties.* Under no circumstances shall any Franchise authorized by this chapter be construed to create any relationship of agency, partnership, joint venture, or employment between Louisville Metro and the Franchisee.

(J) *Defined terms.* For purposes of this chapter, the following terms, phrases, words, and their derivatives shall have the meanings set forth in this section, unless the context clearly indicates that another meaning is intended. Words used in the present tense include the future tense, words in the singular number include the plural number, and words in the plural number include the singular. The words "shall" and "will" are mandatory, and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

**AFFILIATE** means, as to any Person, each Person, directly or indirectly, controlling, controlled by, or under common control with such Person.

**ANTENNA** means any device that transmits or receives signals. Such signals include but are not limited to radio and infrared waves for voice, data or video communications purposes.

**ATTACHER** means any Person or their agents or contractors seeking to permanently or temporarily fasten or affix any type of equipment, Antenna, line or Facility of any kind to a utility pole in the Rights-Of-Way or its adjacent ground space.

**ATTACHMENT APPLICATION** means the application made by an Attacher to a Pole Owner for attachment of equipment, Antenna, line or Facility of any kind to a utility pole.

**COMMUNICATIONS** means the transmission via the Facilities, in whole or in part, of video, audio, data, writings, signs, signals, pictures, sounds or other forms of information or intelligence through wire, wireless or other electronic means, regardless of the federal or State statutory or regulatory scheme to which such transmissions may be subject.

**COMMUNICATIONS SERVICE** means the transmission of Communications via Facilities, to a Customer, or to any other Person, including a Private Communications System Owner's provision of Communications via a Private Communications System, that is within or outside the territorial limits of Louisville Metro. Communications Service includes, but is not limited to, "telecommunications service," "enhanced service," "information service," "Internet access service," "broadband service," "cable service," "video programming service," "other programming service," and Internet-based or "over the top" video service offerings, as those terms are now, or may in the future be, defined under federal law. The term also includes the use of all instrumentalities, Facilities, conduits, apparatus and services or functionalities (among other things, the receipt, forwarding, storage, generation or delivery of Communications), incidental to or designed to directly or indirectly facilitate or accept Communications.

**CUSTOMER** means a Person located within the territorial limits of Louisville Metro who ultimately uses or is intended to ultimately use Communications Service provided by a Franchisee and is the ultimate last user of a Communications Service.

**FACILITIES** means any portion of a System located in, along, over, upon, under, or through the Rights-Of-Way.

**FCC** means the Federal Communications Commission of the United States of America or any successor thereto.

**FRANCHISE** means a Franchise granted under this chapter, or any other Franchise granted by Louisville Metro pursuant to Sections 163 and 164 of the Kentucky Constitution, or by the Kentucky General Assembly prior to the adoption of Sections 163 and 164 of the Kentucky Constitution, which permits a Franchisee to install or operate any Facilities in the Rights-Of-Way to provide Communications Service. Use of this definition in this chapter is not intended to include any license or permit for the privilege of transacting and carrying on a business within Louisville Metro, as may be required by any other ordinance or laws of Louisville Metro or the State.

**FRANCHISE FEE** means the fee imposed by Louisville Metro on Franchisee for use of the Rights-Of-Way pursuant to a Franchise granted under this chapter.

**FRANCHISEE** means the Person to whom a Franchise is granted, or its successors, assigns, or transferees.

**LESSEE** means a Person who provides Communications Service within Louisville Metro solely by leasing Facilities and who has no control over what, where or how any Facilities are erected, installed, maintained, operated, repaired, removed, restored or otherwise used.

**LOUISVILLE METRO** means Louisville/Jefferson County Metro Government.

**MAKE-READY COSTS** means the costs incurred by an Attacher associated with the transfer of the Facilities, Antenna, lines or equipment of a Pre-Existing Third Party User, undertaken by Attacher to enable attachment to the utility pole or similar structure.

**PERSON** means individual, partnership, association, corporation, joint venture, legal entity or organization of any kind.

**POLE OWNER** means a Person having ownership of a pole or similar structure in the Rights-Of-Way to which utilities, including without limitation, electric and Communications Facilities, are located or may be located whether such ownership is in fee simple or by Franchise.

**PRE-EXISTING THIRD PARTY USER** means the owner of any currently operating Facilities, Antenna, lines or equipment on a pole or its adjacent ground space in the Rights-Of-Way.

**PRIVATE COMMUNICATIONS SYSTEM** means a System used for delivering Communications by a Person solely in connection with the internal Communications needs of such Person's business, provided that such Person does not use, or permit the use of, such System to provide Communications Service to a Customer or any other Person.

**PRIVATE COMMUNICATIONS SYSTEM OWNER** means a Person that owns or leases a Private Communications System.

**RESELLER SERVICE PROVIDER** means a Person who provides Communications Service within Louisville Metro solely by reselling Communications Service and who has



no control over what, where or how any Facilities are erected, installed, maintained, operated, repaired, removed, restored or otherwise used.

**RIGHTS-OF-WAY** means the surface and space on, above, and below every street, alley, road, highway, lane or other property dedicated or commonly used now or hereafter for utility purposes and Facilities. Rights-Of-Way shall not include public property owned or leased by Louisville Metro and not intended for Rights-Of-Way use, including, but not limited to, parks, public works property, buildings or overhead lighting.

**STATE** means the Commonwealth of Kentucky.

**SYSTEM** means any and all equipment, structures, materials or tangible components used to provide Communications Service, including without limitation all plant (whether inside or outside), cabinets, surface location markers, fiber strands, electronic equipment, amplification equipment, optic equipment, transmission and distribution structures, Antennae, lines, pipes, mains, conduit, ducts, regenerators, repeaters, vaults, pedestals, manholes, handholds, pull boxes, splice closures, wires, cables, towers, wave guides, and anything else designed and constructed for the purpose of producing, receiving, amplifying or distributing Communications Service. .

#### **§ 116.02 FRANCHISE REQUIREMENTS AND CHARACTERISTICS.**

(A) *Unlawful to operate without a Franchise.* Unless otherwise specifically authorized under applicable federal or State law, or otherwise provided by ordinance, it shall be unlawful for any Person to own, erect, install, maintain, operate, repair, replace, remove or restore any Facilities in the Rights-Of-Way in Louisville Metro that are used to provide Communications Services without a valid, unexpired Franchise from Louisville Metro. Unless otherwise provided hereinafter by Louisville Metro Ordinance,

Reseller Service Providers and Lessees shall not be required to obtain a Franchise. Private Communication Systems shall not require a Franchise, but shall be licensed pursuant to § 116.07.

(B) *Franchises nonexclusive.* The authority granted by Louisville Metro in any Franchise shall be for the nonexclusive use of the Rights-Of-Way. Louisville Metro specifically reserves the right to grant, at any time, such additional Franchises or other rights to use the Rights-Of-Way for any purpose to any other Person, including itself, as it deems appropriate, subject to all applicable laws.

(C) *Nature of rights granted by any Franchise.* Franchises shall not convey title, equitable or legal, in the Rights-Of-Way, and shall give only the right to occupy Rights-Of-Way, for the purposes and for the period stated in this chapter and as may be further limited by the Franchise. No Franchise may excuse Franchisee from obtaining appropriate access or attachment agreements before locating its Facilities on another Person's Facilities. All Franchises shall be deemed to incorporate and be limited by the provisions of this chapter.

(D) *Application and application fee required.*

(1) Applications for an original Franchise granted hereunder shall be filed with Louisville Metro pursuant to the advertisement. All applications received by Louisville Metro from the applicants will become the sole property of Louisville Metro. Applicants shall submit all requested information as provided by the terms of this chapter. The following information must be complete and verified as true by the applicant:

(a) *Application fee.* Applications shall be accompanied by a non-refundable application fee of \$2,500 payable to Louisville Metro. The application fee shall be

established at the rate set forth above, effective upon final passage of this chapter. Thereafter, the application fee shall be increased every two (2) years, in increments of ten (10) dollars, if required, based on the most recently-published Consumer Price Index (CPI) at the time. The application fee shall defray in whole or part Louisville Metro's costs to process any application filed under this chapter and negotiate, award and administer any Franchise.

(b) *Name and address of applicant.* The applicant's name, address, e-mail address and telephone and facsimile numbers; date of application and signature of applicant or appropriate corporate officer(s); the name, address and e-mail address, and telephone and facsimile numbers of a local representative who shall be available at all times; and information regarding how to contact the local representative in an emergency.

(c) *Description of proposed System.* Applicant shall provide a description of the proposed System. At a minimum, the description shall include:

1. General description of the project by geographical area. Projects shall be developed and implemented by Louisville Metro Council District and presented in this application as such.

2. Provide a description of the proposed System components to include but not be limited to:

- a. Anticipated number and general location of small cell Antennae;
- b. Location (aerial/underground) of fiber. Where possible, provide estimated percent aerial and percent underground;
- c. Anticipated ground level elements (GLE's) and general locations.

3. For underground fiber installation, discuss proposed installation methodologies. The narrative shall address compliance with FCC standards as related to applicable equipment such as small cell Antennae and current acceptable RF design standards currently in practice as well as to those standards found in the Public Works and Assets Utility Policy, latest revision.

4. Discuss anticipated project phasing based on geographic and/or right of way limitations, limitations imposed by local events and those internal limitations affected by finance and project logistics.

(d) *Communications Service.* A statement setting forth a description of all the types of Communications Service the applicant plans to provide over the System.

(e) *Applicant organization.* The applicant shall be a corporation or limited liability company, partnership or other business entity authorized to do business in the State, as certified by the Secretary of State. The Applicant must fully disclose the ownership of the proposed Facilities and System.

(f) *Additional requirements.*

1. Supplementary, additional or other information that the applicant deems reasonable for consideration may be submitted at the same time as its application but must be separately bound and submitted with the above number of copies. Louisville Metro may, at its discretion, consider such additional information as part of the application.

2. Applications may be modified at any time prior to the opening of the applications, provided that any modifications must be duly executed in the manner that the applicant's application must be executed.

3. A copy of the applicant's certificate of authority from the Public Service Commission ("PSC") where the applicant is lawfully required to have such certificate from the PSC.

4. A copy of the applicant's certificate of authority from the FCC where the applicant is lawfully required to have such certificate from the FCC.

5. A copy of all insurance policies and certificates required under this chapter with a signed statement from Louisville Metro's Risk Management Department, who shall notify the Director of Finance when such policies and certificates are acceptable to Louisville Metro.

6. A statement signed by the applicant that the applicant agrees to be bound by all provisions of the Franchise and agrees to obtain all applicable permits and authorizations prior to constructing, installing, or operating a System in the Rights-Of-Way.

7. The information provided by applicant shall be certified as true and correct, and applicant shall be responsible to certify to Louisville Metro any material changes to the information provided in the completed application during the term of any Franchise.

(g) *Supplementation to applications.* Louisville Metro reserves the right to require such supplementary, additional or other information that it deems reasonably necessary for its determinations.

(h) *Louisville Metro's rights reserved.* Louisville Metro reserves the right to waive all formalities and/or technicalities where the best interest of Louisville Metro may be served.

(E) *Standards and procedures for approval or renewal of Franchises.* Franchises shall be granted in accordance with Kentucky Constitution Sections 163 and 164. Louisville Metro shall grant Franchises or renewals to any eligible Franchisee for the right and privilege to construct, own, operate, repair, replace and maintain Facilities in, through and along the Louisville Metro's Rights-Of-Way for the purposes of providing Communications Service on a nonexclusive basis within Louisville Metro, subject, however, to the standards, terms and conditions herein set forth within this chapter, which shall be deemed incorporated into every Franchise, and any special conditions as may be provided for in the Franchise. All Franchisees shall be required to obtain and maintain any necessary and lawful permit, license certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, Louisville Metro, the FCC and the PSC. Louisville Metro may establish standard Franchises setting forth the minimum requirements for all Franchisees.

(F) *Acceptance and effective date of Franchise.* Any Franchise granted hereunder, together with the rights, privileges and authority granted thereby, shall take effect and be in force from and after the effective date of a resolution granting a Franchise hereunder, provided that on or before that date Franchisee shall:

(1) Enter into and execute such agreements and documents as required by Louisville Metro that are consistent with the terms and provisions of this chapter;

(2) File such bond or bonds as required in this chapter; and

(3) Advise the Director of Finance in writing of Franchisee's address for mail and official notifications from Louisville Metro.

*(G) Use of Rights-Of-Way; police powers; Franchisee's use subordinate.* A Franchisee shall construct and maintain its Facilities in accordance with all applicable federal, State and local laws, including all permit requirements, the Public Works and Assets Utility Policy, and fee payments, and all other Louisville Metro codes and ordinances in effect as of the date of the award of its Franchise or thereafter adopted or amended, to the full extent permitted by State or federal law. The grant of a Franchise does not in any way affect the continuing authority of Louisville Metro through the proper exercise of its Home Rule or statutory powers to adopt and enforce ordinances necessary to provide for the health, safety and welfare of the public. Louisville Metro makes no express or implied representation or warranty regarding its rights to authorize the installation or construction of Facilities on any particular segment of Rights-Of-Way. The burden and responsibility for making all such determinations in advance of construction or installation shall be entirely upon the Franchisee. The use of the Rights-Of-Way authorized by any Franchise shall in all matters be subordinate to Louisville Metro's use and rights therein. Without limiting the generality of the foregoing:

(1) All rights and privileges granted herein are subject to the police powers of Louisville Metro and its rights under applicable laws and regulations to regulate the construction, operation, and maintenance of Franchisee's System, including, but not limited to, the right to adopt and enforce additional ordinances and regulations as Louisville Metro shall find necessary in the exercise of its police powers, the right to adopt and enforce applicable zoning, building, permitting and safety ordinances and regulations, the right to adopt and enforce regulations relating to equal employment

opportunities, and the right to adopt and enforce ordinances and regulations concerning the Rights-Of-Way and utility standards.

(2) Louisville Metro reserves the right to exercise its police powers, notwithstanding anything in this chapter and in any Franchise to the contrary. Any conflict between the provisions of this chapter or a Franchise and any other present or future lawful exercise of Louisville Metro's police powers shall be resolved in favor of the latter.

(3) Franchisee shall not be excused from complying with any of the requirements of this chapter or any subsequently adopted amendments to this chapter, by any failure of Louisville Metro on any one or more occasions to seek, or insist upon, compliance with such requirements or provisions.

(4) Any Franchise granted pursuant to this chapter shall be subject to any present and future legislation or resolution, which may be enacted by Louisville Metro, and to the Public Works and Assets Utility Policy.

(H) *Emergencies.*

(1) Franchisee shall assign a management level individual to coordinate with, and assist Louisville Metro's Emergency Management Agency, in the development of emergency plans.

(2) If at any time, in case of fire or disaster or other emergency situation in Louisville Metro, it shall become necessary in the reasonable judgment of Louisville Metro to cut raise, lower, or relocate any Facilities, such cutting raising, lowering, or relocating may be done, and any repairs rendered necessary thereby shall be made by Franchisee, at its sole expense.

(I) *Term.* A Franchise shall be for a term not to exceed twenty (20) years.



(J) *Franchise Fees.* During any period of time which Louisville Metro opts to forego imposing a Franchise Fee and to instead participate in the Multichannel Video Programming and Service Tax system set forth under KRS 136.600 et seq., a Franchisee shall not be required to pay Franchise Fees. Before imposing Franchise Fees, Louisville Metro will provide at least sixty (60) days' prior written notice to current Franchisees. If at any time Louisville Metro elects to exercise its constitutional right to impose and collect Franchise Fees, Franchisee's first Franchise Fee payment under this chapter shall be paid to the Louisville Metro the later of one hundred twenty (120) days after such election, or thirty (30) days after the last day of the first calendar quarter expiring after Franchisee received written notice from Louisville Metro that Louisville Metro has opted to exercise its constitutional right to impose and collect Franchisee Fees.

(K) *Use of Franchise Fees.* Louisville Metro shall dedicate and use all Franchise Fees received under this chapter for maintenance of the Rights-Of-Way and for government access television.

(L) *Timing of payment of Franchise Fees.* Unless otherwise agreed to in writing, all Franchise Fees shall be due and payable on a quarterly basis and payment shall be made on or before the date which is thirty (30) calendar days after the last day of the calendar quarter for which the payment applies (the "Due Date"); provided, however, that in the event that a Franchisee ceases to provide Communications Service for any reason (including as a result of a sale or transfer of the Franchisee's System), such Franchisee shall make a final payment of any amounts owed to Louisville Metro on or before the date which is thirty (30) calendar days after the date on which its operations

in Louisville Metro cease (which shall be deemed a “Due Date” for purposes of this chapter).

(M) *Interest on late payments and under payments.* If any Franchise Fee, or any portion thereof, is not received by Louisville Metro on or before the due date, interest thereon shall accrue from the due date until received, at the rate of 1.5 percent per month, unless such other maximum rate is established by applicable law.

(N) *Fee statement.* In the event that Louisville Metro imposes a Franchisee Fee, any Franchise Fee payment shall be accompanied by a statement (a “Fee Statement”) showing the manner in which the Franchise Fee was calculated. Within ninety (90) calendar days following the end of any calendar year in which Louisville Metro imposes a Franchise Fee, each Franchisee shall submit a statement, certified as true, setting forth the amount of linear feet of Rights-Of-Way occupied by its Facilities, provided, however, that in the event that a Franchisee ceases to provide Communications Service for any reason (including as a result of a transfer), such Franchisee shall provide such a statement within thirty (30) calendar days after the date on which its operations in Louisville Metro cease. In calculating the amount of linear feet of Rights-Of-Way occupied by its Facilities, a Franchisee shall include all Facilities, including Antenna and other wireless Facilities, and all Facilities whether installed underneath the Rights-Of-Way or on poles or other structures above the Rights-Of-Way.

(O) *No accord and satisfaction.* No acceptance by Louisville Metro of any Franchise Fee or any other payment shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Franchise Fee or any other payment be construed as a release of any claim of Louisville Metro.

(P) *Description of Communications Service.* During the term of the Franchise, Franchisee shall provide Louisville Metro with a description of any material changes to the types of Communications Service offered over its Facilities in the Rights-Of-Way within Louisville Metro during the prior year. Any individual Communications Service or item for which the Franchisee has a separate charge shall be considered a separate Communications Service.

(Q) *Franchise Fee not a tax; payment of taxes.* The Franchise Fee is compensation for the use of the Rights-Of-Way and shall in no way be deemed a tax of any kind. The Franchise Fees required herein shall be in addition to, not in lieu of, any and all taxes, charges, assessments, licenses, fees and impositions otherwise applicable to Franchisee that are or may be imposed by Louisville Metro. A Franchisee shall be fully responsible for the payment of all applicable taxes.

(R) *Assignment of Franchise.* A Franchisee shall provide Louisville Metro with written notice of any transfer or assignment of the Franchise. A Franchisee shall not sell, assign, sublet, dispose of or otherwise transfer a Franchise (or any of the rights or privileges granted by such Franchise), Franchisee's System, or control of Franchisee to another entity other than by operation of law or to an entity controlling, controlled by, or under common control with the Franchisee, without the prior written consent of Louisville Metro. No such consent shall be required, however, for a transfer in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of the Franchisee in the Franchise or System to secure indebtedness. Louisville Metro's consent to such a transfer shall not be withheld if the acquiring entity would have qualified for an original Franchise had it applied and if the acquiring entity demonstrates

it has the same or equivalent insurance policies and bonds in place as is required of the original Franchisee. Nothing in any approval by Louisville Metro of any transfer pursuant to this section shall be construed to waive, release or delegate any rights or powers of Louisville Metro to hold the original Franchisee liable for any violation of its Franchise.

(S) *Forfeiture of Franchise and privilege.* In case of failure on the part of a Franchisee, its successors and assigns, to comply with any of the material provisions of this chapter or its Franchise, or if the Franchisee, its successors and assigns, should do or cause to be done any material act or thing prohibited by or in violation of this chapter or the terms of its Franchise, the Franchisee, its successors and assigns, shall forfeit all rights and privileges permitted by this chapter and its Franchise, and all rights hereunder shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until Louisville Metro shall carry out the proceedings specified in § 116.10(B).

(T) *Security for payment of fees.*

(1) In the event that Louisville Metro imposes a Franchise Fee, every Franchisee shall provide to Louisville Metro an irrevocable letter of credit in the amount of \$25,000, or one half of the annual Franchise Fee owed, whichever is less, to secure the payment of the Franchise Fee for the first two (2) years in which the Franchisee is subject to a Franchise Fee. If, thereafter, there has been no default in paying the Franchise Fee nor any late payment of the Franchise Fee, the letter of credit shall be released.

(2) This subsection is inoperative during any period of time during which Louisville Metro elects to participate in the state baseline and local growth funds under KRS 136.600 *et seq.*, and to have Franchisees taxed accordingly.

(U) *Special rules for governmental entities.* Nothing herein requires Louisville Metro to apply the provisions of this chapter to a governmental entity if Louisville Metro determines that it is not in the public interest to do so, and nothing in this chapter shall be read to require a governmental entity to comply with this chapter where Louisville Metro cannot enforce the chapter against such entity as a matter of law. Louisville Metro is authorized to enter into agreements with other governmental agencies to facilitate Louisville Metro's use and management of the Rights-Of-Way, and such agreements shall be enforceable according to their respective terms and notwithstanding any provision of this chapter.

### **§ 116.03 RIGHTS-OF-WAY MANAGEMENT AND FACILITIES REQUIREMENTS.**

(A) *Encroachment permit.* A Franchisee shall be subject to and comply with the additional or supplementary terms and conditions of Louisville Metro's "Encroachment on Rights-Of-Way Permit," as may be amended from time to time, with these terms and conditions being incorporated herein by reference and those terms and conditions of Franchisee's encroachment permit deemed a condition of that Franchisee's Franchise.

(B) *Additional Facilities requirements; planned infrastructure.* When a Franchisee installs any new underground Facilities, the Franchisee shall, unless waived by Louisville Metro, simultaneously install conduit provided by Louisville Metro ("Louisville Metro Conduit"). Louisville Metro shall reimburse Franchisee for any marginal or additional costs incurred by Franchisee in connection with installation of the Louisville

Metro Conduit. Louisville Metro Conduit shall be installed in accordance with Louisville Metro specifications and consistent with sound engineering practice. No Franchise Fee shall apply to any Louisville Metro Conduit.

(C) *Removal of Facilities.* Upon expiration of a Franchise, whether by lapse of time, by agreement between the Franchisee and Louisville Metro, or by forfeiture thereof, the Franchisee shall remove, at its sole cost, from the Rights-Of-Way any and all of its Facilities that are the subject of such Franchise within a reasonable time after such expiration, not to exceed ninety (90) days, and, it shall be the duty of the Franchisee immediately upon such removal to restore the Rights-Of-Way from which the Facilities are removed to as good condition as the same were before the removal was effected and as required by Louisville Metro. Notwithstanding the foregoing, Louisville Metro may allow Facilities to be left in place when Louisville Metro determines in its sole discretion that it is not practical or desirable to require removal.

(D) (1) *Relocation of Facilities.* Whenever Louisville Metro shall in its exercise of the public interest request of the Franchisee to relocate or reinstall any of its Facilities, the Franchisee shall, within ten (10) days remove, relocate, or reinstall any such Facilities as may be reasonably necessary to meet the request. The cost of such relocation, removal, or reinstallation of the Facilities shall be the exclusive obligation of the Franchisee. Upon request of any other Person requesting relocation of Facilities and holding a validly issued building or moving permit of Louisville Metro, a Franchisee shall, within ten (10) days, temporarily raise, lower, or relocate its wires or other Facilities as may be required for the Person to exercise the rights under the permit; provided, however, that the Franchisee may require such permit holder to make

payment to Franchisee in advance for any expenses incurred by the Franchisee to temporarily move its Facilities pursuant to such Person's request.

(2) *Third party Facilities.* Notwithstanding any provision of this chapter to the contrary, the provisions of this subsection shall not apply to (i) Facilities located above the "Communication Worker Safety Zone" as such term is defined in the National Electrical Safety Code or (ii) any electric supply Facilities wherever located. Make-Ready Costs that are to be paid by Attacher include, without limitation, all costs and expenses to relocate or alter the attachments or Facilities of any Pre-Existing Third Party User as may be necessary to accommodate Attacher's Attachment. Upon approval of an Attachment Application, Attacher may relocate or alter the attachments or Facilities of any Pre-Existing Third Party User as may be necessary to accommodate Attacher's Attachment using Pole Owner approved contractors; provided, however, that Attacher will not effectuate a relocation or alteration of a Pre-Existing Third Party User's Facilities that causes or would reasonably be expected to cause a customer outage (this subsection does not authorize activity requiring an electric supply outage) without first providing thirty (30) days prior written notice to the Pre-Existing Third Party User. In the event the Pre-Existing Third Party Users of such other Facilities fail to transfer or rearrange their Facilities within thirty (30) days from receipt of notice of relocation or alteration of a Pre-Existing Third Party User's Facilities that causes or would reasonably be expected to cause a customer outage, Attacher may undertake such work. Within thirty (30) days of the completion of any relocation or alteration, Attacher will send notice of the move and as-built reports to the Pre-Existing Third Party User and the owner(s) of all poles or other structures on which such relocations or alterations were

made. The as-built reports will include a unique field label identifier, and an address or coordinates. Upon receipt of the as-built reports, the Pre-Existing Third Party User and pole or structure owner(s) may conduct an inspection within fourteen (14) days at Attacher's expense. Attacher will pay the actual, reasonable, and documented expenses incurred by the Pre-Existing Third Party User and pole or structure owner(s) for the inspection. If any such relocation or alteration results in the Facilities of the Pre-Existing Third Party User on the pole or other structure failing to conform with the applicable Pole Owner's standards, the Pre-Existing Third Party User will notify Attacher within seven days of the inspection. In the notice, the Pre-Existing Third Party User will elect to either (a) perform the correction itself and bill the Attacher for the actual, reasonable and documented costs of the correction, or (b) instruct the Attacher to correct such conditions at Attacher's expense. Any post-inspection corrections performed by the Attacher must be completed within thirty (30) days of such notification. As a condition of exercising the ability to relocate, rearrange, or alter a Pre-Existing Third Party User's Facilities pursuant to this subsection, Attacher shall indemnify, defend and hold harmless the owner or owners of all poles or other structures on which such relocation, rearrangement or alteration takes place, the Affiliates of such owner or owners, and the officers, directors and employees of such owner or owners and their Affiliates (each an "Indemnatee") from and against all third party damage, loss, claim, demand, suit, liability, penalty or forfeiture of every kind and nature, including, but not limited to, costs and expenses of defending against the same, payment of any settlement or judgment therefor and reasonable attorney's fees, that are actually and reasonably incurred by an Indemnatee, by reason of any claim by an affected Pre-Existing Third Party User or any



Person or entity claiming through such Pre-Existing Third Party User arising from such relocation, rearrangement or alteration.

(E) *Franchisee responsible for costs.* A Franchisee shall be responsible for all reasonable costs incurred by Louisville Metro that are directly associated with the Franchisee's erecting, installing, maintaining, operating, repairing, replacing, removing or restoring its Facilities in the Rights-Of-Way. A Franchisee shall be responsible for its own costs incurred in removing or relocating its Facilities when required by Louisville Metro due to Louisville Metro requirements relating to maintenance and use of the Rights-Of-Way for Louisville Metro purposes.

(F) *Insurance and bonds.* During the term of any Franchise, a Franchisee shall obtain and maintain at its sole expense, all insurance and bonds required by this chapter. It is expressly understood that Louisville Metro does not in any way represent that the specified limits of liability or coverage or policy forms are sufficient or adequate to protect the interest or liabilities of Franchisee.

(1) Franchisee shall file with the Director of Public Works and Assets (a) a Franchise bond in the amount of \$1,000,000 which shall be required to be in place for the entire term of the Franchise, and (b) a performance bond in an amount to be determined by the Director of Public Works and Assets. In no event shall the amount of the performance bond required by Public Works and Assets exceed the reasonable costs of repairing the Rights-Of-Way in the event of non-performance by the Franchisee. The performance bond shall provide for the faithful performance of construction and installation of Franchisee's System. Two (2) years after demonstration

of the completion of the construction of the System by Franchisee to Public Works and Assets, Public Works and Assets shall release the performance bond.

(2) The performance bond shall indemnify Louisville Metro in its own right and as trustee, from any damages or losses arising out of the failure of Franchisee to faithfully perform and satisfactorily complete construction of the System in accordance with this chapter.

(3) The failure of Franchisee to comply with its obligations under this chapter or the Franchise as determined by Louisville Metro shall entitle Louisville Metro to draw against either or both of Franchisee's performance or Franchise bonds.

(4) The rights reserved to Louisville Metro with respect to the performance and Franchise bonds required hereunder are in addition to all other rights of Louisville Metro, whether reserved by this chapter or authorized by law, and no action, proceeding or exercise of a right with respect to such performance or Franchise bonds shall affect any other rights Louisville Metro may have.

(5) Unless otherwise released by Louisville Metro, the performance or Franchise bonds required hereunder shall not expire or be materially altered without thirty (30) days written notice and without securing and delivering to Louisville Metro a substitute, renewal and replacement bond in conformance with this chapter. In the event Louisville Metro does draw monies against the performance bonds required hereunder, within ten days thereafter, Franchisee shall pay such funds to the bonding company as necessary to bring said performance and/or Franchise bonds back to the applicable principal, where it shall continue to be maintained. The performance and Franchise bonds required hereunder shall contain the following endorsements:

“It is hereby understood and agreed that this bond may not be reduced, altered or canceled by Franchisee or Surety without thirty (30) days written notice, by certified mail, to Louisville Metro. Such termination or cancellation shall have no effect on any liability incurred or accrued under this bond prior to the effective date of such termination or cancellation.”

(6) Immediately upon the effective date of the resolution granting a Franchise under this chapter, Franchisee shall file with Louisville Metro the following proof of liability insurance issued by a company(ies) authorized to do business in the Commonwealth with an AM Best Rating of A- or better:

(a) General Liability Insurance, via an occurrence form, covering bodily injury, including death, personal injury and property damage, and including completed operations, contractual liability, independent contractors protective liability and personal injury liability protection. The minimum acceptable limit of liability amount is \$5,000,000 per occurrence and aggregate under a combined single limit. This policy must include the Louisville/Jefferson County Metro Government, including its Mayor and Metro Council members, as additional insureds as respects all operations of the insured Franchisee. This policy must cover Louisville Metro for damages resulting from any transmission over a System. Louisville Metro reserves the right to make reasonable increases in the required amount of insurance coverage herein at any time. Nothing herein is intended as a limitation on the extent of any legal liability of the Franchisee.

(b) Automobile Liability, insuring all owned, non-owned and hired motor vehicles. The minimum coverage liability limit is \$5,000,000 combined single limit for

any one accident. The limit of liability may be subject to increase according to any applicable State or federal transportation regulations.

(c) Workers' Compensation (if applicable), insuring the employers' obligations under Kentucky Revised Statutes Chapter 342 at statutory limits, and Employers' Liability, \$100,000 each accident/\$500,000 disease – policy limit/\$100,000 disease – each employee.

(7) Franchisee shall maintain on file with Louisville Metro a certificate of insurance certifying the coverage required under this chapter, which certificate shall be subject to the approval of Louisville Metro as to the adequacy of the certificate and of the insurance certified under the requirements of this chapter. Louisville Metro may at its sole discretion require a certified copy of the insurance policy(s) required under this chapter, specifically endorsed to include all liability assumed by Franchisee hereunder. Such policy(s) and certificate shall be identified on their face by the name of Franchisee, and shall be submitted to Louisville Metro, in accordance with the terms and conditions of this chapter. Failure to maintain adequate insurance as required under this chapter shall be deemed a breach of the Franchise.

(8) Louisville Metro reserves the right to make increases in the amount of insurance coverage referred to in this section at any time.

(9) The following clause shall be added to Franchisee's (and subcontractors) Commercial General Liability Policies:

"The Louisville/Jefferson County Metro Government, its elected and appointed officials, employees, agents and successors are added as an "additional insured" as respects operations of the Named Insured performed relative to the contract."

(G) *Permits.* Prior to performing any construction or installation work in the public Rights-Of-Way, Franchisee shall apply to Public Works and Assets for a permit, and shall include descriptive information about the specific location of any lines, Facilities, boxes, or related equipment. All terms and conditions of the permit application shall apply and be adhered to.

(1) Franchisee shall furnish detailed plans of the work to be done within the Rights-Of-Way and provide other such information as required by Louisville Metro.

(2) Franchisee shall coordinate any construction work within the Rights-Of-Way with Public Works and Assets and shall begin construction work only after approval of Public Works and Assets.

(3) All permits issued by Louisville Metro shall be conspicuously displayed at all times at the indicated work site and shall be available for inspection by Louisville Metro personnel.

(H) *Notification.* Franchisee shall notify Public Works and Assets, in writing, at least fifteen 15 days prior to construction. Such written notification shall contain the location of the construction, the starting date and the estimated completion date.

(I) *Standards.* Any work required or performed pursuant to this chapter shall be done in accordance with federal, State and local law, and the National Electric Safety Code.

(1) In the event that Franchisee leases space on the poles or in the conduits of an electric or other utility, Franchisee shall abide by the construction and other requirements of that utility, and the granting of a Franchise by Louisville Metro shall not

be construed or interpreted in any way to alleviate Franchisee's responsibilities and obligations to the pole or conduit owner.

(2) Franchisee, its contractors, sub-subcontractors and anyone directly or indirectly employed by Franchisee shall conduct such operations so as to promote and preserve the public safety and general welfare of the citizens of Louisville Metro.

(3) All construction, installation or maintenance by Franchisee shall be completed with diligence and with respect to all interests and rights of the public.

(J) *Traffic.* Franchisee's work in the Rights-Of-Way shall be accomplished with a minimum of disruption and interference to the free flow of vehicular and pedestrian traffic on the Rights-Of-Way or public land.

(1) Franchisee shall maintain lanes of vehicular traffic in each direction at all times during construction, installation or maintenance activity.

(2) Traffic control devices to protect and control pedestrian and vehicular traffic in any construction, maintenance or installation areas may be prescribed by Louisville Metro in accordance with the Manual on Uniform Traffic Control Devices.

(K) *Delay.* Improvements to Louisville Metro Rights-Of-Way conducted by Louisville Metro or its contractors shall not be delayed by any Franchisee work authorized by this chapter.

(L) *Special exceptions.* Louisville Metro may grant a special exception to the requirements of this chapter if a Franchisee, upon application, demonstrates with written evidence that:

(1) The exception will not create any threat to the public health, safety or welfare;

(2) The increased economic burden and the potential adverse impact on Franchisee's construction schedule resulting from the strict enforcement of the requirement would actually or effectively prohibits the ability of Franchisee to provide Communications Service in Louisville Metro; and

(3) The requirement unreasonably discriminates against Franchisee in favor of another comparable Communications Service provider.

Any special exceptions shall be granted in a non-discriminatory manner.

(M) *Inspections.* All construction, installation and operation of Franchisee's System in the Rights-Of-Way are subject to inspection by Public Works and Assets.

(N) *Repair of sunken pavement over excavation.* In case the pavement or the surface of the Rights-Of-Way over any excavation should become depressed or broken at any time within five (5) years after the excavation has been completed and before resurfacing of the Rights-Of-Way, natural wear of the surface excepted, Franchisee shall, upon written notice from Public Works and Assets, immediately proceed to inspect the depressed or broken area over the excavation to ascertain the cause of the failure. Franchisee shall make repairs to the installation or backfill and have the pavement restored as specified by Public Works and Assets, within such time period as may be specified by Public Works and Assets. If the pavement is not restored as specified by Public Works and Assets within the time period specified by Public Works and Assets, and unless delayed by a strike or conditions beyond Franchisee's control, Louisville Metro may cause the work to be done after giving Franchisee twenty four (24) hours final notice. The cost thereof, including, but not limited to, any inspection costs and

administrative overhead incurred by Louisville Metro, shall be assessed against Franchisee.

(O) In the event that the use of any part of the System is discontinued for any reason by any Franchisee for a continuous period of twelve (12) months, or in the event such System or Facility has been installed in Rights-Of-Way without complying with requirements of this chapter, or the rights granted hereunder have been terminated, cancelled or have expired, the Franchisee shall promptly remove from the Rights-Of-Way all such Facilities of such System, other than any which Louisville Metro may permit to be abandoned in place. In the event of such removal, the Franchisee shall promptly restore the Rights-Of-Way from which such Facilities have been removed to a condition satisfactory to Louisville Metro. Any Facilities of a Franchisee to be abandoned in place, shall be abandoned in such manner as Louisville Metro may prescribe. Upon a permanent abandonment of the Facilities of a Franchisee in place, the Franchisee shall submit to Louisville Metro an instrument to be approved by Louisville Metro, transferring to Louisville Metro the ownership of such Facilities.

(P) During any phase of construction, installation, maintenance, or repair of the System, the Franchisee shall use materials of good and durable quality. All such work shall be performed in a safe, thorough and reliable manner and in compliance with Louisville Metro's Public Access and Utility Policy, as amended.

#### **§ 116.04 MISCELLANEOUS.**

(A) *Administration of Franchise.* Louisville Metro shall be responsible for the continued administration of this chapter and any Franchises granted hereunder.



(B) *Non-enforcement by Louisville Metro.* A Franchisee shall not be relieved of its obligation to comply with any of the provisions of this chapter or its applicable Franchise by reason of any failure of Louisville Metro to enforce prompt compliance.

(C) *Publication of notices.* A Franchisee shall be responsible for all costs of publication that may be required with respect to its Franchise or any amendments or renewals thereto.

(D) *Severability.* If any material provision of this chapter or of any Franchise granted pursuant to this chapter is held by a court or other competent governmental authority of competent jurisdiction to be invalid or unlawful as conflicting with applicable laws now or hereafter in effect, or is held by a court or competent governmental authority to be modified in any way in order to conform to the requirements of any such applicable laws, such provision shall be considered a separate, distinct, and independent part of this chapter or the Franchise, and, to the extent possible, such holding shall not affect the validity and enforceability of all other provisions herein or therein.

#### **§ 116.05 TRANSITIONAL PROVISIONS.**

(A) *Existing Franchises.*

(1) Franchises previously granted shall be deemed to continue through their current expiration date, incorporating this amended chapter, and they shall be automatically deemed to have complied with all application and qualification requirements hereunder, unless, within sixty (60) days of passage of this amended chapter, a Franchisee indicates in writing it does not accept this amended chapter as part of its Franchise. Upon such notice of non-acceptance, said Franchisee and

Louisville Metro may renegotiate or terminate the Franchisee's Franchise pursuant to all local, State and federal law.

(2) Further amendments of the chapter and the Public Works and Assets Utility Policy, shall be deemed accepted by a Franchisee unless, within sixty (60) days of any further amendments, a Franchisee, indicates in writing it does not accept the amendments as part of its Franchise. Upon such notice of non-acceptance, said Franchisee and Louisville Metro may renegotiate or terminate the Franchisee's Franchise pursuant to all local, State and federal law.

(B) *Transitional provisions to be narrowly interpreted.* It is the intent of Louisville Metro to apply the provisions of this chapter to all owners or operators of Communications Systems with Facilities, including local exchange carriers, that now occupy or may in the future occupy Rights-Of-Way, except to the extent federal or State law prevents Louisville Metro from doing so.

**§ 116.06 FRANCHISEES PROVIDING COMMUNICATIONS SERVICE TO CUSTOMERS.**

All Franchisees providing Communications Service to Customers shall to the greatest extent applicable:

(A) at all times comply, at a minimum, with the FCC requirements for Emergency Alert System specially applicable to their Communications Services.

(B) provide to every Customer access to Public, Educational and Government Access channels that are available on Louisville Metro's website, not to exceed three (3), at no cost to Louisville Metro. Additional channels may be negotiated, with both party's consent, in the Franchise agreement.

(C) have a publicly listed telephone number.

(D) employ an operator or maintain a telephone answering device twenty four (24) hours per day, each day of the year to receive Customer complaints.

(E) upon Customer's termination of the Communications Services, permit Customers to return any equipment that Franchisee requires to be returned upon such termination at Franchisee's expense and advise Customers of this requirement when Customers inquire about returning equipment. These expenses do not include the cost for use of the equipment before termination of the Communications Services.

(F) shall indemnify Louisville Metro, pursuant to Section 116.01(F), against any alleged infringement of patent or copyright or any other legal infringement in the transmission of materials through the System. Nothing herein is intended as a limitation on the extent of any legal liability of the Franchisee.

**§ 116.07 PRIVATE COMMUNICATIONS FACILITIES.**

(A) *Application for license.* A Person wishing to erect, install, maintain, operate, repair, replace, remove or restore a Private Communications System in the Rights-Of-Way must obtain a license therefore from Public Works and Assets. Such license shall only authorize placement of the Private Communications System in a specific portion of the Rights-Of-Way for a limited period of time and for a specific purpose in connection with the Person's business and shall not permit the use of the Private Communications System to provide Communications Service to any other Person or to the public. Such Person shall submit an application to Public Works and Assets on such form as may be developed by Public Works and Assets, accompanied by such application fee as may be determined by Louisville Metro.

(B) *Conditions of license.* Any license shall be subject to such conditions as Louisville Metro may from time to time establish, shall be expressly subordinate to the use of the Rights-Of-Way by Louisville Metro and Franchisees, and shall otherwise conform to the requirements of this chapter.

(C) *Compensation.* A Private Communications System Owner shall pay a fee established by Louisville Metro from time to time to reflect the fair market value of the Rights-Of-Way used.

#### **§ 116.08 LIABILITIES AND PENALTIES.**

Except as expressly stated in this chapter, the express or implied repeal or amendment by this chapter of any ordinance or part thereof shall not affect any liabilities accrued, penalties incurred or proceedings begun prior to the effective date of this chapter. Those liabilities and penalties are continued, and penalties shall be imposed and enforced under the repealed or amended ordinance as if this chapter had not been adopted.

#### **§ 116.09 REMEDIES NOT EXCLUSIVE.**

The rights and remedies of Louisville Metro and the Franchisee as set forth in their Franchise, or in this chapter, shall be in addition to and not in limitation of, any other rights and remedies provided by law or in equity.

#### **§ 116.10 REVIEW, TERMINATION, AND CANCELLATION.**

(A) To provide for technological changes in the state of the art of Communications Services, to facilitate renewal procedures, and to achieve continuing, advanced, modern Systems for the Louisville Metro area, the Franchisee shall comply with the following review provisions:

(1) Louisville Metro may hold review sessions which shall be open to the public and notice shall be given by advertisement in a newspaper of general circulation at least one week before each session.

(2) Either Louisville Metro or the Franchisee may select additional topics for discussion at any regular or special review session.

(3) Any topic proposed for discussion at any regular or special review session by a resident of the Louisville Metro area and supported by a petition bearing the signature of one hundred (100) Louisville Metro residents shall be included in the list of topics for discussion.

(B) *Termination.*

(1) Louisville Metro may terminate any Franchise in accordance herewith in the event of the violation of any material provision hereof or of any rule or regulation promulgated pursuant here to or of any applicable federal, State, or local law, or the breach or other failure, refusal or neglect by the Franchisee to perform its obligations under the material terms and conditions of the ordinance or of any ordinance or agreement awarding a Franchise in accordance herewith, except when such violation, breach, failure, refusal or neglect is caused by any of the following:

(a) Act of God;

(b) Riot, insurrection, civil disturbance, sabotage or vandalism, tampering or interference, act of public enemy, accident, fire, flood, strike, unavailability of materials or equipment, war or act of war, all of which are beyond the control of the Franchisee; or

(c) An emergency declared by the President of the United States of America, the Governor of the Commonwealth of Kentucky or the Mayor.

(2) In the event that Louisville Metro determines that the Franchisee has violated any material provision of this chapter, any rule or regulation promulgated pursuant hereto, any applicable federal, State or local law, or any material term of an agreement or ordinance awarding a Franchise, Louisville Metro shall make a written demand on the Franchisee that it comply with the law or said agreement or ordinance. If the violation, breach, failure, refusal or neglect is not remedied to the satisfaction of Louisville Metro within thirty (30) days following such demand, Louisville Metro shall determine whether or not, in its sole discretion, any violation, breach, failure, refusal, or neglect by the Franchisee was excusable or inexcusable as provided in § 116.10(B)(1).

(a) If Louisville Metro determines such violation, breach, failure, refusal or neglect by the Franchisee was excusable as provided in § 116.10(B)(1), Louisville Metro shall direct the Franchisee to correct or remedy the same within such additional time, in such manner and upon such terms and conditions as are just and reasonable and as Louisville Metro may direct.

(b) If Louisville Metro determines such violation, breach, failure, refusal, or neglect by the Franchisee was inexcusable, then Metro Council, by ordinance, may declare the Franchisee's Franchise breached, terminated, and of no further force and effect. Metro Council may provide a time period for the Franchisee to become compliant.

(3) If Louisville Metro declares the said agreement breached pursuant to § 116.10(B)(2)(b), Louisville Metro may pursue any remedies available to it pursuant to this chapter or to the said Franchise or ordinance or any other remedy, legal or equitable, available to Louisville Metro.

(C) If any Franchise is cancelled by reason of the default of the Franchisee, Louisville Metro may exercise its option to purchase any portion of the System then connected in any manner with the Rights-Of-Ways, public places, or other property of Louisville Metro, at a cost not to exceed its then book value less any amount for any damages incurred by Louisville Metro in connection with such cancellation. Damages incurred by Louisville Metro shall include, but shall not be limited to, any payment made by Louisville Metro authorizing or directing the continued operation of the System.

(D) In the event that the Franchise is terminated, the Franchisee shall follow the procedure in § 116.03(O).

#### **§ 116.11 FORECLOSURE-RECEIVERSHIP.**

(A) Upon the foreclosure or other judicial sale of all or a substantial part of the System, or upon the termination of any lease covering all or a substantial part of the System, the Franchise shall notify Louisville Metro of such foreclosure. Franchisee's notification shall be treated as a notification that a change in control of the Franchisee has taken place, and the provisions of this chapter governing the consent of Louisville Metro to such change in control of the Franchisee shall apply.

(B) Louisville Metro shall have the right to cancel the Franchise one hundred twenty (120) days after the appointment of a receiver, or trustee, to take over and conduct the business of the Franchisee, whether in receivership, reorganization, bankruptcy, or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless:

(1) Within one hundred twenty (120) days after his or her election of appointment, the receiver or trustee shall have fully complied with all of the provisions of this chapter

and the agreement and ordinance awarding a Franchise hereunder, and remedied all defaults thereunder; and

(2) Such receiver or trustee, within said one hundred twenty (120) days shall have executed an agreement, duly approved by the court having jurisdiction over same, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this chapter and the agreement and ordinance awarding a Franchise hereunder.

#### **§ 116.12 REPORTS.**

Upon Louisville Metro's request, the Franchisee shall submit a written report to Louisville Metro, including, but not limited to, the following information:

(A) A summary of the previous year's or, in the case of the initial reporting year, the initial year's activities in development of the System, including, but not limited to, Communications Service begun or discontinued, total number of Customers, and Customers added or discontinued during the reporting year;

(B) If Louisville Metro exercises its constitutional right to collect Franchise Fees, a statement of revenues;

(C) A list of officers and members of the Board of Directors of the Franchisee, and its parent, subsidiary, or Affiliate corporations, if any;

(E) It shall be unlawful for the Franchisee to refuse, fail or neglect to file the reports required under this chapter. The refusal, failure, or neglect of the Franchisee to file any of the reports required under this chapter or as Louisville Metro may direct, shall be deemed a violation of this chapter and shall subject the Franchisee to the provisions of § 116.10, shall be deemed a material breach of any agreement or ordinance awarding a



Franchise in accordance herewith, and shall subject the Franchisee to all penalties and remedies prescribed therein and to all other remedies, legal or equitable, which are available to Louisville Metro.

(F) Any material misrepresentation made knowingly by the Franchisee in any report required under this chapter shall subject the Franchisee to the provisions of § 116.10 and shall subject the Franchisee to all penalties and remedies prescribed therein and to all other remedies, legal or equitable, which are available to Louisville Metro.

### **§ 116.13 BOOKS AND RECORDS OF THE FRANCHISE.**

(A) The Franchisee shall keep complete and accurate books of account and records of its business and operations in connection with any Franchise granted under this chapter.

(B) Upon request, Louisville Metro shall have access to all books of account and records of the Franchisee for the purpose of auditing Franchise Fee or tax payments and of ascertaining the correctness of any and all reports and may examine its officers and employees in respect thereto.

(C) Any false entry in the books of account or record submitted to Louisville Metro, or false statements in reports to Louisville Metro, as to material fact, knowingly made by the Franchisee, shall constitute a breach of a material provision of this chapter and any Franchise agreement or ordinance hereunder, for which the remedies provided in this chapter may be invoked.

### **§ 116.14 TIME OF ESSENCE.**

Whenever this chapter, or any ordinance or agreement awarding a Franchise hereunder, shall set forth any time for any act to be performed by or on behalf of a

Franchisee, such time shall be deemed of the essence, and any failure of a Franchisee to perform within the time set forth shall constitute a material breach of the terms of this chapter and shall entitle Louisville Metro to invoke all penalties and remedies prescribed in this chapter as well as all other legal or equitable remedies available to Louisville Metro.

**§ 116.15 EQUAL EMPLOYMENT OPPORTUNITY.**

(A) Franchisees shall comply in all respects with the FCC's regulations governing equal opportunity. Franchisees shall also comply with all other applicable equal opportunity government regulations whether federal, State or local.

(B) Franchisees shall afford equal opportunity in employment to all qualified Persons, and no Person shall be discriminated against because of race, color, religion, national origin, handicap, sex, or age.

(C) Franchisees must currently be and remain qualified by the Louisville Metro Human Relations Commission concerning the requirements for an affirmative action plan consistent with the Louisville Metro Code of Ordinances § 37.68(B)

**§ 116.16 VIOLATIONS.**

(A) It shall be unlawful for any Person to establish, operate or to carry on the business of distributing to any Persons in Louisville Metro, any Communications Service by means of a System in the Rights-Of-Way unless a Franchise therefore has first been obtained from Louisville Metro, and unless such Franchise is in full force and effect.

(B) It shall be unlawful for any Person to own, erect, install, maintain, operate, repair, replace, remove or restore within any public street in Louisville Metro, equipment or Facilities for distributing any Communications Service through a System, unless a

Franchise authorizing such use of such Rights-Of-Way has first been obtained from Louisville Metro, and unless such Franchise is in full force and effect.

**SECTION II.** This Ordinance shall take effect upon passage and approval.

\_\_\_\_\_  
H. Stephen Ott  
Metro Council Clerk

\_\_\_\_\_  
David James  
President of the Council

\_\_\_\_\_  
Greg Fischer  
Mayor

\_\_\_\_\_  
Approval Date

**APPROVED AS TO FORM AND LEGALITY:**

MICHAEL J. O'CONNELL  
Jefferson County Attorney

By: \_\_\_\_\_

O-429-17 LMCO 116 – Franchise Ordinance, Repealed and Replaced (Amendment by Substitution)(4-23-18).docx