

FRANCHISE AGREEMENT

This Agreement is made and entered into by and between the City of Fairhope, Alabama ("City") a municipal corporation and _____, ("Grantee").

RECITALS

Grantee is a sole proprietor with a principal place of business at _____, Fairhope, AL 36532. Grantee is engaged in the business of _____ to the public. Grantee proposes to install and operate _____ at the _____. Grantee requests that the City grant to Grantee a franchise to install, maintain and operate this business on public property at the _____.

In consideration of the mutual covenants, promises and conditions set forth herein the parties agree as follows:

SECTION 1

Section 1.1 DEFINITIONS

Unless otherwise specially provided, or unless clearly required by the context, the words and phrases defined in this section shall have the following meanings when used in this Ordinance and Franchise Agreement:

- (1) **MAYOR:** Shall mean the Mayor of the City of Fairhope
- (2) **COUNCIL:** Shall mean the City Council of Fairhope, the governing body of City of Fairhope, Alabama.
- (3) **CITY:** Shall mean City of Fairhope, Alabama, which is governed by the Fairhope City Council.
- (4) **FRANCHISE:** Shall mean the franchise granted under the provisions of the *Ala. Code §11-40-1*, et seq., which authorizes municipalities to contract and to be contracted with. A "franchise" as used in this agreement is a special privilege not belonging to the citizens by common right but conferred by a municipality upon an individual or corporation.
- (5) **GRANTEE:** Shall mean _____ to whom a franchise has been granted by the City or anyone who succeeds _____, in accordance with the provisions of the franchise.
- (6) **GROSS REVENUES:** Shall mean all revenues received by the Grantee from or in connection with the operation of the franchise to provide services in the City of Fairhope pursuant to this franchise agreement.

(7) **PERSON:** Shall mean an individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

(8) **SERVICE AREA:** Shall mean the geographical area within City of Fairhope and specifically defined as follows: _____.

Section 1.2 REQUIREMENTS FOR FRANCHISE

(a) No person shall engage in the construction, operation, or maintenance of a private business on public property in the City unless such person or the person for whom such action is being taken shall hold a valid franchise granted by the City.

(b) Any franchise granted by the City pursuant to these rules and regulations shall not be deemed to be an exclusive right of permission. The City expressly reserves the right to grant similar nonexclusive franchises to other persons.

(c) In the event the City enters into a franchise, permit, license, authorization, or other agreement of any kind with any other person or entity other than the Grantee to enter into the City's Public Rights-of-way or public property for the purpose of operating a private business on public property in any part of the City, the material provisions thereof shall be reasonably comparable to those contained herein, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

(d) No franchise shall be granted by the City in the Central Business District located in downtown Fairhope.

Section 1.3 TERM OF FRANCHISE, RENEWAL

(a) The duration of this franchise agreement granted pursuant to this Ordinance shall be for one year and shall be renewed automatically each year for three years unless notice of termination is given in writing to the other party at least 60 days prior to the expiration of the then current term. This Agreement shall commence 10 days after approved by the City Council.

Section 1.4 ENFORCEMENT OF FRANCHISE

(a) A Grantee shall not be excused from complying with any of the terms or conditions of the franchise by any failure of the City upon any one or more occasions to insist upon or to seek compliance with any such terms or conditions.

(b) Whenever the City shall set forth any time for any action to be performed by or on behalf of Grantee, said time shall be deemed of the essence and any failure of Grantee to perform within the time allotted shall be sufficient grounds for the City to revoke the franchise.

(c) A Grantee agrees by filing an application for a franchise that they will not assert, at any time, in any claim or proceeding that any condition or term of the franchise

is unreasonable, arbitrary or void or that the City had no power or authority to make such term or conditions, but shall be required to accept the validity of the terms and conditions of the franchise in their entirety.

Section 1.5 CONFLICT WITH LAWS

(a) Whenever any law of the State of Alabama or of the United States, or of any agency of either, shall be in direct conflict with and supersede any provision of these rules and regulations, then for so long as such state or federal law or regulation shall be in force and effect, any affected provisions of this franchise granted hereunder shall be suspended and be of no force and effect and the Grantee shall not be required to comply with such provision; however, the validity of the remaining portions or provisions shall not be affected thereby. In the event this franchise imposes burdens different than those imposed by any other law, but within the power of the City to impose said burdens, the more restrictive provision shall apply.

(b) If any section, sentence, clause or phrase of these rules and regulations or of any franchise granted hereunder is held unconstitutional or otherwise invalid, such infirmity shall not affect the validity of the remaining portion of these rules and regulations or a of any franchise granted hereunder.

SECTION 2

Section 2.1 PROCEDURE FOR GRANTING FRANCHISE

(a) Any person desiring a franchise shall apply to the City for such a grant. The application for a franchise shall be in writing, in the form approved by and containing such information as required by the City and must be accompanied by a nonrefundable application fee of \$150.00 by cashier's check, certified check or money order payable to City of Fairhope. This is a separate fee from the Franchise fee.

(b) Upon receipt of said franchise application, the City shall provide notice of said application and conduct a public hearing to determine if the grant of the franchise would be in the best interest of the citizens of City of Fairhope.

(c) The application shall contain a statement under oath that the applicant will comply with all legal, financial and technical provisions of these rules and regulations and any other municipal, state or federal regulatory agencies.

(d) The application shall define the proposed service area of the applicant with specific time standards for the establishment of service to suit the service area.

SECTION 3

Section 3.1 CONSTRUCTION AND INSTALLATION

(a) After receipt of an initial franchise, a Grantee shall proceed with due diligence to install and begin operation of the franchise.

(b) Failure on the part of the Grantee to commence and diligently pursue _____ or failure to commence operation after 90 days from the commencement of this agreement shall be grounds for termination of the franchise. The City may extend the time for the commencement and completion of _____ for additional periods in the event the Grantee, acting in good faith, experiences delays by reasons of circumstances beyond her control.

(d) The _____ shall be constructed and operated in accordance with all adopted City, state and national construction and electrical codes.

Section 3.2 CONDITIONS FOR USE OF PUBLIC PROPERTY

(a) Grantee shall not install or begin operation of the franchise business until the installation has been approved by the Mayor or his designee.

Section 3.3 OPERATION AND MAINTENANCE

(a) The Grantee shall install and maintain _____ in a prudent and reasonable manner.

(b) Failures or malfunctions of the _____ shall be corrected by the Grantee promptly after notice of such failure or malfunction except or unless such failure or malfunction shall have been caused by storm, fire, lightning, explosion, civil unrest or other similar catastrophe.

(c) The City shall, if it deems it necessary, have the right and privilege to inspect the installation, operation and maintenance of the _____ by the Grantee in order to satisfy itself as to the proper performance of the terms of this franchise agreement.

SECTION 4

Section 4.1 FRANCHISE FEE

(a) There shall be a franchise fee of twenty (20) percent of Gross Revenues; and the fee for the business license which is an annual license issued by the municipality for the privilege of doing any kind of business, trade, profession or other activity in the municipality, by whatever name called.

(b) Grantee shall pay quarterly to the City during the life of the franchise a sum equal to twenty (20) percent of its gross revenues. Grantee shall file with the City on such form as prescribed by the City within sixty (60) days after the end of each quarterly a report, under oath at the risk of perjury, of the gross revenues for the preceding quarterly period, and shall, at the same time, pay to the City a sum equal to twenty (20) percent of the gross revenues for the said quarterly period.

Section 4.2 INDEMNIFICATIONS

(a) Grantee shall at his/her sole cost and expense fully indemnify, defend and save harmless the City, its officers, boards, and employees against any and all

claims, demands, suits, actions, liability and judgments for damage arising out of the construction, operation and maintenance of the _____ franchise, and against all liabilities for damages by reason of, or arising out of, any failure by Grantee to safely operate and maintain the _____, including reasonable attorney's fees, arising out of the exercise or enjoyment of this franchise, irrespective of the amount of comprehensive liability policy required hereunder. This indemnity shall not apply to damages occasioned solely and exclusively by acts of the City, its agents or employees.

(b) Within thirty (30) days after the granting of the franchise and at all times during the term of the franchise, Grantee shall obtain, pay all premiums for, and file with the City executed duplicate copies and receipts evidencing the payment of premiums for the following:

A general comprehensive public liability insurance policy indemnifying, defending and saving harmless the City, its officers, boards, agents or employees from any and all claims by any person whatsoever on account of injury to or death of a person or persons occasioned by the operations of the Grantee under franchise herein granted or alleged to have been so caused with a minimum of liability of _____ for personal injury or death of any two or more persons in any one occurrence. Renewal certificates of such insurance shall be promptly forwarded to the City as such renewals are made, and such insurance shall be kept in force and effect during the term of this grant or franchise. The Grantee and/or the insurance company shall file with the City a written notice of any material alteration or cancellation of any insurance coverage at least thirty (30) days prior to the effective date of such alteration or cancellation. Property damage insurance indemnifying, defending and saving harmless the City, its officers, boards, agents, and employees from and against all claims by any person whatsoever for property damage occasioned by the operation of a Grantee under franchise granted by _____ City caused with a minimum liability of _____ for property damage to two or more persons in any one occurrence. Said policies of insurance shall name the City as an additional insured.

(c) All of the foregoing insurance certificates shall be in form satisfactory to the City and shall be issued and maintained by companies authorized to do business in the State of Alabama and acceptable to the City and they shall require thirty (30) days written notice of any cancellation or reduction in coverage to both the City and Grantee herein, and a copy of said certificates shall be filed with the City.

Section 4.3 BOOKS/RECORDS OF GRANTEE

(a) All books and records of a Grantee concerning its operations within the City necessary for the enforcement of the provisions of this franchise, shall be made available for inspection and audit upon demand by the City within thirty (30) days after any request for such inspection or audit has been made.

Section 4.4 GRANTEE ACKNOWLEDGEMENT

(a) Grantee is an independent contractor. No agency or employment relationship is created by this Franchise Agreement.

SECTION 5

Section 5.1 SALE OR LEASE OF FRANCHISE

(a) No transfer or control of the _____, whether by force or voluntary sale, lease, assignment, foreclosure, attachment, merger, or any other form of disposition, shall occur or be considered valid without first giving prior notice and receiving the approval of the City. The notice shall include full identifying particulars of the proposed transaction. For the purpose of determining whether it shall consent to such change, transfer, or acquisition of control, the City may inquire into the qualification of the prospective controlling party and the Grantee shall assist the City in any such inquiry. The City shall have one 60 days from the date the notice is received by the City within which to approve or disapprove, by resolution, the proposed transfer of control. The City will not unreasonably withhold its approval.

(b) Approval of such transfer shall be expressly conditioned upon full compliance with the material terms of the franchise agreement and this Ordinance. The transferee shall agree in writing to comply with all provisions of this Ordinance and the franchise agreement.

Section 5.2 REVOCATON OF FRANCHISE

(1) Subject to the provisions of this section, the City reserves the right to revoke, at any time, any franchise granted hereunder and rescind all rights and privileges associated therewith in the event that:

(a) Grantee has not substantially complied with a material provision of this Ordinance, the franchise agreement, or of any supplemental written agreement entered into by an between the City and the Grantee; or

(b) Grantee has made a material false statement in the application for the franchise, knowing it to be false, or Grantee commits a fraud in its conduct or relations under the franchise with the City; or

(c) Grantee becomes insolvent, enters into receivership or liquidation, files for bankruptcy or assignment for benefits of creditors, or is unable to pay its debts as they mature, unless the Grantee is in due process of contesting such debts; or

(d) Grantee fails to substantially comply with a material provision of any federal or state statue, or of any material rules or regulations that govern telecommunications; or

(e) Grantee exhibits a pattern of failing to comply with service standards as adopted herein or in the franchise agreement; or

(f) Grantee fails to comply with any federal or state judgment arising directly from the exercise of Grantee's rights under its franchise; or

(g) Grantee fails to provide or maintain in full force and effect the bond and insurance policies required by this Ordinance and franchise agreement; or

(h) Grantee assigns, sells or transfers its title or interest in its franchise without the consent of the City.

(2) In the event that the City shall make a preliminary decision to revoke a franchise granted hereunder, it shall give the Grantee a minimum of thirty days written notice of its intention to terminate and stipulate cause. A public hearing shall be scheduled for the end of said 30 day period. If during said period, the cause shall be cured to the satisfaction of the City, the City shall declare the notice to be null and void. If the cause is not cured to the satisfaction of the City, before a franchise may be terminated, the Grantee must be provided with an opportunity to be heard before the City in a public hearing in accordance with due process procedures. After the public hearing, if the City, by majority vote, determines that the franchise should be terminated, it shall issue a written decision containing its findings of fact and stating the specific grounds for termination. The decision to terminate a franchise shall be subject to judicial review as provided by law.

(3) A Grantee shall not be declared in default or be subject to any sanction under any provision of this Ordinance and franchise agreement in any case where the City determines that the action justifying such sanction is without the Grantee's knowledge or authorization or outside its control.

Section 5.3 RIGHTS UPON REVOCATION OR NON-RENEWAL

In the event the City determines that a franchise should not be renewed at its expiration or that a franchise should be revoked for cause as permitted hereunder, the Grantee shall be allowed three months from the date of such determination, or such longer period as the City may permit, to negotiate the sale of its _____ within the City to another provider at a price acceptable to the Grantee, provided that such sale shall be approved by the City pursuant to Section 5 herein. In the event a sale to a provider acceptable to the City is not then negotiated within the time allowed, then an independent expert shall be appointed to determine the fair market value of the Grantee's _____. The appointment of said expert shall be by mutual agreement between the City and the Grantee; provided, however, that if the City and the Grantee are unable to reach an agreement within 30 days of the written decision of termination, then the matter of appointing an expert shall be submitted, within ten (10) days immediately following expiration of the former 30 days, to the American Arbitration Association [unless the City and the Grantee mutually agree upon some other arbitrator(s)], and the expert designated by the American Arbitration Association or such other arbitrators shall be appointed. The cost of employing the arbitrator or arbitrators

and the cost of arbitration, if required, shall be borne equally by the Grantee and the City. Upon determination of the fair market value of the Grantee's _____ by the appointed independent expert, the Grantee shall be required to sell its _____ to any entity which offers said fair market value and which has obtained the approval of the City to purchase said _____.

Section 5.4 REMOVAL AND ABANDONMENT OF PROPERTY

(a) If the use of any part of Grantee's _____ is discontinued for any reason for a continuous period of twelve (12) months, or if such _____ does not comply with the requirements of these rules and regulations, or if Grantee's franchise is terminated or revoked the City may in its discretion require that said _____ be sold to a franchise designated by the City at a purchase price equal to the _____ fair market value as determined in subsection (b) hereof.

(b) Any dispute between the City and the Grantee over determination of the system's fair market value shall be determined in accordance with Section 5.3 above.

Section 5.5 MISCELLANEOUS PROVISIONS

(a) This agreement constitutes the entire agreement of the parties and supersedes any and all agreements, understandings, statements or representations either oral or in writing. This agreement can be amended only by a written document signed by the parties.

(b) This agreement shall be enforced and interpreted pursuant to the laws of the State of Alabama.

IN WITNESS WHEREOF, the Parties have hereunto set their respective signatures and seals on the ____ day of _____, 20____.

THE CITY OF FAIRHOPE, ALABAMA

By: _____
Timothy M. Kant, Mayor

Attest: _____
Lisa A. Hanks, MMC
City Clerk

By: _____
, Grantee