


**ACCEPTANCE**

December 9, 1999

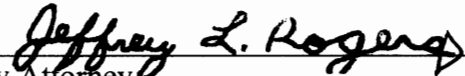
Auditor of the City of Portland  
City Hall Room 140  
1221 SW 4<sup>th</sup> Avenue  
Portland, Oregon 97204

This is to advise the City of Portland, Oregon that I hereby accept the terms and provisions of Ordinance No. 173990, passed by the Portland City Council on December 8, 1999, granting a temporary, revocable permit to TCG Oregon and establishing terms and conditions, and in consideration of the benefits received thereunder by me I hereby agree to abide by and perform each and all of the terms and provisions thereof applicable to me. The City of Portland acknowledges that TCG Oregon has paid the amount required under Section 17.



  
\_\_\_\_\_  
(Signature - Title)\* Vice President - Operations  
Kevin Peters

Rosalie Leib, Legal Department  
AT&T Local Services  
431 Ridge Road  
Dayton, New Jersey 08810

Approved as to form:  
**APPROVED AS TO FORM**  
  
\_\_\_\_\_  
City Attorney  
**CITY ATTORNEY**

\*When an acceptance is signed by an officer of a firm or corporation, his or her official title must be stated.



431 Ridge Road  
Dayton, NJ 08810  
732 392-2000  
FAX 732 392-2641

November 11, 1999

**VIA FEDERAL EXPRESS**

Ms. Mary Beth Henry  
Deputy Director  
Portland Office of Cable Communications  
and Franchise Management  
1211 SW Fifth Avenue #1160  
Portland, OR 97204-3711

**RECEIVED**  
NOV 15 1999

**OFFICE OF CABLE COMMUNICATIONS  
CITY OF PORTLAND**

Re: TCG Oregon, a wholly owned subsidiary of AT&T Corp.  
Request for Temporary Revocable Permit

Dear Ms. Henry :

On behalf of TCG Oregon, a wholly owned subsidiary of AT&T Corp. (TCG), I request that the City of Portland grant to TCG a temporary revocable permit for a period of one year or until the City of Portland grants a franchise to TCG, whichever occurs first. The temporary revocable permit is necessary to permit TCG to immediately begin construction to add to its fiber optic system providing telecommunications services in the City of Portland and the State of Oregon.

The parties have reached final agreement on the terms and conditions of the franchise and understand that the terms of the temporary revocable permit will be substantially the same as the terms and conditions of the franchising agreement. The parties also agree that the issuance of the temporary revocable permit will allow TCG to begin construction, operation and use of its fiber optic system in the City of Portland immediately upon issuance.

We thank you for your assistance in this matter. If you have any questions or need additional information, please contact Mary Fisher, Rosalie Leib or myself.

Very truly yours,

*Meredith Harris* /sw

Meredith R. Harris  
Senior Rights-of-Way  
Counsel

EXHIBIT A  
PAGE 1 of 1



CITY OF

# PORTLAND, OREGON

OFFICE OF CABLE COMMUNICATIONS  
AND FRANCHISE MANAGEMENT

Erik Sten, Commissioner  
David C. Olson, Director  
1120 SW Fifth Ave., Rm. 704  
Portland, OR 97204  
(503) 823-5385  
FAX: (503) 823-5370  
TDD #: (503) 823-6868  
www.ci.portland.or.us

## Memorandum

December 3, 1999

**TO:** Mayor Katz  
Commissioner Francesconi  
Commissioner Hales  
Commissioner Saltzman  
City Auditor Gary Blackmer

**THROUGH:** Commissioner Sten

**FROM:** David Olson, Director  
David Soloos, Program Coordinator  
Office of Cable Communications  
and Franchise Management

OS

**RE:** TCG Oregon Temporary Revocable Permit Emergency Ordinance

An ordinance granting TCG Oregon a temporary revocable permit is on the Council Consent Agenda for Wednesday, December 8, 1999. TCG and City staff have reached tentative, non-binding general agreement on the terms and conditions of a franchise. The City Charter requires a 4-month approval process for franchises, which includes publication of the franchise and two readings before Council. The first reading of the franchise for TCG will most likely be before Council by February, 2000.

TCG currently has facilities in the City's right of way which were obtained from TCI Oregon. In late 1998 TCG requested and received a permit, and in early 1999 requested a franchise. During the effective dates of the previous permit TCG built and operated a telecommunications system. However, because TCG did not return the signed written acceptance of the franchise within the time frame allowed by City Charter, the franchise and permit became null and void. The franchise will address the outstanding regulatory issues in a mutually satisfactory manner.

TCG has requested a temporary revocable permit in order to continue construction and operation of its telecommunications system, and to pursue another 10 year franchise. The City has used this procedure in the past with many other telecommunications providers. The permit contains much of the applicable language from the franchise.

### Highlights of the Franchise

#### Nature and Terms of Franchise

The temporary revocable permit will be in effect for one year or until a new franchise is approved, whichever occurs first. The permit gives TCG the immediate authority to conduct its business and add to its telecommunications infrastructure in the City's right of way. The permit will restate many of the relevant conditions of the franchise. The franchise term is 10 years.

### Compensation

The permit and franchise will require TCG to pay 5% of its gross revenues or the minimum annual fee of \$6,000 per year, whichever is greater. In addition, TCG will pay the City 1% of all infrastructure sales and leases. Staff is unable to make a going forward revenue projection at this time. TCG has already paid \$24,000 to resolve all issues relating to its failure to sign the written franchise acceptance, including the City's costs to refile and reprocess a permit and franchise, and a penalty for operating in the right of way without a valid permit or franchise.

### Capacity for City Use

TCG will make available to the City an OC-3 level of capacity on its telecommunications system. TCG will provide ducts for the City whenever TCG constructs conduit. The capacity may be used to meet City telecommunication needs. The Cable/Franchise Office will work with the Bureau of General Services Division Director for Communications Services to make recommendations on how to use the capacity and conduit set asides negotiated as part of various telecommunications and cable franchises.

### Other

The remaining sections of the franchise contain standard language that has been reviewed and approved by the relevant City bureaus. TCG paid for the cost of publishing the franchise in the Daily Journal of Commerce as well as a notice in the Oregonian as required by the City Charter.

### **Process**

Cable and Franchise Management along with the City Attorney's Office will negotiate the final terms and conditions of the franchise. Representatives from the Office of Transportation and the Bureau of General Services' Communications Division have been and will continue to be consulted during the process.

**Proposed Timeline for TCG Temporary Revocable Permit and Franchise**

November 3	Agreement reached on Temporary Revocable Permit and general Franchise terms
November 17	Revocable Permit circulated to TCG and City
November 17	Filed Temporary Revocable Permit Ordinance with Auditor
December 8	City Council considers Temporary Revocable Permit (Emergency Ordinance, takes effect immediately).
December 29	Franchise submitted to Daily Journal of Commerce
January 19, 2000	Franchise published in the Daily Journal of Commerce and Oregonian (Minimum 20 days after publication until First Reading before Council)
February 9	File Franchise Ordinance with City Auditor
February 16	First Reading of Franchise
March 21	Second Reading of Franchise at City Council (minimum 30 days after First Reading)
May 23	Franchise takes Effect (minimum 60 days after passage at Council)

**Questions or Further Information**

Please contact David Soloos, 823-5359.

cc Olson, Walters/City Att., Gardner/Trans., Bob Johnson/Trans., Runkel/Com. Sten  
h:utility:TCGrpt

ORDINANCE No. **173990**

\*Grant a temporary, revocable permit to TCG Oregon, and establish terms and conditions.  
(Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

1. Staff for the City of Portland, Oregon, (the "City"), and TCG Oregon, ("TCG "), have reached tentative, non-binding general agreement on the terms and conditions of a ten-year franchise for TCG to use the City streets to provide telecommunications services.
2. The City will shortly begin to consider whether or not to approve the proposed franchise, following the formal Portland City Charter procedure of public notice and hearing. This process will begin with the publication of a notice of proposed franchise, together with the publication of the entire proposed agreement in the City's official newspaper. The process mandated by the Portland City Charter for reviewing and adopting a proposed franchise may take up to four months, or more, from the date of initial publication.
3. TCG and the City acknowledge that TCG previously requested and received a permit (Ordinance 172995), and previously requested a franchise. While the previous permit was effective TCG built and began operating a telecommunications system. However, because TCG did not return the signed written acceptance of the franchise within the time frame allowed by City Charter, the franchise and permit became null and void. TCG has paid \$24,000 to the City for its costs to refile and reprocess a permit and franchise, and as a penalty for operating in the City right-of-way without a valid permit or franchise.
4. TCG has asked the City, in writing, to issue a temporary, revocable permit allowing TCG "to immediately begin construction to add to its fiber optic system providing telecommunications services in the City of Portland..." A copy of TCG's letter is attached to this Ordinance as Exhibit A.
5. TCG has been advised that the City staff cannot bind the City Council and that there is no guarantee that the proposed franchise will be approved as currently drafted or approved in any form.
6. The temporary, revocable permit to be issued under this Ordinance will be similar but not identical to the terms and conditions set forth in the current draft of the proposed franchise agreement between the City and TCG. Some provisions of the permit will differ from the proposed franchise due to recent policy changes that will affect all similarly situated entities.

NOW, THEREFORE, the Council directs:

a. NATURE AND TERM OF PERMIT.

1. Issuance of Temporary, Revocable Permit. The City of Portland, (the "City"), does hereby grant to TCG Oregon,, a wholly owned subsidiary of AT&T Corporation, ("TCG"), a temporary, revocable permit to construct, operate and maintain a Telecommunications System, with all necessary Facilities, in, under, and over the surface of the City's Streets.

2. This Permit is issued to TCG subject to all of the following terms and conditions:

A. This Permit shall be effective for either: (1) a period of only one year, as measured from its effective date; or, (2) until the City grants a franchise to TCG and the franchise becomes effective, whichever event occurs sooner. The effective date of this Permit shall be upon passage of this ordinance by the City Council, unless TCG fails to file an unconditional written acceptance of this Permit in accordance with Paragraph r., in which event this Permit shall thereupon be null and void. The passage date of this Permit is set forth on the last page of the original hereof, as stamped by the Council Clerk.

B. This Permit is temporary and revocable, and no expenditure of money, lapse of time, act, event, or other occurrence shall give TCG any rights, vested or otherwise, to occupy or use the City's streets, or shall operate as an estoppel against, or a waiver by, the City. Upon expiration of the term of this Permit, or its revocation by the City Council, TCG shall remove its Telecommunications System and other facilities from the City Streets, or waive its rights to such Telecommunications System and other facilities. Any such removal shall be directed by, and to the satisfaction of, the City Engineer.

C. Permit not Exclusive. This Permit is not exclusive. The City expressly reserves the right to grant permits or franchises to other persons or corporations, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed TCG hereunder, by permit, franchise or otherwise.

D. Charter and General Ordinances To Apply. To the extent authorized by law, this Permit is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of TCG, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland (1942 compilation, as revised in part by subsequent amendments) as the same now exist or hereafter are amended by the people of the City of Portland, are hereby incorporated by reference and made a part of this Permit, to the extent authorized by law. Nothing in this Permit shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permit requirements, fees to be paid or the manner of construction.

b. DEFINITIONS.

1. Captions. Throughout this Permit, captions to sections are intended solely to facilitate reading and to reference the paragraphs and provisions of this Permit. The captions shall not affect the meaning and interpretation of this Permit.

2. Definitions. For the purposes of this Permit, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. 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 include the plural number. The word "shall" is always mandatory and not merely directory.

A. "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

B. "City Council" means the Council of the City of Portland.

C. "Conduit" means any structure, or section thereof, containing one or more ducts or raceways used to provide path for electrical or optical cables.

D. "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.

E. "Facility" means any tangible component of the Telecommunications System.

F. "Gross Revenues" shall mean gross revenues derived by TCG for the provision of Telecommunications Services (I) originating or terminating in Portland, Oregon and (ii) charged to a circuit location in Portland, Oregon regardless of where the circuit is billed or paid.

G. "Indefeasible Right of User Interest " ("IRU") means a form of acquired capital in a telecommunications system, in which the holder of the interest possesses a right to use the telecommunications system, but not the right to control, maintain, construct or revise the telecommunications system.

H. "Minimum Permit Fee" shall mean \$6,000.

I. "OC-3" means an Optical Carrier 3 level of telecommunications service.

J. "Optical Fiber" means a filament of transparent dielectric material, usually glass or plastic, and usually circular in cross Paragraph , that guides light, and is used to convey modulated information."



K. "Penalties" means any and all monetary penalties provided for in this Permit.

L. "Permit" means this Permit, as approved by the City Council and accepted by TCG, according to the terms of Paragraph r. of this Permit.

M. "Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.

N. "Streets" means the surface of, and the space above and below, any public street, road, alley or highway, within the City, used or intended to be used by the general public, to the extent the City has the right to allow TCG to use them.

O. "Telecommunications Services" means:

(1) Services interconnecting interexchange carriers, competitive carriers, and/or wholesale telecommunications providers for the purpose of voice, video, or data transmission;

(2) Services connecting interexchange carriers and/or competitive carriers to telephone companies providing local exchange services for the purpose of voice, video, or data transmission;

(3) Services connecting interexchange carriers or competitive carriers to any entity, other than another interexchange carrier, competitive carrier, or telephone company providing local exchange services, for the purpose of voice, video, or data transmission;

(4) Services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission; and,

(5) Other telecommunications services as authorized by the Federal Communications Commission or the Oregon Public Utility Commission.

(6) This Permit does not authorize TCG to operate as a telecommunications services provider. TCG represents that it has applied for and received all necessary regulatory authority.

(7) This Permit does not authorize TCG to operate a cable system or provide video programming, as defined by 47 U.S.C.A §522 (Supp.1997).

(8) Nothing in this Permit shall preclude TCG from entering into a contract for the use of any portion of its Telecommunications System with any Person for any services,

whether specified herein or not, provided that said Person is another permittee, licensee, or franchisee and has assumed responsibility for obtaining any required authority from the City.

P. "Telecommunications System" means all wires, cables, ducts, conduits, vaults, poles and other necessary Facilities owned or used by TCG for the purpose of providing Telecommunications Services and located in, under and above the Streets, excluding ducts, conduits and vaults leased from another City permittee, licensee or franchisee.

Q. "Year", "Annual", or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Permit.

c. COMPENSATION AND AUDITING.

1. Amount of compensation.

A. As compensation for the benefits and privileges under this Permit and in consideration of permission to use the Streets of the City, TCG shall pay as a fee to the City, the greater of either: (1) the Minimum Permit Fee; or, (2) an amount equal to five percent (5%) of TCG's Gross Revenues. However, revenues derived from the sale or lease of facilities, and subject to Paragraph c. 1. B. shall be excluded from the Gross Revenues calculation of permit fees under this Paragraph c.1.A.

B. As additional compensation to the amounts set forth in Paragraph c.1.A.:

(1) In the event TCG sells any portion of its Telecommunications System, TCG shall pay a one-time Permit fee to the City of one percent (1%) of the sales price; and,

(2) In the event TCG leases any portion of its Telecommunications System, TCG shall pay a Permit fee to the City of one percent (1%) of the lease revenues annually.

(3) The calculations of the one percent Permit fee on sale and lease revenues shall be calculated under the following formula:

Permit fee = (.01) X Ts X (Fp÷Ft), where:

Ts = Total sales price for the facility, expressed in Dollars/fiber-miles;

Fp = the length of the facilities sold, located within the City, expressed in fiber-miles; and,

Ft = the total length of the facilities sold, expressed in fiber-miles.

An illustrative example of this calculation would be as follows: Out of a fiber optic bundle of  
 REVOCABLE PERMIT – TCG Oregon, Inc

twenty four (24) fibers in a forty mile loop, TCG sells two (2) fibers to a purchaser for a total sales price of five hundred thousand dollars (\$500,000). Ten miles of the fiber optic loop are located within the City of Portland. The calculation would be as follows: Permit fee =  $(.01) \times \$500,000 \times (10 \div 40) = \$1,250$ .

2. City Use of Telecommunications Services and/or Telecommunications System.

A. If the City requests Telecommunications Services from TCG other than as provided in Paragraph i, TCG may deduct the charges for such services from Permit fee payments. TCG shall charge the City TCG's most favorable rate offered at the time of the City's request charged to a similar user within Oregon for a similar volume of service, subject to any of TCG's tariffs and regulations on file with the Oregon Public Utility Commission. Other terms and conditions of such services shall be specified in a separate agreement between the City and TCG.

B. As specifically provided elsewhere in this Permit, TCG may deduct charges for installation and maintenance services requested by the City from the Permit fees paid by TCG to the City under Paragraph c.1.

3. Fee Payments.

A. TCG's Minimum Permit Fee payable under Paragraph c.1. shall be paid to the City following the effective date of this Permit.

B. The Gross Revenue based fee payable under Paragraph c.1. A., together with fees based upon revenues from sales and leases under Paragraph c. 1. B., shall be computed and paid on or before the forty-fifth (45th) day following each calendar year quarter period, (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31), during the term of this Permit.

C. Fee payments not received by the City on or before the due date shall be assessed interest based on the average prime interest rate set by the City's bank on December 31st of the previous year, plus 300 basis points (3%). At no time shall the annual interest rate be reduced to less than 12%.

4. Reports. Each Gross Revenue based fee payment under Paragraph c.3.B. shall be accompanied by a written report to the City, verified by an officer or other authorized representative of TCG, containing an accurate statement in summarized form, as well as in detail, of TCG's Gross Revenues and the computation basis and method. Such reports shall be in a form satisfactory to the City.

5. Acceptance of Payment and Recomputation. No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further

or additional sums payable. All amounts paid under Paragraph c.1. shall be subject to confirmation and recomputation by the City, provided that such audit and computation is completed within two (2) years of the date any audited and recomputed payment is due. If no such audit is conducted within the two (2) year period, then any claim that the City might have had for additional compensation shall be forever waived and relinquished.

A. TCG shall reimburse the City for:

(1) The reasonable costs of such confirmation if the City's recomputation discloses that TCG has paid 95% or less of the fees owing for the period at issue, upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit; or

(2) One-half of the reasonable costs of such confirmation if the City's recomputation discloses that TCG had paid more than 95% but less than 98% of the fees owing for the period at issue.

(3) The City's costs which may be reimbursed under this Paragraph c.5.A. shall not exceed \$5,000.00 per audit.

B. If the City determines that TCG made any underpayment, and that the underpayment exceeded 5% of the amount due, TCG shall pay interest compounded at the rate of one percent (1%) over the existing prime rate as set by the bank with which the City contracts for its banking services, compounded monthly. Interest shall be due on the entire underpayment from the date on which payment was due until the date on which full payment is received.

C. If TCG disputes the City's determination of underpayment, TCG shall place the disputed amount in an escrow account until final resolution.

D. All TCG's books, maps, and records directly concerning its Gross Revenues under this Permit and its calculation of fee payments to the City shall be open for inspection by authorized officers or agents of the City, upon no less than 48 hours prior written notice, during normal business hours to determine the amount of compensation due the City under this Permit, and shall be kept so as to accurately show the same. All other reports required by the Charter and ordinances of the City shall be made by TCG from time to time as required.

E. Payment of compensation under this Permit shall not exempt TCG from the payment of any license fee, tax or charge on the business, occupation, property or income of TCG that may be lawfully imposed by the City or any other taxing authority, except as may otherwise be provided in the ordinance or laws imposing such other license fee, tax or charge.

d. GENERAL FINANCIAL AND INSURANCE PROVISIONS

1. Insurance.

A. TCG shall maintain public liability and property damage insurance that protects TCG and the City, as well as the City's officers, agents, and employees, from the claims referred to in Paragraph e. The insurance shall provide coverage at all times of not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$50,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$500,000 covering all claims per occurrence, plus costs of defense. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of this Permit. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this Permit, TCG shall provide a replacement policy with the same terms. TCG shall maintain continuous uninterrupted coverage, in the terms and amounts required, upon and after the effective date of this Permit.

B. TCG shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the reasonable approval of the City Attorney.

C. In the alternative to providing a certificate of insurance to the City, certifying liability insurance coverage as required in this Paragraph d.1.C., TCG may provide the City with a statement regarding its self-insurance. TCG's self-insurance shall provide at least the same amount and scope of coverage for TCG and the City, its officers, agents and employees, as otherwise required under this Paragraph d.1. The adequacy of such self-insurance shall be subject to the City Attorney's review and approval. Upon TCG's election to provide self-insurance coverage under this Paragraph d.1.C., any failure by TCG to maintain adequate self-insurance shall be cause for termination of this Permit under Paragraph p.1.

2. Faithful Performance Bond.

A. Upon the effective date of this Permit, TCG shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved

by the City, in the penal sum of \$100,000, conditioned that TCG shall well and truly observe, fulfill, and perform each term and condition of this Permit. TCG shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of this Permit, including, if necessary, the time required for removal of all of TCG's Telecommunications System installed in the City's Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without 30 days prior written notice first being given to the City Auditor. The bond shall be reviewed and approved as to form by the City Attorney. Failure to keep bond in effect shall be cause for revocation under Paragraph p.1.

B. During the term of this Permit, TCG shall file with the City Auditor a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under Paragraph d.2. if a bona fide, good faith dispute exists between the City and TCG.

3. Construction Bond. During all times when TCG is performing any construction work in or under the Streets requiring a street opening permit, TCG shall post a faithful performance bond or irrevocable letter of credit, as is required for street opening permits, running to the City, with good and sufficient surety approved by the City, in the sum of \$100,000. The bond or letter of credit shall be conditioned that TCG shall well and truly observe, fulfill and perform each term and condition under Paragraph f. TCG shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated upon final approval of TCG's construction work in or under the Streets by the City Engineer which shall not be unreasonably withheld or delayed. Upon such approval, the City shall sign all documents necessary to release the bond in accordance with the terms of this Paragraph. During the duration of the construction work, TCG shall file with the City Auditor a copy of the bond or letter of credit, along with written evidence of the required premiums. The bond or letter of credit shall be subject to the reasonable approval of the City Attorney as to its adequacy under the requirements of this Paragraph. Failure to keep bond in effect at all times required in this Paragraph d.3. shall be cause for revocation under Paragraph p.1.

e. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS.

1. General Indemnification. TCG shall indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Permit, by or for TCG, its agents or employees, or by reason of any neglect or omission of TCG to keep its Telecommunications System in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide TCG with prompt notice of any such claim which TCG shall defend with counsel of its own choosing and no

settlement or compromise of any such claim will be done without the prior written approval of TCG. TCG and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

2. Relocation Indemnification. TCG shall also indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from TCG's failure to remove, adjust or relocate any of its Facilities in the Streets in a timely manner in accordance with a relocation schedule furnished to TCG by the City Engineer, unless TCG's failure arises directly from the City's negligence or willful misconduct.

f. CONSTRUCTION AND RELOCATION.

1. Subject to applicable regulations of the City, TCG may perform all necessary construction to build, operate and maintain its Telecommunications System. All construction and maintenance of any and all Telecommunications System Facilities within the Streets incident to TCG's provision of Telecommunications Services shall, regardless of who performs installation and/or construction, be and remain the responsibility of TCG. TCG shall apply for and obtain all permits necessary for installation and/or construction of any such Facilities, and for the excavation and laying of any Telecommunications System Facilities within the Streets. TCG shall pay all applicable fees due for City construction permits.

A. Maps.

- (1) Prior to beginning construction, TCG shall provide the City with an initial construction schedule for work in the Streets and the estimated total cost of such work. When TCG's construction in the Streets is completed, TCG shall provide the City with a map showing the location of its installed Telecommunications System in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

- (2) Within one year after the effective date of this Permit, TCG shall provide a map to the City's Office of Cable Communications and Franchise Management, or its successor, showing the location of TCG's optical fibers in the Streets on a scale of Three thousand five hundred feet (3,500') per inch or whatever standard scale the City adopts for general use. TCG shall also provide such maps in an electronic format acceptable to the City and the TCG.

B. TCG may make excavations in City Streets for any Facility needed for the maintenance or extension of TCG's Telecommunications System, subject to obtaining permits from the City. Prior to doing such work, TCG must apply for, and obtain, appropriate permits from the City, and give appropriate notices to any further permittees, licensees or franchisees of the City, or bureaus of the City, or other units of government owning or maintaining facilities which may be affected by the proposed

excavation, as provided in Paragraph f.2.

C. In the event that emergency repairs are necessary, TCG shall immediately notify the City of the need for such repairs. TCG may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. TCG must comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.

2. Locates. TCG shall comply with the requirements of the Oregon Utility Notification Law (ORS 757.542 to 757.562 and 757.993 (1997)), and the rules and regulations promulgated thereunder.

3. Relocation. The City shall have the right to require TCG to change the location of its Telecommunications System within the Streets when the public convenience requires such change, and the expense thereof shall be paid solely by TCG. The City shall provide TCG with the standard notice given under the circumstances to other permittees, licensees, or franchisees. Should TCG fail to remove or relocate any such facilities by the date established by the City, the City may cause and/or effect such removal or relocation, and the expense thereof shall be paid by TCG, including all direct, indirect and/or consequential costs and expenses incurred by the City due to TCG's delay. If the City requires TCG to relocate its facilities located within the City's Streets, the City will make a reasonable effort to provide TCG with an alternate location for its facilities within the City's Streets.

4. TCG's Telecommunications System shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits or other facilities that may have been laid in the Streets by or under the City's authority.

5. Upon TCG's acquisition of any Telecommunications System Facilities in the Streets, or upon any addition or annexation to the City of any area in which TCG retains any such Facilities in the Streets, TCG shall submit to the City a written statement describing all Facilities involved, whether authorized by permit or any other form of prior right, and specifying the location of all such Facilities. At the City's sole option, as expressed by ordinance adopted by the City Council, such acquired Facilities shall be subject to the terms of this Permit, within a reasonable period of time to bring such acquired Facilities into compliance with this Permit and TCG shall pay additional Permit fees as determined by the City.

**g. RESTORATION OF STREETS.**

1. Whenever TCG disturbs the surface of any unimproved Street for any purpose, TCG shall promptly restore the street to at least its prior condition, to the satisfaction of the City



Engineer to the extent reasonably practicable. When any opening is made by TCG in a hard surface pavement in any Street, TCG shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer, in accordance with standards developed and adopted by the City Engineer.

2. If TCG excavates the surface of any Street, TCG shall be responsible for restoration of the Street and its surface within the area affected by the excavation. The City may, after providing notice to TCG, refill and/or repave any opening made by TCG in the Street, and the expense thereof shall be paid by TCG. The City reserves the right, after providing notice to TCG, to remove and/or repair any work done by TCG which, in the determination of the City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by TCG. All excavations made by TCG in the Streets shall be properly safeguarded for the prevention of accidents. All of TCG's work under Paragraph g. shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

3. Only upon obtaining a written permit from the City Forester, TCG may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with TCG's Telecommunications System. Except in emergencies, TCG may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For the purposes of this Paragraph g.3., an emergency exists when it is necessary to prune to protect the public from imminent danger. The owner or occupant shall have seven days from receipt of TCG's notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, TCG may prune such tree at its own expense.

The City Forester may, at his or her discretion, waive the notification and permit process in the case of single trees, if TCG adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by TCG shall be subject to the approval of the City Forester. The City Forester shall have the discretion to cancel the permit if, at any time, TCG or its agents, fails to use proper arboricultural practices as determined by the City Forester.

h. **RESERVATION OF CITY STREET RIGHTS.** Nothing in this Permit shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as to not obstruct, injure or prevent the unrestricted use and operation of the Telecommunications Systems of TCG under this Permit. However, if any of TCG's Telecommunications System interferes with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, TCG's System shall be removed or replaced in the manner the City shall direct; provided, however, the City will cooperate with TCG to identify alternate locations within the Streets. Any and all such removal or

replacement shall be at the expense of TCG. Should TCG fail to remove, adjust or relocate its Facilities by the date established by the City Engineer's written notice to TCG, the City may cause and/or effect such removal, adjustment or relocation, and the expense thereof shall be paid by TCG, including all costs and expenses incurred by the City due to TCG's delay.

i. USE OF NETWORK CAPACITY AND DUCTS BY CITY.

1. Upon written request from the City, TCG shall provide conduit and/or lit optical fiber network connections to the City, for municipal purposes.

2. Ducts. In the case of any new construction by TCG in the Streets, TCG shall install for the City two two-inch ducts, or one single four-inch (4") duct, for municipal purposes. The cost of such ducts may not be deducted from any Permit fees under this Paragraph c.1 of this Permit payable to the City, or otherwise be charged to the City.

3. City Use of Surplus Ducts or Conduits. The City may install or affix, and maintain wires and equipment for municipal purposes within any of TCG's surplus ducts or conduits, as defined in Paragraph 1.1.E. TCG shall not be responsible for any damages resulting to the wires or property of the City occurring as a result of the City's use of TCG's surplus ducts or conduits. The City shall not have access to TCG's surplus ducts and conduits without TCG's prior approval, except in the event of an emergency requiring that the City obtain immediate access to those conduits or ducts. In such an emergency, the City shall exercise its best efforts to notify TCG as soon as possible of the emergency and the City's need for immediate access. All work to attach, install, and/or maintain City wires and equipment in such surplus ducts shall be performed by TCG, at City expense, at a charge not to exceed TCG's direct incremental costs of material and labor plus ten percent (10%). TCG's charges for attaching, installing, or maintaining such City wires and equipment may be deducted from Permit fees paid by TCG to the City under Paragraph c.1 of this Permit, or may otherwise be separately charged by TCG to the City.

4. The value of the City's use of TCG's surplus conduits or ducts may not be charged to the City, or be deducted from compensation paid by TCG to the City under Paragraph c.1 of this Permit, or other fees or charges payable to the City by TCG.

5. Network Capacity.

A. TCG shall provide the City with access to TCG's lit optical fiber network, up to an OC-3 level of capacity, as specifically requested in writing by the City, for municipal purposes only. TCG shall provide the City with a reliable level of service, repair and maintenance, comparable to that which the TCG makes available to commercial customers of its lit optical fiber network. The City shall be responsible for obtaining any necessary authority for TCG to enter any premises necessary for building and installing the connections requested by the City. The City shall have no rights of physical access to TCG's lit optical fiber lines for construction, interconnection or splicing without the TCG's

prior written consent.

B. TCG may charge the City for costs for any design, installation, provisioning or connection of the City to the lit optical fiber network. However, such charges shall not exceed TCG's direct incremental costs of labor and materials, plus ten percent (10%). TCG's charges for designing, installing, provisioning, or connecting the City to the lit optical fiber network may be deducted from Permit fees payable by TCG to the City under Paragraph c.1 of this Permit, or may otherwise be separately charged to the City.

The other terms and conditions of such services shall be specified in a separate agreement between the City and TCG, not inconsistent with this Permit, including but not limited to, the demarcation point for maintenance responsibilities, system monitoring, and system usage.

C. TCG shall not deduct the cost of building or installing its optical fiber network from TCG's Permit fee or other fees or charges payable to the City. TCG shall not charge the City for the value of the City's use of TCG's lit fiber optic network, or deduct such value from TCG's Permit fees or other fees or charges payable to the City.

6. For the purposes of this Paragraph i., the term "municipal purposes" includes, but is not limited to, the use of TCG's structures, Facilities, and installations for the City's fire, police, traffic, water, and users of data, video, telephone, and/or signal systems. The term "municipal purposes" does not include: (1) the sale or lease of telecommunications services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers; or (3) the transportation of water or wastewater. City installations under this Paragraph i. shall meet all local, state, and federal clearance and other safety requirements, and be properly grounded and anchored.

7. In lieu of providing ducts to the City where TCG already has built or obtained underground facilities in the Streets, constructed under the auspices of another franchisee, TCG agrees to pay the City \$75,000. This payment is in settlement of a dispute between TCG and the City.

j. STREET VACATION. If any Street or portion thereof used by TCG is vacated by the City during the term of this Permit, unless the City Council specifically reserves to TCG the right to continue its installation in the vacated Street, TCG shall, without expense to the City, forthwith remove its Facilities from such Street, and restore, repair or reconstruct the Street where such removal has occurred, and place the Street in such condition as may be required by the City Council which shall be no better than the condition of such Street immediately prior to removal. In the event of failure, neglect or refusal of TCG, after thirty (30) days notice by the City Council, to repair, improve or maintain such Street, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by the City Council, shall be entered in the Docket of City Liens against any property of TCG which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. The City will cooperate with TCG to identify alternative locations within the Streets.

k. **MAINTENANCE OF FACILITIES.** TCG shall provide and put in use all Telecommunications System Facilities necessary to control and carry TCG's Telecommunications Services so as to prevent injury to the City's property or property belonging to any Person within the City. TCG, solely at its own expense, shall repair, renew, change and improve said Facilities from time to time as may be necessary to accomplish this purpose. TCG shall not construct its Telecommunications System in a manner that requires any customer, except the City, to install cables, ducts, conduits, or other facilities, in, under or over the City's Streets.

1. **COMMON USERS.**

1. For the purposes of this Paragraph 1.:

A. "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

B. "Conduit Facility" means any structure, or section thereof, containing one or more ducts, conduits, manholes, handhole or other such facilities in TCG's Telecommunications System.

C. "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.

D. "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association franchised, licensed or otherwise permitted by the City to use the Streets. For the purposes of this Paragraph 1., TCG shall not be construed to be a "Licensee" as defined herein.

E. "Surplus ducts or conduits" are Conduit Facilities other than those occupied by TCG or any prior Licensee, one unoccupied duct held by TCG as an emergency use spare, and other unoccupied ducts that TCG reasonably expects to use within the next 18 months.

2. The Streets have a finite capacity for containing conduits, ducts and facilities. Therefore, whenever the City Engineer determines it is impracticable to permit construction of an underground conduit system by any other person which may at the time have authority from the City to construct or maintain conduits or ducts in the Streets, the City Engineer may require TCG to afford to such person the right to use TCG's surplus ducts or conduits in common with TCG, pursuant to the terms and conditions of an agreement for use of surplus conduits and ducts being entered into by TCG and the Licensee.

3. A Licensee occupying part of a Duct shall be deemed to occupy the entire Duct.
4. TCG shall give a Licensee and the City 120 written days notice of its need to occupy licensed conduit and shall propose that the Licensee take the first feasible action listed:
  - A. Pay revised conduit rent designed to recover the cost of retrofitting the conduit with multiplexing, optical fibers, or other space-saving technology sufficient to meet TCG's space needs;
  - B. Pay revised conduit rent based on the cost of new conduit constructed to meet TCG's space needs;
  - C. Vacate ducts that are no longer surplus; or,
  - D. Construct and maintain sufficient new conduit to meet TCG's space needs.
  - E. TCG shall provide a written copy of such notice to the City at the same time such notice is provided to the Licensee.
5. When two or more Licensees occupy a section of Conduit Facility, the last Licensee to occupy the Conduit Facility shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space-saving technology or construction of new conduit, all Licensees shall bear the revised cost.
6. All attachments shall meet local, state, and federal clearance and other safety requirements, be properly grounded and anchored, and meet the provisions of contracts executed between TCG and the Licensee. TCG may, at its option, correct any attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay TCG for any fines, fees, damages, or other reasonable costs the Licensee's attachments cause TCG to incur.

m. **DISCONTINUED USE OF FACILITIES.** Whenever TCG intends to discontinue use of its Telecommunications System within all or part of a particular portion of the Streets and does not intend to use said Facilities again in the future, TCG shall submit to the City Engineer for the City Engineer's approval a completed application describing the Facility and the date on which TCG intends to discontinue using the facility. TCG may remove the Facility or request that the City permit it to remain in place, which permission shall not be unreasonably withheld or delayed. If TCG is permitted to abandon its Facilities in place, upon written consent of the City, the ownership of Facilities in the City's Streets shall transfer to the City and TCG shall have no further obligation therefor. Notwithstanding TCG's request that any such Facility remain in place, the City Engineer may require TCG to remove the Facility from the street area or modify the Facility in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require TCG to perform a combination of modification and removal of the Facility. TCG shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until such time as TCG removes or

modifies the Facility as directed by the City Engineer, or until the rights to and responsibility for the Facility are accepted by another Person having authority to construct and maintain such Facility, TCG shall be responsible for all necessary repairs and relocations of the Facility, as well as restoration of the Street, in the same manner and degree as if the Facility were in active use, and TCG shall retain all liability for such Facility.

n. HAZARDOUS SUBSTANCES.

1. TCG shall comply with all applicable state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to TCG's Telecommunications System in the Streets. For the purposes of this Paragraph n., "Hazardous Substances" shall have the meaning given by ORS 465.200(15) (1997).

2. Inspection and Removal.

A. TCG shall maintain and inspect its Telecommunications System located in the Streets. Upon reasonable notice to TCG and in the presence of an authorized representative of TCG, the City may inspect TCG's facilities in the Streets to determine if any release of Hazardous Substances has occurred, or may occur, from or related to TCG's Telecommunications System.

B. In removing or modifying TCG's facilities as provided in Paragraph f.3, h. and m. of this Permit, TCG shall also remove all residue of Hazardous Substances in compliance with applicable environmental clean-up standards related thereto.

3. TCG shall forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by TCG's ownership or operation of a Telecommunications System in the Streets.

o. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

1. Neither this Permit nor any of TCG's Telecommunications System located in the Streets by authority of this Permit shall be sold, leased, mortgaged, assigned or otherwise transferred without the prior written consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with TCG. TCG shall notify the City of any transfers to such entities within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained herein shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of TCG's Telecommunications System, for the purpose of financing the acquisition of equipment for or the construction and operation of TCG's Telecommunications System, within or outside the City, without the City's consent, but any

such mortgage, pledge or assignment shall be subject to the City's other rights contained in this Permit.

2. For the purpose of determining whether the City will consent to any assignment, transfer, merger, lease or mortgage, the City may inquire into the qualifications of the prospective party. TCG shall assist the City in any such inquiry. The City may condition any assignment, transfer, merger, lease or mortgage upon such conditions as it deems appropriate. The City shall not unreasonably delay or withhold its consent to any such sale, lease, mortgage, assignment, transfer or merger. No sale, lease, mortgage, assignment, transfer or merger for which the City's consent by ordinance is required may occur until the successor, assignee or lessee has complied with the requirements of Paragraph d., including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) days after execution and delivery of any instrument so consented to by the City, TCG shall file with the Auditor an executed counterpart or certified copy thereof.

3. TCG shall not lease any of its Facilities, or the public right-of-way in which such are contained, without the City's consent as expressed by ordinance. However, TCG may grant Indefeasible Right of User Interests (IRU's), or may lease or otherwise use its Telecommunications System, or any portion thereof, in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as TCG remains solely responsible for locating, servicing, repairing, relocating or removing its Telecommunications System. The holder of any IRU in TCG's Telecommunications System shall not obtain any greater rights under this Permit, or otherwise, than that held by the TCG.

4. Notwithstanding Paragraph o., TCG may sell portions of its Telecommunications System in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as TCG complies with the following conditions: (i) the sale is to the holder of a current existing, valid telecommunications franchise with the City; (ii) Within fourteen days of the sale being executed and becoming final, TCG shall provide notice to the City, describing the portions of the Telecommunications System sold by TCG, identifying the purchaser of the facilities, the location of the facilities (in accordance with the requirements of Paragraph f.1.A), and an executed counterpart or certified copy of the sales documents; and, (iii) TCG remains solely responsible for locating, servicing, repairing, relocating or removing its Telecommunications System. The purchaser of any portion of TCG's Telecommunications System located in the City Streets shall not obtain any greater rights under this Permit, or otherwise, than that held by TCG.

5. Within ten (10) days after execution and delivery of any instrument so consented to by the City, TCG shall file with the Auditor an executed counterpart or certified copy thereof. No sale, lease, mortgage, assignment, transfer or merger shall be binding upon the City with regard to the rights granted by this Permit until the successor, assignee or lessee has complied with the requirements of Paragraph d. of this Permit, including but not limited to all requirements for public liability and property damage insurance, faithful performance bonds and construction bonds.

P. REVOCATION AND REMEDIES.

1. Revocation.

A. In addition to any other rights set out elsewhere in this Permit, the City reserves the right to declare a revocation of this Permit, and all of TCG's rights arising thereunder, in the event that:

(1) TCG violates any material provision of this Permit;

(i) For purposes of this Paragraph p.1., the following are material provisions of this Permit, allowing the City, without limitation, to exercise its rights of revocation under this Paragraph or as set forth elsewhere in this Permit:

(a) The invalidation, failure to pay or any suspension of TCG's payments of compensation under Paragraph c.1. of this Permit to the City for use of the Streets under this Permit;

(b) Any failure by TCG to submit timely reports to the City regarding the calculation of its fees under this Permit;

(c) Any failure by TCG to maintain the liability insurance required under this Permit;

(d) Any failure by TCG to maintain the performance bond required under this Permit; or,

(e) Any failure by TCG to otherwise fully comply with the requirements of this Permit.

(2) TCG is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City;

(3) There is a final determination that TCG has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding TCG's operation of its Telecommunications System within the City;

(4) TCG's construction schedule is delayed for over 6 months; or,

(5) TCG becomes unable or unwilling to pay its debts, or is adjudged a bankrupt.

2. Additional Remedies. In addition to any rights set out elsewhere in this Permit, as well as its rights under the City Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:



- A. Impose a financial penalty of up to \$1,000.00, per violation of this Permit; or,
- B. Suspend TCG's rights under this Permit, until TCG corrects or otherwise remedies the violation.
- C. Revocation. In addition to other remedies set forth in this Permit, the City Council may otherwise revoke this Permit in the event that any provision becomes invalid or unenforceable and the City Council expressly finds that such provision constituted a consideration material to the grant of this Permit.

3. In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.

4. Notice and Opportunity to Cure. The City shall give TCG thirty (30) days prior written notice of its intent to exercise its rights under this Paragraph p., stating the reasons for such action. If TCG cures the stated reason within the thirty (30) day notice period, or if TCG initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its remedy rights. If TCG fails to cure the stated reason within the thirty (30) day notice period, or if TCG does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, then the City Council may impose any or all of the remedies available under this Paragraph p. However, in no event shall the City exercise its rights under this Paragraph p. if a bona fide, good faith dispute exists between the City and TCG.

#### q. MISCELLANEOUS PROVISIONS

##### 1. Compliance With Laws.

A. Both TCG and the City shall comply with all applicable federal and state laws.

B. TCG shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

2. Severability. If any Paragraph, provision or clause of this Permit is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Permit shall not be affected.

3. Regulation and Nonenforcement by the City. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Permit in the public interest. TCG shall not be relieved of its obligations to comply with any

of the provisions of this Permit by reason of any failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Permit by reason of such failure or neglect.

4. Force Majeure.

A. For purposes of this Paragraph s.4., the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts or terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within the control of the parties hereto.

B. If TCG is wholly or partially unable to carry out its obligations under this Permit as a result of Force Majeure, TCG shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and TCG's obligations under this Permit, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. TCG agrees to use its best efforts to remedy as soon as possible, under the circumstances, TCG's inability, by reason of Force Majeure, to carry out its responsibility and duties under this Permit.

5. Choice of Forum. Any litigation between the City and TCG arising under or regarding this Permit shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

6. Notice. Any notice provided for under this Permit shall be sufficient if in writing and (1) delivered personally to the following addressee or deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (2) sent by overnight or commercial air courier (such as Federal Express), or (3) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to the City:	Office of Cable Communications and Franchise Management City of Portland, Oregon 1120 SW 5th Avenue, Room 704 Portland, Oregon 97204 FAX (503) 823-5370	PHONE (503) 823-5385
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With a copy to: City Attorney's Office  
City of Portland  
Room 315, City Hall  
1220 SW 5th Avenue  
Portland, Oregon 97204  
FAX (503) 823-3089

If to TCG: TCG Oregon/AT&T Local Services  
851 SW Sixth Avenue, Suite 550  
Portland, Oregon 97204  
FAX (503) 535-0050 PHONE (503) 535-0009

With copies to: Attention: Legal Department  
AT&T Local Services  
431 Ridge Road  
Dayton, New Jersey 08810  
FAX (732) 392-2641 PHONE (732) 2845

And Mary Fisher, Director of Finances  
TCG Seattle/AT&T Local Services  
1215 Fourth Avenue, Suite 1500  
Seattle, Washington 98161  
FAX (206) 505-0098 PHONE (206) 505-0002

C. Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

7. Confidentiality. TCG may identify information submitted to the City as confidential. Prior to submitting such information to the City, TCG shall prominently mark any such information with the mark "Confidential" in letters at least one-half (1/2) inch in height. The City shall treat any information so marked as confidential and not subject to public disclosure, until the City receives any public records request for disclosure of such information. Within five (5) working days of receiving any such request, the City shall provide TCG with written notice of the request, including a copy of the request. TCG shall have five (5) working days within which to provide a written response to the City, before the City may release any of the requested confidential information. Whether TCG submits any written response to the City, the City shall retain final discretion to determine whether to release the requested confidential information, provided that the City shall give TCG at least five days written notice after receipt of any response from TCG, prior to releasing such information.

8. Public Records.

A. Some information submitted by TCG to the City may be relevant to TCG's obligation to pay Permit fees. Requiring such information to be submitted to the City in order to determine fees payable or paid to the City may qualify such information as being exempt from public disclosure under ORS 192.501(5) (1997) of the Oregon Public Records Law.

B. Some information submitted by TCG to the City may otherwise be used to conduct its business and known to certain individuals within the organization, with actual or potential commercial value, and giving TCG a business advantage over its competitors. Such information may constitute trade secrets and be exempt from public disclosure under ORS 192.501(2) (1997) of the Oregon Public Record Law.

C. Identification of these exemptions under the Oregon Public Records Law, which may apply to information submitted by TCG to the City, is not an exhaustive list of those possibly applicable to such information.

9. Permit Amendment. The City has issued this Permit in good faith, in reliance upon the information provided by TCG regarding the scope of its authority to offer the Telecommunications Services described in Paragraph b.2.L. above. In the event that TCG actually receives authority to offer telecommunications services outside the scope of this Permit, or otherwise begins offering telecommunications services outside the scope of those identified in Paragraph b.2.L., TCG shall immediately notify the City. Within 90 days of receiving such notice, the City may either enter into negotiations with TCG to revise or amend this Permit to reflect such changed circumstances, or may proceed with early termination of

This Permit. The parties will negotiate in good faith to revise the Permit to authorize the expanded scope of services.

10. Mutual Reservation of Rights. TCG and the City disagree on the legality of the requirements of paragraph c. of this Permit. Nothing in this Permit shall be deemed a waiver by TCG or the City of the rights of TCG or the City under applicable law. The City reserves and in no way waives any right to enforce these requirements during the term of this Permit and TCG agrees to such reservation and non-waiver by the City. TCG reserves and in no way waives any right to challenge the enforcement of these requirements and the City agrees to such reservation and non-waiver by TCG.

r. WRITTEN ACCEPTANCE. On or before the tenth (10th) day after this ordinance becomes effective, TCG shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by TCG, meeting the approval of the City Attorney. Any failure on the part of TCG to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this

ordinance shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

s. **OTHER AUTHORITY SUPERSEDED.** Upon effectiveness of this Permit, any and all authority to operate previously granted to TCG by the City shall be superseded by this Permit.

Section 2. The Council declares that an emergency exists because the general public welfare will be served by TCG Communications, Inc. being authorized to immediately begin construction to add to its telecommunications system, to allow it to begin operation without delay and introduce further competition into the marketplace for telecommunications services; therefore, this ordinance shall be in full force and effect from and after its passage by the Council.

Exhibit A: Copy of letter from TCG to the City of Portland.

Passed by the Council:

DEC 08 1999

COMMISSIONER ERIK STEN

David Soloos  
11/22/99

Gary Blackmer  
Auditor of the City of Portland

By

*Britte Olson*

Deputy

1731

Agenda No.

ORDINANCE NO.

173990

Title

\*Grant a temporary, revocable permit to TCG Oregon, and establish terms and conditions. (Ordinance)

INTRODUCED BY	DATE FILED: <b>DEC 9 1999</b>
Commissioner Sten	Gary Blackmer Auditor of the City of Portland
NOTED BY COMMISSIONER	
Affairs	By: <u>Cay Kershner</u> Deputy
Finance and Administration	For Meeting of: _____
Safety	ACTION TAKEN:
Utilities	
Works <b>EX STAIR</b>	
BUREAU APPROVAL	
Bureau: Cable Comm. & Franchise Mgmt.	
Prepared by      Date David Soloos    11/22/99	
Budget Impact Review: <input checked="" type="checkbox"/> Completed <input type="checkbox"/> Not Required	
Bureau Head: David C. Olson	

53-9

AGENDA	FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:	
		YEAS	NAYS
Consent <b>XXX</b> Regular	Francesconi		
NOTED BY	Hales		
City Attorney <i>[Signature]</i>	Saltzman		
City Auditor	Sten		
City Engineer	Katz	✓	