

**MILLCREEK, UTAH**  
**ORDINANCE NO. 17-**

**AN ORDINANCE ADOPTING A  
TELECOMMUNICATIONS RIGHT-OF-WAY**

**WHEREAS**, the Millcreek Council (“Council”) met in regular session on August \_\_, 2017, to consider, among other things, adopting an ordinance regarding a telecommunications right-of-way; and

**WHEREAS**, after careful consideration of the public comments, the Council has determined that it is in the best interest of the health, safety and welfare of the citizens of Millcreek to adopt the ordinance regarding a telecommunications right-of-way.

**NOW, THEREFORE, BE IT ORDAINED** by the Council as follows:

**SECTION 1. DECLARATION OF FINDING AND INTENT;  
SCOPE OF ORDINANCE**

**1.1 Declaration of Finding and Intent.**

**1.1.1 Findings Regarding Rights-of-Way.** The city finds that the rights-of-way within the city:

- (a) Are critical to the travel and transport of persons and property in the business and social life of the city;
- (b) Are intended for public uses and must be managed and controlled consistent with that intent;
- (c) Can be partially occupied by utilities and other public service entities delivering utility and public services rendered for profit, to the enhancement of the health, welfare, and general economic well-being of the city and its citizens; and
- (d) Are a unique and physically limited resource requiring proper management to maximize the efficiency and to minimize the costs to the taxpayers of the foregoing uses and to minimize the inconvenience to and negative effects upon the public from such facilities' construction, placement, relocation, and maintenance in the rights-of-way.

**1.1.2 Finding Regarding Compensation.** The city finds that the right to occupy portions of the rights-of-way for limited times for the business of providing telecommunications services is a valuable use of a unique public resource that has been acquired and is maintained at great expense to the city and its taxpayers, and, therefore, at such time that the city deems it appropriate, provider shall pay compensation for use of the rights-of-way.

1.1.3 **Finding Regarding Local Concern.** The city finds that while telecommunications systems are in part an extension of interstate commerce, their operations also involve rights-of-way, municipal franchising, and vital business and community service, which are of local concern.

1.1.4 **Finding Regarding Promotion of Telecommunications Services.** The city finds that it is in the best interests of its taxpayers and citizens to promote the rapid development of telecommunications services, on a nondiscrimination basis, responsive to community and public interest, and to assure availability for municipal, educational and community services.

1.1.5 **Findings Regarding Franchise Standards.** The city finds that it is in the interests of the public to franchise and to establish standards for franchising providers in a manner that:

- (a) Fairly and reasonably compensates the city on a competitively neutral and non-discriminatory basis as provided herein;
- (b) Encourages competition by establishing terms and conditions under which providers may use valuable public property to serve the public;
- (c) Fully protects the public interests and the city from any harm that may flow from such commercial use of rights-of-way;
- (d) Protects the police powers and rights-of-way management authority of the city, in a manner consistent with federal and state law;
- (e) Otherwise protects the public interests in the development and use of the city infrastructure;
- (f) Protects the public's investment in improvements in the rights-of-way; and
- (g) Ensures that no barriers to entry of telecommunications providers are created and that such franchising is accomplished in a manner that does not prohibit or have the effect of prohibiting telecommunication services, within the meaning of the Act.

1.1.6. **Power to Manage Rights-of-Way.** The city adopts this tele-communications ordinance pursuant to its power to manage the rights-of-way, pursuant to common law, the Utah Constitution and statutory authority, and to the extent the city deems it appropriate, to receive compensation for the use of rights-of-way by providers as expressly set forth by section 253 of the Act.

1.2 **Scope of Ordinance.** This ordinance shall provide the basic local scheme for providers of telecommunications services and systems that require the use of the rights-of-way, including providers of both the system and service, those providers of the system only, and those providers who do not build the system but who only provide services. This ordinance shall apply to all future providers and to all providers in the city prior to the effective date of this ordinance, whether operating with or without a franchise as set forth in section 12.2.

1.3 **Excluded Activity.**

1.3.1 **Cable TV.** This ordinance shall not apply to cable television operators otherwise regulated by ordinance (the “**Cable Television Ordinance**”).

1.3.2 **Providers Excluded by the Act.** This ordinance shall not apply to providers that are excused by the Act that prohibits the city from requiring a franchise.

1.3.3 **Provisions Applicable to Excluded Providers.** Providers excused by other law that prohibits the city from requiring a franchise shall not be required to obtain a franchise, but all of the requirements imposed by this ordinance through the exercise of the city's police power and not preempted by other law shall be applicable.

**SECTION 2. DEFINED TERMS**

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

2.1.1 “Act” means the Telecommunication Act of 1996 (P.L. No. 104-104).

2.1.2 “Application” means the process by which a provider submits a request and indicates a desire to be granted a franchise to utilize the rights-of-way of all, or a part, of the city. An application includes all written documentation, verbal statements and representations, in whatever form or forum, made by a provider to the city concerning: the construction of a telecommunications system over, under, on or through the rights-of-way; the telecommunications services proposed to be provided by the city by a provider; and any other matter pertaining to a proposed system or service.

2.1.3 “City” means Millcreek, Utah.

2.1.4 “Completion Date” means the date that a provider begins providing services to customers in the city.

2.1.5 “Construction Costs” means all costs of constructing a system, including make ready costs, other than engineering fees, attorneys or accountants fees, or other consulting fees.

2.1.6 “Control” or “Controlling Interest” means actual working control in whatever manner exercised, including, without limitation, working control through ownership, management, debt instruments or negative control, as the case may be, of the system or of a provider. A rebuttable presumption of the existence of control or a controlling interest shall arise from the beneficial ownership, directly or indirectly, by any person, or group of persons acting in concert, of more than 25% of any provider (which person or group of persons is hereinafter referred to as “**Controlling Person**”). “Control” or “Controlling Interest” as used herein may be held simultaneously by more than one person or group of persons.

2.1.7 “FCC” means the Federal Communications Commission, or any successor thereto.

2.1.8 “Franchise” means the rights and obligation extended by the city to a provider to own, lease, construct, maintain, use or operate a system in the rights-of-way within the boundaries of the city. Any such authorization, in whatever form granted, shall not mean or include: (i) any other permit or authorization required for the privilege of transacting and carrying on a business within the city required by the ordinances and laws of the city; (ii) any other permit, agreement or authorization required in connection with operations on rights-of-way or public property including, without limitation, permits and agreements for placing devices on or in poles, conduits or other structures, whether owned by the city or a private entity, or for excavating or performing other work in or along the rights-of-way.

2.1.9 “Franchise Agreement” means a contract entered into in accordance with the provisions of this ordinance between the city and a franchisee that sets forth, subject to this ordinance, the terms and conditions under which a franchise will be exercised.

2.1.10. “Gross Revenue” includes all revenues of a provider that may be included as gross revenue within the meaning of Chapter 26, Title 11, *Utah Code Annotated*, 1953, as amended.

2.1.11 “Infrastructure Provider” means a person providing to another, for the purpose of providing telecommunication services to customers, all or part of the necessary system which uses the rights-of-way.

2.1.12 “Open Video Service” means any video programming services provided to any Person through the use of rights-of-way, by a provider that is certified by the FCC to operate an open video system pursuant to sections 651, *et seq.*, of the Act regardless of the system used.

2.1.13 “Open Video System” means the system of cables, wires, lines, towers, wave guides, optic fiber, microwave, laser beams, and any associated converters, equipment, or

facilities designed and constructed for the purpose of producing, receiving, amplifying or distributing open video services to or from subscribers or locations within the city.

2.1.14 “Operator” means any person who provides service over a telecommunications system and directly or through one or more persons owns a controlling interest in such system, or who otherwise controls or is responsible for the operation of such a system.

2.1.15 “Ordinance” or “Telecommunications Ordinance” means this telecommunications ordinance concerning the granting of franchises in and by the city for the construction, ownership, operation, use or maintenance of a telecommunications system.

2.1.16 “Person” includes any individual, corporation, partnership, association, joint stock company, trust, or any other legal entity, but not the city.

2.1.17 “Personal Wireless Services Facilities” has the same meaning as provided in section 704 of the Act which includes what is commonly known as cellular and PCS Services that do not install any system or portion of a system in the rights-of-way.

2.1.18 “Provider” means an operator, infrastructure provider, resaler, or system lessee.

2.1.19 “PSC” means the Public Service Commission, or any successor thereto.

2.1.20 “Resaler” refers to any person that provides local exchange service over a system for which a separate charge is made, where that person does not own or lease the underlying system used for the transmission.

2.1.21 “Rights-of-Way” means the surface of and the space above and below any public street, sidewalk, alley, or other public way of any type whatsoever, now or hereafter existing as such within the city.

2.1.22 “Signal” means any transmission or reception of electronic, electrical, light or laser or radio frequency energy or optical information in either analog or digital format.

2.1.23 “System Lessee” refers to any person that leases a system or a specific portion of a system to provide services.

2.1.24 “Telecommunications” means the transmission, between or among points specified by the user, of information of the user's choosing (*e.g.*, data, video, and voice), without change in the form or content of the information sent and received.

2.1.25 “Telecommunications System” or “System” means all conduits, “manholes, poles, antennas, transceivers, amplifiers and all other electronic devices, equipment, wire and appurtenances owned, leased, or used by a provider, located in the rights-of-way and

utilized in the provision of services, including fully digital or analog, voice, data and video imaging and other enhanced telecommunications services. Telecommunications system or systems also includes an open video system.

2.1.26 “Telecommunications Service(s)” or “Services” means any telecommunications services provided by a provider within the city that the provider is authorized to provide under federal, state and local law, and any equipment and/or facilities required for and integrated with the services provided within the city, except that these terms do not include “cable service” as defined in the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. § 521, *et seq.*), and the Telecommunications Act of 1996. Telecommunications system or systems also includes an open video system.

2.1.27 “Wire” means fiber optic telecommunications cable, wire, coaxial cable, or other transmission medium that may be used in lieu thereof for similar purposes.

### **SECTION 3. FRANCHISE REQUIRED.**

3.1 **Non-Exclusive Franchise.** The city is empowered and authorized to issue non-exclusive franchises governing the installation, construction, operation, use and maintenance of systems in the city's rights-of-way, in accordance with the provisions of this ordinance. The franchise is granted through a franchise agreement entered into between the city and provider.

3.2 **Every Provider Must Obtain.** Except to the extent exempted by federal or state law, every provider must obtain a franchise prior to constructing a telecommunications system or providing telecommunications services, and every provider must obtain a franchise before constructing an open video system or providing open video services via an open video system and shall be subject to the customer service and consumer protection provisions applicable to the cable TV companies. The fact that particular telecommunications systems may be used for multiple purposes does not obviate the need to obtain a franchise for other purposes. By way of illustration and not limitation, a cable operator of a cable system must obtain a cable franchise, and, should it intend to provide telecommunications services over the same system, must also obtain a telecommunications franchise.

3.3 **Nature of Grant.** A franchise shall not convey title, equitable or legal, in the rights-of-way. A franchise is only the right to occupy rights-of-way on a non-exclusive basis for the limited purposes and for the limited period stated in the franchise; the right may not be subdivided, assigned, or subleased. A franchise does not excuse a provider from obtaining appropriate access or pole attachment agreements before collocating its system on the property of others, including the city's property. This section shall not be construed to prohibit a provider from leasing conduit to another provider, so long as the lessee has obtained a franchise.

3.4 **Current Providers.** Except to the extent exempted by federal or state law, any provider acting without a franchise on the effective date of this ordinance shall request issuance of a franchise from the city within 90 days of the effective date of this ordinance. If such request is made, the provider may continue providing service during the course of negotiations. If a timely

request is not made, or if negotiations cease and a franchise is not granted, the provider shall comply with the provisions of section 9.4.

3.5 **Nature of Franchise.** The franchise granted by the city under the provisions of this ordinance shall be a nonexclusive franchise providing the right and consent to install, operate, repair, maintain, remove and replace its system on, over and under the rights-of-way in order to provide services.

3.6 **Regulatory Approval Needed.** Before offering or providing any services pursuant to the franchise, a provider shall obtain any and all regulatory approvals, permits, authorizations, licenses or business license for the offering or provision of such services from the appropriate federal, state and local authorities, if required, and shall submit to the city upon the written request of the city evidence of all such approvals, permits, authorizations or licenses.

3.7 **Term.** No franchise issued pursuant to this ordinance shall have a term greater than 15 years. Each franchise shall be granted in a nondiscriminatory manner.

#### **SECTION 4. COMPENSATION AND OTHER PAYMENTS.**

4.1 **Compensation.** As fair and reasonable compensation for any franchise granted pursuant to this ordinance, a provider shall have the following obligations:

4.1.1 **Franchise Fees.** The franchise fee, if any, shall be set forth in the franchise agreement. The obligation to pay a franchise fee shall commence on the completion date. The franchise fee is offset by any business license tax or fee enacted by the city.

4.1.2 **Excavation Permits.** The provider shall also pay fees required for an excavation permit as provided in Millcreek ordinances (“**Excavation Ordinance**”).

4.2 **Timing.** Unless otherwise agreed to in the franchise agreement, all franchise fees shall be paid on a monthly basis within 45 days of the close of each calendar month.

4.3 **Fee Statement and Certification.** Unless a franchise agreement provides otherwise, each fee payment shall be accompanied by a statement showing the manner in which the fee was calculated and shall be certified as to its accuracy.

4.4 **Other Costs.** A provider shall also pay to the city or to third parties, at the direction of the city, an amount equal to the costs and expenses that the city incurs for the services of third parties (including but not limited to attorneys and other consultants) in connection with any grant, renewal or provider-initiated renegotiation, transfer, amendment or other modification of this ordinance or a franchise, provided, however, that the parties may agree upon a reasonable financial cap at the outset of negotiations.

4.5 **Taxes and Assessments.** To the extent taxes or other assessments are imposed by taxing authorities, other than the city on the use of the city property as a result of a provider's use or occupation of the rights-of-way, the provider shall be responsible for payment of its pro rata share of such taxes, payable annually unless otherwise required by the taxing authority. Such payments shall be in addition to any other fees payable pursuant to this ordinance.

4.6 **Interest on Late Payments.** In the event that payment, if any, is not actually received by the city on or before the applicable date fixed in the franchise, interest thereon shall accrue at 18% compounded daily until paid.

4.7 **No Accord and Satisfaction.** No acceptance by the city of any fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of such fee payment be construed as a release of any claim the city may have for additional sums payable.

4.8 **Not in Lieu of Other Taxes or Fees.** The fee payment is not a payment in lieu of any tax, fee or other assessment except as specifically provided in this ordinance, or as required by applicable law. By way of example, and not limitation, excavation permit fees and fees to obtain space on the city owned poles are not waived and remain applicable.

4.9 **Continuing Obligation and Holdover.** In the event a provider continues to operate all or any part of the system after the term of the franchise, such operator shall continue to comply with all applicable provisions of this ordinance and the franchise, including, without limitation, all compensation and other payment provisions throughout the period of such continued operation, provided that any such continued operation shall in no way be construed as a renewal or other extension of the franchise, nor as a limitation on the remedies, if any, available to the city as a result of such continued operation after the term, including, but not limited to, damages and restitution.

4.10 **Costs of Publication.** A provider shall assume any publication costs associated with its franchise that may be required by law.

## **SECTION 5. FRANCHISE APPLICATIONS.**

5.1 **Franchise Application.** To obtain a franchise to construct, own, operate, maintain or provide services through any system within the city, to obtain a renewal of a franchise granted pursuant to this ordinance, or to obtain the city approval of a transfer of a franchise, as provided in subsection 7.1.2, granted pursuant to this ordinance, an Application must be filed with city on a form to be provided by the city, which is hereby incorporated by reference.

5.2 **Application Criteria.** In making a determination as to an application filed pursuant to this ordinance, the city may, but shall not be limited to, request or consider the following:

(a) Obtaining an order from the PSC granting a Certificate of Convenience and Necessity.

(b) Certification of the provider's financial ability to compensate the city for provider's intrusion, maintenance and use of the rights-of-way during the franchise term proposed by the provider;

(c) Provider's agreements to comply with the requirements of section 6 of this ordinance.

(d) Insurance coverage from an acceptable insurance company maintained in full force and effect at provider's sole expense that provides a commercial general liability including coverage for insurance products/completed operations liability, personal injury liability, owners and contractors protective liability, broad form property damage, contractual liability meeting the indemnification obligations herein,, automobile liability (owned; non-owned and hired automobiles), workers compensation and employer liability. The policy or policies, excluding workers compensation and employer liability, shall name as an additional insured the city and in their capacity as such, their officers, agents and employees. Policies of insurance shall be in the minimum single limit amount of \$2,000,000 per occurrence, which may be met by a combination of primary and excess umbrella insurance. The insurance policy or policies shall contain contractual liability insurance naming provider, and shall insure against the types of liabilities covered by the indemnification and hold harmless provisions in the Franchise Agreement ("**Indemnification by Provider**") and shall provide for a deductible of no greater than \$100,000 per occurrence. The insurer or insurers shall be authorized to write the required insurance, approved by the Insurance Commissioner of the state of Utah. The policy or policies of insurance shall be maintained by provider in full force and effect during the entire term of the franchise. Each policy of insurance shall contain a statement on its face that the insurer provide at least 30 calendar days advance written notice mailed by the insurer to the city recorder.

5.3 **Franchise Determination.** The city, in its discretion, shall determine the award of any franchise on the basis of these and other considerations relevant to the use of the rights-of-way, without competitive bidding.

## **SECTION 6. CONSTRUCTION AND TECHNICAL REQUIREMENTS.**

6.1 **General Requirement.** No provider shall receive a franchise unless it agrees to comply with each of the terms set forth in this section governing construction and technical requirements for its system, in addition to any other requirements or procedures specified by the city or the franchise, including requirements regarding co-location and cost sharing. A provider shall obtain an excavation permit, pursuant to the excavation ordinance, before commencing any work in the rights-of-way.

6.2 **Quality.** All work involved in the construction, operation, maintenance, repair, upgrade and removal of the system shall be performed in a safe, thorough and reliable manner using materials of good and durable quality. If, at any time, it is determined by the FCC or any

other agency granted authority by federal law or the FCC to make such determination, that any part of the system, including, without limitation, any means used to distribute signals over or within the system, is harmful to the public health, safety or welfare, or quality of service or reliability, then a provider shall, at its own cost and expense, promptly correct all such conditions.

**6.3 Licenses and Permits.** A provider shall have the sole responsibility for diligently obtaining, at its own cost and expense, all permits, business licenses or other forms of approval or authorization necessary to construct, operate, maintain, upgrade or repair the system, including but not limited to any necessary approvals from persons and/or the city to use private property, easements, poles and conduits. A provider shall obtain any required permit, license, business license, approval or authorization, including but not limited to excavation permits, pole attachment agreements, etc., prior to the commencement of the activity for which the permit, license, approval or authorization is required.

**6.4 Relocation of the system.**

**6.4.1 New Grades or Lines.** If the grades or lines of any rights-of-way are changed at any time in a manner affecting the system, then a provider shall comply with the requirements of the excavation ordinance.

**6.4.2 The City Authority to Move System.** The city may, at any time, in case of fire, disaster or other emergency, as determined by the city in its reasonable discretion, cut or move any parts of the system and appurtenances on, over or under the rights-of-way of the city, in which event the city shall not be liable therefor to a provider. The city shall notify a provider in writing prior to, if practicable, but in any event as soon as possible and in no case later than the next business day following any action taken under this section. Notice shall be given as provided in section 11.4.

**6.4.3 A Provider Required to Temporarily Move System.** A provider shall, upon prior reasonable written notice from the city or any person holding a permit to move any structure, and within the time that is reasonable under the circumstances, temporarily move any part of its system to permit the moving of said structure. A provider may impose a reasonable charge on any person other than the city or its agents that provide services to the city for any such movement of its system.

**6.4.4 Rights-of-Way Change - Obligation to Move System.** When the city is changing a rights-of-way and gives written notice of the same to providers, a provider shall move or remove its system from the rights-of-way, without cost to the city. This obligation exists whether or not the provider has obtained an excavation permit.

**6.5 Protect Structures.** In connection with the construction, operation, maintenance, repair, upgrade or removal of the system, a provider shall, at its own cost and expense, protect any and all existing structures belonging to the city. A provider shall obtain the prior written consent of the city or other appropriate authority to alter any water main, power facility, sewerage or drainage

system, or any other municipal type structure on, over or under the rights-of-way of the city required because of the presence of the system.

6.6 **No Obstruction.** In connection with the construction, operation, maintenance, upgrade, repair or removal of the system, a provider shall not unreasonably obstruct the rights-of-way of fixed guide way systems, railways, passenger travel, or other traffic to, from or within the city without the prior consent of the appropriate authorities.

6.7 **Safety Precautions.** A provider shall, at its own cost and expense, undertake all necessary and appropriate efforts to prevent accidents at its work sites, including the placing and maintenance of proper guards, fences, barricades, security personnel and suitable and sufficient lighting, and such other requirements prescribed by OSHA and Utah OSHA. A provider shall comply with all applicable federal, state and local requirements including but not limited to the National Electric Safety Code.

6.8 **Repair.** Subject to the excavation ordinance and after written notice to the provider, unless, in the sole determination of the city, an eminent danger exists, any rights-of-way within the city which are disturbed or damaged during the construction, operation, maintenance or reconstruction by a provider of its system may be repaired by the city at the provider's expense, to a condition as good as that prevailing before such work was commenced. Upon doing so, the city shall submit to such a provider a statement of the cost for repairing and restoring the rights-of-ways intruded upon. The provider shall, within 30 days after receipt of the statement, pay to the city the entire amount thereof.

6.9 **System Maintenance.** A provider shall:

(a) Install and maintain all parts of its system in a non-dangerous condition throughout the entire period of its franchise.

(b) Install and maintain its system in accordance with standard prudent engineering practices and shall conform, when applicable, with the National Electrical Safety Code and all applicable other federal, state and local laws or regulations.

(c) At all reasonable times, permit examination by any duly authorized representative of the city of the system and its effect on the rights-of-way.

6.10 **Trimming of Trees.** A provider shall have the authority to trim trees, in accordance with all applicable utility restrictions, ordinance and easement restrictions, upon and hanging over rights-of-way so as to prevent the branches of such trees from coming in contact with its system. For all trimming, the provider shall use generally accepted pruning standards of modern arboriculture in a manner which is least damaging to the health and aesthetic appearance of the trees, etc., being trimmed.

## **SECTION 7. FRANCHISE AND LICENSE NON-TRANSFERRABLE.**

## 7.1 Notification of Sale.

7.1.1 **PCS Approval.** When a provider is the subject of a sale, transfer, lease, assignment, sublease or disposed of in whole or in part, either by forced or involuntary sale, or by ordinary sale, consolidation or otherwise, such that it or its successor entity is obligated to inform or seek the approval of the PSC, the provider or its successor entity shall promptly notify the city of the nature of the transaction and, if applicable, request a transfer of the franchise to the successor entity. A request for a transfer shall include a certification that the successor entity unequivocally agrees to all of the terms of the original provider's franchise agreement.

7.1.2 **Transfer of Franchise.** Upon receipt of a request to transfer a franchise, the city or its designee may send notice approving the transfer of the franchise to the successor entity. Such approval shall not be unreasonably withheld. If the city has reason to believe that the successor entity may not comply with this ordinance or the franchise agreement, it may require an application for the transfer. Such application shall comply with section 5.

7.2 **If PCS Approval is No Longer Required.** If the PSC no longer exists, or if its regulations or state law no longer require approval of transactions described in section 7.1, then the following events shall be deemed to be a sale, assignment or other transfer of the franchise requiring compliance with section 7.1: (i) the sale, assignment or other transfer of all or a majority of a provider's assets to another Person; (ii) the sale, assignment or other transfer of capital stock or partnership, membership or other equity interests in a provider by one or more of its existing shareholders, partners, members or other equity owners so as to create a new controlling interest in a provider; (iii) the issuance of additional capital stock or partnership, membership or other equity interest by a provider so as to create a new Controlling Interest in such a provider; or (iv) the entry by a provider into an agreement with respect to the management or operation of such provider or its system.

## SECTION 8. OVERSIGHT AND REGULATION.

8.1 **Insurance, Indemnity, and Security.** Prior to the execution of a franchise, a provider will deposit with the city an irrevocable, unconditional letter of credit or surety bond as required by the terms of the franchise, and shall obtain and provide proof of the insurance coverage and a certificate of insurance as provided in section 5.2. A provider shall also indemnify the city as set forth in the franchise agreement.

8.2 **Oversight.** The city shall have the right to oversee, regulate and inspect periodically the construction, maintenance, and upgrade of the system, and any part thereof, in accordance with the provisions of the franchise and applicable law. A provider shall establish and maintain managerial and operational records, standards, procedures and controls to enable a provider to prove, in reasonable detail, to the satisfaction of the city at all times throughout the term, that a provider is in compliance with the franchise. A provider shall retain such records for not less than the applicable statute of limitations.

8.3 **Maintain Records.** A provider shall at all times maintain:

(a) On file with the city, a full and complete set of plans, records and "as-built" hard copy maps and, to the extent the maps are placed in an electronic format, they shall be made in electronic format compatible with the city's existing GIS system, of all existing and proposed installations and the types of equipment and systems installed or constructed in the rights-of-way, properly identified and described as to the types of equipment and facility by appropriate symbols and marks acceptable to the city which shall include annotations of all rights-of-ways where work will be undertaken. As used herein, "as-built" maps includes "file construction prints." Maps shall be drawn to scale. "As-built" maps, including the compatible electronic format, as provided above, shall be submitted within 30 days of completion of work or within 30 days after completion of modification and repairs. "As- built" maps are not required of the provider who is the incumbent local exchange carrier for the existing system to the extent they do not exist.

(b) Throughout the term, a provider shall maintain complete and accurate books of account and records of the business, ownership, and operations of a provider with respect to the system in a manner that allows the city at all times to determine whether a provider is in compliance with the franchise. Should the city reasonably determine that the records are not being maintained in such a manner, a provider shall alter the manner in which the books and/or records are maintained so that a provider comes into compliance with this section. All financial books and records which are maintained in accordance with the regulations of the FCC and any governmental entity that regulates utilities in the state of Utah, and generally accepted accounting principles shall be deemed to be acceptable under this section.

8.4 **Confidentiality.** If the information required to be submitted is proprietary in nature or must be kept confidential by federal, state or local law, upon written request by a provider, such information shall be treated as a Protected Record within the meaning of the Utah Government Records Access and Management Act ("GRAMA"), making it available only to those who must have access to perform their duties on behalf of the city, provided that a provider notifies the city of, and clearly labels the information which a provider deems to be confidential, proprietary information. Such notification and labeling shall be the sole responsibility of the provider.

8.5 **Provider's Expense.** All reports and records required under this ordinance shall be furnished at the sole expense of a provider, except as otherwise provided in this ordinance or a franchise.

8.6 **Right of Inspection.** For the purpose of verifying the correct amount of the franchise fee, the books and records of the provider pertaining thereto shall be open to inspection or audit by duly authorized representatives of the city at all reasonable times, upon giving reasonable notice of the intention to inspect or audit the books and records. The provider agrees to reimburse the city the reasonable costs of an audit if the audit discloses that the provider has paid 96% or less of the compensation due the city for the period of such audit. In the event the accounting rendered to the city by the provider herein is found to be incorrect, then payment shall be made on the corrected amount within 30 calendar days of written notice, it being agreed that the city may accept any amount offered by the provider, but the acceptance thereof by the city shall not be deemed a settlement of such item if the amount is in dispute or is later found to be incorrect.

## SECTION 9. RIGHTS OF CITY.

### 9.1 Enforcement and Remedies.

9.1.1 **Enforcement - City Designee.** The city is responsible for enforcing and administering this ordinance, and the city or its designee, is authorized to enforce the same and give notice required by law or under any franchise agreement.

9.1.2 **Enforcement Provision.** Any franchise granted pursuant to this ordinance shall contain appropriate provisions for enforcement, compensation, and protection of the public, consistent with the other provisions of this ordinance, including, but not limited to, defining events of default, procedures for accessing the bond/security fund, and rights of termination or revocation.

9.2 **Force Majeure.** In the event a provider's performance of any of the terms, conditions or obligations required by this ordinance or a franchise is prevented by a cause or event not within a provider's control, such inability to perform shall be deemed excused and no penalties or sanctions shall be imposed as a result thereof. For the purpose of this section, causes or events not within the control of a provider shall include, without limitation, acts of God, strikes, sabotage, riots or civil disturbances, failure or loss of utilities, explosions, acts of public enemies, and natural disasters such as floods, earthquakes, landslides, and fires.

### 9.3 Extended Operation and Continuity of Services.

9.3.1 **Continuation After Expiration.** Upon either expiration or revocation of a franchise granted pursuant to this ordinance, the city shall have discretion to permit or require a provider to continue to operate its system or provide services for an extended period of time not to exceed six months from the date of such expiration or revocation. A provider shall continue to operate its system under the terms and conditions of this ordinance and the franchise granted pursuant to this ordinance.

9.3.2 **Continuation by Incumbent Local Exchange Carrier.** If the provider is the incumbent local exchange carrier, it shall be permitted to continue to operate its system and provide Services without regard to revocation or expiration, but shall be obligated to negotiate a renewal in good faith.

### 9.4 Removal of Abandonment of Franchise Property.

9.4.1 **Abandoned System.** In the event that (1) the use of any portion of the system is discontinued for a continuous period of 12 months, and 30 days after no response to written notice from the city to the address of provider as set forth in the franchise; (2) any system has been installed in the rights-of-way without complying with the requirements of this ordinance or franchise; or (3) the provisions of section 3 are applicable and no franchise is granted, a

provider, except the provider who is an incumbent local exchange carrier, shall be deemed to have abandoned such system.

**9.4.2 Removal of Abandoned System.** The city, upon such terms as it may impose, may give a provider written permission to abandon, without removing, any system, or portion thereof, directly constructed, operated or maintained under a franchise. Unless such permission is granted or unless otherwise provided in this ordinance, a provider shall remove within a reasonable time the abandoned system and shall restore, using prudent construction standards, any affected rights-of-way to their former state at the time such system was installed, so as not to impair their usefulness. In removing its plant, structures and equipment, a provider shall refill, at its own expense, any excavation necessarily made by it and shall leave all rights-of-way in as good or better condition as that prevailing prior to such removal without materially interfering with any electrical or telephone cable or other utility wires, poles or attachments. The city shall have the right to inspect and approve the condition of the rights-of-way cables, wires, attachments and poles prior to and after removal. The liability, indemnity and insurance provisions of this ordinance and any security fund provided in a franchise shall continue in full force and effect during the period of removal and until full compliance by a provider with the terms and conditions of this section.

**9.4.3 Transfer of Abandoned System to City.** Upon abandonment of any system in place, a provider, if required by the city, shall submit to the city a written instrument, satisfactory in form to the city, transferring to the city the ownership of the abandoned system.

**9.4.4 Removal of Above-Ground System.** At the expiration of the term for which a franchise is granted, or upon its revocation or earlier expiration, as provided for by this ordinance, in any such case without renewal, extension or transfer, the city shall have the right to require a provider to remove, at its expense, all above-ground portions of a system from the rights-of-way within a reasonable period of time, which shall not be less than 180 days. If the provider is the incumbent local exchange carrier, it shall not be required to remove its system, but shall negotiate a renewal in good faith.

**9.4.5 Leaving Underground System.** Notwithstanding anything to the contrary set forth in this ordinance, a provider may abandon any underground system in place so long as it does not materially interfere with the use of the rights-of-way or with the use thereof by any public utility, cable operator or other person.

## **SECTION 10. OBLIGATION TO NOTIFY.**

**10.1 Publicizing Work.** Before entering onto any private property, a provider shall make a good faith attempt to contact the property owners in advance, describe the work to be performed, and obtain the owner's consent.

## **SECTION 11. GENERAL PROVISIONS.**

11.1 **Conflicts.** In the event of a conflict between any provision of this ordinance and a franchise entered pursuant to it, the provisions of this ordinance shall control.

11.2 **Severability.** If any provision of this ordinance is held by any federal, state or local court of competent jurisdiction, to be invalid as conflicting with any federal or state statute, or is ordered by a court to be modified in any way in order to conform to the requirements of any such law and all appellate remedies with regard to the validity of the ordinance provisions in question are exhausted, such provision shall be considered a separate, distinct, and independent part of this ordinance, and such holding shall not affect the validity and enforceability of all other provisions hereof. In the event that such law is subsequently repealed, rescinded, amended or otherwise changed, so that the provision which had been held invalid or modified is no longer in conflict with such law the provision in question shall return to full force and effect and shall again be binding on the city and the provider, provided that the city shall give the provider 30 days, or a longer period of time as may be reasonably required for a provider to comply with such a rejuvenated provision, written notice of the change before requiring compliance with such provision.

11.3 **New Developments.** It shall be the policy of the city to liberally amend this ordinance, upon Application of a provider, when necessary to enable the provider to take advantage of any developments in the field of telecommunications which will afford the provider an opportunity to more effectively, efficiently, or economically serve itself or the public.

11.4 **Notices.** All notices from a provider to the city required under this ordinance or pursuant to a franchise granted pursuant to this ordinance shall be directed to the officer as designated by the mayor or as designated in the franchise. A provider shall provide in any Application for a franchise the identity, address and phone number to receive notices from the city and shall supplement the same in the franchise. A provider shall immediately notify the city of any change in its name, address, or telephone number.

11.5 **Exercise of Police Power.** To the full extent permitted by applicable law either now or in the future, the city reserves the right to adopt or issue such rules, regulations, orders, or other directives that it finds necessary or appropriate in the lawful exercise of its police powers.

## **SECTION 12. FEDERAL, STATE AND CITY JURISDICTION.**

12.1 **Construction.** This ordinance shall be construed in a manner consistent with all applicable federal and state statutes.

12.2 **Ordinance Applicability.** This ordinance shall apply to all franchises granted or renewed after the effective date of this ordinance. This ordinance shall further apply, to the extent permitted by applicable federal or state law to all existing franchises granted prior to the effective date of this ordinance and to a provider providing services, without a franchise, prior to the effective date of this ordinance.

12.3 **Other Applicable Ordinances.** A provider's rights are subject to the police powers of the city to adopt and enforce ordinances necessary to the health, safety and welfare of the public.

A provider shall comply with all applicable general laws and ordinances enacted by the city pursuant to its police powers. In particular, all providers shall comply with the city zoning and other land use requirements.

12.4 **City Failure to Enforce.** A provider shall not be relieved of its obligation to comply with any of the provisions of this ordinance or any franchise granted pursuant to this ordinance by reason of any failure of the city to enforce prompt compliance.

12.5 **Construed According to Utah Law.** This ordinance and any franchise granted pursuant to this ordinance shall be construed and enforced in accordance with the substantive laws of the State of Utah.

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This ordinance, assigned no. 17-\_\_, shall take effect immediately.

**PASSED AND APPROVED** this \_\_\_\_ day of August, 2017.

**MILLCREEK COUNCIL**

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

**Jeff Silvestrini, Mayor**

**ATTEST:**

\_\_\_\_\_  
**Leslie Van Frank, Acting City Recorder**

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