Exhibit 10.5  
  
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 FRANCHISE AGREEMENT  
  
 Between  
  
 THE CITY OF NEW YORK  
  
 and  
  
 NATIONAL FIBER NETWORK, INC.  
  
 Franchise for Local High-Capacity  
 Telecommunications Services  
  
  
 Dated: December 20, 1993  
  
  
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 THIS AGREEMENT, dated as of the 20th day of December, 1993 (the  
"Effective Date"), is by and between THE CITY OF NEW YORK (as defined in Section  
I hereof, the "City") and NATIONAL FIBER NETWORK, INC., whose principal place of  
business is located at 000-00 00xx Xxxx, Xxxxxxxxxx, Xxx Xxxx (as defined in  
Section 1 hereof, the "Company").  
  
 W I T N E S S E T H :  
  
 WHEREAS, the New York City Department of Telecommunications and  
Energy (as defined in Section 1 hereof, "DTE"), on behalf of the City, has the  
authority to grant franchises involving the occupation or use of the Inalienable  
Property (as defined in Section 1 hereof) of the City in connection with the  
provision of Telecommunications Services (as defined in Section 1 hereof),  
including renewals thereof; and  
  
 WHEREAS, the Company has submitted to DTE its proposal in response  
to a Request for Proposals issued by DTE pursuant to Resolution No. 404 (adopted  
by the New York City Council on March 26, 1992); and  
  
 WHEREAS, on December 6, 1993 the New York City Franchise and  
Concession Review Committee (as defined in Section 1 hereof, the "FCRC") held a  
public hearing on the Company's petition for a franchise to install cable, wire,  
fiber optic telecommunications cable or other transmission medium that may be  
used in lieu of cable, wire or fiber optic telecommunications cable for the same  
purposes and related equipment and facilities on, over, and under the City's  
Inalienable Property to be used in providing Telecommunications Services, which  
was a full public proceeding affording due process in compliance with the  
requirements of Chapter 14 of the City Charter; and  
  
 WHEREAS, at said hearing, the FCRC reviewed the Company's financial,  
legal and technical ability to carry out its obligations pursuant to this  
Agreement; reviewed the Company's plan for constructing, operating, maintaining  
and upgrading the System (as defined in Section 1 hereof); and determined that  
this Agreement granting the Company a nonexclusive franchise complies with all  
applicable City laws and regulations; and  
  
 WHEREAS, DTE reviewed the proposed action for its potential  
environmental impacts and determined that this action is properly classified as  
a "Type II" action, pursuant to Executive Order 91, City Environmental Review,  
August 24, 1977; and  
  
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 WHEREAS, the New York City Department of City Planning determined,  
as evidenced in its letter dated April 23, 1992, that the proposed  
franchise would have no land use impacts and that review pursuant to Section  
197c of the New York City Charter (the "City Charter") would not be necessary;  
and  
  
 WHEREAS, the City intends to exercise the full scope of its  
municipal powers, including both its police power and contracting authority, to  
promote the public interest, to enhance the health, welfare and safety of the  
public, and to stimulate commerce by assuring the widespread availability of  
reliable high-capacity telecommunications services; and, in pursuit of these  
goals, among other purposes, desires to maximize the availability of such  
Telecommunications Services and to develop innovative uses by the City and its  
institutions of such Services.  
  
 NOW, THEREFORE, in consideration of the foregoing clauses, which  
clauses are hereby made a part of this Agreement, the mutual covenants and  
agreements herein contained, and other good and valuable consideration, the  
parties hereby covenant and agree as follows:  
  
 SECTION 1 -- DEFINED TERMS  
  
 For purposes of this Agreement, 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.  
  
 1.1 "Affiliated Person" means each Person who falls into one or more  
of the following categories: (ii) each Person having, directly or indirectly, a  
Controlling Interest in the Company; (ii) each Person in which the Company has,  
directly or indirectly, a Controlling interest; (iii) each officer, director,  
general partner, limited partner holding an interest of five percent (5%) or  
more joint venturer or joint venture partner of the Company; and (iv) each  
Person, directly or indirectly, controlling, controlled by or under common  
Control with the Company; provided that "Affiliated Person" shall in no event  
mean the City, any limited partner holding an interest of less than five percent  
(5%) of the Company or any creditor of the Company solely by virtue of its  
status as a creditor and which is not otherwise an Affiliated Person.  
  
 1.2 "Agreement" means this agreement, together with the Appendices  
attached hereto and all amendments, modifications or renewals hereof or thereof.  
  
 1.3 "City" means the City of New York or, as appropriate in the case  
of specific provisions of this Agreement, any board, bureau, authority, agency,  
  
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commission department or any other entity of the City of New York, or any  
authorized officer, official, employee or agent thereof or any successor  
thereto.  
  
 1.4 "Commissioner" means the Commissioner of DTE, or his or her  
designee, or any successor in function to the Commissioner.  
  
 1.5 "Company" means National Fiber Network, Inc., a corporation  
organized and existing under the laws of the State of Delaware, whose principal  
place of business is located at 000-00 00xx Xxxx, Xxxxxxxxxx, Xxx Xxxx.  
  
 1.6 "Comptroller" means the Comptroller of the City, the  
Comptroller's designee, or any successor in function to the Comptroller.  
  
 1.7 "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 the Company. 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 five percent (5%) of any Person (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.  
  
 1.8 "Customer" means any Person lawfully receiving any Service  
provided by the Company by means of the System.  
  
 1.9 "DTE" means the Department of Telecommunications and Energy of  
the City of New York or any successor thereto.  
  
 1.10 "District" means the City of New York, unless a smaller area is  
depicted in Appendix A to this Agreement.  
  
 1.11 "Effective Date" means December 20, 1993.  
  
 1.12 "FCC" means the Federal Communications Commission, or any  
successor thereto.  
  
 1.13 "FCRC" means the Franchise and Concession Review Committee  
ofthe City of New York, or any successor thereto.  
  
 1.14 "Fiber" means fiber optic telecommunications cable or other  
transmission medium that may be used in lieu thereof for the same purposes.  
  
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 1.15 "Franchise Area" means the District.  
  
 1.16 "Gross Revenue" shall include all revenue, as determined in  
accordance with generally accepted accounting principles, that is received  
directly or indirectly by the Company or by any Affiliated Person from or in  
connection with any Telecommunications Services provided in accordance with this  
Agreement which originate in and/or terminate in or transit the City (which  
shall include a proportional allocation, which allocation shall be fair and  
equitable, of revenues received by, or that should have been received by, the  
Company, any Affiliated Person or any other Person for Service utilizing any  
part of the System, provided, however, that such proportional allocation shall  
in no case be less than the fair market value for such Service). The Company  
shall, within two years following the Effective Date, submit to the City for the  
City's review and approval the method by which such allocation is to be made,  
and such approval by the City shall not be unreasonably withheld. If the City's  
decision becomes subject to court review, the court shall undertake its review  
consistent with the standards established in this Section 1.16. The revenues  
described in this paragraph shall include, without limitation, the value of any  
free Services provided by the Company (provided, however, that the value of any  
free Service provided hereunder to the City pursuant to Section 7.1.1(b) or  
Appendix E or to any other governmental entity shall not constitute Gross  
Revenue); the fair market value of any nonmonetary transactions between the  
Company and any Person other than Affiliated Person, but not less than the  
customary prices paid in connection with equivalent transactions, viewing all  
components of the transactions taken as a whole; the fair market value of any  
nonmonetary transactions between the Company and any Affiliated Person but not  
less than the customary prices paid in connection with equivalent transactions,  
considering the entirety of all transactions taken as a whole, conducted with  
Persons who are not Affiliated Persons; and any revenue received by the Company  
or by any Affiliated Person, as reasonably determined from time to time by the  
City through any means which is intended to have the effect of evading the  
payment of compensation that would otherwise be paid to the City for the  
franchise granted herein. Gross Revenue shall also include revenue derived from  
the sale or lease of equipment and/or facilities provided by the Company or any  
Affiliated Person if such facilities and/or equipment are required for and  
integrated with the Services provided by the Company within the District, except  
that Gross Revenue shall not include revenue from the sale of equipment that is  
readily available for sale in the consumer retail market. Gross Revenue shall  
not include: (i) actual payments made to interconnecting telecommunications  
service providers outside the boundaries of New York City for services provided  
outside the boundaries of New York City; (ii) taxes collected to pay to  
legitimate taxing authorities; (iii) any revenues that are already included in  
the calculation of franchise fees payable to the City under any other franchise  
agreement between (a) the City and (b) the Company or any Affiliated Person,  
provided that any services other than "cable service," as defined in the Cable  
Communications Policy Act of 1984 as amended by the Cable Television Consumer  
  
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Protection and Competition Act of 1992, 47 U.S.C. ss. 521 et seq., shall be  
considered to be provided under the franchise granted herein; (iv) any free  
Services required by this Agreement; (v) the revenue of any Person (including,  
without limitation, a supplier of services) to the extent that such revenue is  
also included in Gross Revenue of the Company; (vi) the revenue of the Company  
or any Affiliated Person received directly from the sale of any merchandise,  
goods or other non-Telecommunications Services that are sold through any Service  
distributed over the System (other than that portion of such revenue which  
represents or can be attributed to a customer fee or other payment for the use  
of the System for the sale of such merchandise, goods or non-Telecommunications  
Services, which portion shall be included in Gross Revenue), provided, however,  
that the foregoing exclusion from Gross Revenue shall in no way be deemed to  
exclude from Gross Revenue any revenue derived from the sale or lease of  
equipment and/or facilities provided by the Company or any Affiliated Person if  
such facilities and/or equipment are required for and Integrated with the  
Services provided by the Company; (vii) Investment income; (viii) the revenue of  
any Affiliated Person which represents standard and reasonable amounts paid by  
the Company to the Affiliated Person for ordinary and necessary business  
expenses of the Company, including, without limitation, professional service  
fees and insurance or bond premiums; (ix) advertising commissions deducted by  
advertising agencies before advertising revenues are paid over to the Company;  
(x) any amount billed to customers and collected by the Company or any  
Affiliated Person on behalf of any non-Affiliated telecommunications provider  
for services provided by such provider to such customers, where such amount is  
passed through in its entirety by the Company or Affiliated Person to such  
provider; (xi) the value of any use of the System by the Company or any  
Affiliated Person for wholly Internal administrative purposes, including the  
distribution of cable programming from one Affiliated Person to another  
Affiliated Person, provided that such Affiliated Persons ace substantially owned  
by the Company or its parent; (xii) to the extent consistent with generally  
accepted accounting principles, consistently applied, bad debt writeoffs; and  
(xiii) the value of short-term promotional Services. Appendix B herein sets  
forth examples and guidelines for the application of the foregoing definition.  
  
 1.17 "Inalienable Property" means the rights of the City in and to  
its waterfront, ferries, wharf property, bridges, land under water, public  
landings, wharves, docks, streets, avenues, highways, parks, waters, waterways  
and all other public places.  
  
 1.18 "Initial Backbone" means the backbone depicted in Appendix C to  
this Agreement.  
  
 1.19 "Mayor" means the chief executive officer of the City, the  
Mayor's designee, or any successor to the executive powers of the present Mayor.  
  
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 1.20 "Person" shall mean any natural person or any association,  
firm, Partnership, joint venture, corporation, or other legally recognized  
entity, whether for profit or not for profit, but shall not mean the City.  
  
 1.21 "PSC" means the New York State Public Service Commission, or  
any successor thereto.  
  
 1.22 "Service or "Telecommunications Service(s)" means any  
telecommunications services provided by the Company within the District which  
the Company is authorized to provide under applicable federal, state and local  
law, and any equipment and/or facilities required for and integrated with the  
Services provided by the Company within the District, 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. ss. 521 et seq.), and do not include "mobile  
telecommunications services" as defined in the authorizing resolution adopted by  
the New York City Council on May 23, 1991 (Resolution 985).  
  
 1.23 "Signal" means any transmission of electronic, electrical or  
radio frequency energy or optical information.  
  
 1.24 "System" or "Telecommunications System" means the  
telecommunications system which is to be constructed, operated and maintained by  
the Company pursuant to this Agreement, including, without limitation, all real  
property and interests in real property, all tangible and intangible personal  
property, buildings, offices, furniture, Customer lists, cables, wires, optical  
fibers, amplifiers and all other electronic devices, equipment and facilities  
used in connection therewith and all rights, contracts and understandings with  
regard to any matter related thereto.  
  
 SECTION 2 -- GRANT OF AUTHORITY  
  
 2.1 Term. This Agreement, and the franchise granted hereunder, shall  
commence upon the Effective Date, and shall continue for a period of fifteen  
(15) years from the Effective Date, unless this Agreement is earlier terminated  
upon the earliest to occur of: (a) a revocation of the franchise, as provided by  
Section 11.3 hereof, or (b) the expiration of the term of the franchise by  
acceleration, or otherwise. The period of time that this Agreement remains in  
effect is herein referred to as the "Term."  
  
 2.2 Certain Actions by the Company Before Execution. Prior to the  
execution of this Agreement, the Company has satisfied certain conditions to the  
City's execution of this Agreement by delivering to DTE the following: (a)  
evidence that it has deposited with the Comptroller the Performance  
Bond/Security Fund required   
  
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pursuant to Section 5.8 hereof; (b) a certificate of liability insurance,  
pursuant to Section 10.2 hereof, with a copy to the Comptroller; (c) an opinion  
of the Company's counsel dated as of the Effective Date opining that this  
Agreement has been duly authorized, executed and delivered by the Company and is  
a binding obligation of the Company and opining as to such other matters as the  
City has requested; (d) the questionnaires required in connection with the  
City's Vendor Information Exchange System ("VENDEX"), provided that favorable  
completion of the appropriate review in connection therewith shall be a  
condition subsequent to the effectiveness of this Agreement; (e) evidence that  
the Company has paid the initial portion of its pro rata share of the City's  
franchising costs pursuant to Section 7.2.1 herein; and (f) certified copies of  
the Company's organizational and governing documents, as amended to date,  
pursuant to Section 13.6.1 herein.  
  
 2.3 Nature of Franchise, Effect of Termination and Renewal.  
  
 2.3.1 Nature of Franchise. (a) The City hereby grants the  
Company, subject to the terms and conditions of this Agreement, a nonexclusive  
franchise providing the right and consent to install, operate, repair, maintain,  
remove and replace cable, wire, Fiber or other transmission medium that may be  
used in lieu of cable, wire or Fiber for the same purposes and related equipment  
and facilities on, over and under the Inalienable Property of the City in order  
to provide Telecommunications Services which originate and/or terminate in or  
transit the Franchise Area.  
  
 (b) The Telecommunications Services the Company intends  
(as of the Effective Date) to offer and the Telecommunications Systems the  
Company intends (as of the Effective Date) to construct, operate and maintain,  
are set forth on Appendix D to this Agreement.  
  
 (c) Before offering or providing any Telecommunications  
Services pursuant to this franchise, the Company shall obtain any and all  
regulatory approvals, permits, authorizations or licenses for the offering or  
provision of such Telecommunications Services from the appropriate federal,  
state and local authorities, if required, and shall submit to DTE upon the  
written request of the City evidence of all such approvals, permits,  
authorizations or licenses.  
  
 2.3.2 Effect of Termination. Upon termination of this  
Agreement, the franchise shall expire; all rights of the Company in the  
franchise shall cease, with no value allocable to the franchise itself; and the  
rights of the City and the Company to the System or any pact thereof, shall be  
determined as provided in Sections 11.3 through 11.6 hereof. The termination of  
this Agreement and the franchise granted hereunder shall not, for any reason,  
operate as a waiver or release of any obligation of the Company or any other  
Person, as applicable, for any liability (i) pursuant to Section 10.1 hereof,  
which arose or arises out of any act or failure to act   
  
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required hereunder prior to the termination; (ii) which exists pursuant to  
Sections 7, "Compensation," 8.7.2, "Right of Inspection," 11.3 through 11.6,  
"Termination," 13.14, "Governing Law" and 13.17, "Claims under Agreement,"  
hereof; and (iii) to maintain in full force and effect the Performance  
Bond/Security Fund and coverage under the liability insurance policies required  
under and in accordance with Sections 5.8 and 10.2 hereof.  
  
 2.3.3 Renewal. This Agreement does not grant to the Company  
any right to renewal of this Agreement or the franchise granted hereunder, and  
there shall be no such right. The Company may submit a written petition to the  
City to renew this Agreement and the franchise granted hereunder not later than  
twelve (12) months nor more than eighteen (18) months before the expiration of  
the Term. Nonetheless, the City shall not be obligated to renew this Agreement  
or the franchise granted hereunder.  
  
 2.4 Conditions and Limitations on Franchise.  
  
 2.4.1 Not Exclusive. Nothing in this Agreement shall affect  
the right of the City to grant to any Person a franchise, consent or right to  
occupy and use Inalienable Property of the City, or any part thereof, for the  
Construction, operation and/or maintenance of a system to provide  
telecommunications services in the City for any purpose, or the right of the  
City to construct, operate and/or maintain a system to provide  
telecommunications services in the City or to acquire and operate the System  
pursuant to this Agreement, except that the City shall not use any services,  
equipment, cable, wire, Fiber or other transmission medium provided by the  
Company pursuant to this Agreement to offer or provide services to  
non-governmental entities in competition with the Company.  
  
 2.4.2 Construction of System. (a) The Company is authorized to  
install cable, wire, Fiber or other transmission medium that may be used in lieu  
of cable, wire or Fiber for the same purposes, or related equipment and  
facilities at any location on, over or under the Inalienable Property of the  
City within the Franchise Area at any time during the Term, without further  
approval of DTE, subject to the terms and conditions of this Agreement. The  
Company shall use its best efforts to coordinate its construction schedule with  
the appropriate City agencies, including, without limitations the appropriate  
Borough Engineer and the office of Construction, to minimize unnecessary  
disruption.  
  
 (b) The Company agrees to commence construction of the  
Initial Backbone as soon as feasible after the Effective Date and in any event  
no later than four (4) months after the Effective Date, subject to the timely  
issuance of necessary permits and licenses, which will be diligently pursued by  
the Company. The Company agrees to substantially complete the installation of  
the Initial Backbone within   
  
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nineteen (19) months after the date of commencement of construction of the  
Initial Backbone, subject to the timely issuance of necessary permits and  
licenses, which will be diligently pursued by the Company.  
  
 (c) The company shall obtain all construction, building  
or other permits or approvals necessary before installing such cable, wire,  
Fiber or other transmission medium that may be used in lieu of cable, wire or  
Fiber for the same purposes, or related equipment and facilities. The Company  
shall provide copies of any such permits and approvals to DTE upon request.  
  
 2.4.3 Public Works and Improvements. Nothing in this Agreement  
shall abrogate the right of the City to perform any public works or public  
improvements of any description. In the event that the System interferes with  
the construction, operation, maintenance, repair or removal of such public works  
or public improvements, the Company shall, at its own cost and expense, promptly  
protect or alter or relocate the System, or any part thereof, as directed by the  
City. In the event that the Company refuses or neglects to so protect, alter or  
relocate all or part of the System, the City shall have the right to break  
through, remove, alter, or relocate all or any part of the System without any  
liability to the Company, and the Company shall pay to the City the costs  
incurred in connection with such breaking through, removal, alteration or  
relocation.  
  
 2.4.4 No Waiver. Nothing in this Agreement shall be construed  
as a waiver of any codes, ordinances or regulations of the City or of the City's  
right to require the Company or Persons utilizing the System to secure the  
appropriate permits or authorizations for such use, provided that no fee or  
charge may be imposed upon the Company for any such permit or authorization,  
other than the standard fees or charges generally applicable to all Persons for  
such permits or authorizations. Any such standard fee or charge shall not be an  
offset against the compensation the Company is required to pay to the City  
pursuant to Section 7 of this Agreement.  
  
 2.4.5 No Release. Nothing in this Agreement shall be construed  
as a waiver or release of the rights of the City in and to the Inalienable  
Property of the City. In the event that all or part of the Inalienable Property  
within the Franchise Area is eliminated, discontinued, closed or demapped, all  
rights and privileges granted pursuant to this Agreement with respect to said  
Inalienable Property or any part thereof so eliminated, discontinued, closed or  
demapped, shall cease upon the effective date of such elimination,  
discontinuance, closing or demapping. If said elimination, discontinuance,  
closing or demapping is undertaken for the benefit of any private Person, the  
City shall make reasonable efforts to condition its consent to said elimination,  
discontinuance, closing or demapping on the agreement of said private Person to  
(i) grant the Company the right to continue to occupy and use said   
  
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Inalienable Property or (ii) reimburse the Company for the reasonable costs of  
relocating the affected part of the System.  
  
 2.5 Renegotiation of Agreement. (a) Each party shall have the right,  
any one time Following the date seven (7) years after the Effective Date and  
upon six (6) months notice to the other party, to require the renegotiation of  
the terms of Sections 7 and 8 hereof based an changes in technological,  
regulatory or market conditions that have occurred since the Effective Date,  
provided, however, that any renegotiated terms shall apply only prospectively to  
any contracts entered into by the Company with customers following the effective  
date of the renegotiated terms. The parties shall, during renegotiation of said  
Sections under this Section 2.5, negotiate in good faith.  
  
 (b) If, despite such good faith negotiations, the  
parties fail to reach an agreement that is reasonably acceptable to both parties  
within a reasonable period, then either party shall have the right, by notice to  
the other, that the term of this Agreement and the franchise granted hereunder  
shall be accelerated and shall terminate on the date which is one half of the  
number of days between the date of such notice and January 1, 2009.  
  
 (c) The parties' rights pursuant to this Section 2.5  
shall be cumulative and shall be in addition to and not in derogation of all  
other rights reserved under other provisions of this Agreement.  
  
 SECTION 3 -- SERVICE  
  
 3.1 No Interference. In the operation of the System, the Company  
shall not interfere with the technical operation of any other telecommunications  
system in the City.  
  
 3.2 No Monopoly. If, at any time during the Term, it is finally  
determined by a court of competent jurisdiction (not subject to further appeal)  
that the distribution or provision of any Service in the District by the Company  
or any Affiliated Person, or any other action in connection with the operation  
of the System, has tended to create or has created a monopoly or a restraint of  
trade in violation of law, such determination shall be deemed to be an Event of  
Default under this Agreement. In such event, in addition to pursuing any of the  
actions set forth in Section 11.2 hereof, DTE may issue a directive to correct  
such conditions, consistent with this Agreement and the determination of the  
court, without following the procedural requirements of Sections 11.2.2 and  
11.2.3 hereof.  
  
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 3.3 No Discrimination. The Company shall not discriminate in the  
provision of Services on the basis of race, creed, color, national origin, sex,  
age, handicap, marital status, or real or perceived sexual orientation.  
  
 3.4 Service. The Company agrees to market its Services on the System  
throughout the Term. In the event the Company, with the consent of the City,  
sells or otherwise transfers the System or Control thereof to any Person, the  
City or the City's assignee, or in the event the franchise terminates, the  
Company shall transfer the System in an orderly, manner in order to maintain  
continuity of Service to the City and to other Customers.  
  
 SECTION 4 -- TARIFF FILINGS  
  
 4.1 Tariffs. The Company shall provide annually to DTE a list of all  
and any tariffs or tariff applications, and all amendments or modifications  
thereof, that the Company has filed with any federal, state or local regulatory  
authorities or other governmental agencies within the previous twelve (12)  
months with respect to Telecommunications Services offered within the District   
through, over or by use of the System. Each entry on this list must be in a  
form, and provide sufficient detail, to allow DTE to readily identify the  
services to which the tariffs and tariff applications apply, and must show the  
date of each tariff and tariff application and such other information as DTE may  
thereafter request. Upon the request of DTE, the Company shall promptly but in  
no case later than 10 business days following the request deliver to DTE a  
complete copy of any tariff or tariff application.  
  
 SECTION 5 --  
 CONSTRUCTION AND TECHNICAL REQUIREMENTS  
  
 5.1 General Requirement. The Company 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 Commissioner.  
  
 5.2 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 City or any other agency or authority  
of competent jurisdiction 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 or safety, then the Company shall, at its own cost  
and expense, promptly correct all such conditions.  
  
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 5.3 Licenses and Permits. The Company shall have the sole  
responsibility for obtaining, at its own cost and expense, all permits, 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 to use private property, easements, poles and  
conduits. The Company shall obtain any required permit, license, approval or  
authorization prior to the commencement of the activity for which the permit,  
license, approval or authorization is required.  
  
 5.4 Relocation of the System.  
  
 5.4.1 New Grades or Lines. If the grades or lines of any  
Inalienable Property within the Franchise Area are changed at any time during  
the Term in a manner affecting the System, then the Company shall, at its own  
cost and expense and upon reasonable notice by the City, promptly protect or  
promptly alter or relocate the System, or part thereof, so as to conform with  
such new grades or lines. In the event that the Company unreasonably refuses or  
neglects to so protect, alter or relocate all or part of the System, the City  
shall have the right to break through, remove, alter or relocate such part of  
the System without any liability to the Company, and the Company shall pay to   
the City the costs incurred in connection with such breaking through, removal,  
alteration or relocation.  
  
 5.4.2 City Authority to Move Wires. 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 other optical fibers, wires, cable,  
amplifiers, appliances or other parts of the System on, over or under the  
Inalienable Property of the City in which event the City shall not be liable  
therefor to the Company. The City shall notify the Company 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 5.4.2.  
  
 5.4.3 Company Required to Move Wires. The Company shall upon  
prior written notice by the City or any Person holding a permit to move any  
structure, and within the time that is reasonable under the circumstances,  
temporarily move its wires to permit the moving of said structure. The Company  
may impose a reasonable charge on any Person other than the City for any such  
movement of its wires.  
  
 5.5 Protect Structures. In connection with the construction,  
operation, maintenance, repair, upgrade or removal of the System, the Company  
shall, at its own cost and expense, protect any and all existing structures  
belonging to the City and all designated landmarks, as well as all other  
structures within any designated landmark district. The Company shall obtain the  
prior approval of the City before altering any water main, sewerage or drainage  
system, or any other municipal structure   
  
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one over or under the Inalienable Property of the City required because of the  
presence of the System. Any such alteration shall be made by the Company, at its  
own cost and expense and in a manner prescribed by the City. The Company agrees  
that it shall be liable, at its own cost and expense, to replace or repair and  
restore to its prior condition in a manner as may be reasonably specified by the  
City, any municipal structure or any other Inalienable Property of the City  
involved in the construction, operation, maintenance, repair, upgrade or removal  
of the System that may become disturbed or damaged as a result of any work  
thereon by or on behalf of the Company pursuant to this Agreement.  
  
 5.6 No Obstruction. In connection with the construction, operation  
maintenance, upgrade, repair or removal of the System, the Company shall not  
unreasonably obstruct the Inalienable Property of the City, subways, railways,  
passenger travel, river navigation, or other traffic to, from or within the  
Franchise Area without the prior consent of the appropriate authorities.  
  
 5.7 Safety Precautions. The Company 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.  
  
 5.8 Performance Bond/Security Fund.  
  
 5.8.1 General Requirement. Prior to the execution of this  
Agreement, the Company has deposited with the Comptroller an irrevocable,  
unconditional letter of credit and surety bond which together total two million  
dollars ($2,000,000). Such $2,000,000 constitutes the Company's Performance  
Bond/ Security Fund. A minimum of one million dollars ($1,000,000) of this  
amount shall be in the form of a surety bond, and the Company may, at its  
discretion, further increase the proportion of the Performance Bond/Security  
Fund that is in the form of a surety bond so long as at least two hundred fifty  
thousand dollars ($250,000) of the Performance Bond/Security Fund remains in the  
form of a letter of credit. The total amount of the Performance Bond/Security  
Fund may be reduced to one million dollars ($1,000,000), which must consist of  
at least a two hundred fifty thousand dollar ($250,000) letter of credit,  
following the date 30 days after completion by the Company of the Initial  
Backbone. Throughout the Term, and for one hundred twenty (120) days thereafter,  
unless the City notifies the Company that a reasonable longer period shall  
apply, the Company shall maintain the Performance Bond/Security Fund in the  
amount specified in this Section 5.8. At any time during the Term, the City may,  
acting reasonably, require the Company to increase the amount of the Performance  
Bond/Security Fund if it finds that new risk factors exist, such as an increase  
in the amount of compensation payments to be made pursuant to Section 7.1 hereof  
or the failure of the Company to perform any of its obligations pursuant to this  
Agreement,   
  
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which reasonably necessitate an increase in the amount of the Performance  
Bond/Security Fund.  
  
 5.8.2 Indemnification. The Performance Bond/Security Fund  
shall indemnity the City, up to the full face amount of the Performance  
Bond/Security Fund, for: (i) the cost to continue any construction of the  
portion of the System being constructed for the City pursuant to Section  
7.1.1(b) herein and Appendix E hereof; (ii) the cost of maintaining operation of  
the System following a termination of this Agreement in excess of all net  
revenue actually received through the continued operation of the System during  
said period; (iii) any loss or damage to any municipal structure or other  
Inalienable Property of the City during the course of any construction of the  
System; (iv) any other costs, or loss or damage actually incurred by the City as  
a result of the Company's failure to perform its obligations pursuant to this  
Agreement; and (v) the removal of all or any part of the System from the  
Inalienable Property of the City, as authorized by this Agreement.  
  
 5.8.3 Other Purposes. The Performance Bond/Security Fund shall  
also serve as security for:  
  
 (a) the faithful performance by the Company of all  
terms, conditions and obligations of this Agreement;  
  
 (b) any expenditure, damage, or loss incurred by the  
City occasioned by the Company's failure to comply with all rules, regulations,  
orders, permits and other directives of the City and the Commissioner issued  
pursuant to this Agreement;  
  
 (c) payment of compensation set forth in Section 7  
hereof;  
  
 (d) the payment of premiums for the liability insurance  
required pursuant to Section 10 hereof;  
  
 (e) the removal of the System from the Inalienable  
Property of the City at the termination of the Agreement, at the election of the  
City, pursuant to Section 11.4 hereof;  
  
 (f) the payment to the City of any amounts for which the  
Company is liable pursuant to Section 10.1.1 hereof which are not paid by the  
Company's insurance;  
  
 (g) the payment of any other amounts which become due to  
the City pursuant to this Agreement or law;  
  
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 (h) the timely renewal of the letter of credit that  
constitutes the Performance Bond/Security Fund; and  
  
 (i) any costs, losses or damages, incurred by the City  
as a result of a default of the Company's obligations under this Agreement.  
  
 5.8.4 Withdrawals from the Performance Bond/Security Fund. In  
accordance with the procedures set forth in Sections 5.8.5, 11.2 and 11.3, the  
Comptroller, upon the direction of the Commissioner, may make withdrawals from  
the Performance Bond/Security Fund and pay to the City such amounts for the  
satisfaction of obligations under Section 5.8.2 hereof, or for the purposes  
specified in Section 5.8.3 hereof. Withdrawals from the Performance  
Bond/Security Fund shall not be deemed a cure of the default(s) that led to such  
withdrawals. The City may not seek recourse against the Performance  
Bond/Security Fund for any costs or damages for which the City has previously  
been compensated through a withdrawal from the Performance Bond/Security Fund or  
otherwise by the Company.  
  
 5.8.5 Notice of Withdrawals. Within one (1) week after any  
withdrawals from the Performance Bond/Security Fund, the Comptroller shall  
notify the Company of the date and amount thereof, provided, however, that the  
City shall not make any withdrawals by reason of any breach for which the  
Company has not been given notice. The withdrawal of amounts from the  
Performance Bond/Security Fund shall constitute a credit against the amount of   
the applicable liability of the Company to the City but only to the extent of   
said withdrawal.  
  
 5.8.6 Replenishment. Within thirty (30) days after receipt of  
notice from the Comptroller that any amount has been withdrawn from the  
Performance Bond/Security Fund letter of credit, as provided in Section 5.8  
hereof, the Company shall restore the Performance Bond/Security Fund to the  
amount specified in Section 5.8.1 hereof, provided that, if a court finally  
determines that said withdrawal by the City was improper, the City shall refund  
the improperly withdrawn amount to the Performance Bond/Security Fund or to the  
Company such that the balance in the Performance Bond/ Security Fund shall not  
exceed the amount specified in Section 5.8.1 hereof. In case of such an improper  
withdrawal, the Company shall receive any interest accrued on the amount  
improperly withdrawn from the time of withdrawal to the time of refund to the  
Fund. If the Company has not made the required restoration to the Performance  
Bond/ Security Fund within such thirty (30) day period, interest on said amount  
shall accrue at the rate specified in Section 7.4 hereof, to commence at the  
completion of such 30-day period. The Comptroller may withdraw from the  
Performance Bond/Security Fund and pay to the City such interest periodically up  
to the date on which the Company makes the required principal payment, provided  
that the Company shall not be obligated to pay such interest with such principal  
payment to the extent such interest has been already withdrawn by the  
Comptroller.  
  
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 5.8.7 Not a Limit on Liability. The obligation to perform and  
the liability of the Company pursuant to this Agreement shall not be limited by  
the acceptance of the Performance Bond/Security Fund required by this Section  
5.8.  
  
 5.8.8 Form. The Performance Bond/Security Fund does, and any  
replacement bond shall, contain the following endorsement: "It is hereby  
understood and agreed that this bond may not be canceled or not renewed by the  
surety nor the intention to cancel or not to renew be stated by the surety until  
ninety (90) days after completion of construction of the System and,  
notwithstanding the foregoing, shall in no case be canceled or not renewed by  
the surety until at least ninety (90) days' written notice to the City of  
surety's intention to cancel or not renew this bond." Notwithstanding the  
preceding, the letter of credit portion of the Performance Bond/Security Fund  
shall not be canceled or not renewed by the issuer until at least sixty (60)  
days, notice to the City of the issuer's intention to cancel or not renew the  
letter of credit.  
  
 SECTION 6 -- EMPLOYMENT AND PURCHASING  
  
 6.1 Right to Bargain Collectively. The Company agrees to recognize  
the right of its employees to bargain collectively through representatives of  
their own choosing in accordance with applicable law. The Company shall  
recognize and deal with the representatives duly designated or selected by a  
majority of its employees for the purpose of collective bargaining with respect  
to rates of pay, wages, hours of employment or any other terms, conditions or  
privileges of employment. The Company shall not dominate, interfere with,  
participate in the management or control or, or give financial support to any  
union or association of its employees.  
  
 6.2 Local Preference. The Company shall, at its own cost and  
expense, develop and maintain a plan for the recruitment, education, training  
and employment of residents of the City, for the opportunities to be created by  
the construction, operation, marketing and maintenance of the System. Such  
recruitment activities shall include provisions for the posting of employment  
and training opportunities at appropriate City agencies responsible for  
encouraging employment of City residents. Such plan shall be designed so as to  
ensure the promotion of equal employment opportunity for all qualified Persons  
employed by, or seeking employment with, the Company. Such plan shall be updated  
from time to time as the City deems reasonably necessary. The Company shall,  
throughout the Term, implement such plan, at its own cost and expense, by  
ensuring, to the maximum feasible extent, the recruitment, education, training,  
and employment of City residents.  
  
 6.3 City Vendors. To the maximum feasible extent, after taking into  
account price and quality considerations, the Company shall utilize vendors  
located in   
  
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the City in connection with the construction, operation, marketing and  
maintenance of the System. The Company shall, after taking into account price  
and quality considerations, in the purchase of comparable materials, equipment,  
services or supplies of any nature, give effect to a preference for such items  
which are assembled, manufactured, or otherwise produced, in whole or in part,  
within the City.  
  
 6.4 Executive Order No. 50. The Company agrees to comply in all  
respects with the provisions of the Mayor's Executive Order No. 50 (April 25,  
1980) and all rules and regulations promulgated thereunder, as such Order or  
regulations may be amended, modified or succeeded throughout the Term.  
Notwithstanding that Executive Order No. 50 may not apply on its face to the  
Company as a franchisee of the City, the Company shall comply in all respects  
with the provisions of such order and successor and replacement laws, orders and  
regulations adopted following the Effective Date. As required by said Executive  
Order No. 50, the provisions of Sections 50.30 and 50.31 of the Final Rule  
implementing said Order are incorporated herein by this reference. The Company  
agrees to make a reasonable inquiry and to engage in reasonable monitoring  
efforts to ensure compliance with all unions to ensure that all contractors and   
subcontractors comply with the required contractual language in Section 6.5. The  
Company shall not contract with and shall discontinue any contract entered into  
after the Effective Date with any union, contractor or subcontractor that  
refuses to agree to or fails to comply with the contractual language in Section  
6.5.  
  
 6.5 Enforcement. The Company shall take steps to ensure that the  
requirements of Section 6.4 hereof are adhered to by each union with which the  
Company deals, each officer, employee, agent, contractor or subcontractor of the  
Company, and each Person performing work pursuant to this Agreement with respect  
to the System for, on behalf of, or at the discretion of, the Company. The  
requirements of Section 6.4 hereof shall apply to every contract relating to the  
System between the Company and: (i) any union; (ii) any contractor; (iii) any  
subcontractor; or (iv) any Person with which any of the foregoing Persons has a  
relationship in connection with any aspect of the System. To comply with the  
obligations of this Section 6.5, the Company shall include, in all contracts  
described in the foregoing sentence which are entered into following the  
Effective Date (which shall include any renewals, amendments and modifications,  
of existing contracts), the following language, stating that such party: "has  
received a copy of Section 6.4 of a certain agreement by and between the City of  
New York and the Company dated as of December 20, 1993, granting to the Company  
a nonexclusive franchise providing the right and consent to install cable, wire,  
Fiber or other transmission medium that may be used in lieu of cable, wire or  
Fiber for the same purposes and related equipment and facilities on, over and  
under the Inalienable Property of the City within the Franchise Area to provide  
Telecommunications Services and agrees to comply with each term, condition and  
requirement of Section 6.4 of such agreement, which terms, conditions and  
requirements are deemed to be incorporated herein by this reference."  
  
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 SECTION 7 --  
 COMPENSATION AND OTHER PAYMENTS  
  
 7.1 Compensation.  
  
 7.1.1 Compensation. As compensation for the franchise, the  
Company shall have the following obligations:  
  
 (a) Franchise Fee. The Company's obligation to pay  
franchise fees shall commence on the Completion Date. For purposes of this  
Section 7.1, the Completion Date shall be the earlier of the date of completion  
of the Initial Backbone or January 1, 1995. Commencing on the Completion Date,  
the Company shall pay to the City the following percentage of Gross Revenue each  
year during the Term:  
  
First year following Completion Date ..........................Ten Percent (10%)  
   
Second year following Completion Date..........................Ten Percent (10%)  
   
Third year following Completion Date............................Six Percent (6%)  
   
Fourth year following Completion Date   
 and each year thereafter   
 through the end of the Term..............................Five Percent (5%)  
   
 During each year of the Term following the Completion Date, the  
Company's compensation payments pursuant to this Section 7.1.1(a) shall not be  
less than $200,000.00 (two hundred thousand dollars). To the extent that the sum  
of all payments pursuant to this Section 7.1.1(a) with respect to any year is  
less than said minimum payment, then the Company's compensation payment to be  
made within forty-five (45) days of the last day of December of said year  
pursuant to Section 7.1.2 shall include an amount which brings the total amount  
paid with respect to said year up to said minimum payment.  
  
 (b) Services to City. The Company shall provide services  
to the City, and observe its other obligations as specified in Appendix E to  
this Agreement. The Company expressly acknowledges and agrees that neither the  
provision of Services to the City nor the satisfaction of other obligations  
specified in Appendix E to this Agreement shall be chargeable against the  
franchisee fees to be paid to the City by the Company pursuant to Section  
7.1.1(a) hereof.  
  
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 7.1.2 Timing. (a) All payments made pursuant to Section  
7.1.1(a) hereof shall be made on a quarterly basis within forty-five (45) days  
of the close of each calendar quarter. The Company shall in good faith estimate  
each quarterly payment based on anticipated revenues for that quarter.  
  
 (b) Within sixty (60) days following the end of the  
calendar year, the Company shall calculate the exact fee due to the City  
pursuant to Section 7.1.1(a) hereof for said calendar year. Should the total  
calculated franchise fee for the year exceed the estimated quarterly payments  
made by the Company for the year, the Company shall, within the 60-day period  
following the end of the calendar year, remit to the City any balance due.  
Should the estimated quarterly payments made by the Company for the year exceed  
the total calculated franchise fee for the year, the City will remit the  
overpayment within thirty (30) days following notice from the Company of the  
balance due.  
  
 (c) In no case shall the estimated quarterly payments to  
be paid pursuant to paragraph (a) of this Section 7.1.2 be less than one-fourth  
(1/4) of the total calculated franchise fee based on Section 7.1.1(a) hereof for  
the preceding calendar year.  
  
 7.1.3 Records and Audits. The Company shall keep comprehensive  
itemized records of all revenues received and of all Services provided, in  
sufficient detail to enable the City to determine whether all compensation owed  
to the City pursuant to Section 7.1 is being paid to the City.  
  
 7.1.4 Reservation of Rights. No acceptance of any compensation  
payment by the City shall be construed as an accord and satisfaction that the  
amount paid is in fact the correct amount, nor shall such acceptance of any  
payment be construed as a release of any claim that the City may have for  
further or additional sums payable under the provisions of this Agreement. All  
amounts paid shall be subject to audit and recomputation by the City.  
  
 7.1.5 Ordinary Business Expense. Nothing contained in this  
Section 7.1 or elsewhere in this Agreement is intended to prevent the Company  
from treating the compensation and other payments that it may pay pursuant to  
this Agreement as an ordinary expense of doing business and, accordingly, from  
deducting said payments from gross income in any City, state, or federal income  
tax return.  
  
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 7.2 Other Payments.  
  
 7.2.1 Franchising Costs. The Company has, prior to the  
execution of this Agreement, paid a portion of the Company's pro rata share of  
costs incurred by the City for the services of third parties (including, without  
limitation, attorneys and other consultants) in connection with the award of  
this franchise. Within thirty (30) days after receipt of an itemized and  
detailed invoice for services rendered, the Company shall pay to DTE, or at the  
direction of the Commissioner to a third party, the Company's pro rata share of  
all remaining reasonable costs and expenses incurred by the City for the  
services of third parties (including, without limitation, attorneys and other  
consultants) in connection with the award of this franchise. The Company  
expressly agrees that the payments referred to in this Section 7.2.1 are in  
addition to and not in lieu of, and shall not be offset against, the  
compensation to be paid to the City by the Company pursuant to Section 7.1  
hereof.  
  
 7.2.2 Future Costs. The Company shall pay to the City or to  
third parties, at the direction of the Commissioner, an amount equal to the  
reasonable costs and expenses which the City incurs for the services of third  
parties (including but not limited to attorneys and other consultants) in  
connection with any renewal or Company initiated renegotiation, transfer,  
amendment or other modification of this Agreement or the franchise, provided,  
however, that in the case of renewal only, the parties shall agree upon a  
reasonable financial cap at the outset of negotiations. However, in the event  
the City brings any action for termination or for enforcement of this Agreement  
against the Company and the Company finally prevails, then the Company shall  
have no obligation to reimburse the City or pay any sums directly to third  
parties, at the direction of the City, pursuant to this Section with respect to  
such termination or enforcement. In the event the Company contests the charges,  
it shall pay any uncontested amounts. The Commissioner shall review the   
contested charges and the services rendered and shall reasonably determine  
whether such charges are reasonable for the services rendered. The Company  
expressly agrees that the payments made pursuant to this Section 7.2 are in  
addition to and not in lieu of, and shall not be offset against, the  
compensation to be paid to the City by the Company pursuant to Section 7.1  
hereof.  
  
 7.3 No Credits or Deductions. (a) The Company expressly acknowledges  
and agrees that:  
  
 (i) The compensation and other payments to be made or  
 Services to be provided pursuant to this Section 7 shall not be deemed to  
 be in the nature of a tax, and shall be in addition to any and all taxes  
 or other fees or charges which the Company or any Affiliated Person shall  
 be required to pay to the City or to any state or federal agency or  
 authority, all of which shall be separate and distinct obligations of the  
 Company; and  
  
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 (ii) The Company expressly relinquishes and waives its  
 rights and the rights of any Affiliated Person to a deduction or other  
 credit pursuant to Section 626 of the New York State Real Property Tax Law  
 and any successor or amendment thereto, and to any subsequent law, rule,  
 regulation, or order which would purport to permit any of the acts  
 prohibited by this Section 7.3; and  
  
 (iii) Neither the Company nor any Affiliated Person  
 shall have or make any claim for any deduction or other credit of all or  
 any part of the amount of the compensation or other payments to be made or  
 Services to be provided pursuant to this Agreement from or against any  
 City or other governmental taxes of general applicability or other fees or  
 charges which the Company or any Affiliated Person is required to pay to  
 the City or other governmental agency; and  
  
 (iv) Neither the Company nor any Affiliated Person shall  
 apply or seek to apply all or any part of the amount of the compensation  
 or other payments to be made or Services to be provided pursuant to this  
 Agreement as a deduction or other credit from or against any City or other  
 government taxes of general applicability (other than income taxes) or  
 other fees or charges, each of which shall be deemed to be separate and  
 distinct obligations of the Company and the Affiliated Persons; and  
  
 (v) Neither the Company nor any Affiliated Person shall  
 apply or seek to apply all or any part of the amount of any City or other  
 governmental taxes or other fees or charges of general applicability as a  
 deduction or other credit from or against any of the compensation or other  
 payments to be made or Services to be provided pursuant to this Agreement,  
 each of which shall be deemed to be separate and distinct obligations of  
 the Company and the Affiliated Persons.  
  
 (b) In any situation where the Company believes the  
effect of this Section 7.3 is unduly harming, in a manner inconsistent with the  
intent of this Section 7.3, an Affiliated Person of the Company, the Company may  
petition the City for relief, and such relief shall not be unreasonably  
withheld.  
  
 7.4 Interest on Late Payments. In the event that any payment  
required by this Agreement is not actually received by the City on or before the  
applicable date fixed in this Agreement, interest thereon shall accrue from such  
date until received at a rate equal to the rate of interest then in effect  
charged by the City for late payments of real estate taxes.  
  
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 7.5 Method of Payment. Except as provided elsewhere in this  
Agreement, all payments made by the Company to the City pursuant to this  
Agreement shall be made to the City's Department of Finance, with a copy to DTE.  
  
 7.6 Continuing Obligation and Holdover. (a) In the event the Company  
continues to operate all or any part of the System after the Term, then the  
Company shall continue to comply with all applicable provisions of this  
Agreement, including, without limitation, all compensation and other payment  
provisions of this Agreement, 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 this Agreement or the franchise granted pursuant  
to this Agreement, 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.  
  
 (b) In the event this Agreement terminates for any  
reason whatsoever and the Company falls to cease providing Service over the  
System, the City, in addition to all other remedies available to it under this  
Agreement or by law, shall be entitled to receive all payments it is entitled to  
receive under this Agreement including, but not limited to, the compensation set  
forth in Section 7.  
  
 SECTION 8 -- OVERSIGHT AND REGULATION  
  
 8.1 Confidentiality. The City shall protect from disclosure  
confidential, proprietary information of the Company submitted to the City  
pursuant to this Agreement in accordance with applicable law, provided that the  
Company notifies the City of, and clearly labels the information which the  
Company deems to be confidential, proprietary information. Such notification and  
labeling shall be the sole responsibility of the Company.  
  
 8.2 Oversight. DTE shall have the right to oversee, regulate and  
inspect periodically the construction, maintenance, operation and upgrade of the  
System, and any part thereof, in accordance with the provisions of this  
Agreement and applicable law. The Company shall establish and maintain  
managerial and operational records, standards, procedures and controls to enable  
the Company to prove, in reasonable detail, to the satisfaction of the City at  
all time throughout the Term, that the Company is in compliance times throughout  
with this Agreement. The Company shall retain such records for not less than six  
(6) years following their creation, and for such additional period as DTE may  
direct.  
  
 8.3 Notification to City. (a) The Company shall, on an annual basis,  
provide DTE with a report describing the Services offered and classes of  
customers served by the Company during the previous twelve months. Further, such  
Report shall   
  
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describe the Company's plans for the coming twelve months with regard to new  
Services that the Company reasonably anticipates might be offered or new classes  
of customers that the Company reasonably anticipates might be served.  
Notwithstanding the requirements of this Section 8.3(a), the Company shall  
provide to the City, upon the City's request, any additional information that  
the City reasonably deems necessary during the Term.  
  
 (b) The Company shall also, on an annual basis, provide  
DTE with a Report describing any construction or installation of cable, wire,  
Fiber or other transmission medium that may be used in lieu of cable, wire or  
Fiber for the same purposes, or related equipment and facilities, in any areas  
outside of the Initial Backbone, that has occurred during the previous twelve  
months. Such Report shall also describe the Company's reasonably anticipated  
plans for such construction and installation for the coming twelve months.  
Notwithstanding the requirements of this Section 8.3(b), the Company shall  
provide to the City, upon the City's request, any additional information that  
the City reasonably deems necessary during the Term. It is not anticipated that  
confidential information will be required under this Section 8.3(b).  
  
 8.4 Regulation by City. 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 governing  
telecommunications that are consistent with the terms of this Agreement and that  
it finds necessary or appropriate in the lawful exercise of its police powers,  
and the Company expressly agrees to comply with all such lawful rules,  
regulations, orders, or other directives.  
  
 8.5 Reports.  
  
 8.5.1 Status Reports. The Company shall submit to DTE reports  
describing, in detail, the status of the construction of the Initial Backbone  
every six (6) months from the Effective Date until its substantial completion.  
The Company shall, upon substantial completion of the Initial Backbone, notify   
the Commissioner in writing.  
  
 8.5.2 Financial Reports. The Company shall submit to the  
Comptroller and DTE not later than three (3) months after the end of each annual  
fiscal period, a copy of the Company's annual financial statements for such  
period which statements shall be signed by the Chief Financial Officer of the  
Company, provided, however, that the Comptroller may also require such  
statements to be audited and certified by an independent certified public  
accountant in accordance with generally accepted accounting principles. Such  
statements shall be accurate and complete.  
  
 8.5.3 Additional Reports. The Company shall submit to DTE  
every twelve months commencing with the date twelve (12) months after the  
Effective   
  
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Date, a report describing the Company's compliance with its obligations under  
Sections 6.2 and 6.3 hereof. Such report shall be accurate and complete.  
  
 8.5.4 Additional Information and Reports. Upon the request of  
the Commissioner, one Company shall promptly submit to DTE any information or  
report reasonably related to the Company's obligations under this Agreement, its  
business and operations, or those of any Affiliated Person, with respect to the  
System or its operation, or any Service distributed over the System, in such  
form and containing such information as the Commissioner shall specify. Such  
information or report shall be accurate and complete.  
  
 8.6 Additional Filings. The Company shall provide annually to DTE a  
list of any and all material communications, public reports, petitions or other  
filings, either received from or submitted to any municipal, county, state or  
federal agency or official (and any response thereto submitted by or received by  
the Company), which in any way materially affects the operation of the System or  
any Service or the Company's representations and warranties set forth herein,  
but not including tax returns or other filings which are confidential. Upon the  
request of DTE, the Company shall promptly, but in no case later than ten (10)  
business days following the request, deliver to DTE a complete copy of any item  
on said list.  
  
 8.7 Books and Records/Audit.  
  
 8.7.1 Books and Records. Throughout the Term, the Company  
shall maintain complete and accurate books of account and records of the  
business, ownership, and operations of the Company with respect to the System in  
a manner that allows the City at all times to determine whether the Company is  
in compliance with the Agreement. Should the City reasonably determine that the  
records are not being maintained in such a manner, the Company shall alter the  
manner in which the books and/or records are maintained so that the Company  
comes into compliance with this Section. All financial books and records which  
are maintained in accordance with the regulations of the PSC and generally   
accepted accounting principles shall be deemed to be acceptable under this  
Section. The Company shall also maintain and provide such additional books and  
records as the Comptroller or the Commissioner deem reasonably necessary to  
ensure proper accounting of all payments due the City.  
  
 8.7.2 Right of Inspection. The Commissioner and the  
Comptroller, or their designate representatives, shall have the right to  
inspect, examine or audit during normal business hours and upon reasonable  
notice to the Company under the circumstances, all documents, records or other  
information which pertain to the Company or any Affiliated Person with respect  
to the System, its operation, its employment and purchasing practices, Services  
distributed over the System, and with respect to the Company's obligations  
pursuant to this Agreement. All such documents   
  
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shall be made available within New York City or in such other place that the  
City may agree upon in writing in order to facilitate said inspection,  
examination, or audit, provided, however, that if such documents are located  
outside of the City, then the Company shall pay the reasonable expenses incurred  
by the Commissioner, the Comptroller or their designated representatives in  
traveling to such location. All of such documents shall be retained by the  
Company for a minimum of six (6) years following termination of this Agreement.  
Access by the City to any of the documents covered by this Section 8.7.2 shall  
not be denied by the Company on grounds that such documents are alleged by the  
Company to contain confidential, proprietary or privileged information, provided  
that this requirement shall not be deemed to constitute a waiver of the  
Company's right to assert that confidential, proprietary or privileged  
information contained in such documents should not be disclosed, subject to  
Section 8.1 hereof. In order to determine the validity of such assertion and  
withholding by the Company, the City agrees to review the alleged proprietary  
information, and/or a log of the documents believed by the Company to be  
privileged reflecting sufficient information to establish the privilege claimed,  
at the Company's premises and, in connection with such review, to limit access  
to the alleged proprietary information to those individuals who require the  
information in the exercise of the City's rights under this Agreement. If the  
Corporation Counsel of the City concurs with the Company's assertion regarding  
the proprietary nature of such information, the City will hold such information  
in confidence to the extent authorized by and in accordance with applicable law  
and will not remove from the Company's premises the proprietary portion of any  
document or other intangible thing that contains such proprietary information.  
If the Corporation Counsel of the City concurs with the Company's assertion  
regarding the privileged nature of such information, then the Company will not  
be required to disclose such information. If the Corporation Counsel of the City  
does not concur with such assertions, then the Company shall promptly provide  
such documents, including the alleged proprietary or privileged portion thereof,  
to the City, provided that the Company shall not be required to provide the  
proprietary or privileged portion thereof during the pendency of any court  
challenge to such provision.  
  
 8.7.3 Protection from Disclosure. In accordance with  
applicable law, the City shall protect from disclosure any confidential,  
proprietary information required to be made available to the City pursuant to  
Sections 8.7.1 and 8.7.2, provided that the Company notifies the City of, and  
clearly labels the information which the Company deems to be confidential,  
proprietary information. Such notification and labeling shall be the sole  
responsibility of the Company.  
  
 8.8 Compliance With "Investigations Clause." The Company agrees to  
comply in all respects with the City's "Investigations Clause," a copy of which  
is attached at Appendix F hereto.  
  
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 SECTION 9 -- RESTRICTIONS AGAINST  
 ASSIGNMENT AND OTHER TRANSFERS  
  
 9.1 Transfer of Interest. Except as provided in Section 9.6 hereof  
and Appendix G hereto, and excepting conveyances and leases of real or personal  
property in the ordinary course of the operation of the System (but not  
excepting leases which by their size or nature are the functional equivalent of  
transfers of the System), neither the franchise granted herein nor any rights or  
obligations of the Company in the System or pursuant to this Agreement shall be  
encumbered, assigned, sold, transferred, pledged, leased, sublet, or mortgaged  
in any manner, in whole or in part, to any Person, nor shall title therein,  
either legal or equitable, or any right or interest therein, pass to or vest in  
any Person, either by act of the Company, by act of any Person holding Control  
of or any interest in the Company or the System or the franchise granted herein,  
by operation of law, or otherwise, without the prior written consent of the City  
pursuant to the procedures set forth in this Section 9, provided that the City  
shall consider any such action in accordance with its usual procedural rules.  
  
 9.2 Transfer of Control or Stock. A complete description of the  
ownership and Control of the Company as of the Effective Date is set forth in  
Appendix G to this Agreement. Notwithstanding any other provision of this  
Agreement, except as provided in Section 9.6 hereof or as set forth in on  
Appendix G, no change in Control of or any interest in the Company, the System  
or the franchise granted herein shall occur after the Effective Date, by act of  
the Company, by act of any Person holding Control of the Company the System or  
the franchise granted herein, by operation of law, or otherwise, without the  
prior written consent of the City granted pursuant to the procedures set forth  
in this Section 9. The requirements of Section 9.3 hereof shall also apply  
whenever any change is proposed of five percent (5%) or more of the ownership or  
Control of the Company, the System, the franchise granted herein or of any  
Person holding Control of the Company or in the System or in the franchise (but  
nothing herein shall be construed as suggesting that a proposed change of less  
than five percent (5%) does not require consent of the City (acting pursuant to  
the procedures set forth in this Section 9) if it would in fact result in a   
change in Control of the Company, the System or the franchise granted herein),  
and any other event which could result in a change in ownership or Control of  
the Company, regardless of the manner in which such ownership or control is  
evidenced (e.g., stock, bonds, debt instruments or other indicia of ownership or  
Control).  
  
 9.3 Petition. The Company shall promptly notify the Commissioner of  
any proposed action requiring the consent of the City pursuant to Sections 9.1  
or 9.2 hereof or to which this Section 9.3 applies by submitting to the  
Commissioner, with a copy to the Corporation Counsel, a petition requesting the  
submission by the Commissioner of such petition to the FCRC and approval thereof  
by the FCRC or requesting a determination that no such submission and approval  
is required and its   
  
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argument why such submission and approval is not required. Each petition shall  
fully describe the proposed action and shall be accompanied by a justification  
for the action and, if applicable, the Company's argument as to why such action  
would not involve a change in Control of the Company, the System or the  
franchise, and such additional supporting information as the Commissioner and/or  
the FCRC may reasonably require in order to review and evaluate the proposed  
action. The Commissioner shall expeditiously review the petition and shall (a)  
notify the Company in writing if the Commissioner determines that the submission  
by the Commissioner and the approval of the FCRC is not required or (b) if the  
Commissioner determines that such submission and approval is required, either  
(i) notify the Company that the Commissioner does not approve the proposed  
action and therefore will not submit the petition to the FCRC, or (ii) submit  
the petition to the FCRC for its approval.  
  
 9.4 Consideration of the Petition. DTE, and the FCRC, as the case  
may be, may take such actions as it deems appropriate in considering the  
petition and determining whether consent is needed or should be granted. In  
considering the petition, DTE and the FCRC, as the case may be, may inquire  
into: (i) the qualifications of each Person involved in the proposed action,  
(ii) all matters relevant to whether the relevant Person(s) will adhere to all  
applicable provisions of this Agreement, (iii) the effect of the proposed action  
on competition; and (iv) all other matters it deems relevant in evaluating tho  
petition, including whether the Company executed this Agreement under a good  
faith belief that it would itself carry out the obligations of the Company  
hereunder. After receipt of a petition, the FCRC may, as it deems necessary or  
appropriate, schedule a public hearing on the petition. Further, DTE and the  
FCRC may review the Company's performance under the terms and conditions of this  
Agreement. The Company shall provide all requested assistance to DTE and the  
FCRC in connection with any such inquiry and, as appropriate, shall secure the  
cooperation and assistance of all Persons involved in said action.  
  
 9.5 Conditions. As a condition to the granting of any consent  
required by this Section 9, the Commissioner and/or the FCRC may: (i) upon a  
determination that the Company did not execute this Agreement under a good faith  
belief that it would itself carry out the obligations of the Company pursuant to  
this Agreement, require the Company or any Affiliated Person to pay to the City   
part or all of the profits earned or to be earned by such Person in connection  
with, upon the completion of, or as a result of, any of the actions described in  
Sections 9.1 or 9.2 hereof with respect to any of such actions which occur  
within four (4) years after the Effective Date; and (ii) require that each  
Person involved in any action described in Sections 9.1 or 9.2 hereof shall  
execute an Agreement, in a form and containing such conditions as may be  
specified by the City, providing that such Person assumes and agrees to be bound  
by all applicable provisions of this Agreement and such other conditions which  
the City deems necessary or appropriate in the circumstances. The execution of  
such agreement by such Person(s) shall in no way relieve the Company or   
  
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any other transferor involved in any action described in Sections 9.1 or 9.2  
hereof, of its obligations pursuant to this Agreement.  
  
 9.6 Permitted Encumbrances. Nothing in this Section 9 shall be deem  
to prohibit any assignment, pledge, lease, sublease, mortgage, or other transfer  
of all or any part of the System, or any right or interest therein, for  
financing purposes, provided that each such assignment, pledge, lease, sublease,  
mortgage, or other transfer shall be subject to the rights of the City pursuant  
to this Agreement and applicable law. The consent of the City shall not be  
required with respect to any transfer to, or taking of possession by, any  
banking or lending institution which is a secured creditor of the Company of all  
or any part of the System pursuant to the rights of such secured creditor under  
Article 9 of the Uniform Commercial Code, as in effect in the State of New York,  
and, to the extent that the collateral consists of real property, under the New  
York Real Property Law; provided, further that, the City's rights are in no way  
adversely affected or diminished.  
  
 9.7 Consent Not a Waiver. The grant or waiver of any one or more of  
such consents shall not render unnecessary any subsequent consent, nor shall the  
grant of any such consent constitute a waiver of any other rights of the City,  
as required in this Section 9.  
  
 9.8 Petitions From Persons Other Than the Company Seeking Control  
Over the Company. Notwithstanding the foregoing, DTE reserves the right, on a  
case by case basis, to accept, hear and/or grant petitions for the transfer of  
Control of the Company, the System or the franchise granted herein from Persons  
seeking to obtain Control of the Company. The City shall provide the Company  
with reasonable notice of any such petitions. The City, its officers, employees,  
agents, attorneys, consultants and independent contractors shall not be liable  
to the Company or any other Person for exercising its rights herein. The Company  
shall be entitled to rely upon publicly filed reports to which it has access in  
connection with its determination of the applicability of this Section 9.8,  
except to the extent the Company knows or has reason to believe that any such  
report is or may be incorrect, or is aware of the information which is the  
subject of this Section otherwise than as a result of publicly filed reports.  
  
 SECTION 10 -- LIABILITY AND INSURANCE  
  
 10.1 Liability and Indemnity.  
  
 10.1.1 Company. The Company shall be liable for, and the  
Company and each Affiliated Person (not including a limited partner or an  
individual shareholder) shall indemnify, defend and hold the City, its officers,  
agents, servants, employees, attorneys, consultants and independent contractors  
(the "Indemnitees")   
  
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harmless from, any and all liabilities, suits, obligations, fines, damages,  
penalties, claims, costs, charges and expenses (including, without limitation,  
reasonable attorneys' fees and disbursements), that may be imposed upon or  
incurred by or asserted against any of the Indemnitees arising out of the  
construction, operation, maintenance, upgrade, repair or removal of the System  
or otherwise arising out of or related to this Agreement; provided, however,  
that the foregoing liability and indemnity obligation of the Company pursuant to  
this Section 10.1 shall not apply to any willful misconduct or gross negligence  
of the City, its officers, employees, servants, agents, attorneys, consultants  
or independent contractors. Further, it is a condition of this Agreement that  
the City assumes no liability for liabilities, suits, obligations, fines,  
damages, penalties, claims, costs, charges and expenses (including, without  
limitation, reasonable attorneys' fees and disbursements) to either Persons or  
property on account of the same, except as expressly provided herein.  
  
 10.1.2 No Liability for Public Work, etc. None of the City,  
its officers, agents, servants, employees, attorneys, consultants or independent  
contractors shall have any liability to the Company for any damage as a result  
of or in connection with the protection, breaking through, movement, removal,  
alteration, or relocation of any part of the System by or on behalf of the  
Company or the City in connection with any emergency, public work, public  
improvement, alteration of any municipal structure, any change in the grade or  
line of any Inalienable Property of the City, or the elimination,  
discontinuation, closing or demapping of any Inalienable Property of the City,  
as provided in Sections 2.4.5 and 5.4 hereof. When reasonably possible, the  
Company shall be consulted prior to any such activity and shall be given the  
opportunity to perform such work itself, but the City shall have no liability to  
the Company in the event it does not so consult the Company. All costs to repair  
or replace the System, or parts thereof, damaged or removed as a result of such  
activity, shall be borne by the Company; provided, however, that the foregoing  
obligation of the Company pursuant to this Section 10.1.2 shall not apply to any  
willful misconduct or gross negligence of the City, its officers, employees,  
servants, agents, attorneys, consultants or independent contractors.  
  
 10.1.3 No Liability for Damages. None of the City, its  
officers, agents, servants, employees, attorneys, consultants and independent  
contractors shall have any liability to the Company for any special, incidental,  
consequential, punitive, or other damages as a result of the proper and lawful  
exercise of any right of the City pursuant to this Agreement or applicable law,  
including, without limitation, the rights of the City to terminate, amend, or   
otherwise modify all or any part of this Agreement or the franchise granted  
herein; provided, however, that the foregoing limitation on liability pursuant  
to this Section 10.1.3 shall not apply to any willful misconduct or gross  
negligence of the City, its officers, employees, servants, attorneys,  
consultants or independent contractors.  
  
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 10.1.4 Defense of Claim, etc. If any claim, action or  
proceeding is made or brought against any of the Indemnitees by reason of any  
event to which reference is made in Section 10.1.1 hereof, then upon demand by  
the City, the Company shall either resist, defend or satisfy such claim, action  
or proceeding in such Indemnitee's name, by the attorneys for, or approved by,  
the Company's insurance carrier (if such claim, action or proceeding is covered  
by insurance) or by the Company's attorneys. The foregoing notwithstanding, upon  
a showing that the Indemnitee reasonably requires additional representation,  
such Indemnitee may engage its own attorneys to defend such Indemnitee, or to  
assist such Indemnitee in such Indemnitee's defense of such claim, action or  
proceeding, as the case may be, and the Company shall pay the reasonable fees  
and disbursements of such attorneys of such Indemnitee.  
  
 10.2 Insurance.  
  
 10.2.1 Specifications. Prior to the execution of this  
Agreement, the Company has, at its own cost and expense, obtained and furnished  
to DTE, with a copy to the Comptroller, a liability or umbrella insurance policy  
taking effect no later than the Effective Date, insuring the Company and the  
City, its officers, agents, servants, employees, attorneys, consultants and  
independent contractors against each and every form of liability referred to in  
Section 10.1 herein, in the minimum combined amount of fifty million Dollars  
($50,000,000), covering bodily injury, including death, personal injury and  
property damage. Such policy or policies have been issued by companies duly  
licensed to do business in the State of New York and acceptable to the  
Comptroller, carrying a rating by Best's of not less than A. The foregoing  
minimum coverage shall not prohibit the Company from obtaining a liability  
insurance policy or policies with coverage in excess of such minimum, provided  
that the City shall be named as an additional insured to the full extent of any  
limitation contained in any such policy or policies obtained by the Company.  
  
 10.2.2 Maintenance. (a) The Company shall continuously  
maintain one or more liability insurance policies meeting the requirements in  
Section 10.2.1 hereof throughout the Term and thereafter until completion of  
removal of the System over, under or on the Inalienable Property of the City to  
the extent such removal is required pursuant to this Agreement.  
  
 (b) Each such liability insurance policy shall contain  
the following endorsement: "It is hereby understood and agreed that this policy  
may not be canceled nor the intention not to renew be stated until ninety (90)   
days after receipt by the City, by registered mail, of a written notice of such  
intent to cancel or not to renew." Within sixty (60) days after receipt by the  
City of any said notice, and in no event later than thirty (30) days prior to  
any said cancellation, the Company shall obtain and furnish to DTE, with a copy  
to the Comptroller, replacement insurance   
  
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policies in a form reasonably acceptable to DTE and the Comptroller together  
with evidence demonstrating that the premiums for such insurance have been paid.  
  
 10.2.3 Adjusted Insurance Coverage. The Company agrees to  
adjust the minimum coverage of the liability insurance policy or policies  
required by Section 10.2.1 within three (3) months of notice from the City that  
the City has reasonably determined that additional amounts or types of insurance  
are being commonly carried with respect to systems of a size and nature similar  
to the System or other circumstances have arisen which make it reasonably  
prudent to obtain such additional amounts or types of insurance.  
  
 10.2.4 Liability Not Limited. The liability of the Company and  
any Affiliated Person (not including a limited partner or an individual  
shareholder) to the City or any Person for any of the matters which are the  
subject of the liability insurance policy or policies required by this Section  
10.2 shall not be limited by said insurance policy or policies nor by the  
recovery of any amounts thereunder; provided, however, that the City shall in no  
case be entitled to duplicative recoveries from different sources.  
  
 SECTION 11 -- SPECIFIC RIGHTS AND REMEDIES  
  
 11.1 Non Exclusive. The Company agrees that the City shall have the  
specific rights and remedies set forth in this Section 11. These rights and  
remedies are in addition to and cumulative of any and all other rights or  
remedies, existing or implied, now or hereafter available to the City at law or  
in equity in order to enforce the provisions of this Agreement. Such rights and  
remedies shall not be exclusive, but each and every right and remedy  
specifically provided or otherwise existing or given may be exercised from time  
to time and as often and in such order as may be deemed expedient by the City,  
except as provided herein. The exercise of one or more rights or remedies shall  
not be deemed a waiver of the right to exercise at the same time or thereafter  
any other right or remedy nor shall any such delay or omission be construed to  
be a waiver of or acquiescence to any default. The exercise of any such right or  
remedy by the City shall not release the Company from its obligations or any  
liability under this Agreement.  
  
 11.2 Default.  
  
 11.2.1 Events of Default. In addition to any other Event of  
Default specified herein, any of the following shall constitute an Event of  
Default:  
  
 (a) any breach of a provision of the Agreement requiring  
the Company (i) to replenish the Performance Bond/Security Fund   
  
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(Section 5.8.6); (ii) to maintain the Performance Bond/Security Fund (Section  
5.8); (iii) to make any payments to the City; (iv) to maintain a liability  
insurance policy (Section 10.2); or (v) to provide or furnish information to the  
City, that is not cured within thirty (30) days after notice pursuant to Section  
11.2.2;  
  
 (b) any substantial breach of a material provision of  
this Agreement by the Company that is not cured within thirty (30) days after  
notice pursuant to Section 11.2.2; or  
  
 (c) any persistent failure by the Company to comply with  
any of the provisions, terms or conditions of this Agreement or with any rules,  
regulations, orders or other directives of the City after having received notice  
of a failure to comply.  
  
 11.2.2 Cure Procedures. (a) The Commissioner shall notify the  
Company, in writing, of any breach under this Agreement, in accordance with  
Section 13.5 hereof. The notice shall specify the alleged breach(es) with  
reasonable particularity. The Company shall either (i) within the number of days  
set forth in the applicable paragraph of Section 11.2.1 hereof, or such longer  
period of time as the Commissioner may specify in such notice, cure such alleged  
breach(es); or (ii) in a written response submitted to the Commissioner within  
fifteen (15) days after the notice of breach, present facts and arguments in  
refutation or excuse of such alleged failure. The submission of such a response  
shall toll the running of the applicable cure period as provided in Section  
11.2.1 hereof. Notwithstanding the preceding, no Event of Default shall exist if  
a breach is curable but work to be performed, acts to be done, or conditions to  
be removed which cannot, by their nature, reasonably be performed, done or  
removed within the cure period provided, so long as the Company shall have  
commenced curing the same within the cure period provided and shall diligently  
and continuously prosecute the same promptly to completion.  
  
 (b) If the Company fails to cure the breach within the  
applicable cure period, and fails to submit a response to the Commissioner  
pursuant to subparagraph (a) hereof within the period provided herein for  
submitting such response, an Event of Default will be deemed to have occurred.  
  
 (c) If, after the Company makes a response to the  
Commissioner, the Commissioner determines, in his or her reasonable discretion,  
that a breach under this Agreement has occurred, the Company shall cure such  
breach within the balance of the time period to cure that remained when the   
submission was made. If the Company is not able to cure within the remaining  
time, the breach will be deemed to be an Event of Default, provided, however,  
that no Event of Default shall exist if a breach is curable but work to be  
performed, acts to be done, or conditions to be removed which cannot, by their  
nature, reasonably be performed, done   
  
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or removed within the cure period remaining, so long as the Company shall have  
commenced curing the same within the cure period provided and shall diligently  
and continuously prosecute the same promptly to completion.  
  
 11.2.3 Remedies of the City. (a) Upon an Event of Default, DTE  
may:  
  
 (i) cause a withdrawal from the Performance  
 Bond/Security Fund for any specified amount due the City under this  
 Agreement;  
  
 (ii) assess money damages from the Company as  
 compensation for such Event of Default;  
  
 (iii) revoke the franchise granted pursuant to this  
 Agreement by termination of this Agreement;  
  
 (iv) accelerate the expiration of the Term by decreasing  
 the term of the franchise provided in Section 2.1 hereof, provided that  
 the remaining term of the franchise as accelerated pursuant to this  
 Section 11.2.3(a)(iv) shall not be less than twelve (12) months;  
  
 (v) restrain by injunction, the default or reasonably  
 anticipated default by the Company of any provision of this Agreement; and  
  
 (vi) invoke any other available remedy that would be  
 permitted by law.  
  
 (b) DTE shall give the Company when it determines to pursue  
one or more remedies, but nothing herein shall prevent DTE from electing more  
than on remedy, simultaneously or consecutively, for any default.  
  
 11.3 Termination.  
  
 11.3.1 Termination Events. (a) The occurrence of any of the  
following shall result in termination of the Agreement:  
  
 (i) the occurrence of any event relating to the  
 financial status of the Company which may reasonably lead to the  
 foreclosure or other judicial or nonjudicial sale of all or any material  
 part of the System, and the Company fails to demonstrate to the reasonable  
 satisfaction of the Commissioner within thirty (30) days after notice that  
 such event will not lead to such foreclosure or other judicial or  
 nonjudicial sale;  
  
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 (ii) the condemnation by public authority, other than  
 the City, or sale or dedication under threat or in lieu of condemnation of  
 all or substantially all of the System, the effect of which would  
 materially frustrate or impede the ability of the Company to carry out its  
 obligations and the purposes of this Agreement and the Company fails to  
 demonstrate to the reasonable satisfaction of the Commissioner within  
 thirty (30) days after notice that such condemnation, sale or dedication  
 would not materially frustrate or impede such ability of the Company;  
  
 (iii) if: (A) the Company shall make an assignment of  
 the Company or the System for the benefit of creditors, shall become and  
 be adjudicated insolvent, shall petition or apply to any tribunal for, or  
 consent to, the appointment of, or taking possession by, a receiver,  
 custodian, liquidator or trustee or similar official pursuant to state or  
 local laws, ordinances or regulations of or for it or any substantial part  
 of its property or assets, including all or any part of the System; (B) a  
 writ or warranty of attachment, execution, distraint, levy, possession or  
 any similar process shall be issued by any tribunal against all or any  
 material part of the Company's property or assets; (C) any creditor of the  
 Company petitions or applies to any tribunal for the appointment of, or  
 taking possession by, a trustee, receiver, custodian, liquidator or  
 similar official for the Company or of any material parts of the property  
 or assets of the Company under the law of any jurisdiction, whether now or  
 hereinafter in effect, and a final order, judgment or decree is entered  
 appointing any such trustee, receiver, custodian, liquidator or similar  
 official, or approving the petition in any such proceedings; or (D) any  
 final order, judgment or decree is entered in any proceedings against the  
 Company decreeing the voluntary or involuntary dissolution of the Company;  
 or  
  
 (iv) if there shall occur any denial, forfeiture or  
 revocation by any federal, state or local governmental authority having  
 regulatory jurisdiction over the Company of any authorization required by  
 law or the expiration without renewal of any such authorization, and such  
 events, either individually or in the aggregate, materially jeopardize the  
 System or its operation, and the Company fails to take steps to obtain or  
 restore such authorization within thirty (30) days after notice.  
  
 (b) In addition, an Event of Default under Section 11.2  
herein may result in termination of the Agreement.  
  
 11.3.2 Rights Upon Termination. In the event of any  
termination of this Agreement, whether pursuant to Section 11.3.1 hereof, by the  
expiration of the Term or by revocation of the franchise by DTE, the Company, at  
the City's election, shall (a) sell to the City or to the City's designee the  
portions of the   
  
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System on, over or under the Inalienable Property of the City and all equipment  
necessary for the functioning of such portions of the System; and/or (b) remove  
the System, or portions of the System, installed on, over or under the  
Inalienable Property of the City at the Company's own cost and expense, pursuant  
to Section 11.4 hereof.  
  
 11.3.3 Price. (a) The price to be paid to the Company upon an  
acquisition pursuant to Section 11.3.2 herein shall be fair value (or, in case  
of termination by revocation, an equitable price, determined with due regard to  
the injury to the City and its residents) with no value allocable to the  
franchise itself, which price shall be the fair value as provided in Section  
363(h)(5) of the City Charter, as may be amended, or under any successor  
provision. Subject to the limitations found in the next sentence, to the extent  
the City effects an acquisition pursuant to Section 11.3.2 herein and  
subsequently sells that portion of the System acquired to a third party, and the  
amount received by the City from such sale exceeds the price paid by the City to  
the Company pursuant to this Section 11.3.3, the City shall pay such excess  
amount to the Company after deducting all reasonable expenses incurred by the  
City in connection with such acquisition and sale. The preceding sentence shall  
apply only in cases where the Agreement has terminated by reason of the  
expiration of the full Term or by reason of the occurrence of an event in  
Section 11.3.1(a) hereof, and shall not apply in any case where the Agreement  
has been terminated for cause. In cases where the Agreement has been terminated  
for cause and the City effects an acquisition or transfer of the System for any  
reason, and the party acquiring the System acquires it directly from the  
Company, then the City shall be entitled to receive from such party any amount  
in excess of the price which the City could have received if it had purchased  
the System from the Company and subsequently sold the System to such third  
party.  
  
 (b) The date of valuation for purposes of Section 11.3.2  
hereof shall be the date of termination of the Agreement. For the purpose of  
determining such valuation, the parties shall select a mutually agreeable  
independent appraiser to compute the purchase price in accordance with industry  
practice and the aforementioned standards. If they cannot agree on an appraiser  
in ten (10) days, the parties will seek an appraiser from the American  
Arbitration Association. The appraiser shall be instructed to make the appraisal  
as expeditiously as possible, but in no more than sixty (60) days and shall  
submit to both parties a written appraisal. The appraiser shall be afforded  
access to the Company's books and records, as necessary to make the appraisal.  
Notwithstanding the provisions of Section 7.2.2 hereof, the parties shall share  
equally the costs and expenses of the appraiser.  
  
 (c) The City will notify the Company, within thirty (30)  
days after receipt of the appraisal, of its election of rights pursuant to  
Section 11.3.2 hereof. If it elects to make the purchase permitted under Section  
11.3.2 hereof, it will purchase the same at a closing to occur within a  
reasonable time after its election.  
  
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 (d) The Company agrees at the request of the City, (i)  
to operate the System on behalf of the City pursuant to the provisions of this  
Agreement and such additional terms and conditions as are equitable to the City  
and the Company for a period of up to four (4) months after the termination of  
this Agreement, until the City either elects not to purchase any portion of the  
System, or closes on such a purchase, or (ii) to cease all construction and  
operational activities in a prompt and workmanlike manner.  
  
 11.3.4 Company's Obligations. In the event of any acquisition  
of the System by the City or the City's designee pursuant to Section 11.3.2  
hereof, the Company shall:  
  
 (a) cooperate with the City to effectuate an orderly  
transfer of all records and information concerning the System to the City;  
  
 (b) promptly execute all appropriate documents to  
transfer to the City, subject to any liabilities, title to the System as well as  
all contracts, leases, licenses, permits, rights of way, and any other rights,  
contracts or understandings necessary to maintain and operate the System, as  
appropriate; provided, that such transfers shall be made subject to the rights,  
under Article 9 of the Uniform Commercial Code as in effect in the State of New  
York and, to the extent that any collateral consists of real property, under the  
New York Real Property Law, of banking or any other lending institutions which  
are secured creditors or mortgagees of the Company at the time of such  
transfers; and provided, that, with respect to such creditors or mortgagees, the  
City shall have no obligation following said transfers to pay, pledge, or  
otherwise commit in any way any general or any other revenues or funds of the  
City, other than the gross operating revenues received by the City from its  
operation of the System, in order to repay any amounts outstanding on any debts  
secured by the System which remain owing to such creditors or mortgagees; and  
provided, finally, that the total of such payments by the City to such creditors  
and mortgagees, from the gross operating revenues received by the City from its  
operation of the System, shall in no event exceed the lesser of: (1) the fair  
market value of the System on the date of the transfer of title to the City or  
(2) the outstanding debt owed to such creditors and mortgagees on said date.  
Nothing in this Section 11.3 shall be construed to limit the rights of any such  
secured creditors to exercise its or their rights as secured creditors or  
mortgagees at any time prior to the payment of all amounts due pursuant to the  
applicable debt instruments; and  
  
 (c) promptly supply the Commissioner with all necessary  
records (1) to reflect the City's ownership of the System; and (2) to operate  
and maintain the System including, without limitation, all Customer records and  
plant and equipment layout documents.  
  
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 11.4 Removal.  
  
 11.4.1 Discretion of DTE. Upon any termination of Service,  
DTE, in its sole discretion, may, but shall not be obligated to, direct the  
Company to remove, at the Company's sole cost and expense, all, or any portion  
designated by DTE, of the System installed by the Company from the Inalienable  
Property of the City in accordance with all applicable requirements of the City  
and subject to the following:  
  
 (a) this provision shall not apply to buried portions of  
the System which, in the opinion of DTE, cannot be removed;  
  
 (b) in removing the System, or part thereof, the Company  
shall refill and compact, at its own cost and expense, any excavation that shall  
be made by it and shall leave, in all material aspects, all Inalienable Property  
and other property in as good condition as that prevailing prior to the  
Company's removal of the System from Inalienable Property of the City and  
without affecting, altering or disturbing in any way any electric, telephone or  
other cables, wires, structures or attachments;  
  
 (c) the City shall have the right to inspect and approve  
the condition of such Inalienable Property after removal and, to the extent that  
the City determines that said Inalienable Property and other property have not  
been materially as good condition, as that prevailing prior to the Company's  
removal of the System, the Company shall be liable to the City for the cost of  
restoring the Inalienable Property and other property to said condition;  
  
 (d) the Performance Bond/Security Fund, liability  
insurance and indemnity provisions of this Agreement shall remain in full force  
and effect during the entire period, after removal and associated repair of all  
Inalienable Property of the City, and for not less than one hundred twenty (120)  
days thereafter; and  
  
 (e) removal shall be commenced within thirty (30) days  
of the removal order by DTE and shall be substantially completed within twelve  
(12) months thereafter including all reasonably associated repair of the  
Inalienable Property of the City.  
  
 11.4.2 Failure to Commence Removal. If, in the reasonable  
judgment of the Commissioner, the Company fails to commence removal of the  
System as designated by DTE, within thirty (30) days after DTE's removal order,  
or if the Company fails to substantially complete such removal, including all  
associated repair of the Inalienable Property of the City, within twelve (12)   
months thereafter then, to the extent not inconsistent with applicable law, the  
City shall have the right to:  
  
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 (a) declare that all rights, title and interest to the  
System belong to the City with all rights of ownership, including, but not  
limited to the right to connect and use the System or to effect a transfer of  
all right, title and interest in the System to another Person for operation; or  
  
 (b) authorize removal of the System installed by the  
Company on, over or under the Inalienable Property of the City at the Company's  
cost and expense, by another Person; and  
  
 (c) to the extent consistent with applicable law, any  
portion of the Company's System on, over or under the Inalienable Property of  
the City designated by DTE for removal and not timely removed by the Company  
shall belong to and become the property of the City without payment to the  
Company notwithstanding the provisions of Section 11.3.2 hereof, and the Company  
shall execute and deliver such documents, as the Commissioner shall request, in  
form and substance acceptable to the Commissioner, to evidence such ownership by  
the City.  
  
 11.4.3 No Condemnation. None of the declaration, connection,  
use, transfer or other actions by the City, or the Commissioner under Section  
11.4.2 shall constitute a condemnation by the City or a sale or dedication under  
threat or in lieu of condemnation.  
  
 11.5 Return of Performance Bond/Security Fund. Upon the later of the  
date one hundred and twenty (120) days after the termination of this Agreement  
for any reason or the date of the completion of removal of the System from and  
associated repair of the Inalienable Property of the City pursuant to Section  
11.4.1 hereof, the Company shall be entitled to the return of the Performance  
Bond/Security Fund deposited pursuant to Section 5.8 hereof, or such portion  
thereof as remains on deposit with the Comptroller at said termination, provided  
that all offsets necessary (a) to compensate the City pursuant to Sections 5.8.2  
and/or 5.8.3 hereof, (b) to cover any costs, loss or damage incurred by the City  
as a result of any Event of Default, in the event of termination of this  
Agreement by the City pursuant to Section 11.3 hereof, and (c) to reimburse the  
City for the cost of removal of the System from the Inalienable Property of the  
City pursuant to Section 11.4.2 hereof have been taken by the City.  
  
 11.6 Other provisions. The City and the Company shall negotiate in  
good faith all other terms and conditions of any such acquisition or transfer,  
except that the Company hereby waives its rights, if any, to relocation costs  
that may be provided by law and except that, in the event of any acquisition of  
the System by the City: (i) the City shall not be required to assume any of the  
obligations of any collective bargaining agreements or any other employment   
contracts held by the Company or any other obligations of the Company or its  
officers, employees, or agents, including, without limitation, any pension or  
other retirement, or any insurance obligations; and   
  
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(ii) the City may lease, sell, operate, or otherwise dispose of all or any part  
of the System in any manner.  
  
 SECTION 12 -- SUBSEQUENT ACTION  
  
 12.1 Compensation. In the event that, after the Effective Date any  
court, agency, commission, legislative body, or other authority of competent  
jurisdiction takes any action or enters any judgment which has a materially  
adverse effect, with respect to the City or the Company, on the compensation or  
other payments to be made by the Company pursuant to Section 7 of this  
Agreement, then the Company and DTE shall enter into negotiations to amend this  
Agreement in a manner not inconsistent with any such action or judgment so as to  
establish a fair and equitable relationship between the parties. In the event  
that either party fails to negotiate in good faith to produce an agreement which  
is reasonably acceptable to both parties within a reasonable period, then either  
party shall have the right, by notice to the other, to accelerate the term of  
this Agreement and the franchise granted hereunder such that the term and the  
franchise shall terminate on the date which is one half of the number of days  
between the date of such notice and January l, 2009, but in no event shall the  
City be permitted to reduce the Term of this franchise by virtue of this Section  
12.1 such that the term of this franchise is less than 10 years.  
  
 12.2 Procedure for Subsequent Invalidity.  
  
 12.2.1 Declaration of Invalidity or Injunction. Except as  
provided in Section 12.1 hereof, in the event that, after the Effective Date,  
any court, agency, commission, legislative body, or other authority of competent  
jurisdiction:  
  
 (a) declare this Agreement invalid, in whole or in part,  
or  
  
 (b) requires the City or the Company either to: (i)  
perform any act which is inconsistent with any provision of this Agreement or  
(ii) cease performing any act required by any provision of this Agreement, then  
the Company or the City, as the case may be, shall promptly notify the other  
party in writing of such fact.  
  
 12.2.2 Continued Compliance. After the occurrence of the  
events described in Section 12.2.1 hereof, the Company and the City shall  
continue to comply with all provisions of this Agreement, including the affected  
provision, until the validity of the declaration or requirement has been finally  
adjudicated or a court orders the Company or the City to comply with such  
declaration or order, provided  
  
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that either party may comply with any court order which is not stayed during the  
pendency of any appeal leading to said final adjudication.  
  
 12.2.3 Negotiations to Amend Agreement. Except as provided in  
Section 12.1 hereof, to the extent that any statute, rule, regulation, ordinance  
or any other law is enacted, adopted, repealed, amended, modified, changed or  
interpreted in any way during the term of this Agreement so as to (a) declare  
the Agreement invalid, in whole or in part, or (b) require the Company or City  
either to: (i) perform any act which is inconsistent with any provision of this  
Agreement, or (ii) cease performing any act required by any provision of this  
Agreement, the Company and City shall enter into good faith negotiations so as  
to modify this Agreement and/or regulate the System, as applicable, to reflect  
such enactment, adoption, repeal, amendment, modification, change or  
interpretation and the Company agrees to comply with any such modifications or  
regulations arising out of such negotiations. In the event that either party  
fails to negotiate in good faith to produce an agreement which is reasonably  
acceptable to both parties within a reasonable period, then either party shall  
have the right, by notice to the other, to accelerate the term of this Agreement  
and the franchise granted hereunder such that the term and the franchise shall  
terminate on the date which is one half of the number of days between the date  
of such notice and January 1, 2009, but in no event shall the City be permitted  
to reduce the Term of this franchise by virtue of this Section 12.2.3 such that  
the Term of this franchise is less than 10 years.  
  
 SECTION 13 -- MISCELLANEOUS  
  
 13.1 Appendices. The Appendices to this Agreement, attached hereto,  
and all portions thereof and exhibits thereto, are, except as otherwise  
specified in said Appendices, incorporated herein by reference and expressly  
made a part of this Agreement. The procedures for approval of any subsequent  
amendment or modification to said Appendices shall be the same as those  
applicable to any amendment or modification hereof.  
  
 13.2 Action Taken by City. Any action to be taken by DTE pursuant to  
this Agreement shall be taken in accordance with the applicable provisions of  
the City Charter as said Charter may be amended or modified throughout the Term.  
Whenever, pursuant to the provisions of this Agreement, the City, the Company,  
or any other Person is required or permitted to take any action, including,  
without limitation, the making of any request or the granting of any consent,  
approval, or authorization, the propriety of said action shall be measured  
against the standard of reasonableness such that each such action shall be  
undertaken in a reasonable manner, unless this Agreement authorizes the City,  
the Company, or other Person to take such action in its sole discretion.  
  
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 13.3 Entire Agreement. This Agreement, including all Appendices  
hereto, embodies the entire understanding and agreement of the City and the  
Company with respect to the subject matter hereof and merges and supersedes all  
prior representations, agreements and understandings, whether oral or written,  
between the City and the Company with respect to the subject matter hereof,  
including, without limitation, all prior drafts of this Agreement and any  
Appendix to this Agreement and any and all written or oral statements or  
representations by any official, employee, agents, attorney, consultant or  
independent contractor of the City or the Company.  
  
 13.4 Delays and Failures Beyond Control of Company. Notwith standing  
any other provision of this Agreement, the Company shall not be liable for delay  
in the performance of or failure to perform, in whole or in part, its  
obligations pursuant to this Agreement due to strike, war or act of war (whether  
an actual declaration of war is made or not), insurrection, riot, act of public  
enemy, accident, fire, flood or other act of God, technical failure where the  
Company has exercised all due care in the prevention thereof, or other causes or  
events, to the extent that such any such causes or events are beyond the control  
of the Company. In the event that any such delay in performance or failure to  
perform affects only part of the Company's capacity to perform, the Company  
shall perform to the maximum extent it is able to do so and shall take all steps  
within its power to correct said cause(s). The Company agrees that in correcting  
said cause(s), it shall take all reasonable steps to do so in as expeditious a  
manner as possible. The Company shall notify DTE in writing of the occurrence of  
an event covered by this Section 13.4 within five (5) business days of the date  
upon which the Company learns or should have learned of its occurrence.  
  
 13.5 Notices. Every notice, order, petition, document, or other  
direction or communication to be served upon the City or the Company shall be in  
writing and shall be sufficiently given if sent by registered or certified mail,  
return receipt requested. Every such communication to the Company shall be sent  
to its office located at 150 00 00xx Xxxx, Xxxxxxxxxx, Xxx Xxxx 00000 or to such  
other location in New York City as the Company may designate, from time to time.  
Every communication from the Company shall be sent to the individual, agency or  
department designated in the applicable section of this Agreement, unless it is  
to "the City," in which case such communication shall be sent to the  
Commissioner of DTE at 00 Xxxx Xxxxx, 0xx Xxxxx, Xxx Xxxx, Xxx Xxxx 00000. A  
required copy of each communication from the Company shall be sent to  
Corporation Counsel, New York City Law Department, 000 Xxxxxx Xxxxxx, Xxx Xxxx,  
Xxx Xxxx 00000, Attention: Chief, Economic Development Division. Except as  
otherwise provided herein, the mailing of such notice, direction, or order shall  
be equivalent to direct personal notice and shall be deemed to have been given  
when mailed. Any notice the Commissioner is required to give to the Company  
pursuant to Section 11.2 hereof for which a cure period is ten (10) days at less  
must be served by personal delivery, overnight mail service or facsimile  
transmission.  
  
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 13.6 General Representations, Warranties and Covenants of the  
Company. In addition to the representations warranties, and covenants of the  
Company to the City set forth elsewhere herein, the Company represents and  
warrants to the City and covenants and agrees (which representations,  
warranties, covenants and agreements shall not be affected or waived by any  
inspection or examination made by or on behalf of the City), that, as of the  
Effective Date:  
  
 13.6.1 Organization, Standing and Power. The Company is a  
corporation duly organized, validly existing and in good standing under the laws  
of the State of Delaware and is duly authorized to do business in the State of  
New York and in the City. The Company has all requisite power and authority to  
own or lease its properties and assets, to conduct its businesses as currently  
conducted and to execute, deliver and perform this Agreement and all other  
agreements entered into or delivered in connection with or as contemplated  
hereby. Certified copies of the Company's organizational and governing  
documents, as amended to date, have been delivered to the Commissioner, and are  
complete and correct. The Company is qualified to do business and is in good  
standing in the State of New York.  
  
 13.6.2 Authorization; Non Contravention. The execution,  
delivery and performance of this Agreement any ail other agreements, if any,  
entered into in connection with the transactions contemplated hereby have been  
duly, legally and validly authorized by all necessary action on the part of the  
Company and the Company has furnished the City with a certified copy of  
authorizations for the execution and delivery of this Agreement. This Agreement  
and all other agreements, if any, entered into in connection with the  
transactions contemplated hereby have been duly executed and delivered by the  
Company and constitute (or upon execution and delivery will constitute) the  
valid and binding obligations of the Company, and are enforceable (or upon  
execution and delivery will be enforceable) in accordance with their respective  
terms. The Company has obtained the requisite authority to authorize, execute  
and deliver this Agreement and to consummate the transactions contemplated  
hereby and no other proceedings or other actions are necessary on the part of  
the Company to authorize the execution and delivery of this Agreement and the  
consummation of the transactions contemplated hereby. Neither the execution and  
delivery of this Agreement by the Company nor the performance of its obligations  
contemplated hereby will:  
  
 (a) conflict with, result in a material breach of or  
constitute a material default under (or with notice or lapse of time or both  
result in a material breach of or constitute a material default under) (i) any  
governing document of the Company or to the Company's knowledge, any agreement  
among the owners of the Company, or (ii) any statute, regulation, agreement,  
judgment, decree, court or administrative order or process or any commitment to  
which it (or any of its properties or assets) is subject or bound;  
  
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 (b) result in the creation of, or give any party the  
right to create, any material lien, charge, encumbrance or security interest  
upon the property and assets of the Company; or  
  
 (c) terminate, modify or accelerate, or give any third  
party the right to terminate, modify or accelerate any provision or term of any  
contract, arrangement, agreement, license agreement or commitments, except for  
any event specified in (a) or (b) above which individually or in the aggregate  
would not have a material and adverse effect on the business, properties or  
financial condition of the Company or the System.  
  
 13.6.3 Consent. No consent, approval or authorization of, or  
declaration or filing with, any public, governmental or other authority is  
required for the valid execution and delivery of this Agreement or any other  
agreement or instrument, if any, executed or delivered in connection herewith.  
  
 13.6.4 Compliance with Law. The Company certifies that, to the  
best of its knowledge after diligent inquiry, it is in compliance with all laws,  
ordinances, decrees and governmental rules and regulations applicable to the  
System and has filed, has obtained or will file for all government licenses,  
permits, and authorizations necessary for the operation, marketing and  
maintenance of the System.  
  
 13.6.5 Litigation; Investigations. To the best of of the  
Company's knowledge after diligent inquiry, except to the extent otherwise  
disclosed to the City: (a) there is no civil, criminal, administrative,  
arbitration or other proceeding, investigation or claim (including, without  
limitation, proceeding with respect to unfair labor practice matters or labor  
organization activity matters), pending or threatened against the Company or any  
Affiliated Person, at law or in equity, or before any foreign, federal, state,  
municipal or other governmental department commission, board, bureau, agency or  
instrumentality (including without limitation any matter involving the granting  
of a temporary or permanent injunction against the Company or any Affiliated  
Person) that is reasonably likely to have a material adverse effect on the  
business, operation, properties, assets or financial condition of the Company or  
the System, or which questions the validity or prospective validity of this  
Agreement, or of any essential element upon which this Agreement depends, or of  
any action to be taken by the Company or any Affiliated Person; (b) no  
Investigation or review by any governmental entity with respect to the Company  
or any Affiliated Person, relating to the System or any of the transactions  
contemplated hereby is pending or is threatened against the Company or any  
Affiliated Person, nor has any governmental entity indicated to the Company or  
any Affiliated Person an intention to conduct the same; and (c) neither the  
Company nor any Affiliated Person is subject to any outstanding order, writ,  
injunction or decree which materially and adversely affects the business,  
operations, properties, assets or financial condition of the System.  
  
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 13.6.6 Fees. The Company has paid all franchise, license or  
other fees and charges which have become due pursuant to any franchise or permit  
to which it is a party and has made adequate provisions for any such fees and  
charges which have accrued, except where contested in good faith and by  
appropriate proceedings.  
  
 13.6.7 Criminal Acts. Neither the Company, nor any Person  
holding a Controlling Interest in the Company, nor any director or officer of  
the Company nor any employee or agent of the Company nor any Controlling Person,  
acting pursuant to the express direction, or with the actual consent of the  
foregoing has been convicted (where such conviction is a final, nonappealable  
judgment) or has entered a guilty plea with respect to: (A) any criminal  
offense, excluding Class B misdemeanors, violations, and traffic infractions as  
designated in the New York State Penal Law or their equivalents in other  
jurisdictions; or (B) any criminal offense, including, without limitation,  
bribery or fraud, arising out of or in connection with (i) this Agreement, (ii)  
the award of the franchise granted pursuant to this Agreement, or (iii) any act  
to be taken following the Effective Date, pursuant to this Agreement by the  
City, its officers employees, or agents.  
  
 13.6.8 Misrepresentation. No material misrepresentation has  
been made, either oral or written, intentionally or negligently, by or on behalf  
of the Company in this Agreement, in connection with any submission to DTE or  
the Commissioner, including the Proposal, in connection with the negotiation of  
this Agreements for the purposes of this Section, Proposal means the responses  
to the City's Request for Proposals for Local High CapaCity Telecommunications  
Services submitted to the City by the Company, and any amendments thereto.  
  
 13.7 Additional Covenants. Until the termination of this Agreement  
and the satisfaction in full by the Company of its obligations under this  
Agreement, in consideration of the franchise granted herein, the Company agrees  
that it will comply with the following affirmative covenants, unless the City  
otherwise consents in writing:  
  
 13.7.1 Compliance with laws; Licenses and Permits. The Company  
shall comply with: (a) all applicable laws, rules, regulations, orders, writs,  
decrees and judgments (including, but not limited to, those of the PSC and FCC  
and any other federal or state agency or authority of competent jurisdiction)  
affecting this Agreement, the franchise, and the System; and (b) all local laws  
and all rules, regulations, orders, or other directives of the City, DTE, and  
the Commissioner issued pursuant to and in accordance with this Agreement or  
otherwise.  
  
 The Company shall have the sole responsibility for obtaining or  
causing to be obtained all permits, licenses and other forms of approval or  
authorization necessary to construct, operate, maintain, upgrade, repair or  
remove the System, or   
  
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any part thereof. The Company will, prior to any construction, operation, mainte  
xxxxx, upgrade, repair or removal of the System, secure all necessary permits,  
licenses and authorizations in connection with the construction, operation,  
maintenance, upgrade, repair or removal of the System, or any part thereof, and  
will file all required registrations, applications, reports and other documents  
with the FCC, the PSC and other entities exercising jurisdiction over the  
provision of telecommunications services or the construction of delivery systems  
therefor, except those which cannot be obtained prior to the date hereof, which  
the Company will promptly seek to obtain. The Company will promptly seek to  
obtain all leases, easements and equipment rental or other agreements necessary  
for the maintenance and operation of the System.  
  
 The Company shall not permit to occur, or shall promptly take  
corrective action if there shall occur, any event which (a) could result in the  
revocation or termination of any such license or authorization, (b) could  
materially and adversely affect any rights of the Company, or (c) permits or,  
after notice or lapse of time or both, would permit, revocation or termination  
of any such license or which materially and adversely affects or reasonably can  
be expected to materially and adversely affect the System or any part thereof.  
  
 13.7.2 Criminal Acts. The Company shall not permit any of the  
convictions or guilty pleas of the types listed in Section 13.6.7 to occur  
during the term of this Agreement, arising out of or in connection with (i) this  
Agreement, (ii) the award of the franchise granted pursuant to this Agreement,  
or (iii) any act to be taken following the Effective Date, pursuant to this  
Agreement by the City, its officers, employees, or agents, and it shall be an  
Event of Default if any such convictions or guilty pleas shall occur during the  
term of this Agreement, provided that the City's right to take enforcement  
action under this Agreement in the event of said convictions or guilty pleas  
shall arise only with respect to any of the foregoing convictions or guilty  
pleas of the Company itself or, with respect to any of the foregoing convictions  
or guilty pleas of any of the other Persons specified in Section 13.6.7, if the  
Company shall have failed to disassociate itself from, or terminate the  
employment of, said Person or Persons within thirty (30) days after the  
Commissioner orders such disassociation.  
  
 13.7.3 Maintain Existence. The Company will preserve and  
maintain its existence, its business, and all of its rights and privileges  
necessary or desirable in the normal conduct of said business in the District,  
unless any such change shall not have a material and adverse impact on the  
Company's ability to construct, operate, maintain and upgrade the System as  
provided herein or fulfill the obligations of the Company hereunder. The Company  
shall maintain its good standing in its state of organization and continue to  
qualify to do business and remain in good standing in the State of New York. The  
Company shall conduct business in accordance with its organizational and  
governing documents, and shall comply with the material terms of   
  
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all mortgages, indentures, leases, contracts and other agreements and  
instruments binding upon it except where contested in good faith and by  
appropriate proceedings.  
  
 13.7.4 Condition of System. All of the properties, assets and  
equipment used as part of the System will be maintained in good repair, working  
order and good condition.  
  
 13.8 Binding Effect. This Agreement shall be binding upon and inure  
to the benefit of the parties hereto and their respective successors and  
permitted transferees and assigns. All of the provisions of this Agreement shall  
apply to the Company, its successors, and assigns.  
  
 13.9 No Waiver; Cumulative Remedies. No failure on the part of the  
City to exercise, and no delay in exercising, any right hereunder shall operate  
as a waiver thereof, nor shall any single or partial exercise of any such right  
preclude any other right, except as provided herein, subject to the conditions  
and limitations established in this Agreement. The rights and remedies provided  
herein are cumulative and not exclusive of any remedies provided by law, and  
nothing contained in this Agreement shall impair any of the rights of the City  
under applicable law, subject in each case to the terms and conditions of this  
Agreement. A waiver of any right or remedy by the City at any one time shall not  
affect the exercise of such right or remedy or any other right or other remedy  
by the City at any other time. In order for any waiver of the City to be  
effective, it must be in writing. The failure of the City to take any action  
regarding a default or an Event of Default by the Company shall not be deemed or  
construed to constitute a waiver of or otherwise affect the right of the City to  
take any action permitted by this Agreement at any other time regarding such  
default or Event of Default which has not been cured, or with respect to any  
other default or Event of Default by the Company.  
  
 13.10 No Opposition. The Company agrees that it shall not oppose the  
intervention by the City in any suit, action, or proceeding involving the  
Company with respect to the System or its construction, operation, maintenance,  
repair or removal, or to any provision of this Agreement. The Company agrees  
that it will not, at any time, set up against the City any claim nor institute  
against the City any proceeding alleging that, pursuant to any law, rule or  
regulation in effect on the Effective Date, a condition or term of this  
Agreement is unreasonable, arbitrary, void, or otherwise unenforceable, or that  
the City had no power or authority to make such term or condition. By execution  
of this Agreement, the Company accepts the validity of the terms and conditions  
of this Agreement in their entirety and hereby waives and relinquishes, to the  
maximum extent permitted by applicable law, any and all rights it has, in law or  
in equity, to assert in any manner at any time or in any forum that this  
Agreement, the franchise granted pursuant to this Agreement, the terms and  
conditions of this Agreement or the processes and procedures pursuant to which  
this Agreement was   
  
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entered into and the franchise was granted are not consistent with applicable  
law in effect on the Effective Date.  
  
 13.11 Partial Invalidity. If any section, subsection, sentences  
clause, phrase, or other portion of this Agreement is, for any reason, declared  
invalid, in whole or in part, by any court, agency, commission, legislative  
body, or other authority of competent jurisdiction, such portion shall be deemed  
a separate, distinct, and independent portion. Except as provided in Section 12  
hereof, such declaration shall not affect the validity of the remaining portions  
hereof, which other portions shall continue in full force and effect.  
  
 13.12 Headings. The headings contained in this Agreement are to  
facilitate reference only, do not form a part of this Agreement, and shall not  
in any way affect the construction or interpretation hereof. Terms such as  
"hereby," "herein," "hereof," "hereinafter," "hereunder," and "hereto" refer to  
this Agreement as a whole and not to the particular sentence or paragraph where  
they appear, unless the context otherwise requires. The term "may" is  
permissive; the terms "shall" and "will"" are mandatory, not merely directive.  
All references to any gender shall be deemed to include both the male and the  
female, and any reference by number shall be deemed to include both the singular  
and the plural, as the context may require. Terms used in the plural include the  
singular, and vice versa, unless the context otherwise requires.  
  
 13.13 No Agency. The Company shall conduct the work to be performed  
pursuant to this Agreement as an independent contractor and not as an agent of  
the City.  
  
 13.14 Governing Law. This Agreement shall be deemed to be executed  
in the City of New York, State of New York, and shall be governed in all  
respects, including validity, interpretation and effect, and construed in  
accordance with the laws of the State of New York, as applicable to contracts  
entered into and to be performed entirely within that State.  
  
 13.15 Survival of Representations and Warranties. All  
representations and warranties contained in this Agreement shall survive the  
Term.  
  
 13.16 Delegation of City Rights. The City reserves the right to  
delegate and redelegate, from time to time and to the extent permitted by law,  
any of its rights or obligations under this Agreement to any governmental body  
or organization, or official of any other governmental body or organization, and  
to revoke any such delegation or redelegation. Any such delegation or  
redelegation by the City shall be effective upon written notice by the City to  
the Company of such delegation or redelegation. Upon receipt of such notice by  
the Company, the Company shall be bound by all terms and conditions of the  
delegation or redelegation not in conflict with   
  
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this Agreement. Any such delegation, revocation or redelegation, no matter how  
often made, shall not be deemed an amendment to this Agreement or require the  
Company's consent.  
  
 13.17 Claims Under Agreement. The City and the Company agree that,  
except to the extent inconsistent with applicable law, any and all claims  
asserted by or against the City arising under this Agreement or related thereto  
shall be heard and determined either in a court of the United States located in  
New York City ("Federal Court") or in a court of the State of New York located  
in the City and County of New York ("New York State Court"). To effect this  
Agreement and intent, the Company agrees that:  
  
 (a) If the City initiates any action against the Company  
in Federal Court or in New York State Court, service of process may be made on  
the Company as provided in Section 13.20 hereof;  
  
 (b) With respect to any action between the City and the  
Company in New York State Court, the Company hereby expressly waives and  
relinquishes any rights it might otherwise have (i) to move or dismiss on  
grounds of forum non conveniens; (ii) to remove to Federal Court outside of the  
City of New York; and (iii) to move for a change of venue to a court of the  
State of New York outside New York County;  
  
 (c) With respect to any action between the City and the  
Company in Federal Court, the Company expressly waives and relinquishes any  
right it might otherwise have to move to transfer the action to a United States  
Court outside the City of New York; and  
  
 (d) If the Company commences any action against the City  
in a court located other than in the City and State of New York, then, upon  
request of the City, the Company shall either consent to a transfer of the  
action to a court of competent jurisdiction located in the City and State of New  
York or, if the court where the action is initially brought will not or cannot  
transfer the action, the Company shall consent to dismiss such action without  
prejudice and may thereafter reinstitute the action in a court of competent  
jurisdiction in the City of New York.  
  
 13.18 Modification. Except as otherwise provided in this Agreement,  
any Appendix to this Agreement or applicable law, no provision of this Agreement  
nor any Appendix to this Agreement shall be amended or otherwise modified, in  
whole or in part, except by a written instrument, duly executed by the City and  
the Company, and approved as required by applicable law.  
  
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 13.19 Maintain Office. The Company agrees to maintain an office in  
the City of New York throughout the Term of this Agreement. Such office is  
currently located at: 150 00 00xx Xxxx, Xxxxxxxxxx, Xxx Xxxx 00000.  
  
 13.20 Service of Process. Process may be served either in person,  
wherever the Company may be found, or by registered mail addressed to the  
Company at its office in the City, or as set forth in Section 13.5 of this  
Agreement, to such other location as the Company may provide to the City in   
writing, or to the Secretary of State of the State of New York.  
  
 13.21 Compliance With Certain City Requirements. The Company agrees  
to comply in all respects with the City's "XxxXxxxx Principles", a copy of which  
is attached at Appendix B hereto. The Company agrees to comply in all respects  
with the City's Vendor Information Exchange System, as the same may be amended  
from time to time.  
  
 13.22 Matching Provision. (a) In the event that the City grants,  
renews or renegotiates one or more franchises(s), agreement(s) or similar  
authorization(s), for the provision of local, high capacity telecommunications  
services or similar services in the District, and such franchises(s),  
agreement(s) or authorization(s) contain provisions imposing lesser obligations  
on the grantee(s) thereof than are imposed by the provisions of this Agreement,  
the Company may, at any time after the date two years after the Effective Date,  
petition the City for a modification of this Agreement.  
  
 (b) The City shall consider any petition for  
modification pursuant to Section 13.22(a) hereof, and shall grant such  
prospective modifications to the extent that the City reasonably determines that  
such modification(s) must be granted in order to ensure fair and equal treatment  
among the Company and other franchisees, provided that the Company establishes  
by a preponderance of the evidence each of the following:  
  
 (i) that the Company is in compliance with this  
 Agreement and the other franchise(s), agreement(s) or authorization(s)  
 were not granted as a result of the Company's failure to comply, on a  
 timely basis, with the provisions of this Agreement;  
  
 (ii) that the other franchise(s), agreement(s) or  
 authorization(s) allow substantially similar services to those offered by  
 the Company under this Agreement;  
  
 (iii) that the obligations imposed on the Company under  
 this Agreement, taken as a whole, place the Company at a substantial  
  
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 competitive disadvantage in relation to the obligations imposed on the  
 grantee(s) holders of the other franchises(s), agreement(s) or  
 authorization(s), taken as a whole; and  
  
 (iv) that the reason for the City's imposition of or  
 failure to act with respect to a lesser obligation under the other  
 franchises(s), agreement(s) or authorization(s) is not due to the  
 differing nature of the City's regulatory authority with respect to the  
 other communications systems or justified by the relative benefits, in   
 whatever form, received by the City due to the operation of other  
 communications systems.  
  
 (c) For the purposes of this Section 13.22, in order to  
promote fair comparison, to the extent possible all benefits and burdens shall  
be quantified monetarily.  
  
 (d) Notwithstanding the two year waiting period in  
Section 13.22(a) herein, if any of the other entities (specifically, Cablevision  
LightPath, Inc., Time Warner AxS of New York City, L.P., and Urban  
Communications Transport Corp.) for which the FCRC approved local high capacity  
telecommunications service franchises on December 8, 1993 ultimately enter into  
franchise agreements with the City that provide for compensation terms which  
materially differ from those approved by the FCRC on December 8, 1993 in a  
manner that makes them more favorable to such entities than those provided to  
Company in this Agreement, then those more favorable compensation terms will  
also be incorporated into this Agreement.  
  
 13.23 Joint Services. Notwithstanding any other provision of this  
Agreement, in the event the Company provides any Telecommunications Services in  
conjunction with, in a joint venture with or in any other arrangement with (the  
"Joint Services") any one or more entities that the City has also authorized to  
provide local high capacity telecommunications services (the "Other  
Franchisees"):  
  
 (a) no revenues with respect to Telecommunications Services  
being provided by such Other Franchisees, other than Joint Services, shall be  
included in the Company's Gross Revenue, so long as the revenues distributed to  
or otherwise retained by the Other Franchisees with respect to Joint Services  
are subject to the terms of such other Franchisees' own agreements with the  
City; and  
  
 (b) only those revenues received by the Company with respect  
to Joint Services and not distributed to or otherwise retained by the Other  
Franchisees shall be included in the Company's Gross Revenue, so long as the  
revenues distributed to or otherwise retained by the Other Franchisees with  
respect to   
  
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Joint Services are subject to the terms of such other Franchisees' own  
agreements with the City.  
  
 -- end of page --  
 [signatures appear on next page]  
  
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 IN WITNESS WHEREOF, the party of the first part, by its Mayor, duly  
authorized by the Charter of the City of New York, has caused the corporate name  
of said City to be hereunto signed and the corporate seal of said City to be  
hereunto affixed and the party of the second part, by its officers thereunto  
duly authorized, has caused its name to be hereunto signed and its seal to be  
hereunto affixed as of the date and year first above written.  
  
 THE CITY OF NEW YORK  
  
  
 By:  
 --------------------------------  
 Mayor  
  
  
 --------------------------------  
 Date  
  
  
Approved as to form:  
  
  
------------------------------  
Acting Corporation Counsel  
  
  
 NATIONAL FIBER NETWORK, INC.  
  
  
 By:  
 --------------------------------  
 Name:  
 Title:  
  
(Seal)  
Attest:  
 ------------------------  
 (title)  
  
  
CITY OF NEW YORK )  
 ) ss:  
STATE OF NEW YORK )  
  
 I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_, a Notary Public in and for the State of New York,  
residing therein, duly commissioned and sworn, do hereby certify that  
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Mayor of the City of New York, party to the above  
instrument, personally appeared before me in said State on the \_\_\_\_\_ day of  
\_\_\_\_\_\_\_\_\_\_\_\_\_, 1993, the said being personally well known to me and who executed  
the foregoing instrument and acknowledged to me that he executed the same as his  
free act and deed in his capacity as Mayor of the City of New York.  
  
 Given under my hand and seal, this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,  
1993.  
  
  
 --------------------------------  
 Notary Public  
  
My Commission Expires:  
 ---------------  
  
 ---------------  
  
  
CITY OF NEW YORK )  
 ) ss:  
STATE OF NEW YORK )  
  
 I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_, a Notary Public in and for the State of New York,  
residing therein, duly commissioned and sworn, do hereby certify that  
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_, party to the above instrument,  
personally appeared before me in said State on the \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_,  
1993, the said being personally well known to me and who executed the foregoing  
instrument and acknowledged to me that he executed the same as his free act and  
deed.  
  
 Given under my hand and seal, this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,  
1993.  
  
  
 --------------------------------  
 Notary Public  
  
My Commission Expires:  
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