

flict between this article and sections 98-31 and 98-32 shall be controlled by this article. Any appeal or petition for writ of certiorari from the city commission's decision shall stay all actions directed by such decision until the appeal or petition is fully resolved.

- e. If, at any time during this process, the special exception holder submits to the planning director a recorded memorandum of lease with any other service provider, the further proceedings under this subsection shall be canceled, since the tower will in fact be a colocated facility. The planning director shall notify the parties and the city commission of the cancellation of these proceedings.
- (7) Failure to comply with subsections (g)(1) and (g)(4) of this section is grounds for revocation of the tower's special exception.

(Ord. No. 97-31, § 1 (29-31), 9-11-97)

### **Sec. 70-133. Utilization of existing pole-type structures.**

A communication antenna which is attached to a pole-type structure existing on the effective date of the ordinance from which this article derives or the existing pole-type structure is replaced with a monopole tower to accommodate both its prior function and a communication antenna shall be a permitted ancillary use, provided each of the following criteria are met:

- (1) The communication antenna attached to the tower of an existing pole-type structure or replacement monopole shall not extend above the highest point of the pole-type structure or replacement monopole more than 20 feet, as measured from the height of the preexisting pole-type structure.
- (2) If the resulting structure/tower adds additional height over the preexisting pole-type structure, the closest residential structure shall be away from the base of the pole-type structure or replacement tower

a distance of at least 110 percent the height of the entire structure/tower. If no additional height over the height of the preexisting pole-type structure is added by either the attachment of the communication antenna to the existing pole-type structure or the replacement tower including the communication antenna, the structure/tower is permitted with no additional distance separation to residential structures over that which was provided by the preexisting pole-type structure.

- (3) The communication antenna and support structure shall comply with all applicable Federal Communications Commission and Federal Aviation Administration regulations.
- (4) The communication antenna, pole-type structure, and replacement monopole tower shall comply with all applicable building codes.
- (5) Pole-type structures within public road rights-of-way or within side yard or rear yard residential subdivision easements or, if used for power distribution at less than 14 kilovolt service, shall not be eligible for use under this section. Notwithstanding the foregoing sentence, pole-type structures within limited access road system rights-of-way are eligible for use under this section.
- (6) The utilization of an existing pole-type structure for placement of a communication antenna in compliance with the requirements of this section shall supersede the separation requirements contained in subsections 70-57(c) and 70-58(b).

(Ord. No. 97-31, § 1 (29-32), 9-11-97)

## **ARTICLE III. TELECOMMUNICATIONS SYSTEMS**

### DIVISION 1. GENERALLY

#### **Sec. 70-134. Short title.**

This article shall be known and may be cited as the "Winter Garden Telecommunications Systems Ordinance."

(Ord. No. 99-46, § 1, 8-12-99)

#### **Sec. 70-135. Definitions.**

For the purposes of this article, the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. The word "shall" is always mandatory and not merely directory.

*Administrative agreement* means a franchise agreement entered into by the city manager and a grantee. The city manager is delegated the authority by the city commission to enter into administrative agreements in conformity with this chapter.

*City* means the City of Winter Garden, Florida, a Florida municipality organized and existing under the laws of the State of Florida.

*City limits* means the incorporated limits of the city, as those limits may be increased or decreased throughout the term of this article.

*Franchise* means the authorization granted by the city to a properly certificated and licensed operator of a telecommunications facility, giving the operator the nonexclusive right to use public rights-of-way in the city to provide, through physical facilities located therein, telecommunications services within the city limits, as they may be adjusted from time to time. Such authorization shall not include:

- (1) Any other permit, agreement or authorization required by the city's Code, rules, regulations or resolutions for the privilege of conducting business within the city limits;

- (2) Any permits, agreements or authorizations required in connection with operations on public streets or property including, but not limited to, permits and agreements for placing devices on or in poles, conduits or other structures, whether owned by the city or a private entity, or for excavating or performing other work in or along public rights-of-way; and
- (3) Any actions or authorizations which are required by the city engineer or public works director.

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

*Franchise area* means the area of the city that a franchisee is authorized to serve by its franchise agreement.

*Franchisee* refers to a person holding a franchise issued under this chapter, or a franchise issued prior to this chapter, subject to the provisions of sections 70-164 through 70-178 hereof.

*FCC* means the Federal Communications Commission or its designee.

*Grantee* refers to a person holding a franchise issued under this chapter.

*Person* means any person, firm, partnership, association, corporation, company or organization of any kind.

*Public rights-of-way* or *city's rights-of-way* mean the surface, the area above, and the area below the surface of any public streets, lanes, paths, alleys, boulevards, drives, highways, waterways, bridges, sidewalks, tunnels, parkways, or easements in which the city now or hereafter holds any property interest, which, consistent with the purposes for which it was obtained or dedicated, may be used for the purpose of constructing, maintaining, operating and repairing a telecommunications system. Public and city rights-of-way do not include buildings, above or below ground structures, parking areas, parks or other property owned or leased by the city. No reference herein,

or in any franchise agreement, to a public or city right-of-way shall be deemed to be a representation or guarantee by the city that its interest or other right to control the use of such property is sufficient to permit its use for such purposes, and a franchisee shall be deemed to gain only those rights to use as are properly in the city and as the city may have the undisputed right and power to give.

*Public service commission* or *PSC* means the agency charged with the powers and duties, conferred upon it by F.S. ch. 364, as amended from time to time, to regulate telecommunications facilities and companies in the state.

*Recurring local service revenues* means all revenues received by Sprint or other franchisees for providing the local transport of voice, data and video signals, including, but not limited to: those revenues derived from telecommunications services listed in F.S. § 203.012(2); revenues derived from resellers of Sprint's or other franchisees' local telecommunications services within the city limits; revenues derived by Sprint from the lease of telecommunications facilities located within the city's rights-of-way and revenues credited by Sprint or other franchisees to each of the accounts listed in Sections 5000 through 5069 of Part 32, Title 47 of the Code of Federal Regulations, as established by the FCC in its Uniform System of Accounts for Telecommunications Companies, as amended from time to time, including, but not limited to, any subsequently created accounts to which revenues derived from recurring local service are credited.

*Reseller* means any person that provides telecommunications services over a telecommunications facility for which a separate charge is made, where that person does not own or lease the underlying telecommunications facility used for the transmission.

*Roadway recovery area* or *clear zone* means the area required by the Florida Department of Transportation for a vehicle to get completely back onto a roadway once it has left the roadway.

*Telecommunications facility* means a facility that is used to provide one or more telecommunications services, any portion of which occupies the

public rights-of-way. The term includes radio transmitting towers, other supporting structures, and associated facilities used to transmit telecommunications signals.

*Telecommunications services* means the transmission for hire, of information in electronic or optical form, including, but not limited to, voice, video, or data, including telephone service but excluding over-the-air broadcasts to the public at large from facilities licensed by the FCC or any successor thereto, cable service or open video service as defined in the Telecommunications Act of 1996.

*Telecommunications system* or *system* means facilities that are used to provide one or more telecommunications services, any portion of which occupies the public right-of-way.  
(Ord. No. 99-46, § 1, 8-12-99)

#### **Sec. 70-136. Rights reserved.**

The city hereby expressly reserves the right to amend this article and to adopt, in addition to the provisions contained herein and in any existing ordinances, such additional reasonable regulations as it shall find necessary. Nothing herein shall be construed as a waiver of the grantee's legal rights to timely contest the exercise or the validity of the exercise of the city's police powers.  
(Ord. No. 99-46, § 1, 8-12-99)

#### **Sec. 70-137. Alternative remedies.**

No provision of this chapter shall be deemed to bar the right of the city to seek or obtain judicial relief from a violation of any provisions of this chapter, a franchise, or any rule, regulation, requirement or directive promulgated under this chapter, whether administratively, judicially or both. Neither the existence of other remedies identified in this chapter nor the exercise thereof shall be deemed to bar or otherwise limit the right of the city to recover fines, penalties or monetary damages (except where liquidated damages are otherwise prescribed) for such violation by the grantee or judicial enforcement of grantee's obligations by means of specific performance, injunctive relief or mandate of any other administrative remedy or judicial remedy at law or in equity.  
(Ord. No. 99-46, § 1, 8-12-99)

**Secs. 70-138—70-163. Reserved.****DIVISION 2. FRANCHISE****Sec. 70-164. Franchise required.**

No telecommunications system shall be allowed to occupy or use the public rights-of-way in the city without a franchise in accordance with the provisions of this chapter. Existing lines and facilities lawfully placed in the rights-of-way shall be permitted to remain, provided no further additions or extensions thereto shall be allowed without a franchise as required herein.

(Ord. No. 99-46, § 1, 8-12-99)

**Sec. 70-165. Authority to grant; terms and conditions of granting.**

(a) A franchise granted pursuant to this chapter is a nonexclusive franchise granting the right to lay, erect, construct, operate, repair and maintain in, on or upon any and all of the public rights-of-way of the city, as they now exist or may be hereafter constructed, opened, laid out or extended within the present limits of the city or as otherwise limited by law, or in such territory as may be hereafter added to, consolidated, or annexed to the city, any and all conduits, cables, poles, wires, supports and other structures and appurtenances constructed or installed by the telecommunications company as may be reasonably necessary for the construction, maintenance and operation of a telecommunications system ("system") to be used by the telecommunications company to provide for the local transport of voice, data and video signals over a network as permitted by the telecommunications company's state and federal certifications, subject to the terms, conditions and exceptions contained herein.

(b) A franchise may be revoked if the franchisee does not abide by and perform in accordance with the provisions of this chapter, including any amendments to this chapter, the franchise, and such rules and regulations as the city may adopt. Any franchise granted pursuant to this chapter shall be consistent with federal laws and regulations and state general laws and regulations. If a conflict occurs between the terms and conditions of the franchise and the terms and conditions on

which the city can grant a franchise, the general law or statutory requirements shall, without exception, control. Any franchise granted is hereby made subject to the general ordinance provisions in effect in the proper exercise of the city's police power.

(c) Neither this chapter as a whole, nor any of its parts, portions or terms, shall be construed as granting or intending to grant to any franchisee a franchise to use the city's rights-of-way or any portion of the system therein for cable television, including, but not limited to, interactive and pay-per-view television, or any other uses not specified herein; but nothing herein shall preclude the franchisee from entering into a contract for the use of any portion of the system with any person, firm, partnership or corporation, provided that said person, firm, partnership or corporation first obtains an appropriate franchise from the city. A franchisee shall include revenues derived from leasing any portion of its system to any person, firm, partnership or corporation as recurring local service revenues for the purpose of calculating franchise fees to the extent consistent with applicable law. Any person, firm, partnership or corporation, whether lessee or not, if placing cable or facilities in the right-of-way must first obtain an appropriate franchise from the city and obtain all required certifications from the state prior to utilizing the right-of-way.

(d) Neither this chapter as a whole, nor any of its parts, portions or terms, shall be construed as granting or intending to grant to any franchisee the right to use the city's rights-of-way to provide cable services to its cable service subscribers within the city limits via an open video system without obtaining city commission approval for recovery of a percentage of gross revenues as provided for in Section 653(c)(2)(B) of the Telecommunications Act of 1996.

(e) Nothing in this chapter or a franchise granted hereunder shall vest in the franchisee any property rights in city-owned property, nor shall the city be compelled to maintain any of its property any longer than, or in any fashion other than, in the city's sole judgment its own business needs may require.

(f) In granting a franchise, the city does not warrant or represent as to any particular street or portion of a street that it has the right to authorize grantee to install or maintain portions of its system therein, and in each case the burden and responsibility for making such determination in advance of the installation shall be upon the grantee. Upon request, the city shall make available to the grantee such information regarding a particular property as it may have with respect to such reservations or other impediments.

(g) The city, in the proper exercise of its municipal powers and duties with respect to its public rights-of-way, shall have access to all manholes of the grantee in such public right-of-way. The city will provide grantee reasonable prior notice and an opportunity to be present unless it is determined by the city, in its sole discretion, to be an emergency situation.

(h) All grantees shall abide by and perform in accordance with the provisions of this chapter, including any amendments to this chapter and such additional rules and regulations as the city may adopt. In accepting the franchise, the grantee acknowledges that at all times during the term of this franchise, its rights shall be subject to all lawful exercise of the police power of the city, and to such reasonable regulation of its rights-of-way as the city shall hereafter by resolution or ordinance provide in the interests of health, safety and welfare of the public. Any inconsistency or ambiguity between the provisions of this article and the lawful exercise of the city's police power shall be resolved in favor of the latter.

(Ord. No. 99-46, § 1, 8-12-99)

### **Sec. 70-166. Franchise nonexclusive.**

Any telecommunications system franchise granted shall be nonexclusive. The city reserves the right to grant, at any time, such additional franchises for a communications system as it deems appropriate; provided, however, that such additional grants shall not operate to materially modify, revoke or terminate any rights previously granted to any grantee.

(Ord. No. 99-46, § 1, 8-12-99)

### **Sec. 70-167. Applications.**

(a) Applications for a telecommunications system franchise or renewal shall include the following:

- (1) The name of the applicant, the address and telephone number of the applicant, and the applicant's Florida Sunshine State one-call registration number.
- (2) A copy of the applicant's current certificate of authorization issued by the Florida Public Service Commission or the Federal Communications Commission, as applicable.
- (3) A certificate of insurance verifying workers' compensation, general liability and property damage insurance coverage or proof of self-insuring status which demonstrates adequate financial resources to defend and cover claims, in compliance with levels of coverage specified in section 70-175.
- (4) Name of registered agent and incumbency certificate of authorized officer to bind applicant.
- (5) The type of telecommunications service that the facilities within the rights-of-way will be used to provide.

(b) If a franchise is sought to be granted by ordinance, all of the materials and information required of the applicant shall be submitted no less than 45 days prior to the scheduled first hearing on the request for a franchise. Failure to do so shall preclude the matter from being heard at that public hearing. If a franchise is sought to be granted by administrative agreement, all of the materials and information required of the applicant shall be submitted to the city manager. The city manager shall thereafter execute the administrative agreement in a reasonably expeditious manner upon a showing by the grantee of its agreement with, and acceptance of, the provisions of this chapter.

(c) All grantees shall inform the city in writing of any changes to the above information within 30 days following the date on which the grantee has knowledge of the change.

(d) The city commission hereby delegates to the city manager the authority to administratively approve applications that comply with the requirements of this chapter.

(e) Standards of award and denial of applications. The city commission, or where appropriate the city manager, shall award a franchise, or requested franchise renewal, to an applicant where it is determined based on the evidence in the record, that the applicant has complied with the requirements of this chapter, including supplementation as appropriate, and any existing franchise.

(Ord. No. 99-46, § 1, 8-12-99)

#### **Sec. 70-168. Grant procedure.**

All franchise applications when filed shall be available to the public for inspection at places designated by the city. If a franchise is sought to be granted by ordinance, the ordinance adoption process set out by F.S. § 166.041, as it may be amended, must be followed including public notice and public hearings. The need for public notice and public hearings prior to the administrative approval of a franchise application shall be at the sole discretion of the city commission.

(Ord. No. 99-46, § 1, 8-12-99)

#### **Sec. 70-169. Publication costs.**

The applicant shall assume the cost of publication of any ordinance to grant a franchise or any notice of the city's intent to administratively approve a franchise, as such publication is required by applicable law, and such is payable prior to the final consideration of the request by the city commission or execution of the administrative agreement by the city manager.

(Ord. No. 99-46, § 1, 8-12-99)

#### **Sec. 70-170. Duration.**

The term of any franchise shall be set out in the franchise agreement if awarded by an ordinance. The term of any franchise shall be five years if awarded by administrative agreement. Any franchise may be terminated sooner as provided in this chapter.

(Ord. No. 99-46, § 1, 8-12-99)

#### **Sec. 70-171. Acceptance of franchise.**

(a) The grantee expressly agrees that upon its acceptance of the franchise it does so relying on its own investigation and understanding of the power and authority of the city to grant the franchise. The grantee, by accepting the franchise, acknowledges that it has not been induced to accept same by any promise, verbal or written, by or on behalf of the city or by a third person regarding the franchise nor expressed therein. The grantee further pledges that no promise or inducement, verbal or written, has been made by any city employee or official regarding receipt of the franchise.

(b) The operation, or continued operation, in the city's rights-of-way of a telecommunications system for at least 120 days after the effective date of this article [Aug. 12, 1999], even without written acknowledgment by the grantee, shall constitute acceptance by a grantee of a franchise issued pursuant to the provisions of this article.

(Ord. No. 99-46, § 1, 8-12-99)

#### **Sec. 70-172. Franchise fees; audits; inspection of records.**

(a) The grantee shall pay monthly to the city as consideration for the privilege granted under the franchise for the use or occupancy of a communications system within the public ways of the city and the expense of regulation pursuant to the franchise incurred by the city, a sum of money equal to one percent of the gross receipts on recurring local service revenues derived directly or indirectly during each calendar month from services provided within the city limits by the grantee, including in said revenues the reasonable value of nonmonetary compensation and services.

(b) Within 15 calendar days after the close of each calendar month, the grantee shall pay the franchise fee as provided in subsection (a) above, and file, with the city's director of finance, a statement, signed by an authorized accounting or financial representative of the grantee, of the gross receipts on recurring local service revenues derived in the proceeding month. Acceptance of any franchise fee payment shall not be deemed a

waiver or release of any claims the city may have for additional sums, nor be construed as an accord that the amount paid is correct.

(c) If such consideration is not received by the city within such period, the grantee shall pay interest on any such unpaid portion thereof at the lower of the rate of 18 percent per annum, or the highest rate allowed by law, from the first day thereafter until paid to the city, and the grantee shall reimburse the city for the actual and reasonable out-of-pocket costs, including attorney's fees, of the city associated with collecting any sums of money grantee is required to remit to the city pursuant to this chapter.

(d) The sums of money to be paid by grantee to the city under this section are compensation and consideration for the use by grantee of the city's rights-of-way for the construction, maintenance and operation of a telecommunications system and are not taxes, as allowed by the Florida Constitution, the general or special laws of the State of Florida or any other ordinances of the city. The grantee shall at all times continue to be subject to public service taxes (F.S. § 166.231), ad valorem taxes (F.S. § 166.211), and such other taxes, charges or fees as may be lawfully authorized by the Florida Constitution, the general or special laws of the State of Florida, the provisions of the Municipal Home Rule Powers Act (F.S. ch. 166) or the ordinances of the city.

(e) In the event the maximum franchise fee authorized by the laws of the state shall be increased beyond the current amount of one percent of the gross receipts on recurring local service revenues as prescribed by F.S. § 337.401, the city shall be authorized, upon 30 days' written notice to the grantee, to unilaterally amend this chapter and prospectively (from the effective date of such change in the laws of the state) increase the franchise fee provided for herein to the maximum franchise fee authorized by the laws of the state; provided that the city increases the franchise fees for companies offering similar services by an equal percentage.

(f) The grantee, its employees, agents and contractors shall make available for examination by the city or the city's authorized representative or agent, during normal business hours, the books,

records and accounts and other documentation of grantee (collectively referred to herein as the "reports") that, as determined by the city, are necessary to determine the accuracy of the gross receipts on recurring local service revenues upon which the franchise fee payment is based, and shall permit the city, or its authorized representative or agent, to make and remove copies of the reports, including without limitation, computer disks, computer printouts and any other customer billing data. In the event that these reports are not available to the city within the city limits, the grantee shall reimburse the city for the reasonable travel expense of the city's representatives and agents resulting from said travel to the location where the reports are maintained and shall permit the city to make and remove copies of the reports, including, without limitation, computer disks, printouts or other customer billing data. Upon request by the city, or its designated agent, the grantee shall provide a copy of any annual report filed with the PSC and a copy of all telephone service reports required to be filed with the PSC. The city, or its designated agents or representatives, shall have the right during the life of this franchise to examine the reports; provided, however, that the grantee shall be obligated to maintain its billing records only for the period of time required by the PSC (or its successor agency, or, in the event the grantee is no longer subject to the jurisdiction of the PSC, for the period of time required by the city) and that any examination conducted after such period shall be confined to the billing records then available. No later than 30 days after the request of the city, or its agent or representative, the grantee shall supply to the city, a copy of the reports. Such copy shall be in the media requested by the city provided that it is economical and practical for the grantee to do so; however, in no event shall paper copies of requested documentation be deemed uneconomical or impractical. The city shall have no obligation to prevent the disclosure of audit information to a third party where such party has properly requested the disclosure of such information from the city pursuant to applicable state law. The city shall promptly advise the grantee so that the grantee may seek such relief as it may obtain to prevent the disclosure of the information to the third party. Grantee shall indemnify

and hold the city harmless for any cost and expense, including but not limited to, reasonable attorney's fees, incurred by the city as a result of this paragraph, whether or not suit is filed.

(g) The cost of the audit will be borne by the grantee if as a result of the audit, the city determines, and such determination is upheld if challenged, the grantee has underpaid the franchise fees owed in an amount equal to or exceeding two percent of the franchise fees actually paid over the audit period.

(h) Any transaction or arrangement which has the effect of circumventing payment of required franchise fees and/or evasion of payment of franchise fees by noncollection, nonreporting or gross receipts, collection of revenues by affiliates, bartering or any other means which evade the actual collection of gross revenues by a grantee for services is prohibited.

(Ord. No. 99-46, § 1, 8-12-99)

### **Sec. 70-173. Assignment/transfer.**

(a) Any franchise granted pursuant to this chapter shall not be assigned, leased or otherwise alienated or disposed of except with the prior express written consent of the city commission, which shall not be unreasonably withheld or unduly delayed. This shall not be construed as prohibiting grantee from granting to others the right to use capacity on the fiber optic cable facilities located in the rights-of-way, provided the revenues derived therefrom are included by grantee in calculating the franchise fees for purposes of section 70-172.

(b) The proposed assignee must meet all qualifications and requirements under the provisions of this chapter.

(c) The consent or approval of the city to any transfer of the franchise shall not constitute a waiver or release of the rights of the city in and to the public ways, and any transfer shall by its terms, be expressly subordinate to the terms and conditions of a franchise.

(d) In no event shall a transfer of ownership or control be approved without the successor in interest becoming a signatory to the franchise agreement and acknowledging its acceptance of the provisions of this chapter.

(Ord. No. 99-46, § 1, 8-12-99)

### **Sec. 70-174. Indemnification.**

The grantee shall indemnify and hold the city and its officers, commissioners, mayor, directors, agents, servants, employees, successors, and assigns harmless of and from any and all claims for personal injury, death or property damage, any other losses, damages, charges or expenses, including attorney's and paralegal's fees, witness fees, court costs, whether at trial, on appeal or otherwise, and the reasonable value of any services rendered by any officer or employee of the city, and any orders, judgments or decrees which may be entered which arise or are alleged to have arisen out of, in connection with, or attributable to, the grantee's activities under this franchise and the construction, maintenance, operation, placement, repair, relocation, or removal by the grantee, its agents or contractors of any portion of the telecommunications system. The grantee shall undertake at its own expense the defense of any action which may be brought against the city for damages, injunctive relief or for any other cause of action arising or alleged to have arisen out of, in connection with or attributable to, the foregoing and, in the event any final judgment therein should be rendered against the city resulting from the foregoing, the grantee shall promptly pay the final judgment together with all fees and costs relating thereto; the grantee being allowed, however, to appeal to the appropriate court or courts from the judgment rendered in any such suit or action upon the filing of such supersedeas bond as shall be required to prevent levy or judgment against the city during such appeal or appeals.

(Ord. No. 99-46, § 1, 8-12-99)

### **Sec. 70-175. Insurance.**

(a) During the life of a franchise granted pursuant to this chapter, the grantee shall provide, pay for and maintain satisfactory to the city the types of insurance described herein. All insurance shall be from responsible companies duly autho-