

City of Cottonwood Shores

ORDINANCE 4007

AN ORDINANCE WHEREBY THE CITY OF COTTONWOOD SHORES, TEXAS, AND GTE SOUTHWEST INCORPORATED AGREE THAT, FOR THE PURPOSE OF OPERATING ITS COMMUNICATIONS BUSINESS, THE TELEPHONE COMPANY SHALL CONSTRUCT, ERECT, BUILD, EQUIP, OWN, MAINTAIN AND OPERATE IN, ALONG, UNDER, OVER AND ACROSS THE STREETS, AVENUES, ALLEYS, BRIDGES, VIADUCTS AND PUBLIC GROUNDS OF THE CITY, SUCH POSTS, POLES, WIRES, CABLES, CONDUITS AND OTHER APPLIANCES, STRUCTURES AND FIXTURES NECESSARY OR CONVENIENT FOR RENDITION OF TELEPHONE AND OTHER COMMUNICATION SERVICES IN SAID CITY AND FOR CONDUCTING A GENERAL LOCAL AND LONG-DISTANCE TELEPHONE BUSINESS; PRESCRIBING THE CONDITIONS GOVERNING THE USE OF PUBLIC RIGHTS-OF-WAY FOR THE TELEPHONE COMPANY'S COMMUNICATIONS BUSINESS; PRESCRIBING THE ANNUAL COMPENSATION DUE THE CITY UNDER THIS ORDINANCE; PROVIDING AN INDEMNITY CLAUSE; SPECIFYING GOVERNING LAWS; PROVIDING FOR ASSIGNMENT; FOR A PERIOD OF AGREEMENT; FOR FUTURE CONTINGENCIES; FOR REPEAL OF CONFLICTING ORDINANCES; FOR RELEASE OF ALL CLAIMS UNDER PRIOR ORDINANCES; FOR ALTERNATE DISPUTE RESOLUTION; FOR A LIMITATIONS PERIOD; FOR VENUE; AND FOR METHOD OF ACCEPTANCE.

History: August 16, 2012 – Repealed Ordinance 061595-1A and adopted Ordinance 4007

WHEREAS, GTE Southwest Incorporated, hereinafter referred to as the Telephone Company, is now and has been engaged in the communications business in the State of Texas and in furtherance thereof, has erected and maintained certain items of its physical plant in the city of Cottonwood Shores, Texas, hereinafter referred to as the city, for many years pursuant to such rights as have been granted it by and under the laws of the State of Texas, and subject to the reasonable exercise of the police powers granted by and under said laws to the city; and

WHEREAS, the Telephone Company has operated its communications business in the city under successive ordinances of the City, the last of which was Ordinance Number 4007, adopted on 9/27/1990 which provided compensation to the city for the superintendence of that agreement based

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upon a percentage of gross receipts/revenues received by the Telephone Company from certain local services rendered within the corporate limits of the City; and

WHEREAS, it is recognized by the parties hereto that changes in the communications industry, changes in technology, changes in state and federal law, and changes in the accounting practices mandated by the Uniform System of Accounts promulgated by the Federal Communications Commission ("FCC"), along with regulatory requirements of the Public Utility Commission of Texas ("PUC"), have caused the traditional method of determining the amount of compensation to municipalities to become impractical for communications utilities. In order to address these issues in a manner beneficial to both the city and the Telephone company, the City and the Telephone Company have chosen the method of determining the amount of compensation provided for in this Ordinance to eliminate the expense and time related to audits, to achieve administrative simplicity, to provide the city with predictable revenues and an opportunity for growth and to avoid the expense and delays of litigation which could be necessary to resolve any issues in controversy between the parties; and

WHEREAS, it is to the mutual advantage of both the City and the Telephone Company that an agreement should be entered into between the Telephone company and the City establishing the conditions under which the Telephone Company shall maintain and construct its physical plant in the public rights-of-way within the city's corporate limits in the future;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF COTTONWOOD SHORES, TEXAS, THAT:

SECTION 1. DEFINITIONS

Whenever used in this Ordinance, the following words and terms shall have the definitions and meanings provided in this section:

- (a) **CITY**: The City of Cottonwood Shores, Texas
- (b) **FACILITIES**: All Telephone Company duct spaces, manholes, poles, conduits, underground and overhead passageways, and other equipment, structures and appurtenances and all associated Transmission Media, which are located in the City Rights-of-Way.

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(c) COMMUNICATIONS SERVICES: All services, of any nature, offered for sale by the Telephone Company to subscribers in the city, which services are delivered to such subscribers by transmission over the Telephone Company's Transmission Media.

(d) RIGHTS-OF-WAY: All present and future streets, avenues, highways, alleys, bridges, viaducts and public grounds within the city limits of the city.

(e) TELEPHONE COMPANY: GTE Southwest Incorporated.

(f) TRANSMISSION MEDIA: All Telephone Company cables, fibers, wires or other physical devices used to transmit and/or receive communication signals, whether analog, digital or of other characteristics, and whether for voice, video, or data or other purposes, which are physically located in the city Rights-of-Way.

SECTION 2. CONSTRUCTION AND MAINTENANCE OF TELEPHONE PLANT AND SERVICE

Pursuant to the laws of the state of Texas, the Telephone company has the non-exclusive right and privilege to use and occupy the public rights-of-way in the City for the delivery of Communications Services and the operation of a communications system. The Telephone Company's Facilities and Transmission Media used in or incident to the provision of Communications Services and to the maintenance of a communications business by the Telephone Company in the city shall remain as now constructed, subject to such changes as under the conditions prescribed in this Ordinance may be considered necessary to the public health and safety by the City in the exercise of its lawful police powers and such changes and extensions as may be considered necessary by the Telephone Company in the pursuit of its communications business. The terms of this Ordinance shall apply throughout the City, and shall include the provision of communications services in any newly annexed areas upon the effective date of such annexation.

SECTION 3.

(a) Supervision By City Of Location Of Poles And Conduits:

All poles to be placed shall be of sound material and reasonably straight, and shall be so set that they will not interfere with the flow of water to any gutter or drain, and so that the same will interfere as little as practicable with the ordinary travel on the street or sidewalk. The location and route of all poles, stubs, guys, anchors, conduits, cables and any other facilities to be placed and constructed by the Telephone Company in the construction and maintenance of its communications system in the city,

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and the location of all conduits to be laid by the Telephone Company within the limits of the city under this Ordinance, shall be subject to the reasonable and proper regulation, control and direction of the City Council or of any city official to whom such duties have been or may be delegated.

(b) The City expressly reserves the right to change the grade, install, relocate, or widen the public streets, sidewalks, bikeways, alleys, public thoroughfares, highways, landscaping, and public way and places within the present limits of the City and within said limits as same may from time to time be extended, and the Telephone Company shall relocate or place underground, at its own expense, its Facilities and Transmission Media, in order to accommodate the installation, relocation widening, or changing of the grade of any such public street, sidewalk, bikeway, alley, public thoroughfare, highway or public ways, including if necessary relocating such Facilities and Transmission Media to a sufficient distance from the edge of the pavement to permit a reasonable work area for machinery and individuals engaged in installing, relocating, widening, or changing the grade of any public street, sidewalk, bikeway, alley, public thoroughfare, highway or public way.

(c) Whenever by reason of changes in the grade of a thoroughfare or in the location or manner of constructing a water pipe, gas pipe, sewer, or other aboveground or underground structure, it is deemed necessary by the city to remove, alter, change, adapt, or conform the underground or aboveground facilities of the Telephone Company, the Telephone Company shall make the alterations as soon as practicable when ordered in writing by the city without claim for reimbursement or damages against the city.

(d) Whenever it shall be necessary to require Telephone Company to alter, change, adapt, or conform its facilities within the right-of-way, such alterations or changes shall be made promptly, with consideration given to the magnitude of such alterations or changes, without claim for reimbursement or damages against the City. If any such requirements impose a financial hardship upon the Telephone company, the Telephone company shall have the right to present alternative proposals to the City, and the city shall give due consideration to any such alternative proposals. If the City requires the Telephone Company to adapt or conform its facilities to enable any other entity or person, except the City, to use, or to use with greater convenience, rights-of-way or public property, Telephone Company shall not be required to make any such changes until such other entity or person shall reimburse or made arrangements satisfactory to Telephone Company to reimburse the

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Telephone Company for any loss and expense caused by or arising out of such change; provided, however, that the City shall never be liable for such reimbursement.

Nothing in this Ordinance is intended to add to or detract from any authority granted by the Legislature of the State of Texas to the city.

SECTION 4. ATTACHMENTS TO POLES AND SPACE IN DUCTS

Nothing contained in this Ordinance shall be construed to require or permit any pole attachments for electric light or power wires or communications facilities or systems not provided by the Telephone Company to be attached to the Telephone Company's poles or other physical plant or placed in the Telephone Company's conduit. If the City desires pole attachments for electric light or power wires or communications facilities or systems not provided by the Telephone Company, or if the City desires to place communications facilities or systems for its internal use not provided by the Telephone Company in any Telephone Company duct, then a further separate, noncontingent agreement shall be prerequisite to such attachment(s) or such use of any duct by the City. Nothing contained in this Ordinance shall obligate or restrict the Telephone Company in exercising its rights voluntarily to enter into pole attachment, pole usage, joint ownership or other wire space or facilities agreements with light and/or power companies or with other wire-using companies which are authorized to operate within the city.

SECTION 5. STREETS TO BE RESTORED TO GOOD CONDITION

The surface of any street, avenue, alley, highway, viaduct or public ground within the City disturbed by the Telephone Company in building, constructing, renewing, or maintaining its communications system shall be restored within a reasonable time after completion of the work in compliance with the applicable provisions of the Code of Ordinances and maintained to the satisfaction of the City Council, or of any City official to whom such duties have been or may be delegated, for a period of one (1) year following completion of the restoration, after which time responsibility for the maintenance shall revert to the city. No such street, avenue, alley, highway, viaduct or public ground shall be encumbered for a longer period than shall be necessary to execute the work.

SECTION 6. TEMPORARY REMOVAL OF AERIAL WIRES

The Telephone Company on the request of any person shall remove or raise or lower its wires within the city temporarily to permit the moving of houses or other bulky structures. The expense of such temporary removal, raising or lowering of wires shall be paid by the benefitted party or parties, and the Telephone company may require such payment in advance. The Telephone Company shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary wire changes. The clearance of wires above ground shall conform to the basic standards of the National Electrical Safety Code, National Bureau of Standards, United States Department of Commerce, as promulgated at the time of erection thereof.

SECTION 7. TREE TRIMMING

In the pursuit of maintaining its communications system, the Telephone company, its contractors, agents, successors and assigns shall have the right to trim trees upon and overhanging the streets, avenues, alleys, bridges, viaducts and public grounds of the City, so as to prevent the branches of such trees from coming in contact with the wires, cables or other facilities of the Telephone Company.

SECTION 8. COMPENSATION TO THE CITY

(a) As compensation for the Telephone Company's use and occupancy of the City's rights-of-way and for the City's oversight and supervision of such use and occupancy, in consideration for all other agreements and promises made herein by the City and in lieu of and in full compensation for any lawful tax, license, charge, right-of-way permit fee or inspection fee, whether charged to the Telephone company or its contractor(s), or any right-of-way easement or street or alley rental or franchise tax or other character of charge for the use and occupancy of the rights-of-way within the city, except the usual general ad valorem taxes, special assessments in accordance with State law or sales taxes now or hereinafter levied by the city in accordance with State law, the City hereby imposes upon the Telephone Company, and the Telephone Company agrees to pay, an annual fee (the "Annual Fee".) The amount of the "Annual Fee" for the first effective year of this Ordinance shall be \$161.70. The Telephone Company will bill the "Annual Fee" pro rata, to its customers residing within the corporate limits of the city.

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The Telephone Company shall annually adjust its billings to customers to account for any under collection or over collection of the "Annual Fee" due the City.

For the second and subsequent years while this Ordinance remains in effect, the "Annual Fee" is subject to adjustment by application of the Growth Factor set out in paragraph 8(c). This adjustment for the Growth Factor will be made effective as of each anniversary date of this Ordinance.

(b) The "Annual Fee" for each year shall be paid in four equal payments. The due dates shall be February 28, May 31, August 31 and November 30, with the first payment under this Ordinance due February 28, 1996. In the event of any over or under collection from customers, then the Telephone Company may make a pro rata credit or charge to the customer billing for affected customers at the end of each calendar year. No such adjustment may be made more than 150 days following the date of expiration of this Ordinance. If, however, it is impractical to credit any over collection to customers, then such over collection shall be paid to the city and credited to the next year's "Annual Fee", and the "Customer Fee" appropriately adjusted to reflect such credit.

(c) The Growth Factor shall correspond to the percentage change in local exchange access lines within the limits of the City for the preceding calendar year. For purposes of this calculation, "local exchange access lines" shall be defined as all residence, single-line business, multi-line business, Centrex, Centranet, key line, PABX trunks, and any other technology which delivers a basic unit of Local Communications Service by transmission over the Telephone Company's Transmission Media within the corporate limits of the City. For each succeeding year during the period of this Agreement, the previous year's Annual Fee shall be adjusted by such percentage. The Telephone Company will adjust its customer billing annually, on the anniversary date of this Agreement, to account for the Growth Factor as described above.

(d) Payment of the "Annual Fee" shall not relieve the Telephone Company from paying all applicable municipally-owned utility service charges. Should the city not have the legal power to agree that the payment of the foregoing charge shall be in lieu of the taxes, licenses, charges, rights-of-way permit or inspection fees, rentals, rights-of-way easements or franchise taxes as described in Section 8(a) above, then the City agrees that it will apply so much of such payments as may be necessary to the satisfaction

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of the Telephone Company's obligation, if any, to pay any such taxes, licenses, charges, rights-of-way permit or inspection fees, rentals, rights-of-way easements or franchise taxes.

(e) In the event that either (1) territory within the boundaries of the City shall be disannexed and a new incorporated municipality created which includes such territory or (2) an entire, existing incorporated municipality shall be consolidated or annexed into the City, then notwithstanding any other provision of this Ordinance, the Annual Fee shall be adjusted. To accomplish this adjustment, within sixty (60) days following the action affecting a disannexation/annexation as described above, the city shall provide the Telephone Company with maps of the affected area(s) showing the new boundaries of the city.

In the event of an annexation as described above, the Annual Fee paid to the City will be adjusted to include the amount of the Annual Fee paid by the Telephone Company to the existing incorporated municipality being annexed. In the event that the annexed municipality had no ordinance imposing an Annual Fee or in the event of a disannexation, then the adjustment to the Annual Fee will be made based on the City's net gain or loss of telephone subscribers using the same methodology prescribed in section 8(a) above. The effective date of the adjustment shall be within 120 days following the annexation/disannexation action by the City, provided that the city will have supplied the appropriate annexation/disannexation maps to the Telephone Company in accordance with the provisions herein.

SECTION 9. SUCCESSORS AND ASSIGNS

The rights, powers, limitations, duties and restrictions herein provided for shall inure to and be binding upon the parties hereto and upon their respective successors and assigns.

SECTION 10. PERIOD OF AGREEMENT

This agreement shall be in full force and effect for the period beginning with the effective date hereof and ending five (5) years after such date. This Ordinance may be extended for an additional five (5) year period if mutually agreed to in writing by both parties.

SECTION 11. MUTUAL RELEASES

The City hereby fully releases, discharges, settles and compromises any and all claims which the City has made or could have made arising out of or connected with Ordinance Number 4007 adopted 9/27/1990, and renewed or extended from time to time thereafter, and its predecessor ordinances, if any, (hereinafter referred to collectively as "Ordinance 4007". This full and complete release of claims for any matters under Ordinance 4007 shall be for the benefit of GTE Southwest Incorporated; its parent; its affiliates; their directors, officers and employees; successors and assigns; and includes any and all claims, actions, causes of action and controversies, presently known or unknown, arising directly or indirectly out of or connected with the Telephone Company's obligations to the City pursuant to the provisions of Ordinance 4007. GTE Southwest Incorporated, its parent, affiliates, successors and assigns hereby fully release, discharge, settle and compromise any and all claims, actions, causes of action or controversies heretofore made or which could have been made, known or unknown, against the City, its officers or its employees, arising directly or indirectly out of or connected with any matters under Ordinance 4007.

It is the intent of the city and the Telephone company to enter into the foregoing mutual releases in order to reach a compromise that is acceptable to both the City and the Telephone Company. This Ordinance and the mutual release set forth in this Section represent a compromise of each party's claims as well as each party's defenses, and are not intended to be and are not an admission of liability or vulnerability by either party to the other with respect to either the claims or the defenses asserted or which could be asserted against the other.

SECTION 12. FUTURE CONTINGENCIES

Notwithstanding anything contained in this Ordinance to the contrary, in the event that (1) this Ordinance or any part hereof, (2) any statutory or regulatory authority by which the Telephone Company seeks to collect the charge imposed by this Ordinance, or (3) any procedure provided in this Ordinance, or (4) any compensation due the city under this Ordinance, becomes, or is declared or determined by judicial, administrative or legislative authority exercising its jurisdiction to excessive, unrecoverable, unenforceable, void, unlawful or otherwise inapplicable, in whole or in part, the Telephone Company and the City shall meet and negotiate in good faith to obtain a new ordinance

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that is in compliance with the authority's decision or enactment; and, unless explicitly prohibited, the new ordinance shall provide the City with a level of compensation comparable to that set forth in this Ordinance so long as such compensation is recoverable by the Telephone Company in a mutually agreed manner permitted by law for the unexpired portion of the term of this Ordinance.

SECTION 13. GOVERNING LAW

(a) This Ordinance shall be construed in accordance with the city Charter and city Codes in effect on the date of passage of this Ordinance to the extent that such Charter and Codes are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas.

(b) This Ordinance shall be construed and deemed to have been negotiated at arm's length and drafted by the combined efforts of the city and the Telephone company.

SECTION 14. ALTERNATE DISPUTE RESOLUTION

(a) Notwithstanding any other provision of this Ordinance, the Parties hereto agree that any claim, cause of action or other dispute based upon or arising out of this Ordinance (a "dispute") shall be conducted, decided, determined and/or resolved pursuant to and in accordance with the provisions of this Section. The parties desire to resolve disputes arising out of this Ordinance without litigation. Accordingly, in the event of any dispute hereunder, the Parties hereto agree to attempt in good faith to resolve their dispute between themselves. At the written request of a party, each party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Ordinance. The parties intend that these negotiations be conducted by non-lawyer, business representatives.

(b) Except for action seeking a temporary restraining order or injunction related to the purposes of this Ordinance, or suit to compel compliance with this dispute resolution process, the parties agree to use the following alternative dispute resolution procedure, and also agree not to sue any party to this ordinance with respect to any controversy or claim arising out of or relating to this Ordinance or its breach prior to exhausting the procedures set out in this section.

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(c) If the Parties are unable to settle their dispute within sixty (60) days of the initial request, either party may, on written notice to the other party, initiate non-binding mediation of the dispute before a single mediator affiliated with Judicial Arbitration and Mediation Services, Inc. (JAMS) in Dallas County, Texas or another mediation service mutually agreeable to the parties. Mediation is a forum in which an impartial person, the mediator, facilitates communication between the Parties to promote reconciliation, settlement, or understanding among them. A Mediator may not impose his own judgment on the issues for that of the Parties. Unless expressly authorized by the Parties, the mediator may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. Unless the Parties agree otherwise, all matters, including the conduct and demeanor of the Parties and their counsel during mediation, are confidential and shall be inadmissible as settlement discussion pursuant to Rule 408 of the Federal Rules of Evidence or the applicable state rules. The mediator shall be selected by agreement of the Parties within thirty (30) days after each Party first requests mediation of the other. If a single mediator cannot be agreed upon, then each Party shall select its own Mediator from those on the JAMS approved list; those two mediators will then select a third independent mediator who will conduct the mediation session(s). The Mediator's fees will be borne equally by both Parties. In the event mediation is requested, the applicable statutes of limitations shall be automatically tolled until the Mediator declares an impasse. In the event mediation fails, the Parties may then resort to means outside the scope of this Section.

SECTION 15. LIMITATIONS PERIOD

The City and the Telephone Company mutually agree that any dispute, claim or cause of action one party may have against the other party arising from or in any way related to this Agreement must be brought to the attention of the other party, by written notice received no later than four (4) years from the date of the act or omission giving rise to the dispute, claim or cause of action; otherwise, such dispute, claim or cause of action shall be waived and the party asserting such dispute, claim or cause of action shall be barred from pursuing the same.

SECTION 16. INDEMNITY

The Telephone Company shall indemnify and hold the City harmless from all costs, expenses (including reasonable attorney's fees) and damages to persons or property arising directly or indirectly out of the construction, maintenance or operation of the Telephone company's facilities found to be caused solely by the negligence of the Telephone Company. This provision is not intended to create a cause of action or liability for the benefit of third parties but is solely for the benefit of the Telephone Company and the City.

SECTION 17. REPEAL OF CONFLICTING PROVISIONS

All other ordinances and agreements and parts of agreements and ordinances in conflict with the provisions of this Ordinance are hereby repealed.

SECTION 18. VENUE

Venue for any proceeding under this Agreement shall be in Dallas County, Texas.

SECTION 20. NOTICE

For any purposes related to this Ordinance, notice to the City shall be to:

City Secretary
City of Cottonwood Shores
3808 Cottonwood Drive
Cottonwood Shores, TX 78657

Notice to the Company shall be to:

Manager Municipal Affairs
GTE Southwest Incorporated
P.O. Box 152013 MCTXD1921B
Irving, TX 75062

Notice will be effective upon delivery at the above addresses until the City or the Company notifies the other, in writing, of a change of address.

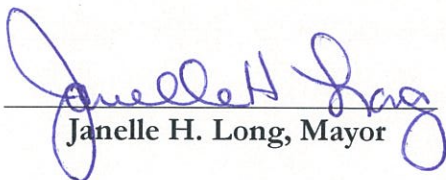
SECTION 21. PARTIAL INVALIDITY AND REPEAL PROVISIONS

If any section, sentence, clause or phrase in this Ordinance is for any reason held to be illegal, ultra vires or unconstitutional, such invalidity shall not affect the validity of the remaining portions. All ordinances and agreements and parts of ordinances and agreements in conflict herewith are hereby repealed.

SECTION 22. ACCEPTANCE OF AGREEMENT

The Telephone company shall have sixty (60) days from and after the passage and approval of this Ordinance to file its written acceptance thereof with the City Secretary. Upon such filing, this Ordinance shall take effect and the effective date of this Ordinance shall be deemed to be the first day of the calendar quarter following the acceptance and it shall be in force from and after such date, and shall effectuate and make binding the agreement provided by the terms hereof.

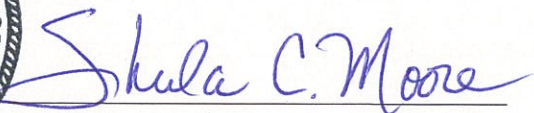
PASSED AND APPROVED by the City Council of Cottonwood Shores, Texas, at a meeting on the 16th day of August, 2012 with 5 votes in favor, 0 votes against and 0 abstentions.



Janelle H. Long, Mayor



Attest:



Sheila C. Moore, City Secretary

Sheila C. Moore, City Secretary