

Special Call

RESOLUTION NO. _____

A RESOLUTION RENEWING THE AGREEMENT WITH AT&T ARKANSAS TO OFFER IP-ENABLED VIDEO SERVICES IN THE CITY OF NORTH LITTLE ROCK; AND FOR OTHER PURPOSES.

WHEREAS, City Council has adopted an ordinance to grant a franchise to all companies that conduct, or may in the future conduct, telephone business in North Little Rock; and

WHEREAS, under the franchise ordinance, companies providing telephone service may enter into separate agreements with the City to extend additional services than those provided in the franchise; and

WHEREAS, on September 25, 2006, the City Council adopted Resolution No. 6998 authorizing an agreement with AT&T Arkansas to extend IP-enabled video services within the City of North Little Rock under the belief that the City had the right to impose greater requirements on such services than is provided in the franchise; and

WHEREAS, the authority of the City to regulate AT&T Arkansas' extension of these additional services continues to be a matter of good-faith dispute between the City and AT&T Arkansas; and

WHEREAS, the City has received no complaints regarding the provision of IP-Enabled Video Services by AT&T Arkansas; and

WHEREAS, for the reasons stated herein and for the reasons stated in the agreement attached hereto as Exhibit A, it is in the best interest of the citizens of North Little Rock to enter into an agreement with AT&T Arkansas that will allow the continuation of services while acknowledging and preserving the legal position of the City.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS:

SECTION 1: That the Mayor is hereby authorized to execute an Agreement with AT&T Arkansas regarding IP-enabled video services that is substantially similar in form and content as the agreement that is attached hereto as Exhibit "A".

SECTION 2: That this Resolution shall be in full force and effect from and after its passage and approval.

PASSED:

APPROVED:

Mayor Patrick H. Hays

SPONSOR:

Mayor Patrick H. Hays

ATTEST:

Diane Whitbey, City Clerk

APPROVED AS TO FORM:

C. Jason Carter, City Attorney

PREPARED BY THE OFFICE OF THE CITY ATTORNEY

AGREEMENT

THIS AGREEMENT ("Agreement") dated _____, 2009 ("Effective Date") is made by and between Southwestern Bell Telephone, L.P., a Texas limited partnership doing business as AT&T Arkansas ("AT&T Arkansas") and the City of North Little Rock, Arkansas, a municipal corporation ("City"). AT& T Arkansas and City shall sometimes be referred to separately as a "Party," and collectively as the "Parties."

RECITALS

A. As a telecommunications provider, AT&T Arkansas has statewide authority under Ark. Code Ann. § 23-17-101 to construct, operate and maintain its telecommunications facilities in the public rights of way ("ROW") throughout the state of Arkansas.

B. Under Ark. Code Ann. § 14-54-302, the City of North Little Rock is empowered and authorized to sell, convey, lease, rent, or let any real estate or personal property owned or controlled by the City.

C. Under Ark. Code Ann. § 14-54-704, the City of North Little Rock is authorized to enter into contracts for any public utility necessities for itself and for the inhabitants of the City on such rates, charges, and terms as may be agreed upon.

D. Under Ark. Code Ann. § 14-200-101, the City is permitted to impose reasonable terms and conditions on the use and occupation of the City's ROW and to collect a reasonable franchise fee for such use and occupation of its ROW.

E. AT&T Arkansas is in the process of upgrading its existing telecommunications network to provide an integrated Internet Protocol ("IP") enabled broadband platform of voice, data and video services ("IP Network"), the video component of which is a switched, two-way, point-to-point and interactive service ("IP-enabled Video Service"). The IP Network upgrade will involve the use of the City's ROW.

F. AT&T Arkansas believes that Ark. Code Ann. § 23-17-101 covers the construction, operation and maintenance of the IP Network, and that AT&T Arkansas is not required to obtain a separate franchise or other authorization from the City to offer IP-enabled services including IP-enabled Video Services within the City over the IP Network.

G. AT&T Arkansas further believes that the City's right to regulate the construction of the IP Network in the City's ROW is limited to the right to impose reasonable conditions regarding the time, place, and manner of AT&T Arkansas' use and occupation of the City's ROW.

H. AT&T Arkansas intends to offer video programming service on a non-discriminatory basis, and without regard to the income or minority status of any resident or group of residents residing within the municipal boundaries of the City. AT&T Arkansas intends to make video programming available, subject to technology or other economic feasibility, to residences within the city boundaries, by use of IP-enabled Video Services or other alternative video programming technology.

I. The City believes that it may have additional authority to regulate the construction of

the IP Network in the City's ROW as provided by Ark. Code Ann. § 14-54-302 and Ark. Code Ann. § 14-54-704, but acknowledges that the law is not settled on this point.

J. Both Parties agree that the deployment of the IP Network and the provision of IP-enabled Video Services should not be delayed by litigation to establish the scope of Ark. Code Ann. § 23-17-101, Ark. Code Ann. § 14-54-302, Ark. Code Ann. § 14-54-704, Ark. Code Ann. § 14-200-101, or the particular details of the City's franchise authority to IP-enabled Video Services.

K. The City and AT&T Arkansas further agree that litigation to resolve this issue would be complex and protracted, and that it is in the best interests of both Parties and the residents of the City to reach a compromise of each other's positions and claims.

NOW, THEREFORE, in consideration of and reliance upon the respective representations, promises, concessions, terms and conditions contained herein, City and AT&T Arkansas agree as follows.

1. Term. The term of this Agreement shall commence on the Effective Date of this Agreement and shall expire on December 31, 2012. The term may be extended upon mutual agreement of the Parties.

2. Change of Law. The Parties agree to consult in the event that after the Effective date, any court, agency, commission, legislative body, or other authority of competent jurisdiction issues a finding that clearly authorizes the City to impose greater obligations than those found in this Agreement, clearly authorizes AT&T to be relieved from obligations found in this Agreement, or otherwise limits the enforceability or principals of this Agreement, in whole or in part. Should the finding be final, non-appealable and binding upon either City or AT&T, this Agreement shall be deemed modified or limited to the extent necessary to address the subject of the finding unless either party, within thirty (30) days of receipt of the ruling, provides written notice to the other party of election to terminate, in which case this Agreement shall terminate within six (6) months or such earlier period as the parties mutually may agree. Where the effect of a finding is a modification, the parties shall enter into good faith negotiations to modify this Agreement in the manner which best effectuates its overall purposes and the intentions of the parties. Failure to reach a mutually satisfactory modification within ninety (90) days of the commencement of such efforts shall entitle either party to terminate the Agreement on the provision of thirty (30) days' written notice.

3. Compensation to City. During the term of this Agreement, AT&T Arkansas shall pay to the City a fee of four percent (4%) of the gross revenues collected from each subscriber to AT&T Arkansas' IP-enabled Video Services product delivered over the IP Network in the City's streets, rights-of-way and other property; such product to be defined by AT&T Arkansas when it is offered to the public. The fee does not apply to non-video revenues or the non-video revenues of a bundled product containing video and non-video offerings. Upon request, AT&T Arkansas shall make their records available to the City to demonstrate compliance with this paragraph for a period of three (3) years preceding the request.

4. Public Educational and Governmental Programming.

(a) AT&T Arkansas shall provide some form of access for the City's noncommercial, public, education and government (PEG) programming through AT&T Arkansas' IP-enabled Video Services.

(b) AT&T Arkansas shall not be responsible for content of PEG programming.

(c) As soon as practicable, AT&T shall provide written notice that that it has the technical capability to provide IP based access for the City PEG channels (in use on the Execution Date of this Agreement) over the platform AT&T wishes to use with this Agreement. If technological feasibility requires a change in the current City technology, City shall be required to support a change in or addition to City technology in use for the PEG programming to make it compatible with AT&T Arkansas' IP-enabled video technology and any other necessary technology.

(d) AT&T Arkansas will provide City capacity on its platform to carry the same number of PEG channels that City currently has activated as of the effective date of this Agreement. PEG content will be made available by the City placing its content on the public Internet. AT&T Arkansas will carry this PEG content on its video platform using its standard Internet-sourced PEG solution. AT&T will provide City a one-time up front capital grant to cover the initial set up costs incurred by the City to make this content available on the Internet. Should AT&T seek to improve its transmission method in a fashion that will substantially affect the integrity of the Internet sourced PEG solution (compatibility), AT&T accepts the responsibility for necessary costs of capital improvements.

5. Emergency Message. In case of a declared emergency or disaster, AT&T Arkansas shall re-broadcast an emergency message originating from the Emergency Alert System over its IP-enabled video service.

6. Customer Service. AT&T Arkansas will offer IP-enabled Video Services and provide customer service consistent with the requirements of 47 C.F.R. Section 76.309(c). AT&T Arkansas will respond to complaints and outages in a diligent fashion.

(a) AT&T Arkansas shall give subscribers in the City thirty (30) days notice of any rate increases, channel lineup changes, or other substantive service changes.

(b) AT&T Arkansas shall restore any pavements, sidewalks, driveways that are disturbed during the installation, improvement or extension of IP-enabled Video Services to a standard that is both commercially reasonable and in compliance with the ordinances of North Little Rock.

(c) AT&T Arkansas shall not refuse to tender IP-enabled Video Services based solely upon the income or minority status of any resident or group of residents.

7. Service Area. This Agreement shall apply to AT&T's service area within the municipal boundaries of North Little Rock as they exist upon the date of execution of this agreement and may hereafter be extended. AT&T Arkansas shall make video programming available, subject to technology or other economic feasibility, to all residential units within the service area, by use of IP-based video technology or other alternative video programming technology.

(a) On December 31, 2009 and the same date in every year thereafter, AT&T Arkansas shall tender an annual report indicating the status of its video programming service. The report shall:

(i) indicate the number of subscribers;

(ii) the technology being used to provide such video programming.

(b) AT&T Arkansas shall be considered to have breached this Agreement if AT&T Arkansas fails to diligently offer video programming throughout the City, unless:

(i) delay is attributable to Force Majeure;

(ii) delay is attributable to the City;

(iii) delay is attributable to AT&T Arkansas' inability to obtain needed private easements;

(iv) delay is attributable to special technical requirements; or

(v) delay is justified by reasonable commercial standards of construction.

8. Obligations of City. During the term of this Agreement City will not attempt to nor subject the provision of AT&T Arkansas' IP-enabled Video Services over the IP Network to regulation under any ordinance that generally applies to cable television franchises. In addition:

(a) City agrees to subject the construction and installation of the IP Network to the same process and review as it subjects the installation and construction of AT&T Arkansas' existing telecommunications infrastructure, so long as the installation of the IP Network results in no greater risk to the public than AT&T Arkansas' existing telecommunications infrastructure.

(b) City agrees not to unreasonably block, restrict, or limit the construction and installation of the IP Network.

(c) City agrees to process any and all applicable permits for the installation, construction, maintenance, repair, removal, and other activities associated with the IP Network in a timely and prompt manner.

9. Indemnification.

(a) AT&T Arkansas agrees to indemnify, defend, and hold harmless City, its officers, agents, and employees, from and against any liability for damages and for any liability or claims resulting from tangible property damage or bodily injury (including accidental death), to the extent proximately caused by AT&T Arkansas' negligent construction, operation, or maintenance of its IP Network, provided that City shall give AT&T Arkansas written notice of its obligation to indemnify City within ten (10) days of receipt of a claim or action pursuant to this subsection. Notwithstanding the foregoing, AT&T Arkansas shall not indemnify City for any damages, liability or claims resulting from the negligence or willful misconduct of City, its officers, agents, employees, attorneys, consultants, independent contractors or third parties or for any activity or function conducted by any person or entity other than AT&T Arkansas in connection with PEG programming.

(b) With respect to AT&T Arkansas' indemnity obligations set forth above, AT&T Arkansas shall provide the defense of any claims brought against City by selecting

counsel of AT&T Arkansas' choice to defend the claim, subject to the consent of City, which shall not be unreasonably withheld. Nothing herein shall be deemed to prevent City from cooperating with AT&T Arkansas and participating in the defense of any litigation by its own counsel at its own cost and expense, provided, however, that after consultation with City, AT&T Arkansas shall have the right to defend, settle or compromise any claim or action arising hereunder, and AT&T Arkansas shall have the authority to decide the appropriateness and the amount of any such settlement. In the event that the terms of any such settlement do not include the release of City and City does not consent to the terms of any such settlement or compromise, AT&T Arkansas shall not settle the claim or action, but its obligation to indemnify City shall in no event exceed the amount of such settlement.

(c) City shall hold AT&T Arkansas harmless and shall be responsible for damages, liability or claims resulting from the gross negligence or willful misconduct of City.

(d) City shall be responsible for its own acts of negligence or willful misconduct, or breaches of obligation committed by City for which City is legally responsible, subject to any and all defenses and limitations of liability provided by law. AT&T Arkansas shall not be required to indemnify City for acts of City which constitute willful misconduct or negligence on the part of City, its officers, employees, agents, attorneys, consultants, independent contractors or third parties.

10. Breach of Agreement. Should either party claim that a material breach of any part of this Agreement has occurred, that party will provide prompt written notice to the other, specifying the nature of the breach; and upon receipt the other party shall cure such breach within 60 days. If EITHER PARTY fails to cure a material breach of this agreement within 60 days after notice has been delivered or engages in fraud or deceit in an attempt to evade obligations of this Agreement, the OTHER PARTY may terminate and cancel the Agreement.

11. Dispute Resolution. Except as otherwise provided in this Agreement, the Parties shall make diligent good faith efforts to resolve all issues and disputes that arise in the administration of this Agreement through discussions between designated representatives of the Parties, and use of a mediator when such discussions have failed.

12. Insurance. AT&T Arkansas shall maintain, throughout the term of this Agreement, insurance in the minimum amounts as follows:

Workers Compensation	Statutory Limits
Commercial General Liability	\$1,000,000 per occurrence, Combined Single Liability (CSL) \$2,000,000 General Aggregate
Auto Liability (including all owned, non-owned, and hired vehicles)	\$1,000,000 per occurrence CSL
Umbrella Liability	\$1,000,000 per occurrence CSL

13. Notices. Any notice to be given under this Agreement shall be in writing and may be delivered to either personally, by facsimile or by certified or registered mail with

postage prepaid and return receipt requested, addressed as follows:

If to City: City of North Little Rock, Arkansas
Attn: Mayor Patrick H. Hays
City Hall
300 Main Street
North Little Rock, Arkansas 72114

If to AT&T Arkansas: AT&T Arkansas
Attn:

14. Modification. This Agreement may be amended or modified only by a written instrument executed by both Parties.

15. Assignment. AT&T Arkansas may not assign or transfer this Agreement or any interest therein without the prior consent of City except to any affiliate of AT&T Arkansas.

16. Entire Agreement. This Agreement embodies the entire agreement and understanding of City and AT&T Arkansas with respect to AT&T Arkansas' use of the City ROW in connection with the offering and provision of IP-enabled services including IP-enabled Video Services within the City using facilities constructed and placed within the City ROW. As such it merges and supersedes all prior verbal agreements, understandings and representations by either party on the matters set forth herein.

17. Waiver. Failure on the part of either Party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision.

18. Miscellaneous.

(a) AT&T Arkansas and City each hereby warrants that it has the requisite power and authority to enter into this Agreement and to perform according to the terms hereof.

(b) The headings used in this Agreement are inserted for convenience or reference only and are not intended to define, limit or affect the interpretation of any term or provision hereof. The singular shall include the plural; the masculine gender shall include the feminine and neutral gender.

(c) AT&T Arkansas and City shall cooperate fully with one another in the execution of any and all other documents and in the completion of any additional actions including, without limitation, the processing of permits that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

(d) Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties hereto toward any person or entity not a party to this Agreement, unless otherwise expressly set forth herein.

(e) Nothing contained in this Agreement is intended or shall be construed as amending, modifying or otherwise affecting any other agreements, authorizations or

memoranda which City and AT&T Arkansas have now. Further, nothing contained in this Agreement is meant to change, limit, modify, restrict or limit any current rights or jurisdiction that either City or other governmental entities currently have nor is this Agreement intended to change, limit, modify, restrict or limit any rights AT&T Arkansas currently has under existing federal and state law and under existing City ordinances and existing construction permits issued by City.

(f) AT&T Arkansas shall comply at all times with applicable Federal, State, and local laws and all executive and administrative orders relating to nondiscrimination, equal employment and affirmative action.

19. Binding Effect. This Agreement shall be binding upon and for the benefit of each of the Parties and their respective past and present principals, managers, City Council members, offices, directors, shareholders, agents, employees, attorneys, successors and assigns and any parents, subsidiaries or affiliated corporations or entities, as applicable.

20. Counterpart Execution. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement. Signature pages may be transmitted by facsimile and any signature transmitted by facsimile will be given the same force and effect as an original signature.

21. Authority of City Council. This Agreement is not intended to limit the authority of the North Little Rock City Council regarding the use of streets, easements, and public rights of way ("ROW") by public utilities, specifically including those that communicate information. The City Council expressly reserves the right to increase the fee imposed in paragraph 3 of this Agreement to that which is imposed on other video service providers in order to generally maintain competitive neutrality, so long as such fee does not exceed the maximum rate authorized under Section 622 of the Federal Communications Act (47 U.S.C. § 542).

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this Agreement and made the same effective as of _____ ("Effective date").

AT&T ARKANSAS

**CITY OF NORTH LITTLE ROCK,
ARKANSAS**

By: _____
Name: Edward Drilling
Title: President – AT&T Arkansas

By: _____
Name: Patrick Henry Hays
Title: Mayor

ATTEST:

Diane Whitbey, City Clerk