

## APPENDIX B. FRANCHISES

### ARTICLE 10. AXON TELECOM, LLC - RIGHT-OF-WAY

- Section 1. DEFINITIONS.** For the purpose of this ordinance, the following words and phrases and their derivations shall have the following meaning:
- a. Axon Telecom means Axon Telecom, L.L.C., its duly authorized successors, transferees, or assigns.
  - b. Cable includes both the coaxial cable used to transmit signals of high frequency, and fiber optic cable that consists of a bundle of thin insulated glass strands used to transmit data, voice, video and other communications, and any other assembly of materials so classified generically as cable.
  - c. City means the City of Leawood, Kansas, a municipal corporation, and any duly authorized representative.
  - d. Facilities means lines, pipes, wires, cables, conduits, ducts, innerducts, culverts, manholes, vaults, pedestals, boxes, appliances, gates, meters, appurtenances, or other equipment used by Axon Telecom for the purposes of conducting its business operations as authorized herein.
  - e. Fee means the fee imposed by the City on Axon Telecom solely because of its status in accordance to K.S.A. 12-2001. It shall not include: (1) any tax, fee, or assessment of general applicability including any which are imposed on Axon Telecom; (2) requirements or charges incidental to the awarding or enforcement of this ordinance, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; (3) any permit fee or other fee imposed under any valid ordinance regulating the right-of-way; or (4) any other fee imposed by federal, state, or local law.
  - f. Person means any natural or corporate person, business association or business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity.
  - g. Right-of-Way means the area on, below or above the present and future City streets, alleys, bridges, bikeways, parkways and sidewalks.
  - h. Right-of-Way Ordinance means this ordinance passed to grant the right, privilege or franchise to construct, operate and maintain conduit facilities within the right-of-way. This ordinance shall operate as an agreement or contract between the City and Axon Telecom and shall be subject to the laws of the State of Kansas.
  - i. Utility Easement means, for the purposes of this ordinance, an easement dedicated to the City for the purpose of utilities.

**Section 2. GRANT.** Axon Telecom is hereby granted the right, privilege or franchise to construct, operate, and maintain facilities in, through and along the City's right-of-way and utility easements in accordance with the plans submitted and approved by the Public Works Director for the purposes of supplying innerducts by lease or sale to other duly franchised entities on a nonexclusive basis within the City, subject, however, to the terms and conditions herein set forth within this ordinance. As a condition of this grant, Axon Telecom is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity. This ordinance does not grant Axon Telecom the right, privilege or franchise to provide telecommunications services (as defined by 47 U.S.C. § 153), cable service (as defined by 47 U.S.C. § 522), open video system service (as defined by 47 U.S.C. § 573) or any other service, or to install its own cable; provided that this restriction shall not preclude Axon Telecom from installing the facilities or cable of other duly franchised or otherwise authorized entities.

**Section 3. USE OF PUBLIC RIGHT-OF-WAY AND UTILITY EASEMENTS.** Axon Telecom's facilities shall be located in the right-of-way and utility easements in accordance with the plans currently proposed and approved by the Public Works Director. Modifications to such plans and/or any future requests for additional placement shall only be allowed as approved and authorized by the Public Works Director. Placement, modification, replacements, maintenance and repairs to Axon Telecom's facilities shall be conducted in compliance with all applicable laws, statutes, ordinances and permit requirements. Axon Telecom will be responsible for obtaining all necessary permits as required by the City for work performed in the right-of-way and utility easements, as well as paying any associated permit fee. In addition, Axon Telecom shall be subject to all technical specifications, design criteria, policies now or hereafter adopted or promulgated by the City, or any other appropriate governmental entity. In its use of the right-of-way and utility easements within the City, Axon Telecom shall be subject to all applicable rules, regulations, policies, laws, orders, resolutions, and ordinances now or hereafter adopted or promulgated by any appropriate governmental entity now or hereafter having jurisdiction, including, but not limited to the City in the reasonable exercise of its police powers, including, but not limited to the City's ordinance regarding the Use and Excavation of the Public Right-of-Way.

**Section 4. MAINTENANCE OF FACILITIES.** Axon Telecom shall keep its facilities in good repair and working order and shall maintain its facilities in accordance with all applicable law, statute and ordinance; provided that any related expense may be shared in whole or in part with entities leasing or purchasing the use of Axon Telecom's facilities. In the event Axon Telecom requests to transfer or relinquish its right, privilege or franchise herein granted, Axon shall provide the City with evidence that such maintenance responsibility has been appropriately assumed by another entity or entities.

- Section 5. FEE.** Axon Telecom shall pay an initial one-time administrative fee of \$1,000 for the right privilege or franchise hereunder. Further, Axon Telecom shall pay the City one (1%) percent of all gross revenues collected for any and all leases and sales of its innerducts and other facilities in the right-of-way and utility easements within the City of Leawood. Such payments shall be made on a semiannual basis for any lease, and within thirty (30) days of the execution of any sale. All payments herein provided shall be in addition to, not in lieu of, all other taxes, charges, assessments, fees and impositions of general applicability that are or may be imposed by the City. Axon Telecom shall pay interest at an annual rate of ten (10%) percent for each month or fraction thereof on any late payment of the charge provided for in this ordinance.
- Section 6. TERM.** This ordinance shall be effective for a term of one (1) year from the effective date. Thereafter, this ordinance will renew for ten (10) renewable one (1) year terms, unless either party notifies the other party of its intent to terminate the agreement created by this ordinance prior to one hundred eighty (180) days before the termination of the then current term.
- Section 7. RENEGOTIATION OF ORDINANCE PROVISIONS.** If the City has a good faith belief that Axon Telecom is offering telecommunications, cable, OVS or any other service within the City beyond those services contemplated and granted by this ordinance, the City may seek renegotiation of this ordinance or require a separate franchise ordinance for such services. Axon Telecom agrees to negotiate with the City in good faith in a timely manner, and to pay for any prior unauthorized use in accordance with the terms of the amended or new ordinance. The purpose of this provision is to allow the City to ensure that Axon Telecom is paying a fee for all services for which a franchise fee is appropriate.
- Section 8. DESCRIPTION OF SERVICE.** In the event Axon Telecom offers new services other than the lease or sale of its innerducts and the installation of other duly franchised entities' cable or other facilities therein, Axon Telecom shall immediately notify the City.
- Section 9. AXON TELECOM'S INFORMATION.** Axon Telecom shall, at its own expense, annually submit to the City a summary of the previous year's development of its facilities, including but not limited to, the location of facilities during the year, and Axon Telecom's plan of development of facilities for the next year — Note: In lieu of this requirement, Axon Telecom's agent may meet in person with the City's Public Works Director to discuss these issues.
- Section 10. USE OF FACILITIES BY OTHER ENTITIES.**
- a. Axon Telecom may sell, transfer or lease its innerducts and related facilities to duly franchised entities; provided that such transaction shall not constitute authorization by the City for such entities to operate within the City, or a transfer in whole or part of the right, privilege or franchise herein granted. Axon Telecom shall timely notify the City of the identity of all entities that have leased or purchased in whole or in part the use of Axon Telecom's facilities.

- b. Axon Telecom shall not interfere with any City right-of-way or franchise requirements regarding any entity leasing in whole or in part the use of Axon Telecom's facilities. Further, Axon Telecom shall not interfere with or oppose any line charge fee imposed upon such entity.
- c. Axon Telecom understands that the City may request service providers to reasonably utilize any available space or capacity within Axon Telecom's facilities. In such event Axon Telecom will charge a fairly priced rate and will make a reasonable attempt to negotiate an appropriate agreement with any such service provider.

**Section 11. TRANSFER OF RIGHT, PRIVILEGE OR FRANCHISE.** Pursuant to permission of the City, which shall not be unreasonably withheld, Axon Telecom shall have the right to assign as a whole the right, privilege or franchise herein granted to any person who, by accepting such assignment, shall be bound by the terms and provisions hereof. City approval may be denied only upon a good faith finding by the City that the assignee lacks the legal, technical or financial qualifications to perform its obligations under this ordinance or any applicable governmental requirement. Notice of Axon Telecom's intent to assign its right, privilege or franchise granted by this ordinance shall be in writing. Upon completion of the assignment, an authenticated copy thereof shall be filed with the city clerk. The right, privilege or franchise granted by this ordinance shall be assignable only in accordance with the laws of the State of Kansas, as the same may exist at the time when any assignment is made. Any attempts to transfer, assign or otherwise dispose of the right, privilege or franchise granted herein by the City or Axon Telecom's facilities not conforming with the requirements of this section shall be null and void. This section is not intended to apply to or prevent Axon Telecom's leasing or sale of its innerducts to other entities, nor shall the same be considered a transfer of any right, privilege or franchise granted herein.

**Section 12. NOTIFICATION PROCEDURE.** Any required or permitted notice under this ordinance shall be in writing. Notice upon the City shall be delivered to the city clerk by first class United States mail or by personal delivery. Notice upon Axon Telecom shall be delivered by first class United States mail or by personal delivery to: Attn: Legal Department, Axon Telecom, L.L.C., 450 Pryor Blvd., P.O. Box 409, Sturgis, KY 42459.

**Section 13. INDEMNIFICATION.** Axon Telecom shall fully indemnify, release, defend and hold harmless the City, and agents of the City when acting in their capacity as municipal officials, employees, agents and authorized contractors from and against any and all claims, demands, suits, proceedings, and actions, liability and judgment by other persons for damages, losses, costs, and expenses, including attorney fees, to the extent caused by negligent acts or omissions of Axon Telecom in the performance of the permitted work. The City agrees to timely notify Axon Telecom of such claim, demand, suit, proceeding, and/or action by providing written notice to Axon Telecom. Nothing herein shall be deemed to prevent the City, or any agent from participating in the defense of any litigation by their own counsel at their own expense. Such participation shall not under any circumstances relieve Axon Telecom from its duty to defend against liability or its duty to pay any judgment entered against the City, or its agents.

- Section 14. LIABILITY INSURANCE REQUIREMENT.** Axon Telecom shall file with the City evidence of liability insurance with an insurance company licensed to do business in Kansas in an amount not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) in aggregate, to protect the City from and against all claims by any person whatsoever for loss or damage from personal injury, bodily injury, death or property damage occasioned by Axon Telecom, or alleged to so have been caused or occurred. If Axon Telecom is self-insured, it shall provide the City proof of compliance regarding its ability to self-insure and proof of its ability to provide coverage in the above amounts.
- Section 15. PERFORMANCE AND MAINTENANCE BOND REQUIREMENT.** Axon Telecom shall at all times maintain in full force and effect a corporate surety bond in a form approved by the City Attorney, in an amount of \$50,000, for a term consistent with the term of this ordinance plus one additional year, conditioned upon Axon Telecom's faithful performance of the provisions, terms and conditions conferred herein. An annual bond automatically renewed yearly during this period shall satisfy this requirement.
- Section 16. RESERVATION OF RIGHTS.** In addition to any rights specifically reserved to the City by this ordinance, the City reserves to itself every right and power available to it under the constitutions of the United States and the State of Kansas, and any other right or power, including, but not limited to all police powers and authority to regulate and legislate to protect and promote the public health, safety, welfare, and morals. Nothing in this ordinance shall limit or govern the right of the City to exercise its municipal authority to the fullest extent allowed by law. The City shall have the right to waive any provision of this ordinance, except those required by federal or state law, if the City determines: (a) that it is in the public interest to do so, and (b) that the enforcement of such provision will impose an undue hardship on Axon Telecom or its subscribers. To be effective, such waiver shall be evidenced by a statement in writing signed by a duly authorized representative of the City. The waiver of any provision in any one instance shall not be deemed a waiver of such provision subsequent to such instance nor be deemed a waiver of any other provision of this ordinance unless the statement so recites. Further, the City hereby reserves to itself the right to intervene in any suit, action or proceeding involving the provisions herein.
- Section 17. FORFEITURE OF RIGHT, PRIVILEGE OR FRANCHISE.** In case of the failure of Axon Telecom to comply with any of the provisions of this ordinance, or if Axon Telecom should do or cause to be done any act or thing prohibited by or in violation of the terms of this ordinance, Axon Telecom shall forfeit any right, privilege or franchise granted by this ordinance and any such right, privilege or franchise shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City shall carry out the following proceedings:

- a. For violations concerning the use of the right-of-way and/or utility easements as described in Section 3 of this ordinance and deemed by the Public Works Director to be a public nuisance and/or emergency, the following procedure shall apply. The City shall provide written notice by certified mail to Axon Telecom of any such violation, setting forth in detail the conditions of neglect, default or failure complained of. Axon Telecom shall have fourteen (14) days subsequent to receipt of such notice to inform the City in writing of the action Axon Telecom shall take to correct the violation. Such corrective action shall be completed within thirty (30) days subsequent to receipt of notice unless otherwise agreed to by the City. If at the end of such period the City deems that the conditions created by this ordinance have not been complied with by Axon Telecom and that this ordinance is subject to cancellation by reason thereof, the City shall enact an ordinance setting out the grounds upon which this ordinance is to be canceled and terminated. If Axon Telecom fails to take corrective action within the thirty (30) day period set forth above, nothing herein shall preclude the City from maintaining an action against Axon Telecom to recover damages as a result of such failure to take corrective action, including, but not limited to, reasonable costs of corrective action incurred by the City.
- b. For all other violations of this ordinance, the following procedure shall apply. The City shall provide written notice by certified mail to Axon Telecom of any such violation, setting forth in detail the conditions of neglect, default or failure complained of. Axon Telecom shall have ninety (90) days after the mailing of such notice in which to comply with the conditions of this ordinance. If at the end of such period the City deems that the conditions have not been complied with by Axon Telecom and that this ordinance is subject to cancellation by reason thereof, the City shall enact an ordinance setting out the grounds upon which this ordinance is to be canceled and terminated.
- c. If within thirty (30) days after the effective date of an ordinance to terminate this ordinance, in accordance with the provisions herein, Axon Telecom shall not have instituted an action in the District Court of Johnson County, Kansas to determine whether or not Axon Telecom has violated the terms of this ordinance and that this ordinance is subject to cancellation by reason thereof, this ordinance shall be canceled and terminated at the end of such thirty (30) day period. If within such thirty (30) day period Axon Telecom does institute an action, as above provided, and prosecutes such action to final judgment with due diligence, then, if the court finds that this ordinance is subject to cancellation by reason of the violation of the terms, this ordinance shall immediately terminate after such final judgment is rendered and all available appeals exhausted.

In addition to any other remedy available herein or and at law or equity, either party shall have the authority to maintain civil suits or actions in any court of competent jurisdiction for the purpose of enforcing the provisions of this ordinance and/or to abate nuisances maintained in violation thereof.

**Section 18. REVOCATION OF THIS ORDINANCE.** In addition to all other revocation rights and powers herein or otherwise enjoyed by the City, the City shall have the additional and separate right to revoke this ordinance and all right, privilege or franchise of Axon Telecom as a result of and in response to any of the following events or reasons:

- a. Any provision of this ordinance is adjudged by a Court of Competent Jurisdiction to be invalid or unenforceable and said judicial act and declaration is deemed by the Governing Body to constitute such a material consideration for the granting of this ordinance as to cause the same to become null and void; or
- b. Axon Telecom commits an act of fraud or deceit against the City in obtaining the grant of this ordinance, or upon being granted Axon Telecom commits such an act against the City.

To revoke this ordinance in accordance with the provisions of this section, the following procedure shall apply. The City shall enact an ordinance setting out the grounds upon which this ordinance is to be canceled and terminated. Prior to the enactment of such ordinance, Axon Telecom shall be provided with timely written notice by certified mail, and Axon Telecom shall be allowed to address the Governing Body before final consideration of such ordinance. If within thirty (30) days after the effective date of such ordinance to terminate this ordinance Axon Telecom shall not have instituted an action in the District Court of Johnson County, Kansas to determine whether or not this ordinance was appropriately terminated in accordance to the provisions of this section and is subject to cancellation by reason thereof, this ordinance shall be canceled and terminated at the end of such thirty (30) day period. If within such thirty (30) day period Axon Telecom does institute an action, as above provided, and prosecutes such action to final judgment with due diligence, then, if the court finds that this ordinance is subject to cancellation by the reason addressed by this section, this ordinance shall immediately terminate after such final judgment is rendered and all available appeals exhausted.

**Section 19. MISCELLANEOUS PROVISIONS.**

- a. Nonexclusive Clause. The privilege to construct, erect, operate and maintain Axon Telecom's facilities and to provide service within the City is nonexclusive. The City expressly reserves the right to grant other rights, privileges or franchises to other persons. However, no such additional grant shall in any way affect the rights or obligations of Axon Telecom.

- b. Exclusive Benefit of Axon Telecom. The right, privilege or franchise granted to Axon Telecom by this ordinance shall be for the sole use of Axon Telecom to provide conduit services as authorized herein. These rights are for the exclusive benefit of Axon Telecom, except where otherwise provided herein, or when authorized by the City.
- c. Axon Telecom is Without Remedy Against the City. Axon Telecom shall have no remedy or recourse whatsoever against the City for any loss, cost, expense, or damage arising from the enactment of the provisions or requirements of this ordinance, or for the failure of the City to have the authority to grant, all, or any part, of this ordinance granted. Second, Axon Telecom expressly acknowledges that it accepted this ordinance granted in reliance upon its independent and personal investigation and understanding of the power and authority of the City to grant the right, privilege or franchise conferred upon Axon Telecom. Third, Axon Telecom acknowledges by its acceptance of this ordinance that it has not been induced to agree to the terms of this ordinance upon any understanding, or promise, whether given verbally or in writing by or on behalf of the City, or by any other person concerning any term or condition of this ordinance not expressed herein. Finally, Axon Telecom acknowledges by the acceptance of this ordinance that it has carefully read the provisions, terms, and conditions of this ordinance and is willing to, and does accept, all of the risk attendant to the provisions, terms, and conditions.
- d. Federal, State and City Jurisdiction. This ordinance shall be construed in a manner consistent with all applicable federal, state, and local laws. Notwithstanding any other provisions of this ordinance to the contrary, the construction, operation and maintenance of Axon Telecom's facilities by Axon Telecom or its agent shall be in accordance with all laws and regulations of the United States the state, and any political subdivision thereof, or any administrative agency thereof, having jurisdiction. In addition, Axon Telecom shall meet or exceed the most stringent technical standards set by regulatory bodies, including, but not limited to the City, now or hereafter having jurisdiction. Axon Telecom's rights are subject to the police powers of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Axon Telecom shall comply with all applicable general laws and ordinances enacted by the City pursuant to that power. Finally, Axon Telecom's failure to comply with any law or regulation governing the operation of said facilities may result in a forfeiture of the granting of the right, privilege or franchise created by this ordinance.
- e. Failure to Enforce. The failure of either party to enforce and remedy any noncompliance of the terms and conditions of the agreement created by this ordinance shall not constitute a waiver of rights nor a waiver of the other party's obligations as provided herein.

(Ord. No. 1851; effective 05-06-00)