

AGENDA ITEM SUMMARY

Subject: Omnitel – Right of Way Use Agreement Resolution 36-22

Background Summary:

At our last council work shop we had further discussion on a ROW Use Agreement between the City and OmniTel communications for installation of fiberoptic cable in the city row so that they can begin offering quality high-speed internet to an initial customer base in Charles City. We presented an initial draft of an agreement for OmniTel to use the City ROW areas based on a fixed area that was determined by the initial map that OmniTel had presented. OmniTel expressed their desire to be able to build anywhere based on demand of service and not be constrained to the initial areas on the map. As we discussed at the meeting additional areas could be added based on approval by the City Administrator or the City Engineer and OmniTel was accepting of that. But personally, I don't know why we wouldn't just include the entire city limits in the ROW Use Agreement to begin with. I don't know why the city engineer or myself (city administrator) would prohibit a build that they would want to do. Any work that they do will require review by the city engineer and a ROW construction permit, any issues would be dealt with at that time. So why not include the full incorporated limits in the Agreement? With that, we changed in the **territory** in the agreement include all of **city limits**. OmniTel can build anywhere as demand dictates.

Term is **20 years** as we previously discussed. That remains unchanged.

Price for ROW Use Agreement. As we initially indicated we were working to determine what the one-time price should be for the agreement. For the one-off agreement we did with them last November for 9th Street Chautauqua we charged our established fee of \$250. But what should we charge for full city use? This was somewhat challenging to determine but we decided to take the approach of compensating the City for costs of staff/city attorney time involved with developing the agreement and that amount is: **\$350**. There will be additional ROW Construction Permit Fees as they build out, and we anticipate using a pricing structure similar to the City of Ft. Dodge which is \$35 for a permit and \$0.10 for every lineal foot over 1,000 feet.

Omnitel is willing to make an investment in Charles City by installing fiber, something we've been wanting to make happen for a number of years now. Our own municipal fiber project may still come about or it may not, it is still a work in progress. We've talked previously with OmniTel about possible partnerships and who knows what the future may hold. But what we do know is that we need a better internet offering in Charles City very badly and incumbents are not stepping up to the plate. Omnitel is willing to make that investment and I think an approach as I've identified above will help get something we need very badly started in Charles City.

- Steve Diers

RESOLUTION NO. 36-22

***RESOLUTION APPROVING AGREEMENT REGARDING USE OF PUBLIC
RIGHT OF WAY
FOR FIBER OPTIC COMMUNICATIONS SYSTEM***

WHEREAS, Omnitel Communications has requested use of the public rights of way within the City limits of Charles City, Iowa, in the form of a nonexclusive and non-franchise license for the installation and operation of a fiber optic communications system; and

WHEREAS, the City of Charles City and Omnitel have prepared an Agreement which grants to Omnitel a nonexclusive, non-franchise license to utilize public right of way within the City limits of Charles City on the terms and conditions set forth therein, which Agreement complies with Chapter 143 of the Charles City Code of Ordinances; and

WHEREAS, it is in the best interests of the City of Charles City to approve the license pursuant to the Agreement.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Charles City, Iowa, meeting in regular session on the 4th day of April, 2022, that the Agreement Regarding Use of Public Right of Way for Fiber Optic Communications System between the City of Charles City and Omnitel be approved.

COUNCIL MEMBER moved the adoption of the foregoing Resolution;

COUNCIL MEMBER seconded the motion to adopt, and on roll call the voting was as follows:

AYES:

NAYS:

Passed and approved this 4th day of April, 2022.

Dean Andrews, Mayor

Attest:

Trudy O'Donnell, City Clerk

**AGREEMENT REGARDING USE OF PUBLIC RIGHT OF WAY
FOR FIBER OPTIC COMMUNICATIONS SYSTEM**

THIS AGREEMENT grants OMNITEL COMMUNICATIONS Inc, its successors, and assigns (the “**Company**”), the right, license and permit to locate and operate a fiber optic communications system (the “**System**”) within the public rights of way and compatible easements of the CITY OF CHARLES CITY, IOWA (the “**City**”).

SECTIONS

SECTION 1.	REGULATORY AUTHORITY
SECTION 2.	GRANT OF LICENSE
SECTION 3.	TERM AND RENEWAL
SECTION 4.	NONEXCLUSIVE LICENSE
SECTION 5.	CONSTRUCTION AND INSTALLATION
SECTION 6.	SERVICE <u>AREA</u> EXTENSIONS
SECTION 7.	OWNERSHIP AND REMOVAL
SECTION 8.	LEGAL COMPLIANCE
SECTION 9.	SCOPE OF REGULATION
SECTION 10.	POLICE POWER
SECTION 11.	FORCE MAJEURE
SECTION 12.	ASSIGNMENT OR TRANSFER
SECTION 13.	REPORTING REQUIREMENTS
SECTION 14.	CONFIDENTIALITY
SECTION 15.	INDEMNIFICATION.
SECTION 16.	LEGAL EFFECT

SECTION 1. REGULATORY AUTHORITY

The Company’s operation of the System shall be governed by this Agreement only to the extent that the City is permitted to exercise its power to regulate and manage the Company’s use and occupancy of the public rights of way within the City in accordance with applicable Iowa and Federal law. Without limiting the preceding, the City’s regulation of the Company’s use and occupancy of the public right of way shall be on a competitively neutral basis as compared to other similarly situated users of the public right of way.

SECTION 2. GRANT OF LICENSE

The Company is granted the nonexclusive right, license and permit (the “**License**”) to locate and operate the System upon the City’s property and rights-of-way ~~set forth in Exhibit A~~ within the corporate limits of the City for the purpose of providing telecommunications, broadband and other information or communications services to end user subscribers located within the corporate boundaries of the City, including any areas annexed to the City in the future. The License includes the right of the Company to construct, install, maintain, operate, repair replace and remove facilities and equipment comprising the System in the public rights-of-way and through easements dedicated for compatible uses throughout the corporate limits of the City.

The Company shall pay a \$ ~~_____~~ \$350.00 fee upon execution of this License in accordance with Chapter 143.03 of the Charles City Code of Ordinances.

The Company acknowledges and agrees that it has not by virtue of this License acquired any property interest in the public right-of-way, and that it shall not be entitled to compensation on account of

lawful termination of the License or on account of City's lawful direction to remove or relocate the System or any part thereof.

SECTION 3. TERM AND RENEWAL

The initial term of the License shall be ~~_____~~ twenty (20) years from the Company's acceptance of the License. At the end of the initial term, the Company may apply for further renewal of the License by giving written notice to the City not less than one hundred eighty (180) days prior to the expiration of the License. Assuming the Company is in material compliance with all terms of the License, renewal of the License shall not be unreasonably withheld, conditioned or delayed.

SECTION 4. NONEXCLUSIVE LICENSE

The License is nonexclusive and shall in no way prevent the City from granting or renewing any other license or franchise for use of the public rights of way. If the City grants or renews an additional license or franchise for similar services, the material terms and conditions of the additional license or franchise shall not provide a competitive preference or advantage to the licensee or franchisee under that license or franchise.

SECTION 5. CONSTRUCTION AND INSTALLATION

The Company shall construct, install, maintain, operate, repair, replace and remove the System in a manner consistent with accepted technical and engineering standards and in accordance with all applicable safety rules and regulations. All facilities and equipment comprising the System and located in the public rights of way shall be located so as to cause minimum interference with the proper use of the public rights of way and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any public right of way. In case of any facilities or equipment causing interference with the public right of way, the Company shall, at its own cost and expense and in a commercially reasonable manner, modify, remove or relocate such facilities or equipment. In the event that at any time during the term of the License the City lawfully elects to alter or change any street, alley or other public right of way, the Company shall, if necessary and upon reasonable notice from the City, modify, remove or relocate any facilities or equipment at its own cost and expense and in a commercially reasonable manner. The Company shall have the authority, at its own cost and expense and in a commercially reasonable manner, to trim trees upon and overhanging the public rights of way so as to prevent the branches of such trees from coming in contact with the facilities and equipment of the Company. In case of any disturbance or damage to a public right of way, the Company shall, at its own cost and expense and in a commercially reasonable manner approved by the City, replace and restore such right of way to as good a condition as before the Company's activities were commenced. In the event that the Company does not timely comply with its obligations under this Section, the City may perform the work and recover its actual, verified costs from the Company. At the request of the City, the Company shall provide to the City Engineer or applicable City department accurate maps of the System, including the location of all facilities and equipment in the public rights of way.

In those areas of the service area where all of the transmission or distribution facilities of the respective utilities providing telephone communications and electric services are underground, the Company shall likewise construct, operate, and maintain all of its transmission and distribution facilities underground. In those areas where utilities are both aerial and underground, the Company shall have the discretion of placing its cable as aerial or underground. If at such time other utilities transfer aerial systems to underground placement, the Company shall make provisions to do likewise. At no time, unless with the

City's consent or under emergency circumstances, will the Company allow its facilities to lay on ground for more than its initial construction period.

SECTION 6. SERVICE AREA EXTENSIONS.

The Company shall strive to serve all residents of the City, except to the extent that population density, adverse terrain or other factors render providing service commercially impracticable or technically infeasible.

~~———— If the Company should at any time determine the need to extend its System to other City rights-of-way not subject to this License, the Company shall make application to the City Engineer to either enter into an additional Agreement or to amend this Agreement by addendum, allowing such use of additional City right of way. The Company shall be required to prepare a route map describing such addition to its System, and shall be required to submit drawings, plans, and specifications showing the proposed locations of its System within the right of way. All extensions within the first five years after the execution of this agreement will be considered an amendment and granted automatic approval. An Addendum to this Agreement shall be subject to the written approval of the City Administrator and City Engineer. Any additional Agreement shall be subject to the written approval of the Charles City City Council.~~

The Company shall be responsible for the acquisition of any necessary permission or easements for the installation of any facilities to be located outside of City right-of-way or City owned property.

SECTION 7. OWNERSHIP AND REMOVAL

The System shall be and remain the exclusive property of the Company at all times and for all purposes. The City waives any and all rights it may have, including any rights it may have in its capacity as licensor under this Agreement to assert any liens, encumbrances or adverse claims, statutory or otherwise, related to or in connection with the ownership of the System or any portion thereof. Any costs, expenses, taxes or other assessments arising from or related to the construction, installation, maintenance, operation, repair, replacement and removal of the System or any portion of the System shall be the sole responsibility of the Company. The Company, in its sole discretion, may remove the System or any portion of the System at any time during the term of the License in compliance with Chapter 143 of the Charles City Code of Ordinances.

SECTION 8. LEGAL COMPLIANCE

The rights and obligations of the Company under the License are subject at all times to compliance with Charles City Code of Ordinances Chapter 143, Iowa and Federal law, and all applicable requirements, specifications, rules and orders of the Federal Communications Commission (the "FCC"). Any condition or provision of this Agreement that is inconsistent with the Charles City Code of Ordinances or Iowa or Federal law or applicable FCC regulations shall be deemed preempted and superseded.

SECTION 9. SCOPE OF REGULATION

Nothing in this Agreement shall be interpreted or construed to impose any requirement that has the purpose or effect of prohibiting, limiting, restricting or conditioning the provision of telecommunications services, broadband services or other communications or information services by the Company or any of its affiliates.

SECTION 10. POLICE POWER

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The Company shall at all times during the term of the License be subject to all lawful exercise of the City's police power. The City reserves the right to take such actions as may be necessary to enforce its lawful ordinances protecting the welfare, safety, and health of the public as it may relate to the Company's activities under the License.

SECTION 11. FORCE MAJEURE

The Company shall not be liable for any delay or failure in performance of any part of its obligations under this Agreement from any cause beyond its control and without its fault or negligence, including acts of God, acts of civil or military authority, government regulations, adverse judicial proceedings, embargoes, epidemics, war, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, strikes, power blackouts, major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities or acts or omissions of transportation common carriers.

SECTION 12. ASSIGNMENT OR TRANSFER

The Company shall not assign or transfer any right granted under this License to any other individual or entity without the prior written consent of the City; provided that such prior written consent shall not be unreasonably withheld, conditioned or delayed if the proposed assignee or transferee agrees in writing to assume the Company's obligations as licensee, including compliance with the terms and conditions of this Agreement. Notwithstanding the preceding or anything in this Agreement to the contrary, no restrictions or special rights with respect to assignment or transfer of the License or the System shall apply to transfers from the Company to any affiliate directly or indirectly controlling, controlled by or under common control with the Company.

SECTION 13. REPORTING REQUIREMENTS; ACCESS TO RECORDS

Upon reasonable request by the City, the City may review the Company's books and records pertaining to the City's operations under this License, during normal business hours and on a non-disruptive basis, as are reasonably necessary to monitor the Company's compliance with the terms of this License.

SECTION 14. CONFIDENTIALITY

The City shall keep confidential all information and data pertaining to the Company or its business and customers of a confidential or proprietary nature and shall not disclose any such information to any other person, firm or entity (except to a governmental or regulatory body in response to a subpoena) and shall use such information only for purposes within the scope of the City's authority under this Agreement. The City agrees that any confidential and proprietary information received pursuant to this Agreement shall be disclosed only to those employees and other persons who have a proper need for its use. Upon expiration or termination of the License, the City shall, at the direction of the Company, return or destroy all confidential or proprietary information provided by the Company along with any and all copies of such information. For purposes of this Section, information provided by the Company shall be deemed to be "confidential" or "proprietary" if (a) it is clearly marked confidential or (b) it is or includes information that a third party should reasonably conclude from the context of disclosure or from a substantive review of the disclosed information is confidential or proprietary. The obligations of the City under this Section shall survive the expiration or termination of the License. Notwithstanding the foregoing, the Company acknowledges that the obligations of the City under this Section are subject to compliance with applicable open meeting or public records laws of the State of Iowa. The City shall not be liable for any disclosure required to be made in compliance with applicable open meeting or public records laws; provided such disclosure is made in good faith and in consultation with and reliance upon the advice of the City's legal

counsel, and provided that prior written notice of the required disclosure is provided to the Company and its legal counsel.

SECTION 15. INDEMNIFICATION.

The Company shall indemnify and hold the City harmless at all times during the term of the License from and against all claims for injury or damage to any person or property caused by the construction, erection, operation or maintenance of its facilities, fixtures or equipment, or the negligence of its contractors or its employees.

SECTION 16. LEGAL EFFECT

This Agreement contains the entire agreement between the City and the Company regarding the License and may only be amended or modified by written agreement signed by the City as set forth herein and the Company. Every provision of this Agreement is intended to be severable. If any provision herein is invalid or unenforceable for any reason, this Agreement will be construed and enforced as if the invalid or unenforceable provision were not a part of this Agreement, and the remaining provisions will remain in full force and effect and will not be affected by the invalid or unenforceable provision or by its severance from this Agreement.

IN WITNESS WHEREOF, the parties are signing this Agreement, effective as of the Date of Acceptance set forth below.

CITY OF CHARLES CITY, IOWA

By: _____

Name: _____

Title: _____

Attest:

STATE OF IOWA, FLOYD COUNTY, ss.

This record was acknowledged before me on the ____ day of _____ 2022, by _____, as Mayor of the City of CHARLES CITY, Iowa, on its behalf.

Notary Public in and for said State

OMNITEL COMMUNICATIONS

By: _____

Name: _____

Title: _____

Date of Acceptance: _____

Attest:

STATE OF IOWA, _____ COUNTY, ss.

This record was acknowledged before me on the ____ day of _____ 2022, by _____, as _____ of OMNITEL COMMUNICATIONS, on its behalf.

Notary Public in and for said State