

**City of Fayetteville Staff Review Form**

**2017-0076**

**Legistar File ID**

**2/21/2017**

City Council Meeting Date - Agenda Item Only  
N/A for Non-Agenda Item

Kit Williams

2/3/2017

City Attorney /  
General Government Department

**Submitted By**

**Submitted Date**

**Division / Department**

**Action Recommendation:**

AN ORDINANCE TO AMEND §110.02 TELECOMMUNICATIONS FRANCHISES OF THE CITY CODE TO INCLUDE AND INCORPORATE REFERENCES TO COMPETING LOCAL EXCHANGE CARRIERS AND ANY OTHER TELECOMMUNICATIONS PROVIDERS DESIRING TO USE CITY STREET RIGHTS OF WAY

**Budget Impact:**

Account Number	Fund
Project Number	Project Title
<b>Budgeted Item?</b> <u>NA</u>	Current Budget        \$                    -
	Funds Obligated        \$                    -
	Current Balance        \$                    -
<b>Does item have a cost?</b> <u>NA</u>	Item Cost
<b>Budget Adjustment Attached?</b> <u>NA</u>	Budget Adjustment
	Remaining Budget        \$                    -

V20140710

Previous Ordinance or Resolution # \_\_\_\_\_

Original Contract Number: \_\_\_\_\_

Approval Date: \_\_\_\_\_

Comments:



OFFICE OF THE  
CITY ATTORNEY

## DEPARTMENTAL CORRESPONDENCE



**Kit Williams**  
*City Attorney*

**Blake Pennington**  
*Assistant City Attorney*

**Patti Mulford**  
*Paralegal*

**TO: Mayor Jordan**  
**City Council**

**CC: Don Marr, Chief of Staff**  
**Paul Becker, Finance Director**  
**Jeremy Pate, Development Services Director**

**FROM: Kit Williams, City Attorney**

A handwritten signature in blue ink, appearing to read "Kit Williams", with a long horizontal line extending to the right.

**DATE: February 2, 2017**

**RE: Competing Local Exchange Carriers Granted Certificate of Public Convenience and Necessity from the Arkansas Public Service Commission**

The Arkansas Legislation has empowered the Arkansas Public Service Commission to grant telecommunications companies known as Competing Local Exchange Carriers a Certificate of Public Convenience and Necessity. Such a certificate provides some authority for these companies to utilize Arkansas cities' rights of way to install low power telecommunications networks. Exactly how much authority this certificate carries and how much continuing authority Arkansas Cities have to control and regulate such carriers within the cities' rights of way is not settled.

My Office believes we should be proactive on this issue and have thus proposed an amendment to § 110.02 Telecommunication Franchises to include Competing Local Exchange Carriers. Our goal is to facilitate the new competing telecommunication companies while preserving Fayetteville's beautiful and uncluttered street scape, especially in residential areas.

This ordinance amendment seeks, to require co-location of these lower power antennas on existing poles or buildings which is similar to co-location requirements for existing cell phone antennas and towers. If co-location is not feasible, then this ordinance seeks to limit the height of new poles to twenty (20) feet along residential, local and collector streets and thirty (30) feet along arterials. This ordinance would also empower the Planning Director (Andrew Garner) to grant reasonable variances for the height restrictions. His variance decision can be appealed to the City Council.

As a couple of competing Local Exchange Carrier companies have begun exploratory conversations with City staff, the City Council needs to enact this legal framework so these negotiations can be successful.

**CHAPTER 110: TELECOMMUNICATION FRANCHISE AND BILLPOSTING**

**Sections:**

**Article I. General Provisions**

- 110.01 Billposting
- 110.02 Telecommunication Franchises
- 110.03—110.99 Reserved

**ARTICLE I. GENERAL PROVISIONS**

**110.01 Billposting**

In order to prevent litter, protect the beauty of Fayetteville, and preserve private property owners' rights, no bill, notice, advertisement or similar document may be posted, stuck, painted, attached or allowed or caused to be posted, stuck, painted or attached to or upon:

- (A) Any utility or light pole, or government traffic, directional or other sign;
- (B) Any private property including a building, fence, wall, pole, sign or other structure without first having obtained express permission from the owner of such property;
- (C) Any public property without first having obtained express permission of the public entity which owns or controls such property;
- (D) Any vehicle located on an off-street parking lot if the parking lot owner has installed a sign prohibiting such bill posting.

(Code 1965, §§13-2, 13-3; Ord. No. 241, 9-11-1908; Ord. No. 3773, §1, 4-5-94; Code 1991, §110.01; Ord. No. 5406, 5-4-11; Ord. No. 5762, §1, 4-7-15)

**110.02 Telecommunication Franchises**

- (A) Definitions. As used in §110.02 the following terms shall have the meanings set out:

*Applicant* means a telecommunications provider or telecommunications lessee that applies for a franchise or license pursuant to this ordinance.

*Franchise fee* means compensation paid to the city by the telecommunications provider or lessee in exchange for the use of the city's streets to deliver telecommunications services.

*Gross revenues* means all revenues from basic local service, excluding, among other things, extension, terminal equipment, toll, access, yellow pages, and other miscellaneous equipment revenues pursuant to Arkansas Code Ann. §14-200-101.

*Person* means any individual, resident, citizens, business firm, corporation, partnership, governmental agency, or institution.

*Streets* means all streets, roads, highways, alleys, rights-of-way, public utility easements, public property, public ways and air space over such streets, roads, alleys, public rights-of-way, public utility easements, public property and public ways located within the geographic limits of the city.

*Telecommunications* means the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information sent and received.

*Telecommunications facilities or facilities* means all conduits, manholes, poles, antennas, transceivers, wires, cable (including fiber optic cable) and appurtenances owned or utilized by a telecommunications provider or telecommunications lessee and located in, under or over the streets of the city and utilized in the provision of telecommunications services.

*Telecommunications lessee or lessee* means any person, firm, corporation, partnership, or other business entity, including resellers, that provides telecommunications services within the geographic boundaries of the city, including long-distance services that originate or terminate in the city, but utilizing, purchasing or leasing a telecommunications facility of a telecommunications provider or any element thereof, whether through purchase, lease, contract, interconnection agreement, or other business arrangement; provided that a person that owns its own telecommunications facilities in the city and utilizes, purchases or leases telecommunications facilities or elements thereof of other telecommunications providers in the city shall be classified as a telecommunications provider under the terms of this ordinance.

*Telecommunications provider or provider* means any person, firm, corporation, partnership or other business entity, other than the city, that provides telecommunications services within or without the geographic boundaries of the city by utilizing its own telecommunications facilities to provide telecommunications services.

*Telecommunications services or services* means any service delivering telecommunications by a telecommunications provider or lessee that the provider or lessee is authorized to provide under federal, state and local law, except that these terms do not include cable service as defined by the Cable Communications Policy Act of 1984, as amended by the Cable television Consumer Protection and Competition Act of 1992, 47 U.S.C. §521 et seq., and the Telecommunications Act of 1996.

*Transmission line* means a telecommunications facility that is used solely for the purpose of transmitting signals from one point to another point and does not include a line for the purpose of delivering telecommunications services to any person in the city.

- (B) *Requirement of City's Consent.* Every telecommunications provider and telecommunications lessee that utilize a telecommunications facility must obtain a franchise or license from the city in accordance with §110.02 in order to provide telecommunications services. Prior to providing any telecommunications facility, or utilizing any telecommunications facility, the provider or lessee must agree in writing to comply with the terms and conditions of this ordinance and enter into a franchise agreement or license agreement.
- (C) *Application Process.* Any telecommunications provider or lessee (who has not yet been awarded a franchise such as AT&T and the Prairie Grove Telephone Company) seeking to

utilize the streets to provide telecommunications service shall complete a brief application form approved by the Department of Transportation Services. Such application form shall briefly describe the general nature of the service to be provided, the type of construction or use of the facilities required, the name, address and telephone number of the person or entity seeking to provide the service, and the name, address and telephone number of an authorized representative of the person or entity.

- (1) The applicant shall also provide evidence in a form satisfactory to the city that it has the financial, legal and technical qualifications necessary to provide the service for which it seeks a franchise or license. The provision of authorization from the Arkansas Public Service Commission shall be deemed satisfactory evidence of these qualifications.

- (2) In considering whether to grant a franchise or license or impose terms and conditions on the grant of a franchise or license, the city may consider, without limitation, the following factors to the extent not already considered by the Arkansas Public Service Commission:
- (a) The applicant's financial ability to pay the compensation and fees required by this ordinance;
  - (b) The applicant's ability to construct and operate the telecommunications facilities it seeks to utilize;
  - (c) The applicant's compliance with the terms and conditions of federal, state and local law including applicant's compliance in other jurisdictions in which it operates;
  - (d) The capacity of the streets to accommodate the applicant's proposed facilities;
  - (e) The damage or disruption, if any, of public or private facilities, improvements, or landscaping if a franchise or license is granted;
  - (f) The public interest in minimizing the cost and disruption of construction in, on, under and above the streets;
  - (g) The effect of public health, safety or welfare if a franchise or license is granted;
  - (h) The availability of alternate routes and/or locations for the proposed facilities;
  - (i) Whether the imposition of certain terms and conditions or the failure to grant the requested franchise or license would prohibit or have the effect of prohibiting the ability of the applicant to provide any interstate or intrastate telecommunications services; and
  - (j) Any other factor relating to whether the grant of a franchise or license impinges on the city's right to manage its streets.

(D) *Franchise or License Agreement.*

- (1) As a condition of the grant of a franchise or license, the provider or lessee shall enter into a franchise agreement or a license agreement with the city. A telecommunications provider shall enter into a franchise agreement. A telecommunications lessee shall enter into a license agreement.
- (2) The franchise agreement or license agreement shall contain such additional terms and conditions as are not in conflict with the terms of this ordinance as may be necessary and appropriate for the particular circumstances of the provider or lessee and its delivery of telecommunications services.

(E) *Construction Maintenance.*

- (1) *Construction Application.* Prior to the beginning construction, excluding routine maintenance or emergency repair, of any telecommunications facility, the telecommunications company shall apply to the Department of Transportation Services of the city for permission to carry out construction activities in the city's streets, and shall comply with all requirements of that department and all applicable ordinances or Code sections.

FAYETTEVILLE CODE OF ORDINANCES  
TITLE XI BUSINESS REGULATIONS

- (2) *Construction Plan.* Prior to beginning construction, as defined above, the applicant shall submit a plan describing the proposed construction. The plan shall specify:
  - (a) The design of any telecommunications facilities to be construction or utilized;
  - (b) A map showing the precise location of any telecommunications facility to be constructed or utilized and any appurtenant facilities such as poles, attachments, guy wires, and the like;
  - (c) A description of any agreements that have been reached or are necessary with other telecommunications providers or providers of other utility services regarding use of existing facilities;
  - (d) The timetable for completion of construction, including any phases of construction;
  - (e) Such other information as well provide the city with pertinent information relating to the construction of the telecommunications facilities, including any pertinent information requested by the city.
- (3) *Prior Authority.* Prior to beginning construction, the applicant shall have received all necessary regulatory authority to construction a telecommunications facility or provide telecommunications service from the Arkansas Public Utilities Commission, the Federal Communications Commission, or other appropriate state or federal agency. Evidence that it has received such regulatory authority shall be filed with the city.
- (4) *Standards of Construction.* The method of construction, workmanship used, and materials utilized in the construction shall conform to all applicable federal, state and local statutes, rules, regulations and ordinances. All work shall be performed in a safe, thorough, and reliable manner using materials of good and durable quality so as not to create a hazard or dangerous conditions on the streets. If, at any time, it is determined by the city or any other agency or authority of competent jurisdiction that any telecommunications facility presents a danger to the public health, safety or welfare, then the telecommunications provider or lessee shall, at its own cost and expense, upon thirty (30) days advance written notice, at its own cost and expense, promptly correct all such conditions.
- (5) *Maintenance and Repair.* Any telecommunications facility constructed or utilized pursuant to a franchise or license shall be maintained and repaired in accordance with the standards and under the terms and conditions set out in the preceding paragraph and such other terms and conditions as shall appear in this ordinance or the franchise agreement or license agreement.
- (6) *Minimal Disruption.* Construction, maintenance and repair of the telecommunications facilities shall be conducted in such a manner as to minimize any interference with or disruption of the city's streets, traffic, residences, businesses and institutions. The provider shall at all times endeavor to use trenchless technology in appropriate circumstances.



- (7) *Restoration.* Any disturbance of the city's streets shall be repaired and restored by the telecommunications provider or lessee at its expense and to a condition at least as good as that prevailing before the work causing such disturbance was commenced.
  - (8) *Location of Facilities.* New poles and other new facilities shall be located to the extent feasible in such a way as to minimize their effect on the visual landscape and on other aesthetic considerations and so as to minimize inconvenience.
  - (9) *Burial of Transmission Lines.* A telecommunications provider shall place its transmission line or other facilities underground where feasible and desirable from an aesthetic perspective.
  - (10) *Co-location; Sharing of Pole Space.* To the maximum extent feasible, a telecommunications provider constructing a new transmission line or other facility, or expanding an existing line or facility, shall utilize existing facilities or place its facilities underground. The owner of any existing facility shall to the extent permitted by law and consistent with any pole attachment regulations of the Public Service Commission, the Federal Communications Commission or other appropriate agency, permit the telecommunications provider to utilize its pole.
  - (11) *Movement of Facilities.* A telecommunications provider shall be required to temporarily disconnect or relocate any of its facilities located in the streets at its own expense when required by the city by reason of traffic conditions, public safety, or the construction, installation or repair of any public road, highway, building, park or other public project. The provider shall cooperate with any other public utility authorized by the city to provide utility service utilizing the city's streets. If a private entity is required by city to modify or affect the streets, that entity shall compensate the provider for its costs for the disconnection or relocation of any of the provider's facilities. Provider shall be notified by said private entity as soon as practical of any plan affecting provider's facilities.
  - (12) *Tree Trimming.* A telecommunications provider is authorized to trim trees in the city's streets to the extent necessary to properly maintain its transmission line or other facility, but prior to major trimming projects, it shall provide at least twenty-four (24) hours' notice to the city. The city, at its option, may choose to supervise such tree trimming. Upon conclusion of the tree trimming, the provider shall immediately clean up and remove all debris.
  - (13) *Curb Cuts.* No provider shall make paving cuts or curb cuts without the written consent of the Director of the Department of Transportation Services.
- (F) *Performance Bond.*
- (1) Prior to the provision of service, the provider shall post a performance bond, satisfactory to the city, in the city's favor to ensure faithful performance of the terms and provisions of the franchise agreement and any planned construction as designated to the construction plan the provider has filed with the city pursuant to subsection (E)(2). The bond shall be equivalent to 10% of the total cost of the construction as provided in the construction plan, or \$25,000.00, whichever is greater.

- (2) In the event the provider fails to comply with the U.D.C. or to complete the construction in a safe, timely, and competent manner, after notice and a reasonable opportunity to cure, the city may recover, jointly and severally from the principal and surety of the bond, any damages or loss suffered by the city as a result, including the full amount of any compensation, indemnification or cost of removal or abandonment or any property of the provider, plus a reasonable allowance for attorneys' fees, up to the full amount of the bond.
  - (3) The city in its sole discretion may waive this requirement of a bond upon provider demonstrating sufficient financial resources or upon good cause shown to the Director of the Department of Transportation services.
- (G) *Fees. Amount.* In consideration of the city's grant of authority to utilize the city's streets for the provision or lease of telecommunications services, the telecommunications provider or lessee shall pay a franchise fee to the city in the following amounts:
- (1) *In the City.* A telecommunications provider or lessee who provides service to residents, businesses or institutions in the city shall pay monthly an amount equal of 4% of its gross revenues within the corporate limits of the city during the preceding month.
  - (2) *Outside the City.* A telecommunications provider who provides service solely to persons outside the geographic boundaries of the city by utilizing a transmission line that uses city right-of-way or streets shall pay the city a reasonable annual fee based upon an installation fee and charge per linear feet of transmission line that traverses the city or based upon such other method as the city deems appropriate. Such a fee may be paid in a lump sum in advance or in a combination of a lump sum plus annual payment as the city deems fit;
  - (3) *Calculation of Payments.* All payments made to the city shall be accompanied by a statement certified as true by an appropriate employee of the provider or lessee explaining the basis of the calculation on which the payment was made.
  - (4) *Audit.* Upon reasonable notice, the city shall have the right to inspect and copy the telecommunications provider's or lessee's books and records that are reasonable necessary for the city to determine compliance with subsection G. A telecommunications provider or lessee shall maintain sufficient financial records governing its operation in the city to allow the determination of gross Revenues and to otherwise document accurate payment of fees.
  - (5) *Fees not a Tax.* Unless otherwise inconsistent with applicable law, the fees provided in this Section G are not taxes and are separate from, and in addition to, any and all federal, state, local and city taxes as may be levied, imposed or due from a telecommunications provider or lessee, its customers or subscribers, or on account of the lease, sale, delivery or transmission of telecommunications services; provided that no fee imposed by this section shall be imposed in violation of state or federal law.

(H) *Removal.*

- (1) Within thirty (30) days following written notice from the city, any telecommunications provider or other person that owns, controls or maintains any obsolete or unusable telecommunications facility or related appurtenances that the city determines is a visual blight or nuisance to the public on, in, under or above the streets shall, at its own expense, remove such facilities and appurtenances from the streets.
- (2) A telecommunications facility need not be removed if renovation or restoration is planned within a reasonable period of time by the telecommunications franchisee or licensee or if the telecommunications facility is being utilized for telecommunications services. In such case, prompt written notice shall be provided to city specifying why such telecommunications should not be removed and the specific time frame, if applicable, for any planned renovations or restoration.

(I) *Transfer; Transfer of Control.* A grantee or transferee of a telecommunications provider or licensee shall notify, at the same time it applies to the Arkansas Public Service Commission for a transfer or change of control, the City of Fayetteville of: 1) its intent to be a telecommunications provider or licensee; 2) its intent to comply with §110.02 Telecommunication Franchises; 3) its intent to promptly provide such information pertinent to the proposed transaction as may reasonably be required by the city.

(J) *Existing Telecommunications Providers.* A telecommunications provider delivering service in the city as of January 1, 2011, such as AT&T and the Prairie Grove Telephone Company need not apply for a franchise and are deemed to hold a franchise in conformity with §110.02. All previous franchise ordinances are deemed superseded by this Code section so that all existing or new telecommunication companies in Fayetteville must comply with all of the terms of §110.02 upon its effective date.

(Ord. No. 5406, 5-3-11)

**110.03—110.99 Reserved**



ExteNet Systems, Inc.  
3030 Warrenville Road, Suite 340  
Lisle, IL 60532  
Phone: (630) 505-3800  
Fax: (630) 577-1332  
www.extenetsystems.com

November 16, 2016

Via United States Postal Service

RECEIVED

NOV 21 2016

CITY OF FAYETTEVILLE  
MAYOR'S OFFICE

**CITY OF FAYETTEVILLE**

Mr. Don Marr, Chief of Staff  
113 W. MOUNTAIN STREET  
FAYETTEVILLE, AR 72701

*Re: ExteNet Networks Request for Authorization and License/Franchise with the City of Fayetteville to provide Telecommunications Services in the City*

Dear Mr. Marr:

Please accept this letter as the formal request of EXTENET SYSTEMS INC., a Delaware corporation ("ExteNet"), for an appropriate form of authorization from the City of Fayetteville, Arkansas (the "City") to conduct business as a telecommunications company operating with infrastructure located in the City's public ways. This application is submitted to the City in accordance with § 253 of the Federal Telecommunications Act of 1996; Title 23 § 17 of the Arkansas Government Code; and Section 110.02 of the Fayetteville Municipal Code governing the use of the public way by telecommunications carriers for the provision of their services.

**Agreement Form and Purpose.**

ExteNet hereby requests a **non-exclusive** License or Franchise Agreement or other appropriate form of authorization from the City in order to install, operate, and maintain fiber optic cable and associated equipment, including optical repeaters and antenna facilities, on, over, and under the public way in the City in connection with the provision of telecommunications provided by ExteNet as a carrier's carrier to its wireless carrier customers.

**A. Information about ExteNet.**

ExteNet Networks, with its proprietary technology and network, helps Cities provide much desired wireless communication services, WITHOUT the need for traditional cellular towers or installations. ExteNet provides this technology and network by utilizing existing utility infrastructure and poles for the attachment. The

network is low-powered and visually unobtrusive. Additional information about ExteNet and its technology and services is contained in a separate document entitled "ExteNet Community Benefits" enclosed with this application letter. Additional information can be supplied to the City upon request.

**B. ExteNet Business Model.**

ExteNet is a facilities-based provider of protocol-agnostic, fiber optic cable light wave-to-radio frequency ("RF") conversion and RF transport telecommunications services. ExteNet will make its services available in the City of Fayetteville to any carrier that wishes to purchase them to transport its customers' wireless voice and data transmission between the carrier's base station and the fiber-fed optical repeater nodes and associated antennas that ExteNet seeks to deploy on streetlights and other infrastructure available under the License Agreement or from other utilities. ExteNet's services will amplify and extend wireless carriers' RF signals in difficult coverage and high capacity areas of the City. ExteNet customers will offer regulated telecommunications services to its customers through which ExteNet will construct and operate fiber-fed microcell networks capable of sustaining up to two (2) carrier customers without unnecessary replication of infrastructure.

**C. Regulatory Status.**

Pursuant to Arkansas State Statutes ExteNet has applied for and expects to receive a Certificate of Convenience and Necessity (CCN) so as to be statutorily compliant as a Telecommunications Providers (TPs) in the State of Arkansas. If required under applicable Arkansas laws, ExteNet will obtain any further authorizations from the Arkansas Public Service Commission (PSC) prior to offering any services in connection with the exercise of its rights under any Franchise or License Agreement from the City.

**D. Proposed Location and Number of Attachments.**

ExteNet proposes that its License Agreement with the City authorize the installation and operation of its equipment and network in, under, and over the public ways of the City on standard-design prefabricated steel poles, wooden distribution poles, and other available structures throughout the City. The initial design and route of ExteNet's proposed facilities is included with this letter.

**E. Use of Poles and Streets; Trenching.**

ExteNet also requests permission to utilize any City-owned streetlight poles, traffic light poles, (collectively "poles") for the deployment of optical repeater telecommunications equipment (including associated cables, brackets, and antennas) in accordance with the terms, conditions, and authorized purposes set forth in a License Agreement. To the greatest extent possible, ExteNet will utilize the existing conduit available for the distribution of fiber optic cable in the City. ExteNet will use every effort to minimize trenching and boring in the streets of the City by feeding fiber optic cabling directly from existing conduit, where available, to the poles to which optical repeater

nodes and related equipment will be attached pursuant to the License Agreement. ExteNet will observe all applicable rules and regulations of the City with respect to encroachment permitting and the terms and conditions related to construction of the ExteNet fiber-fed optical repeater network in the City.

**F. Technical Specifications and Drawings.**

ExteNet will agree to observe all the terms, conditions, limitations, and design specifications set forth in the License Agreement in its installation, deployment, and operation of the ExteNet fiber-fed optical repeater network in the City. Additional specifications and technical drawings of representative types of equipment can be supplied upon requested by the City.

**G. Proposed Compensation to City.**

ExteNet will pay the City all required and authorized fees. In addition, if the City owns infrastructure ExteNet is willing to pay a reasonable fee for the right to attach to these facilities as well. Further, ExteNet will pay all required construction permitting fees consistent with others who are using the public right-of-way.

Thank you so much for your prompt and courteous attention to this request. We look forward to working with the City and bringing this valuable technology and infrastructure to the city. If you have any questions, please do not hesitate to call me at 281-203-6100 or via email at [jmilone@extenetsystems.com](mailto:jmilone@extenetsystems.com). I would request as follow up to this letter that we schedule a meeting at your convenience to discuss the City's response to this letter of application and the next steps required of ExteNet to move our request, application and or form of agreement forward to approval.

With Regards,

EXTENET SYSTEMS, INC.



Joe Milone, Director

External Relations and Real Estate

Enclosures:

- Brochure - "ExteNet Corporate Info"
- Brochure - "Distributed Networks"
- Brochure - "Community Benefits"
- Network Design and Fiber Route Map
- Typical Pole Attachment Drawing
- Pictures of Proposed Node Pole Locations