

**ORDINANCE NO. 99.03-02**

**AN ORDINANCE GOVERNING USE AND OCCUPANCY OF THE CITY'S RIGHTS-OF-WAY FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES, INCLUDING THE ESTABLISHMENT OF COMPENSATION FOR THAT USE AND OCCUPANCY.**

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF Jewett, TEXAS, THAT:**

**SECTION 1.0 - PURPOSE**

The purpose of this Ordinance is to:

- (a) Assist in the management of the Rights-Of-Way;
- (b) Govern the use and occupancy of the Rights-Of-Way by Telecommunications Service Providers;
- (c) Secure fair and reasonable compensation for the use and occupancy of the Rights-Of-Way by Telecommunications Service Providers in a non-discriminatory and competitively neutral manner.

**SECTION 2.0 - DEFINITIONS**

Whenever used in this Ordinance, the following terms, as well as their singulars, plurals and possessives, shall have the following definitions and meanings, unless the context of the sentence in which they are used indicates otherwise:

2.01 Access Line: (1) each switched transmission path of the transmission media within the Rights-Of-Way extended to the end-user customer's premises network interface

within the City that allows delivery of Telecommunications Service; (2) each loop provided as an unbundled network element to a Person pursuant to an Agreement under Section 252 of the Federal Telecommunications Act of 1996; and (3) each termination point of a non-switched telephone circuit consisting of Transmission Media connecting specific locations identified by, and provided to, the end user for the delivery of non-switched Telecommunications Service within the City.

2.02 Cable Service: “cable service” as defined in the “Cable Communications Policy Act of 1984”, as amended, 47 U.S.C. § 532 *et seq.*

2.03 City: The City of Jewett, Texas.

2.04 Direction of the City: all ordinances, laws, rules, resolutions, and regulations of the City that are not inconsistent with this Ordinance and that are now in force or may hereafter be passed and adopted.

2.05 Facilities: any and all of the duct spaces, manholes, poles, conduits, underground and overhead passageways, and other equipment, structures, plant, and appurtenances and all associated Transmission Media used for the provision of Telecommunications Service.

2.06 Line Fee: a monthly fee to be applied to each Access Line for the calculation of the total amount to be paid to the City as a Rights-Of-Way Fee.

2.07 Permit Holder: any Telecommunications Service Provider issued a Permit pursuant to the terms of this Ordinance.

2.08 Person: a natural person (an individual), corporation, company, association, partnership, firm, limited liability company, joint venture, joint stock company or association, and other such entity.

2.09 Public Utility: a Public Utility as that term is used in the Public Utility Regulatory Act of 1995, Tex. Utilities Code Ann. § 11.004, including municipally owned and/or operated utilities.

2.10 Rights-Of-Way: all present and future public streets, avenues, highways, alleys, sidewalks, boulevards, drives, tunnels, easements, bridges, and other such similar passageways, thoroughfares, and public ways within the City.

2.11 Rights-Of-Way Fee: the total amount paid to the City on a quarterly basis for the Use and Occupancy of the Rights-Of-Way.

2.12 Telecommunications Service: the transmittal of voice, data, image, graphics and other communications between or among points by wire, fiber optics, or other similar facilities, as well as the rental, lease, or furnishing of the facilities to accomplish such transmittal, but does not include transmissions for long distance purposes (interLATA and intraLATA) or any “wireless service” as defined by law.

2.13 Telecommunications Service Provider: any Person that supplies Telecommunications Service to others within the corporate limits of the City in exchange for money or other value.

2.14 Telecommunications Utility: “telecommunications utility” as used in the Public Utility Regulatory Act of 1995, Tex. Utilities Code Ann. § 51.002(11).

2.15 Transmission Media: any and all of the cables, fibers, wires or other physical devices owned, maintained or placed by a Permit Holder to transmit and/or receive communication signals, whether analog, digital or of other characteristics, and whether for voice, data or other purposes.

2.16 Use and Occupancy: the Permit Holder's acquisition, installation, construction, reconstruction, maintenance, repair, control, or operation of any Facilities within the Rights-Of-Way for any purpose whatsoever.

### **SECTION 3.0 - REQUIREMENT FOR PERMIT AND GRANTING CLAUSE**

Any Person that owns, places, or maintains Facilities within the Rights-Of-Way shall first obtain a permit pursuant to the terms of this Ordinance. Subject to the restrictions set forth herein, the City under this Ordinance shall issue permits to Telecommunications Service Providers for the purpose of regulating the Use and Occupancy of the public Rights-of-Way in the City for the provision of Access Lines. By acceptance of the permit, the Permit Holder agrees to abide by the reasonable terms of this Ordinance in all its operations within the City, including all operations and facilities and Transmission Media used in whole or in part in the provision of Access Lines in any newly annexed areas as specified in Subsection 5.03 of this Ordinance.

### **SECTION 4.0 - GENERAL TERMS OF THE ORDINANCE**

4.01 No rights agreed to in this Ordinance by the City shall be exclusive and the City reserves the right to grant franchises, licenses, easements or permissions to use the Rights-Of-Way within the City to any Person as the City, in its sole discretion, may determine to be in the public interest.

4.02 A Permit Holder is not authorized to provide Cable Service as a cable operator in the City under this Ordinance, but must first obtain a franchise from the City for that purpose,

under such terms and conditions as may be required by law.

4.03 The initial term of each Permit issued under this Ordinance shall be three (3) years from the date of issuance, unless terminated earlier by mutual written agreement of the City and the Permit Holder or pursuant to law. At the expiration of the initial permit period, the permit shall be automatically extended for successive periods of one (1) year, unless written notice of intent to terminate the permit is given not less than ninety (90) days prior to the termination of the then current period by the City to Permit Holder. When such notice is given, the Permit shall terminate at the expiration of the then current period.

4.04 The rights granted by this Ordinance inure to the benefit of the Permit Holder licensed hereunder. The Ordinance rights granted by permit shall not be assigned, transferred, or sold to another by the Permit Holder without the express written consent of the City. For the purposes of this Section, assignment, transfer or sale means a change of operating control of the Permit Holder, expressly excepting an assignment or transfer to entities that control, are controlled by or are under common control with Permit Holder. Any such consent by the City shall not be withheld unreasonably.

## **SECTION 5.0 - COMPENSATION**

5.01 Rights-of-Way Fee: the Permit Holder shall pay to the City a Rights-of-Way Fee that is calculated as of month-end by applying the appropriate Line Fee to each Access Line owned, placed, or maintained by Permit Holder that is activated for use by an end-user or for another Telecommunications Service Provider that uses Permit Holder's services or Facilities for the provision of Telecommunications Service within the City. The Line Fee to be applied to

each Access Line on a monthly basis shall be:

<u>Access Line</u>	<u>Monthly Fee per Access Line</u>
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Residential.....	\$ .24
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Non-Residential.....	\$ .45
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5.02 Number of Access Lines: subject to City's agreement not to disclose this information, each Permit Holder must provide annually, within a reasonable time after receipt of the City's written request, a report showing the number of each type of Access Line owned or placed and maintained by Permit Holder within the City that are activated for end-user customers and other Telecommunications Service Providers at month's end for each of the preceding twelve (12) months. The City agrees that the report shall be used solely for the purpose of verifying the number of the Permit Holder's Access Lines within the City that are activated for end-user customers and Telecommunications Service Providers. Upon written request, the Permit Holder shall verify the information in the report and, upon reasonable advance notice, produce to the City and permit inspection by the City of all non-customer-specific records and documents reasonably calculated to verify the information. For purposes of payment of fees for use of the Rights-Of-Way, lines terminating at customer's premises that are billed as "Lifeline," "Tel-Assistance," or other service that is required to be similarly discounted pursuant to state or federal law or regulation for the purpose of advancing universal service to the economically disadvantaged shall not be included in the lines upon which the fee is calculated.

5.03 Annexation and Disannexation: within thirty (30) days following the date of the passage of any action effecting the annexation of any property to or the disannexation of any property from the City's corporate boundaries, the City agrees to furnish Permit Holder written

notice of the action and an accurate map of the City's corporate boundaries showing, if available, street names and number details. For the purpose of compensating the City under this Ordinance, a Permit Holder shall start including or excluding Access Lines within the affected area in the Permit Holder's count of Access Lines on the effective date designated by the Comptroller of Public Accounts - Texas for the imposition of State local sales and use taxes; but in no case less than thirty (30) days from the date the Permit Holder is notified by the City of the annexation or disannexation.

5.04 Confidential Records: if the Permit Holder notifies the City of the confidential nature of any information, reports, documents, or writings, the City agrees to maintain the confidentiality of the information, reports, documents, and writings to the extent permitted by law. Upon receipt by the City of requests for the Permit Holder's confidential information, reports, documents, or writings, the City shall notify the Permit Holder of the request in writing by facsimile transmission. The City shall request an Attorney General's Opinion before disclosing any confidential information, reports, documents or writings and will furnish the Permit Holder with copies of Attorney General opinion requests it makes pertaining to the Permit Holder's confidential information, reports, documents or writings.

5.05 No Other Fees: the payments due hereunder shall be in lieu of any permit, license, approval, inspection, or other similar fees or charges, including, but not limited to, all general business license fees customarily assessed by the City for the use of the Rights-Of-Way against Persons operating businesses similar to that of the Permit Holder. Further, such Rights-Of-Way Fee shall constitute full compensation to the City for all of Permit Holder's facilities located within the Rights-Of-Way, including interoffice-transport and other Transmission Media

if the Telecommunications Service Provider that is rebundling those Facilities for resale has provided a signed statement to the Permit Holder that the Telecommunications Service Provider is paying the Access Line fees applicable to those rebundled services directly to the City. If Permit Holder provides a copy of the signed statement to the City, then Permit Holder is absolved of all responsibility for the Line Fees payable on the Telecommunications Service, unbundled network elements, and other Facilities rebundled for the creation of Telecommunications Service for sale within the City.

5.09 Fee Application to Leased Facilities: pursuant to Tex. Utilities Code § 54.206, a Permit Holder may collect the Line Fee imposed by the City pursuant to this Ordinance through a pro rata charge to the customers in the boundaries of the City, including any other Persons who are leasing, reselling or otherwise using the Permit Holder's Access Lines to provide Telecommunications Service. With respect to any Person leasing, reselling, or otherwise using a Permit Holder's Access Lines, if a Permit Holder believes it does not have sufficient information to determine the appropriate rate to apply, then the higher Line Fee shall apply until such time as the Person using the Access Lines provides to the Permit Holder sufficient written information to determine the correct Line Fee. If a Person provides sufficient written information for the application of the Line Fee, Permit Holders may bill the Person on the basis of the information provided. Permit Holder shall provide to the City any information regarding the locations to which it is providing service or facilities for use by another Person for the provision of Telecommunications Service to end-user customers, so long as City first obtains written permission of such other Person for Permit Holder to provide the information to the City. Any other provision of this Ordinance notwithstanding, however, a Permit Holder shall not be liable



for underpayment of Line Fees resulting from the Permit Holder's reliance upon the written information provided by any Person that uses Permit Holder's service or facilities for the provision of Telecommunications Service to end-user customers.

#### **SECTION 6.0 - CONSTRUCTION AND MAINTENANCE OF FACILITIES**

6.01 The location and route of all Facilities and Transmission Media placed and constructed in the Rights-Of-Way shall be subject to the lawful, reasonable and proper control and direction of the City.

6.02 Nothing contained in this Ordinance shall be construed to require or permit the attachment on or placement in the Permit Holder's Facilities of any electric light or power wires or communications facilities or other systems not owned by the Permit Holder. If the City desires to attach or place electric light or power wires, communications facilities or other similar systems or facilities in or on the Permit Holder's Facilities, then a further separate, noncontingent agreement with the Permit Holder shall be required. Nothing contained in this Ordinance shall obligate the Permit Holder to exercise or restrict the Permit Holder from exercising its right to enter voluntarily into pole attachment, pole usage, joint ownership or other wire space or facilities agreements with any Person authorized to operate as a Public Utility or a Telecommunications Utility or authorized to offer Cable Service within the City.

6.03 The surface of the Rights-Of-Way disturbed by the Permit Holder in the construction or maintenance of its telecommunications system shall be restored within a reasonable time after the completion of the work to as good a condition as before the commencement of the work. The Permit Holder shall endeavor to minimize disruptions to the

efficient use of the Rights-Of-Way by pedestrian and vehicular traffic, and Rights-Of-Way shall not be blocked for a longer period than shall be reasonably necessary to execute all construction, maintenance and/or repair work.

6.04 Upon request, the Permit Holder shall remove or raise or lower its aerial wires, fiber or cables temporarily to permit the moving of houses or other bulky structures. The expense of such temporary rearrangements shall be paid by the party or parties requesting them, and the Permit Holder may require payment in advance. The Permit Holder shall be given not less than forty-eight (48) hours advance notice to arrange for such temporary rearrangements.

6.05 The Permit Holder, its contractors and agents have the right, permission and license to trim trees upon and overhanging the Rights-Of-Way to prevent trees from coming in contact with the Permit Holder's Facilities and Transmission Media. When directed by the City, tree trimming shall be done under the supervision and direction of the City or under the supervision of the City's delegated representative.

#### **SECTION 7.0 - RELOCATION AND REMOVAL OF FACILITIES**

7.01 In accordance with Tex. Utilities Code Ann. § 54.203(c), upon thirty (30) days notice by the City, Permit Holder shall begin relocation of its Facilities within the Rights-Of-Way at its own expense to permit the widening or straightening of streets. The notice by the City shall include a specification of the new location for the Permit Holder's Facilities along the Rights-Of-Way.

7.02 The City retains the right to move any Facilities within the Rights-Of-Way to cure or otherwise address a public health or safety emergency. The City shall cooperate to the extent

possible with the Permit Holder in such instances to assure continuity of service and to afford to the Permit Holder the opportunity to make such relocation itself.

#### **SECTION 8.0 - INDEMNIFICATION**

The Permit Holder shall indemnify and hold the City harmless from all costs, expenses, and damages to persons or property arising directly or indirectly from the construction, maintenance, repair, or operation of the Permit Holder's Facilities located within the Rights-Of-Way found to be caused solely by the negligence of the Permit Holder. Expenses shall include any reasonable and necessary attorney's fees and court costs. The City shall give the Permit Holder prompt written notice of any claim for which the City seeks indemnification. The Permit Holder shall have the right to investigate, defend and compromise any such claim. This provision is not intended to create a cause of action or liability for the benefit of third parties, but rather this provision is solely for the benefit of the Permit Holder and the City.

#### **SECTION 9.0 - ADMINISTRATION OF ORDINANCE**

9.01 The City may, at any time, make reasonable inquiries pertaining to the terms, conditions, rights and obligations of this Ordinance, and the Permit Holder shall respond to such inquiries on a timely basis.

9.02 Copies of petitions, applications, and reports submitted by the Permit Holder to the Federal Communications Commission or the Public Utility Commission of Texas shall be provided to the City upon specific request.

9.03 After reasonable notice to the Permit Holder, the City may establish, to the extent

permitted by law, such reasonable and non-discriminatory rules and regulations as may be appropriate for the administration of this Ordinance and the construction of the Permit Holder's Facilities in the Rights-Of-Way, so long as those rules and regulations are competitively neutral.

#### **SECTION 10.0 - FUTURE CONTINGENCY**

In the event this Ordinance or any tariff or other provision that authorizes Permit Holders to recover the fee provided for in this Ordinance, becomes unlawful or is declared or determined by a judicial or administrative authority exercising its jurisdiction to be excessive, unenforceable, void, or illegal, in whole or in part, then the City and all Permit Holders shall negotiate a new compensation arrangement that is in compliance with the authority's decision. Unless explicitly prohibited, the new compensation arrangement shall provide the City with a level of compensation comparable to that set forth in this Ordinance, as long as that compensation is recoverable by Permit Holders in a manner permitted by law for the unexpired portion of the term of this Ordinance.

#### **SECTION 11.0 - GOVERNING LAW**

This Ordinance shall be construed in accordance with the City Code in effect on the date of passage of this Ordinance to the extent that such Code is not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas.

#### **SECTION 12.0 - NON-DISCRIMINATION AND COMPETITIVE NEUTRALITY**

The City hereby recognizes that it has the legal duty to obligate, on a going-forward basis,

all Permit Holders to abide by the same terms and conditions imposed by this Ordinance, including, but not limited to, the payment of the Line Fee, and to apply substantively same requirements governing their use and occupancy of the Rights-Of-Way.

#### **SECTION 13.0 - PERMIT**

Any Permit Holder that owns facilities already located within the Rights-Of-Way on the date this Ordinance is enacted is hereby granted a Permit hereunder; however, within thirty (30) days from the effective date of this Ordinance all such Permit Holders shall provide to the City a Notice of Pre-existing Facilities. All prospective Permit Holders shall file a Permit Application Form at least thirty (30) days before placing any facilities in the Rights-Of-Way. A Permit Application Form will not be accepted and a Permit granted unless the Applicant provides on that form the name and address of the person to whom notices hereunder are to be sent, the date on which the Applicant expects to begin providing service within the City, a 24-hour per day contact number for the Applicant, and the certificate number of the Applicant's certificate issued by the Public Utility Commission of Texas or a notarized statement from a principal or officer of the Applicant that no certification by the Public Utility Commission is required for the type of service to be offered by Applicant.

#### **SECTION 14.0 - ISSUANCE AND EFFECTIVE DATE OF PERMIT**

The City shall deliver a properly certified copy of this Ordinance to the Permit Holder, along with a Permit hereunder, within fourteen (14) days after receipt of the Notice of Pre-Existing Facilities or the Permit Application Form.

## AGREEMENT

This Agreement is entered into by and between the City of Jewett, Texas ("City") and Southwestern Bell Telephone Company ("SWBT"), effective the 8th day of March, 1999.

### WITNESS:

WHEREAS, on March 8, 1999, the City passed Ordinance No. 99-03-02 governing SWBT's use and occupancy of the public Rights-of-Way within the City and establishing compensation for that use and occupancy;

WHEREAS, the initial term of Ordinance No. 95-12-0 was for three years from the effective date of that ordinance, *which was extended for an additional year on December 18, 1996 by Ordinance No. 95-12-01*

WHEREAS, Section 4.03 of Ordinance No. 99-03-02 permits the parties to extend the term of the Ordinance at the expiration of the initial period by "mutual written agreement";

WHEREAS, the laws pertaining to the provision of telecommunications have changed since the effective date of Ordinance No. 95-12-0 including laws permitting competition in the provisioning of local exchange service;

WHEREAS, certain telecommunications companies may be interested in providing telecommunications services within the City in competition with the services provided by SWBT;

WHEREAS, the City and SWBT desire to extend the term of Ordinance No. 95-12-0 and 96-027 for a period not to exceed 90 days [*extend beyond November 30, 1998*] in order to allow the City time to complete negotiations with telecommunications companies, including SWBT, to develop an appropriate ordinance or ordinances to govern their use and occupancy of the public Rights-of-Way under the new laws pertaining to telephony;

WHEREAS, SWBT does not want to enter into an agreement extending the term of Ordinances No. 95-12-0 and 96-027 if *those* agreements would commit SWBT to a level of compensation which is not fair and reasonable and/or which would be discriminatory or which would not be competitively neutral should other telecommunications companies offer competitive services within the City;

WHEREAS, in accordance with City Charter and all other applicable laws, a majority of the City Council of the City of Jewett, Texas has approved this Agreement and authorized the undersigned representative to execute this Agreement;

**NOW THEREFORE:**


The City and SWBT have agreed and do hereby agree as follows:

1. In accordance with Section 4 of Ordinance No. 99-03-08, the term of Ordinances No. \_\_\_\_\_ and 96-027 are extended through \_\_\_\_\_, 1998.
2. The City and SWBT agree to complete good faith negotiations to develop a successor ordinance incorporating fee per line compensation to govern SWBT's use and occupancy of the public Rights-of-Way.
3. Either party shall have the right to terminate this agreement upon giving written notice to the other of the intent to terminate no less than 60 days before the effective date of termination.
4. The persons signing this Agreement as representatives of the City and SWBT represent and warrant that they are duly qualified representatives of the City and SWBT, on whose behalf they sign, holding such capacity as is specified beneath their names, and that they are duly authorized to execute and effectuate this Agreement on behalf of the City and SWBT and do so voluntarily and in their official representative capacities.

SO AGREED, this 8<sup>th</sup> day of March, 1999.

THE CITY OF JEWETT, TEXAS

SOUTHWESTERN BELL  
TELEPHONE COMPANY

By: 

By: \_\_\_\_\_

Title: Margaret, City of Jewett


Title: \_\_\_\_\_


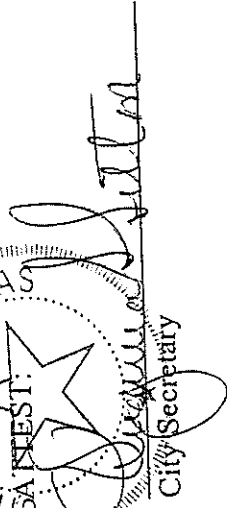
The effective date for any Permit shall be the date of issuance, however, the assessment of the Line Fee shall not begin until the first day of the second month after the date of issuance of the Permit. Permit Holders with pre-existing facilities may continue the pre-existing compensation arrangement until the first day of the second month following the issuance of the Permit.

**SECTION 15.0 - EFFECTIVE DATE OF ORDINANCE**

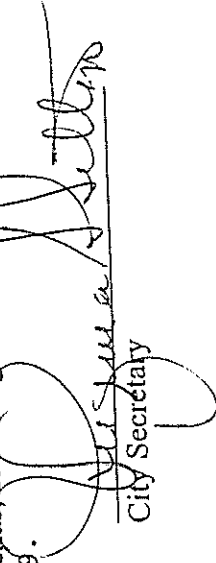
This Ordinance shall take effect and be in force immediately upon final passage by the City.

Passed and approved following the 1st reading hereof this 8th day of March, A.D., 1999.

  
Mayor, City of Jewett, Texas

  
  
City Secretary

I, Virginia S. Sitton, City Secretary of the City of Jewett, Texas, do hereby certify that the foregoing is a true and correct copy of Ordinance Number 99-03-0 finally passed and approved by the City Council of Jewett, Texas, following the 1st reading thereof at a regular meeting held on the 8th day of March, 1999.

  
City Secretary



Erin A. Davis  
Area Manager

Southwestern Bell Telephone  
510 N. Valley Mills Dr.  
Suite 410  
Waco, Texas 76710  
Phone 254-751-8020  
Fax 254-751-8034

 Southwestern Bell

November 18, 1998

Hon. Herman Hammond  
Mayor, City of Jewett  
P.O. Box 189  
Jewett, TX 75846

Dear Mayor Hammond:

Southwestern Bell Telephone Company ("SWBT") hereby provides the City of Jewett advance notice that Ordinance No. 95-12-01 (the "Ordinance") is approaching an automatic extension on March 31, 1999. The Ordinance was adopted on December 12, 1995 and addresses SWBT's occupation and use of public right-of-way and compensation paid to the City.

SWBT believes that historical forms of telephone ordinances (e.g., guaranteed annual payments or percent of gross revenues) may be subjected to challenge for potential violations of current law related to the entry of new competitive local telephone providers into local markets. As a result, SWBT urges that these forms of ordinances be replaced with "fee per line" ordinances. Enclosed is a sample of such an ordinance which will achieve this transition and which comports with current law. Should the City decline to replace its current ordinance, it will automatically extend for another year. Please be aware, however, that SWBT cannot support the continuation on an extended basis of one of the historical forms of ordinances described above.

During the term of any extension, SWBT would urge the City to give due consideration to the model ordinance we propose. Our model achieves what cities need without the institution of excessive bureaucracy, invites non-discriminatory competitive access to the telecommunications marketplace and comports with relevant law.

Please do not hesitate to call me with any questions or comments.

Sincerely,

*Erin A. Davis*