

AGENDA REQUEST

FOR: COUNCIL MEETING OF NOVEMBER 1, 2011

FROM:

**LINDSLEY SMITH, COMMUNICATIONS DIRECTOR and
KIT WILLIAMS, CITY ATTORNEY**

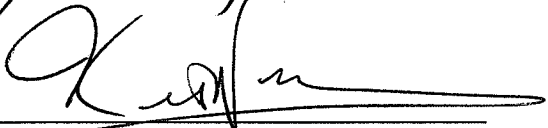
ORDINANCE OR RESOLUTION TITLE AND SUBJECT:

A Resolution To Approve A Renewal Agreement With AT&T Arkansas To Allow It To Continue To Offer Internet Protocol/Cable TV Type Service In Fayetteville


APPROVED FOR AGENDA:




Communications Director 9-28-11
Date



City Attorney 9-27-2011
Date

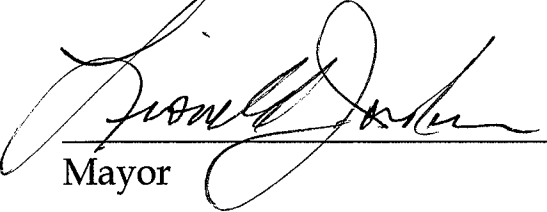


Chief of Staff 9-28-11
Date

9/26/11


Paul A. Bahr

Finance Director 9-28-2011
Date



Mayor 9/30/11
Date

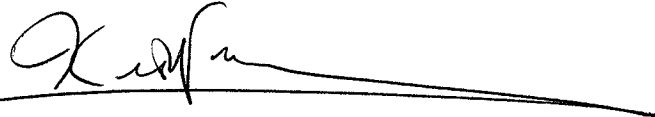
Kit Williams
City Attorney

Jason B. Kelley
Assistant City Attorney

TO: Mayor Jordan
City Council

CC: Don Marr, Chief of Staff
Lindsley Smith, Communications & Marketing Director

FROM: Kit Williams, City Attorney



DATE: September 27, 2011

RE: Five year renewal of AT&T Arkansas' Franchise Agreement

Communications and Marketing Director Lindsley Smith and I recommend renewal of the existing AT&T Arkansas franchise agreement for a second 5 year term. The FCC and Federal Government have still not clarified the law concerning franchises for a company like AT&T Arkansas which provides TV service through an Internet Protocol platform as opposed to normal TV cable like Cox Communications.

However, rather than arguing about the legal unknowns, the City and AT&T Arkansas agreed in 2007 to a basic franchise agreement fairly comparable to our franchise agreement under which Cox Communication operates. Both companies pay a 5% franchise fee and provide bandwidth for the Public, Education and Government Channel to broadcast on.

We recommend the 2007 AT&T Arkansas Franchise Agreement be renewed and extended for another five year term with the only added provision that when AT&T Arkansas U-verse service can be extended to our Cable Administration building, AT&T Arkansas will do so at no cost so that our city cable administrators can better monitor our signal on AT&T Arkansas and respond to any customer complaints.

This proposed renewal of the franchise agreement will be presented to the Telecommunications Board on October 20th and that Board's comments and recommendations will be supplied to the City Council prior to November 1, 2011.

RESOLUTION NO. _____

**A RESOLUTION TO APPROVE A FIVE YEAR RENEWAL OF THE AT&T
U-VERSE AGREEMENT**

WHEREAS, the City and AT&T Arkansas agreed to the initial five year AT&T U-verse Agreement on February 20, 2007, which contained very similar terms to the agreement the City has with Cox Communications; and

WHEREAS, AT&T Arkansas has requested that this contract be renewed for another five years; and

WHEREAS, the Telecommunications Board has reviewed this proposed renewal of the agreement and its comments and recommendations have been supplied to and considered by the Fayetteville City Council; and

WHEREAS, the City Council determines that renewal of the AT&T Arkansas U-verse Agreement is in the best interests of the citizens and City of Fayetteville.

**NOW, THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE
CITY OF FAYETTEVILLE, ARKANSAS:**

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby approves the attached AT&T U-verse Agreement which renews and extends the existing agreement from January 1, 2012 through December 31, 2016, and authorizes Mayor Jordan to sign this agreement.

PASSED and **APPROVED** this 1st day of November, 2011.

APPROVED:

ATTEST:

By: _____
LIONELD JORDAN, Mayor

By: _____
SONDRA E. SMITH, City Clerk/Treasurer

AT&T U-VERSE AGREEMENT

WHEREAS, on February 20, 2007, the City of Fayetteville and Southwestern Bell Telephone, L.P. doing business as AT&T Arkansas entered into a five year agreement so that AT&T Arkansas could provide its IP – enabled Video Service known as “U-verse” to Fayetteville citizens and businesses and use Fayetteville’s rights-of-way for its cables and equipment; and

WHEREAS, AT&T Arkansas has successfully been providing its IP – enabled Video Service to our citizens, has properly paid the 5% fee to Fayetteville, has provided PEG Channel availability for our citizens and properly fulfilled all terms and conditions of the Agreement; and

WHEREAS, the initial five year term of this contract will automatically expire on December 31, 2011, but can be renewed and “extended upon the mutual agreement of the Parties.”

NOW THEREFORE, the City of Fayetteville and AT&T Arkansas hereby agree that the Agreement of February 20, 2007 should be and hereby is renewed and extended for a second five year term (January 1, 2012 – December 31, 2016) upon the same terms and conditions established in the initial Agreement with AT&T Arkansas’ express further agreement to provide free of charge one basic video service connection and one set top box enabling the City to receive basic AT&T U-verse TV service for the purpose of monitoring its PEG channel broadcasts at the City’s Cable Administration Building when such service becomes available to that location.

IN WITNESS WHEREOF, the City of Fayetteville and AT&T Arkansas by their duly authorized representatives, have executed this Agreement on the ____ day of November, 2011.

AT&T ARKANSAS

CITY OF FAYETTEVILLE, ARKANSAS

By: _____
Name: **EDWARD DRILLING**
Title: President – AT&T Arkansas

By: _____
Name: **LIONELD JORDAN**
Title: Mayor

WITNESS:

ATTEST:

By: _____
Name: _____
Title: _____

By: _____
SONDRA E. SMITH, City Clerk

AGREEMENT

THIS AGREEMENT ("Agreement") dated this 20th day of February, 2007 ("Effective Date") is made by and between Southwestern Bell Telephone, L.P., a Texas limited partnership doing business as AT&T Arkansas ("AT&T Arkansas") and the City of Fayetteville, Arkansas, a municipal corporation ("Fayetteville"). AT&T Arkansas and Fayetteville shall sometimes be referred to separately as a "Party," and collectively as the "Parties."

RECITALS

- A. As a telecommunications provider, AT&T Arkansas has statewide authority under Ark. Code Ann. §23-17-101 to construct, operate and maintain its telecommunications facilities in the public rights of way ("ROW") throughout the state of Arkansas.
- B. Under Ark. Code Ann. §14-200-101, Fayetteville is permitted to impose reasonable terms and conditions on AT&T Arkansas' use and occupation of the Fayetteville's ROW and to collect a reasonable franchise fee for such use and occupation of its ROW.
- C. AT&T Arkansas is in the process of upgrading its existing telecommunications network to provide an integrated Internet Protocol ("IP") enabled broadband platform of voice, data and video services ("IP Network"), the video component of which is a switched, two-way, point-to-point and interactive service ("IP-enabled Video Service"). The IP Network upgrade will involve the use of Fayetteville's ROW.
- D. AT&T Arkansas believes that Ark. Code Ann. §23-17-101 covers the construction, operation and maintenance of the IP Network, and that AT&T Arkansas is not required to obtain a separate franchise or other authorization from Fayetteville to offer IP-enabled services including IP-enabled Video Services within Fayetteville over the IP Network.
- E. AT&T Arkansas further believes that Fayetteville's right to regulate the construction of the IP Network in Fayetteville's ROW is limited to the right to impose reasonable conditions regarding the time, place, and manner of AT&T Arkansas' use and occupation of Fayetteville's ROW.
- F. Fayetteville believes that the provision of IP-enabled Video Services by AT&T Arkansas is beyond the scope of Ark. Code Ann. §23-17-101 and is subject to Fayetteville's cable television franchising authority.
- G. Both AT&T Arkansas and the City of Fayetteville agree that the deployment of the IP Network and the provision of IP-enabled Video Services should not

be delayed by litigation to establish the scope of Ark. Code Ann. §23-17-101 or the application of Fayetteville's franchise ordinance to IP-enabled Video Services.

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

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

1. Term. The term of this Agreement shall commence on the Effective Date of this Agreement and continue through the end of 2011. The term may be extended upon mutual agreement of the Parties.

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

3. Compensation to Fayetteville. During the term of this Agreement, AT&T Arkansas shall pay to Fayetteville a fee of 5% of the gross revenues from subscription fees, pay-per-view fees and equipment rental, installation and repair fees collected from each subscriber to AT&T Arkansas' IP-enabled Video Services product delivered over the IP Network in Fayetteville's rights of way. It is understood by the parties that the 5% fee paid to Fayetteville by AT&T Arkansas is applicable to the same gross revenue items as presently required of the current cable television provider for all subscriber paid services and no others until and unless the FCC or a Court determines the fee should apply to more or fewer items. The fee does not apply to non-video revenues or the non-video revenues of a bundled product containing video and non-video offerings. The fee will be forwarded to Fayetteville quarterly by the twenty-first day of the first month of the subsequent quarter. Upon request, AT&T Arkansas shall make their records available to Fayetteville to demonstrate compliance with this paragraph for a period of three (3) years preceding the request.

4. Public, Educational and Governmental Programming.

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

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

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

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

(e) PEG programming will be available via Internet for AT&T Arkansas' IP Video subscribers to view both on the TV and computer. PEG programming will be available via the Internet from the end user's computer for AT&T HomeZone subscribers who also have High Speed Internet Access.

5. Emergency Message. AT&T Arkansas shall carry all Federal, State and Local alerts provided over the Federal Emergency Alert System through AT&T's IP-enabled Video Services in the event of a public safety emergency, which at a minimum will include the concurrent rebroadcast of local broadcast channels.

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

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

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

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

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

(a) On December 31, 2007 and the same date in every year thereafter, AT&T Arkansas shall tender an annual report indicating the status of its video programming service. The report shall: (i) indicate the number of subscribers; and (ii) the technology being used to provide such video programming.

(b) AT&T Arkansas shall be considered to have breached this agreement if AT&T Arkansas fails to diligently offer video programming throughout Fayetteville, unless: (i) delay is attributable to Force Majeure; (ii) delay is attributable to Fayetteville; (iii) delay is attributable to AT&T Arkansas' inability to obtain needed private easements; (iv) delay is attributable to special technical requirements; or (v) delay is justified by reasonable commercial standards of construction.

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

(a) Fayetteville agrees to subject the construction and installation of the IP Network to the same process and review as it subjects the installation and construction of AT&T Arkansas' existing telecommunications infrastructure.

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

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

9. Jurisdiction and Venue. This contract shall be construed pursuant to the laws of Arkansas. Jurisdiction and venue shall be in Washington County, Arkansas.

10. Breach of Agreement. Should either party claim that a breach of any part of this Agreement has occurred, that party will provide prompt written notice to the other, specifying the nature of the breach; and upon receipt the other party shall cure such breach within 60 days.

11. Mediation Recommended. Both AT&T Arkansas and the City of Fayetteville shall make diligent good faith efforts to resolve all issues and disputes that might arise in the administration of this Agreement through discussions between designated representatives of the Parties. If such discussions have failed, the use of a mediator is recommended.

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

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

13. Notices. Any notice to be given under this Agreement shall be in writing and may be delivered to either personally, by facsimile or by certified or registered mail with postage prepaid and return receipt requested, addressed as follows:

If to The City of Fayetteville:

City Attorney's Office
City of Fayetteville
113 W. Mountain Street, Ste. 302
Fayetteville, AR 72701
FAX: (479) 575-8315

If to AT&T Arkansas:

Mr. Edward Drilling,
President, AT&T Arkansas
AT&T Arkansas
1111 W. Capitol Avenue
Little Rock, AR 72201-3005

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

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

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

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

18. Miscellaneous.

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

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

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

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

(e) Nothing contained in this Agreement is intended or shall be construed as amending, modifying or otherwise affecting any other agreements, authorizations or memoranda which Fayetteville and AT&T Arkansas have now. Further, nothing contained in this Agreement is meant to change, limit, modify, restrict or limit any current rights or jurisdiction that either Fayetteville or other governmental entities currently have nor is this Agreement intended to change, limit, modify, restrict or limit any rights AT&T Arkansas currently has under existing federal and state law and under existing Fayetteville ordinances and existing construction permits issued by Fayetteville.

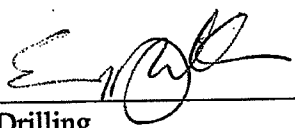
19. Binding Effect. This Agreement shall be binding upon and for the benefit of AT&T Arkansas and the City of Fayetteville.

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

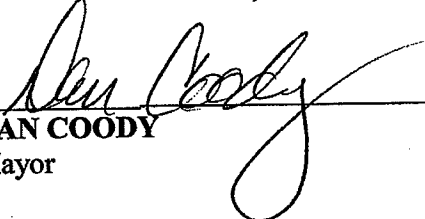
21. Authority of City Council. This agreement is not intended to limit the authority of the Fayetteville City Council regarding the use of streets, easements, and public rights of way ("ROW") by public utilities, specifically including those that communicate information. The City Council expressly reserves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

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this Agreement and made the same effective as of the 6th day of February, 2007.

AT&T ARKANSAS

By: 
Name: Edward Drilling
Title: President - AT&T Arkansas

CITY OF FAYETTEVILLE, ARKANSAS

By: 
Name: DAN COODY
Title: Mayor

ATTEST:

By: 
SONDRA SMITH, City Clerk

