

ORDINANCE NO. 427

AN ORDINANCE GRANTING TO LAVACA TELEPHONE COMPANY, INC. d/b/a PINNACLE COMMUNICATIONS AND ITS SUBSIDIARIES (hereinafter "LAVACA TELEPHONE"), THE RIGHT, PRIVILEGE AND FRANCHISE TO USE AND OCCUPY THE STREETS, AVENUES, ALLEYS, ROADS, HIGHWAYS, AND OTHER PUBLIC PLACES OF THE CITY OF BARLING, ARKANSAS (hereinafter, "CITY") FOR THE PURPOSE OF ERECTING, CONSTRUCTING, OWNING, LEASING, OR OTHERWISE ACQUIRING, MAINTAINING, OR OPERATING ITS FIBER OPTIC INTERNET PROTOCOL (hereinafter, "IP") AND VOICE OVER INTERNET PROTOCOL (hereinafter, "VoIP") SYSTEM SOLELY FOR THE PROVIDING OF HIGH SPEED INTERNET AND VOICE OVER INTERNET SERVICES WITHIN THE CORPORATE LIMITS OF THE CITY OF BARLING, ARKANSAS PROVIDING THAT LAVACA TELEPHONE SHALL PAY TO THE CITY OF BARLING, ARKANSAS A MUNICIPAL FRANCHISE FEE, AND FOR OTHER PURPOSES.

WHEREAS, under Ark. Code Ann. § 14-54-302, the CITY is empowered and authorized to sell, convey, lease, or let any real estate or personal property owned or controlled by the CITY; and

WHEREAS, under Ark. Code Ann. § 14-54-704, the CITY is authorized to enter into contracts for any public utility necessities for itself and for the inhabitants of the CITY on such rates, charges, and terms as may be agreed upon; and

WHEREAS, under Ark. Code Ann. § 14-200-101, the CITY is permitted to impose reasonable terms and conditions on the use and occupation of the CITY'S ROW and to collect a reasonable franchise fee for such use and occupation of its ROW; and

WHEREAS, the CITY is authorized by the federal Cable Act (47 U.S.C. § 521, *et seq.*) to grant non-exclusive franchises to communication operators for the construction, operation, and maintenance of a fiber optic IP and VoIP system to provide such services.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE CITY OF BARLING, ARKANSAS that the CITY and LAVACA TELEPHONE hereby agree as follows:

Section 1. GRANT OF AUTHORITY.

(a) The City of Barling, Arkansas (the "CITY"), hereby grants LAVACA TELEPHONE, (or "Grantee") the right, privilege and authority within the present and all future expansions of the corporate limits of the City of Barling to construct, operate and maintain a fiber optic system solely to provide IP and VoIP services. Nothing herein shall prohibit Grantee from using the IP and VoIP system to provide other lawful services as permitted by applicable law.

(b) Grantee shall have the right, privilege and authority under the terms of this Franchise, through the regulatory authority of the Board of Directors, the FCC and other regulatory authorities:

(i) To sell, furnish, transmit and distribute IP and VoIP services to all inhabitants and consumers within the corporate limits; and

(ii) Subject to the terms, conditions and stipulations set forth in this ordinance, to construct, equip, operate, repair and maintain an IP and VoIP system; and

(iii) To construct, equip, operate, repair and maintain an IP and VoIP system for the purpose of conveying, distributing and conducting IP and VoIP to any point beyond the city limits in order to enable Grantee to distribute and sell such services to subscribers in the CITY.

(c) Nothing herein contained shall be construed as granting to Grantee any exclusive right or privilege, nor shall it affect any prior right of Grantee to maintain an IP and VoIP system within the City of Barling, Arkansas.

Section 2. DEFINITIONS AND CONSTRUCTION.

For the purposes of this ordinance:

(a) *Operator* means that term as defined in 47 USC 522(5).

(b) *Service* means that term as defined in 47 USC 522(6).

(c) *System* means that term as defined in 47 USC 522(7).

(d) *Act* means Title VI of the Communications Act of 1934, and as the same may be further amended from time to time.

(e) *Federal Communications Commission or FCC* shall mean the present federal agency of that name as constituted by the Communications Act of 1934, or any successor agency created by the United States Congress.

(f) *Grantee* shall be construed to mean LAVACA TELEPHONE, the Franchisee under this ordinance.

(g) *Gross Revenues* are limited to amounts billed to and collected from Grantee's Video service subscribers for the following:

(i) recurring charges for IP and VoIP service;

(ii) event-based charges for IP and VoIP service, including but not limited to pay-per-view and video-on-demand charges;

(iii) rental of set top boxes and other IP and VoIP service equipment;

(iv) service charges related to the provision of IP and VoIP service, including, but not limited to, activation, installation, and repair;

(v) administrative charges related to the provision of IP and VoIP service, including, but not limited to service order and service termination charges;

(vi) IP and VoIP Service Provider Fees, including, without limitation, municipal franchise fees collected from subscribers;

(vii) late payment fees; and,

(viii) maintenance fees.

Gross Revenues do not include:

(i) uncollectible fees, provided that all or part of uncollectible fees which is written off as bad debt but subsequently collected fees, shall be included in Gross Revenues in the period collected;

(ii) discounts, refunds, and other price adjustments that reduce the amount of compensation received by Grantee;

(iii) amounts billed to subscribers to recover taxes or surcharges imposed by any governmental authority on the transaction between Grantee and subscribers in connection with the provision of IP and VoIP services, except and only to the extent as provided in (g)(vi) above; and,

(iv) revenue from the sale of capital assets or surplus equipment.

(h) *IP and VoIP Service*, means IP and VoIP services, which are delivered over a fiber optic IP and VoIP network such as the internet, instead of being delivered through traditional terrestrial, satellite signal, and cable television formats.

(i) *Municipal Franchise Fee* shall be defined as that charge levied by the City for the privilege of occupying municipal right-of-way, easement or property.

(j) *Public Way* shall be defined as including streets, avenues, alleys, roads, highways, rights-of-way, easements and other public places and ways within the jurisdiction of the City; provided, not all public ways are available for use for placement of utility facilities including the IP and VoIP network facilities of Grantee.

(k) *Public Ground* shall be defined as City parks and other public places within the jurisdiction of the City.

(l) *IP and VoIP Provider* or *Provider* means a person authorized to provide IP and VoIP service.

(m) *IP and VoIP Service* shall mean a system or network designed to provide any internet and voice over internet service.

Section 3. LOCATION, OTHER REGULATIONS

(a) Location of Facilities. Grantee's system for providing IP and VoIP service shall be located, constructed and maintained so as not to interfere with the safety and convenience of ordinary travel along and over Public Ways and so as not to disrupt

normal operation of any City or Public Utility System previously installed therein. The system for providing IP and VoIP service shall be located on Public Grounds as determined by the City. Grantee may abandon underground facilities in place; provided, at the City's request, Grantee will remove abandoned metal or concrete-encased conduit interfering with a City improvement project, but only to the extent such conduit is or will be uncovered by excavation as part of the City improvement project.

(b) Permits and Inspection Rights. Grantee's construction, reconstruction, operation, repair, maintenance and location of its facilities shall be subject to permits if required by separate ordinance and to other reasonable regulations of the City to the extent not inconsistent with the terms of this Franchise. The City shall have the right to inspect, upon reasonable prior written notice, and at its expense, all construction and installation work performed by Grantee of its facilities on the public rights-of-way as it shall find necessary to ensure compliance with a specified permit. Any such inspection shall be solely for the benefit of the City.

(c) Field Locations. Grantee shall provide horizontal field locations for its underground facilities within the City within forty-eight (48) hours of a formal request by the City. If vertical locations are requested, Grantee shall provide the information within fourteen (14) days.

(d) Street Openings. Grantee shall not open or disturb any Public Way or Public Ground for any purpose without first having obtained a permit from the City, if required by separate ordinance, for which the City may require a surety bond at the beginning of each year. Permit conditions imposed on Grantee shall not be more burdensome than those imposed on other entities for similar facilities or work. Grantee may, however, open and disturb any Public Way or Public Ground without permission from the City where an emergency exists requiring the immediate repair of its Cable System. In such event Grantee shall notify the City by telephone to the office designated by the City as soon as practicable. Grantee shall obtain any required permits for such emergency repair work not later than the second working day thereafter.

(e) Restoration. After completing any work requiring the opening of any Public Way or Public Ground, Grantee shall restore the same, including paving and its foundation, to as good a condition as formerly existed, and shall maintain any paved surface in good condition for two years thereafter. Work outside the paved area must be fine graded and seeded, hydro-mulched, or sod placed so that adjacent property owners or the City can mow without damage to machinery or people. The work shall be completed as promptly as weather permits, but in no case greater than sixty (60) days, and if Grantee shall not promptly perform and complete the work, remove all dirt, rubbish, equipment and material, and put the Public Way or Public Ground in the said condition, the City shall have, after demand to Grantee to cure and the passage of a reasonable period of time following the demand, but not to exceed five (5) days, the right to make to restoration at the expense of the Grantee. Grantee shall pay to the City the cost of such work done for or performed by the City. The remedy shall be in addition to any other remedy available to the City for noncompliance.

(f) Notice of Improvements. The City shall reasonably endeavor to give Grantee reasonable notice of plans for improvements to Public Ways or Public Ground where the City has reason to believe that Grantee's system for providing IP and VoIP services may affect or be affected by the improvement. The notice may contain (i) the

nature and character of the improvements; (ii) the Public Ways and Public Ground upon which the improvements are to be made; (iii) the extent of the improvements; (iv) the time when the City will start the work, and (v) if more than one Public Way or Public Ground is involved, the order in which the work is to proceed. The notice must give Grantee a sufficient length of time in advance of the actual commencement of the work to permit Grantee to make any necessary additions, alterations or repairs to its facilities. Grantee may be required to submit to the City a copy of any long range plan for construction of a system IP and VoIP services before January 1 of each year along with a work schedule inside the City within that particular calendar year.

(g) Utility Corridors. The City will provide Grantee space within a utility corridor in which to locate on all major street projects as determined by the City. Any facility that is located outside the corridor will be required to be moved into the assigned location or the City may move the facility and charge Grantee for the relocation. Grantee must locate within the assigned area of the corridor so as to not interfere with other entities.

(h) The terms “ordinance,” “franchise,” and franchise ordinance are used interchangeably herein.

Section 4. RELOCATIONS.

(a) Relocation of Video Services Facilities in Public Ways. If the City determines to vacate a Public Way for a City improvement project, or at City’s cost to grade, re-grade, or change the line of any Public Way, or construct or reconstruct any City Utility System in any Public Way, it may order Grantee to relocate its IP and VoIP service system facilities located therein if relocation is reasonably necessary to accomplish the City’s proposed public improvement. Grantee shall relocate its facilities at its own expense unless the facilities are located in a private easement or right of way obtained by the Grantee. If they are in an easement controlled or obtained by the City or as part of a City project, the Grantee must relocate at its own expense. The City shall give Grantee reasonable notice of plans to vacate for a City improvement project, or to grade, re-grade, or change the line of any Public Way or to construct or reconstruct any City Utility System. If relocation is ordered within five (5) years of a prior relocation of the same facilities, which relocation was made at Grantee’s expense, the City shall reimburse Grantee for any non-betterment costs on a time and material basis; provided that if a subsequent relocation is required because of the extension of a City Utility System to a previously un-served area, Grantee may be required to make the subsequent relocation at its own expense. Nothing in this ordinance requires Grantee to relocate, remove, replace or reconstruct at its own expense its fiber optic internet and video service system where such relocation, removal, replacement or reconstruction is solely for the convenience of the City and is not reasonably necessary for the construction or reconstruction of a Public Way or City Utility System or other City improvement. Where public funds are made available to reimburse utilities or other occupants of the Public Ways for relocation costs, Grantee shall have equal right to apply for and access such funds.

(b) Relocation of IP and VoIP Service System in Public Ground. The City may require Grantee at Grantee’s expense to relocate or remove its IP and VoIP System from Public Ground upon finding by City that the facilities have become or will become a substantial impairment to the existing or proposed public use of the Public Ground.

(c) Moving of Buildings. Grantee shall remove, raise, or lower its wires temporarily to permit the moving of houses or other structures, provided that the person requesting such temporary removal, raising or lowering of the wires shall pay the expense of such temporary removal, raising or lowering of the wires, and provided that Grantee shall not be required to remove, raise or lower its wires with less than forty-eight (48) hours advance notice or mutually agreed upon time.

Section 5. VEGETATION MANAGEMENT.

Grantee shall have the authority to trim trees or other natural growth overhanging any of its fiber optic internet and video service System or facilities so as to reasonably prevent branches from coming in contact with the Grantee's wires, cables, or other equipment; however, the Grantee shall not engage in excessive trimming except during an emergency or the recovery after an emergency. Grantee shall reasonably attempt to notify the City and its residents at least three days prior to entering onto property to perform any tree trimming activities.

Section 6. FRANCHISE FEE.

(a) Franchise Fee. Grantee shall pay the City a municipal franchise fee in an amount equal to three percent (3%) of Grantee's annual Gross Revenues. The City may adjust said franchise fee at any time by providing written notice to the Grantee of such change no less than ninety (90) days in advance of the specific date upon which the change is to be effective, provided that such different rate does not exceed the maximum permitted by state and federal law.

(b) Payment Schedule and Reports. Payments shall be made to the City on a quarterly basis, not later than forty-five (45) days after the last day of each March, June, September, and December. Each payment shall be accompanied by a brief report from a representative of the grantee showing the basis for the computation, and certification that the calculation of the payment is in accordance with the terms of this ordinance and is believed to be accurate.

(c) Verification. Grantee shall maintain books of account and records adequate to enable Grantee to demonstrate that it is in compliance with the obligation to pay the fees described in this Agreement with respect to fiber optic internet and video services. The City shall have the right to examine, audit and verify from the records of Grantee any data relating to the Gross Revenues subject to the required fee. The City acknowledges that some of the records which may be provided by Grantee may be classified as confidential or proprietary and, therefore, may subject Grantee to competitive disadvantage if made public. To the extent permitted by law, the City shall therefore maintain the confidentiality of any and all records provided to it by Grantee and cooperate with Grantee in protecting such confidential or proprietary information in the event an open records or similar request is received by the City pursuant to applicable laws.

Section 7. ASSIGNMENT.

Grantee shall have the right to assign this Franchise and its respective rights, terms and conditions, to an affiliated entity so long as the operations to be conducted by

said assignee are in accordance with the applicable standards contained therein and Grantee and its assignee remain responsible for all obligations of this ordinance. Any assignment to an “unrelated entity,” as that term is hereinafter defined in this paragraph, or any subsequent assignment of this Franchise to an unrelated entity, shall be subject to the prior written approval of the City, which approval shall not be unreasonably denied or delayed. For purposes of this agreement, an “unrelated entity” shall be defined as a corporation or other entity which is neither partially nor totally owned by nor a subsidiary of Grantee nor the partial or total owner of Grantee.

Section 8. OTHER PROVISIONS.

(a) Local office. Grantee agrees to maintain an office open to the public during regular and normal business hours within the area.

(b) Service Area. This Franchise Agreement shall apply to Grantee’s service area within the municipal boundaries of the City of Barling as they exist upon the date of execution of this Franchise Agreement and may hereafter be extended.

i. Grantee intends to make its IP and VoIP services available to all residences within the Service Area (the municipal boundaries of the City of Barling) on a non-discriminatory basis, and without regard to the income or minority status of any resident or group of residents within the municipal boundaries of the City.

ii. Grantee acknowledges that the City from time to time may add additional land to the city limits by annexation into which Grantee is obligated to provide IP and VoIP service under this Ordinance. Said obligation shall occur whenever the Grantee receives a request for IP and VoIP service from a potential Subscriber in a contiguous unserved area where there are at least forty-five (45) residences within one (1) mile of its IP and VoIP services infrastructure and said connection shall be for the sole purpose of the usual connection and service fees for all Subscribers. The one (1) mile shall be measured in extension length of Grantee’s facilities or line required for service located within the Public Way and shall not include length of necessary service drop to the Subscriber’s home.

(c) Emergency Messages. Grantee shall carry all Federal, State, and Local alerts provided over the Federal Emergency Alert System through its IP and VoIP service system in the event of a public safety emergency.

(d) Customer Service Standards. Grantee shall comply with the customer service requirements set forth in 47 C.F.R. Section 76.309(c), as such requirements may be amended from time to time. The requirements of this Franchise Ordinance are intended to be identical to the federal law and shall be deemed automatically amended should 47 C.F.R. Section 76.309(c) be amended.

(e) FCC Rules and Regulations. The Grantee shall comply with all applicable rules and regulations of the FCC, including, without limitation, any applicable rules and regulations governing emergency alert systems, technical standards and customer service standards.

Section 9. BREACH, TERMINATION AND DISPUTE RESOLUTION.

Should either party claim that a material 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 thirty (30) days. If EITHER PARTY fails to cure a material breach of this agreement, or take reasonable steps as agreed to in writing with the other party to cure such material breach, within thirty (30) days after notice has been delivered or has been found by a court or other agency to have engaged in fraud or deceit in an attempt to evade a material obligation of this Agreement, the OTHER PARTY may terminate and cancel the Agreement. Following such event of termination and cancellation, and regarding all other disputes, the Parties shall make diligent good faith efforts to resolve all issues and disputes that arise in the administration of this Franchise through discussions between designated representatives of the Parties, and use of a mediator when such discussions have failed. Both parties reserve the right to initiate litigation in the Greenwood District of the Circuit Court of Sebastian County if other dispute resolution efforts are not successful.

Section 10. TERM.

The Franchise granted hereunder shall be for a term of five (5) years commencing on the effective date of the Franchise as set forth below, unless otherwise lawfully terminated in accordance with the terms of this Franchise. The municipal franchise fee shall become payable with the _____, 2015 billing for fiber optic IP and VoIP services. The term may be extended or otherwise altered only upon written agreement of the parties.

Section 11. POLICE POWER OF THE CITY.

No provision of this Franchise shall be construed to limit or abridge the authority of the City to implement and exercise police powers and regulations necessary for the safety and welfare of the inhabitants of the City of Barling, Arkansas.

Section 12. INDEMNITY AND INSURANCE

(a) Indemnity. Grantee shall save and hold harmless the City from and indemnify the City against any and all claims, demands, or judgments against the City, as well as any costs incurred by the City in the defense of such claims, by reason of the granting of this Franchise or any act or omission of Grantee in the conduct of its operations.

(b) Insurance. Grantee shall maintain, at its own cost and expense, Workers Compensation, Commercial General Liability, Auto Liability, and Umbrella Liability Insurance as throughout the term of the Franchise. Minimum limits shall be \$1,000,000 per occurrence, with \$5,000,000 umbrella coverage, unless otherwise prescribed by state law. Such insurance shall be non-cancelable except upon thirty (30) days written advance notice the City. Upon request, Grantee shall provide a certificate of insurance showing evidence of the coverage required by this section.

Section 13. EQUAL PROTECTION.

Local Authorization. The right to use and occupy the City's Public Ways for the purpose herein shall not be exclusive; provided, however, that no Person shall be permitted enter into the City's Public Ways for the purpose of constructing or operating an IP and VoIP service system, without first obtaining a Franchise, permit, license, authorization or other agreement from the City. In the event the City authorizes or permits any Person in addition to the Grantee to enter into the City's Public Ways for the purpose of constructing or operating an IP and VoIP service system, the material provisions thereof shall be reasonably comparable to those contained herein, and the obligations imposed on the grantee thereunder shall be no less burdensome nor more favorable than the obligations imposed upon the Grantee hereunder, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

Section 14. CONFLICTS AND SEVERABILITY.

All ordinances or parts of ordinances conflicting with any of the provisions of this Ordinance are hereby repealed. If any clause, sentence, or section of this Ordinance should be determined to be invalid, the invalidity of any clause, sentence, or section hereof shall not affect the validity of the remainder of this Ordinance.

Section 15. NOTICE.

Unless expressly otherwise agreed between the parties, every notice or response required by this Franchise to be served upon the City or the Grantee shall be in writing, and shall be deemed to have been duly given to the required party when placed in a properly sealed and correctly addressed envelope: (i) upon receipt when hand-delivered with receipt/acknowledgment; (ii) upon receipt when sent by certified, registered mail, postage prepaid; or (iii) within five (5) business days after having been posted in first-class mail, postage prepaid.

The notices or responses to the City shall be addressed as follows:

City of Barling, Arkansas
Attn: City Administrator
PO Box 23039
304 Church St.
Barling, Arkansas 72923

The notices or responses to the Grantee shall be addressed as follows:

Grantee's Local Office:

Lavaca Telephone Company, Inc.
301 Hwy 96 SW
POB 230
Lavaca, AR 72941

The City and the Grantee may designate such other address or addresses from time to time by giving notice to the other in accordance with the provisions hereof.

