

PART D

Communications Systems Rights-of-Way Usage⁹⁰

Section 301. Purpose and Scope

a. Purpose. This Ordinance is being adopted pursuant to the Borough's police power authority to manage the Rights-of-Way in a safe and efficient manner that balances the competing needs of Persons seeking to utilize the Rights-of-Way to operate Communications Systems, and other users of the Rights-of-Way including the general public. Consistent with Section 903 of the federal Communications Act of 1934, as amended (47 U.S.C. § 253), this Ordinance seeks to establish competitively neutral and non-discriminatory conditions of access and use for all Communications Systems utilizing the Rights-of-Way, including to the extent allowed under Applicable Law the payment of compensation for the use of the Rights-of-Way.

b. Application of Ordinance to all Communication Systems. This Ordinance shall apply to all Communications Systems located within the Rights-of-Way, except to the extent that specific provisions of this Ordinance may not be applicable based on Applicable Law, including limitations to local authority based on PUC requirements. Any Person claiming an exemption from specific provisions of this Ordinance shall provide the Borough with a detailed explanation as to the basis of the claimed exemption including Applicable Laws and or authorizations upon which it is relying. Within sixty (60) days of adoption, the Borough shall provide a copy of this Ordinance to all Persons with existing Communications Systems within the Rights-of-Way.

c. Use Agreement Required. No Person shall construct, operate or continue to operate a Communications System which occupies the Rights-of-Way within the Borough without having been issued a Use Agreement(s) or can otherwise demonstrate to the satisfaction of the Borough that such Person has a valid prior authorization to occupy the Rights-of-Way under Applicable Law. No Use Agreement shall be required by a Person with a franchise from Borough for a Cable System.

(Ordinance 1960, February 7, 2011.)

Section 302. Defined Terms

a. Definitions. The following words, terms and phrases, when used in this Ordinance, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning or unless otherwise more specifically defined in another Section of this Ordinance or a Use Agreement:

Applicable Law. Any or all federal, state or municipal statutes, ordinances, rules, regulations, standards, and other laws, that are now existing or hereafter adopted or amended from time to time, which apply to a Grantee, its Facilities, operations, Services, or System.

Application. The process by which an Applicant submits a request and indicates a desire to be granted a Use Agreement to utilize the Rights-of-Way of all, or a part, of the Borough. An Application includes all written documentation, statements and representations, in whatever form, made by an Applicant to the Borough concerning: the construction of Facilities in the Rights-of-Way; the area proposed to be served within the Borough by an Applicant; the portion of the Rights-of-Way proposed to be used by an Applicant; and any other matter pertaining to proposed Facilities, including a description of its Communications System and service intended to be made available to subscribers or others and schedule of construction and availability of Services as may be required by the to determine whether or not an Applicant meets the terms and conditions established by this Ordinance.

Applicant or Applicants. A Person who files an Application with the Borough pursuant to this Ordinance.

Borough. The Municipality of State College, Pennsylvania and where necessary for the purposes of the administration and enforcement of this Ordinance or a Use Agreement shall include the Borough's delegated authorities or representatives authorized to perform as contemplated.

Borough Manager. The Borough Manager for the Borough, his designee, or such other or additional individuals that the Borough Council may designate to perform all or any of the duties or responsibilities of that position.

Borough Support Structure Rental Agreement. An authorization to an Applicant to install its Wireless Communications Facilities on a Borough-owned Support Structure in the Rights-of-Way.

Cable System. A system as defined in accordance with Cable System Regulatory Ordinance 1906.

Communications Facilities or Facilities. Wires, cables, fibers, equipment facilities, Wireless Communications Facilities and other component parts utilized to provide Wireline Communications Services or Wireless Communications Services, but does not include a franchised Cable System.

Communications Services. Wireline Communications Services and Wireless Communications Services; other than services made available from a Cable System granted a franchise by Borough pursuant to Cable System Regulatory Ordinance 1906 available to subscribers through a Communications System that enable the provision of voice, video and data services.

Communications System. Any Communications Facilities used to provide Communications Services and installed in or connected with the Rights-of-Way within the corporate limits of the Borough, as now or in the future may exist.

Confidential Information. Any written, non-verbal, information or communication for which there is sound legal basis to assert that such information or communication is confidential or proprietary in nature and which has been clearly and conspicuously marked as such by the party asserting its proprietary or confidential status. The consideration flowing to either party under a Use Agreement is not considered to be confidential information.

Construct or Construction. The act of excavating for, repairing, rehabilitating, maintaining, installing, or removing communications facilities.

Federal Communications Commission or FCC. The Federal Communications Commission of the United States Government.

Grantee. A Person who has obtained a Use Agreement in accordance with this Ordinance.

Gross Revenues. Any revenue received by a provider or a provider's affiliates, from its provision of telecommunications to customers within the Borough and not exempted in whole or in part by reason of applicable law that may be considered as a source of revenue subject to a gross revenue fee payment that may be charged by a local unit of government for the occupancy of its rights-of-way.

Linear Feet or Linear Foot. The length in feet of cable, wire, fiber, conduit, or other linear facilities physically connected, wrapped, or lashed as a single cable, conduit, or bundle of cables or conduit.

Person. Any corporation, partnership, proprietorship, individual, organization, governmental entity or any natural person.

Public Building. Any building or part thereof owned or leased or for the greater part occupied by the Borough or other governmental unit for government administrative purposes, but shall not include buildings owned by the Borough and leased to third parties or buildings such as storage facilities at which government employees are not regularly stationed.

Renewal. A new Use Agreement granted pursuant to this Ordinance to a provider having a prior existing authorization from the Borough.

Rights-of-Way. The surface of and the space above and below any public street, public road, public highway, public freeway, public lane, public path, public way, public alley, public court, public sidewalk, public boulevard, public parkway, public drive or any public easement or Rights-of-Way now or hereafter held by the Borough which shall, within its proper use and meaning, entitle Grantee to the use thereof for the purpose of installing or transmitting over poles, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments and other property as may be ordinarily necessary and pertinent to a Cable System.

ROW Ordinance. The Rights-of-Way Construction and Administration Ordinance of the Borough, Chapter XVI, Part C of this code, and administrative rules promulgated in accordance therewith, as such ordinance, including its administrative rules, may be superseded or amended from time to time.

Services. Any of the services contemplated by this Ordinance to be made available by a Grantee.

Support Structure. A structure designed and constructed and is capable of supporting an antenna array or micro facility and may include a utility pole or a monopole.

Telecommunications. 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 as sent and received.

Telecommunications Service. The offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.

Use Agreement. A grant or authorization from the Borough to construct, operate and maintain Facilities in the Rights-of-Way to provide voice, video, or data service, wired or wireless relating to any of the Systems, technologies or Services as defined in this Section of this Ordinance or other Sections of this Ordinance, to provide Services to subscribers in accordance with the requirements in such Use Agreement as approved by the Borough and this Ordinance.

Wireless Communications Facilities. Facilities used for the transmission or reception of Wireless Communications Services, usually consisting of an antenna array or micro facility, connection cables, an equipment facility and a Support Structure to achieve the necessary elevation, and includes Facilities utilized in a distributed antenna system.

Wireless Communications Services. Communications Services made available to subscribers through Wireless Communications Facilities including any FCC licensed or unlicensed radio communications services, whether used for transmission or reception of voice, video or data, including, wireless fidelity ("WiFi") and personal wireless services as defined by the Telecommunications Act of 1996. The term does not include broadcast radio or television services.

Wireline Communications Services. Communications Services made available through wire or fiber Facilities.

Wireline Use Fee or Wireless Use Fee. The compensation payable to the Borough for use of Rights-of-Way.

(Ordinance 1960, February 7, 2011.)

Section 303. Applicability

a. Restrictions on Location. Communications Facilities shall be installed in Rights-of-Way subject to the requirements of this Ordinance and the ROW Ordinance. Facilities shall not be installed in any rear alley or any utility easement adjacent to or along any rear or side lot line, or portion thereof; provided, however, the Borough may allow Facilities in such areas in the Use Agreement or at the time of site approval based on a finding that it would be less intrusive and aesthetically more acceptable to do so. The term "Rights-of-Way" shall not be construed to mean a utility easement or Rights-of-Way not dedicated to or owned by the Borough but instead is held by a third party, including without limitation another provider (hereinafter referred to collectively as "private easements"). All private easements shall be subject to applicable requirements of the Borough's zoning code.

b. Requirements Applicable to Location. All applicable requirements of this Ordinance and this Section and a Use Agreement shall be applicable to location and placement of Communications Facilities in the Rights-of-Way, and in accordance with the Borough's ROW Ordinance

c. Application of this Ordinance. The placement of covered Communications Facilities in Rights-of-Way shall be governed by this Ordinance. The placement of Facilities outside of the Rights-of-Way shall be governed by the requirements of the Borough's zoning code, where applicable to such Facilities. This Ordinance shall apply, to the extent permitted by applicable federal or State law, to all Borough authorizations for Rights-of-Way Use granted or renewed after passage and adoption of this Ordinance, and to all existing uses of the Rights-of-Way authorized prior to the passage and adoption of this Ordinance to the extent not inconsistent with existing agreements, except such Communications Facilities that have authorization to access the Borough's Rights-of-Way, pursuant to written documentation to the Borough of such authorization, pursuant to the applicable provisions of Pennsylvania law, including 15 Pa. Const.

Stat. § 1511(e). Notwithstanding this exemption, the placement of Communications Facilities in the Rights-of-Way is subject to the reasonable management control, and permit requirements as contained in the Borough's ROW Ordinance

d. Public Buildings. This Section is not meant to regulate or include the use of public buildings, public parks, public sports facilities, public spaces, public structures or other such public properties that are not in or considered to be Rights-of-Way for the installation of Wireless Communications Facilities. For the use of such property a separate lease or license shall be required from the Borough and shall be governed by the terms of such lease or license.

e. Applicable Ordinances. Grantee shall be subject to all applicable Ordinances of the Borough, including, but not limited to, the requirement of permits, payment of permit fees, and construction standards for use of the Rights-of-Way pursuant to the ROW Ordinance and the Borough's zoning code. Grantee acknowledges that the Borough is in the process of updating its ROW Ordinance due to changes in law and technology, and to the extent that such updated Ordinances do not materially conflict with this Ordinance and its Rights-of-Way Use Agreement, the Grantee consents to the applicability of such updated Ordinances.

(Ordinance 1960, February 7, 2011.)

Section 304. Application for Use Agreement

a. Application for Use Agreement. An Application for a Use Agreement from the Borough shall, at a minimum, contain the following, subject to additional information needed by the Borough, to understand the Application:

(1) The Applicant's name. If however the Applicant is not also the proposed Grantee, all information shall be furnished for both.

(2) The names of the Applicant's officers and directors.

(3) The business address of the Applicant.

(4) The name and contact information of a designated contact for the Applicant.

(5) A description of the Communications System that the Applicant proposes to construct and areas to be served by it.

(6) The term of the Use Agreement proposed by the Applicant.

(7) Whether the Applicant holds an existing authorization from the Borough or other legal authority to access the public Rights-of-Way in the Borough. (Explain)

(8) Whether the Applicant will have customers (wholesale or retail) within the Borough.

(9) Written statement that this Ordinance has been reviewed by Applicant; and, unless otherwise stated by Applicant that a term or condition in this Ordinance cannot be complied with by it, this Ordinance shall be deemed agreed to. If a term or condition cannot be complied with, Applicant will include a written description of reason(s) for non-compliance and the legal basis for such non-compliance with proposed alternatives for consideration by the Borough.

(10) Any additional information required by applicable state laws or Borough's Ordinances.

b. Consideration of Application. Applicant may be evaluated according to the information included in an Application as required by Section 904(a) above, and acted on by Borough within ninety (90) days for Applicants with existing authority to access Rights-of-Way and one hundred eighty (180) days for Applicants that do not have authority to access Rights-of-Way. The times start on the date an Applicant files an Application or other writing including certain minimum information which is set forth in Section 904(a) of this Ordinance and deemed complete by the Borough. The Borough may reasonably suspend said time periods for action by the Borough after giving written notice to an Applicant that the Application is incomplete and stating therein the reasons for incompleteness. If the ninety (90)/one hundred eighty (180)-day time elapses without action by the Borough, the Applicant is automatically granted an interim Use Agreement based on the Application submitted. The Borough may reasonably extend the said time periods for action by it on an Application after giving written notice with specificity to an Applicant if additional information is needed and of the extension of time for review required.

c. Confidential Information. To the extent allowed by Applicable Law, or . proprietary information, will be confidential, but Borough has the right to disclose to governmental agencies having requisite governmental or judicial authority provided that the Borough has given the Grantee prior written notice of impending disclosure and the Grantee have a reasonable opportunity to seek confidential status or protective order or other such appropriate remedy.

d. Completed Application. A completed Application along with an Application Processing and Review Fee of five thousand dollars (\$5,000.00) shall be submitted to the Borough Manager. An Applicant will be assessed an additional Application Processing and Review Fee at the end of the review process should the Borough's actual costs of reviewing the application exceed the Application Processing and Review Fee. This Application Processing and Review Fee will be equal to one hundred percent (100%) of Borough's costs (including administration overhead, legal, consulting, etc.) for the review and processing of the Application and granting a Use Agreement. Upon approval of an Application and written acceptance of the Borough's authorization by an Applicant, the Application Processing and Review Fee shall be credited against the Applicant's annual Rights-of-Way compensation.

e. Reservation of Police Powers. The Borough reserves the right, by ordinance or resolution, to establish any reasonable regulations for the convenience, safety, and protection of its inhabitants under its police powers. The rights herein granted are subject to the exercise of such police powers as the same now are, or may hereafter be, conferred upon the Borough. Without limitation as to the generality of the foregoing, the Borough reserves the full scope of its power to require, by ordinance, substitution of underground service for overhead service and vice-versa, or the transfer of overhead service from the front to the rear of property whenever reasonable in all areas in the Borough and with such contributions or at such rates and charges as may then be in effect under the procedures of the Pennsylvania State Corporation Commission ("SCC") or its successor in function or other appropriate regulatory body. The Borough further reserves the full scope of its police power to require by ordinance the location, construction, and maintenance of overhead service at the rear of property or underground service wherever reasonable in all new service installations in the Borough with such contributions or at such rates and charges as may then be in effect under the procedures of the SCC or other appropriate regulatory body or its successor in function.

(Ordinance 1960, February 7, 2011.)

Section 305. Term

a. Use Agreement Term. The Use Agreement term shall be effective as of the Effective Date of the Use Agreement and shall extend for a term of up to ten (10) years commencing on the installation date, unless it is earlier terminated by either party in accordance with the provisions herein. Not later than six (6) months prior to the end of the term of an agreement granted pursuant to this Ordinance, a Licensee(s) will notify the Borough of its desire to have its license renewed. Upon receipt, the Borough will evaluate the past performance of the Licensee, including compliance, terms and conditions requirements of its agreement as well as this Ordinance and schedule a public hearing to consider the renewal request. Such review by the Borough shall be initiated within sixty (60) days after receipt of the request for renewal and unless otherwise needed to complete the review, the Borough shall finalize or act upon the renewal request prior to the end of the term of Licensee's existing license.

(Ordinance 1960, February 7, 2011.)

Section 306. Use Agreement Location Authorization

a. Apply Only to Location. Any Use Agreement issued for a Communications System in accordance herewith shall apply only to the location or locations stated on the Use Agreement, as it may be amended from time to time.

b. No Promise of Issuance. Nothing in this Ordinance shall be construed as a representation, promise or guarantee by the Borough that any permit or other authorization required under any Borough law for the construction or installation of a Communications System shall be issued.

(Ordinance 1960, February 7, 2011.)

Section 307. Construction, Conditions and Limitations

a. Permit for Construction. Grantees shall apply for a permit, based on the Borough ROW Ordinance, for all work and each job within the Rights-of-Way, and shall comply with all terms and conditions of any such permit. Grantee shall furnish detailed plans of the work and other such information as required by this Ordinance, a Use Agreement, and the ROW Ordinance, and shall pay all required permit and inspection fees prior to issuance of a permit in accordance with the rates in effect at the time of payment. Improvements shall be constructed and installed in accordance with the ROW Ordinance and Applicable Law.

b. No Extension or Expansion of Facilities. Grantees shall not expand or extend their Facilities in the Rights-of-Way beyond the Route diagram furnished to the Borough with the Application made part of a Use Agreement without approval from the Borough, which shall not be unreasonably withheld. Upon approval, the Use Agreement shall be amended to reflect the location of the additional Facilities. In addition to any conditions which may be included in a Use Agreement in conformance with this Ordinance, the Use Agreement will be conditioned by the Borough to describe the areas of Borough where the Communications System will be installed.

c. Least Intrusive Design. The Borough may reasonably dictate the method of construction within the Rights-of-Way and compliance with its ROW Ordinance, and of mounting or attachment of Facilities to Support Structures, the scale and aesthetics of such Facilities including, without limitation, architecture, camouflaging and paint color, so long as such requirements do not impermissibly interfere technically with the Facilities or other Facilities installed on the Support Structure, or significantly increase the costs of the Communications System deployment.

d. Restoration of Rights-of-Way. After the removal, relocation, or construction of Facilities, Grantees shall, at their cost, repair, and return the Rights-of-Way to the same or similar condition existing before such removal, relocation, or construction. Grantees shall be responsible for damage to the Borough's street pavements, existing utilities, curbs, gutters, and sidewalks due to Grantees installation, maintenance, repair, or removal of its Facilities in Rights-of-Way, and shall repair, replace, and restore in kind, the said damaged property at its sole expense. If Grantees fails to restore Rights-of-Way after twenty (20) day notice from the Borough, the Borough may repair such portions of Rights-of-Way that may have been disturbed by Grantees and collect the costs so incurred from Grantees.

e. **Preservation of Trees.** In placing or maintaining its Facilities, upon and along the Rights-of-Way, Grantees shall not injure, or in any manner, cut or trim the trees, branches of trees along and in such Rights-of-Way without the previous permission of the Borough or its designee. All such trimmings shall be performed in a safe and orderly manner and, to the extent practicable for the proper maintenance and use of Grantees lines or other Facilities. Grantees shall be solely responsible for obtaining any required consents from private parties, other utilities, State or County agencies to the extent that it's trimming activities may require consent from private parties, other utilities, or State or County agencies.

f. **Facilities Map.** Grantees shall maintain an accurate map showing the location of its Facilities. As-built drawings of any new construction of Facilities shall be furnished to the Borough within sixty (60) days of completion of such construction as requested. Said map shall be provided in a format mutually agreed upon by the parties, which may include an acceptable GIS format.

g. **Surety Bond.**

(1) Upon commencement of construction of the Facilities, Grantees shall deposit with the Borough a surety bond or irrevocable letter of credit naming the Borough as an obligee in the amount of fifty thousand dollars (\$50,000.00), or such other amount as may be required by the ROW Ordinance or as described in a Use Agreement.

(2) Such surety bond shall be for the faithful performance by Grantee of all the provisions of this Ordinance, the Use Agreement and compliance with all orders, permits and directions of the Borough and the payment by a Grantee of any claim, liens, costs, expenses and taxes due the Borough which arise by reason of the construction, operation or maintenance of its Facilities.

(3) Provision shall be made to permit the Borough to withdraw funds from the surety bond. Grantee shall not use the surety bond for other purposes and shall not assign, pledge or otherwise use this surety bond as security for any purpose. The Borough reserves the right to increase the required amount of the surety bond to match changes in the Consumer Price Index for All Items and All Urban Consumers.

(4) If a Grantee fails to pay to the Borough any amounts due and unpaid to Borough; or fails to pay to the Borough any liquidated damages, costs or expenses which the Borough shall be compelled to pay by reason of any act or default of a Grantee in connection with this Ordinance and a Use Agreement, the Borough may then withdraw such funds from the surety bond. Payments are not use or rental fees as required in Section 911, or as otherwise described in a Use Agreement.

(5) The Borough may draw against the surety bond, up to its full face amount, for any loss or damage to the Rights-of-Way utilized by Grantees during construction, operation and maintenance of the Facilities to the extent the Borough previously has not been otherwise compensated through a withdrawal from the surety bond or by Grantees.

(Ordinance 1960, February 7, 2011.)

Section 308. Changes Affecting Construction and Removal of Facilities

a. Discontinuance of Operation of a Communications System and Facilities.

Subject to applicable provisions of the ROW Ordinance, in the event that the use of Facilities is discontinued by the Grantee, or in the event a Grantee files notice to Borough, the PUC or the FCC of its intent to cease operating the Facilities, the Grantee shall provide written notice to the Borough of its intent to discontinue its Rights-of-Way use and termination of its Use Agreement and the date when the use shall be discontinued. If such Communications System and Facilities are not removed within ninety (90) days of discontinuance or such greater time as may be allowed by the Franchise Manager, the Borough may remove it at the Grantee's expense and receive reimbursement from Grantee and applicable bonds or other security filed with Borough within thirty (30) days of invoicing.

(Ordinance 1960, February 7, 2011.)

Section 309. Technical Standards

a. Technical Standards. All technical standards governing construction, reconstruction, installation, operation, testing, use, maintenance and dismantling of a Communications System shall be in accordance with the ROW Ordinance and all applicable FCC and other federal, State, and local laws and regulations.

(Ordinance 1960, February 7, 2011.)

Section 310. Requirement for Support Structures Attached Agreement

a. Requirement for Borough-owned Support Structures Rental Agreement. The grant of authority to occupy the public Rights-of-Way does not convey the right to make attachments on Support Structures located within the Rights-of-Way absent authorization from the Support Structure Owner. Every Grantee who constructs, installs or maintains Facilities in the Rights-of-Way must obtain an attachment agreement with the owner, including the Borough, of the Support Structure.

b. No Title. A Use Agreement and Rental Agreement to attach Facilities to a Borough-owned Support Structure shall not convey title, equitable or legal, in the Rights-of-Way or Borough-owned Support Structure. A Rental Agreement grants the right to occupy a Borough-

owned Support Structure in the Rights-of-Way for the construction and installation of Facilities required as part of a Grantee's Communications System and may also grant the right to erect a new Support Structure as authorized by a Use Agreement and in accordance with this Ordinance.

c. Denial of Rental Agreement. In addition to any other reasons for denial of a Use Agreement or Rental Agreement as set forth in this Ordinance, the Borough shall refuse to issue a Use Agreement for construction of a System or a Rental Agreement if the proposed location of the Facilities interferes with the use of the Borough-owned Support Structure if it is not technically or structurally feasible, as determined by the Borough; or is otherwise contrary to public safety. The denial of a Use Agreement or Rental Agreement shall be final, subject to appeal to the Borough Council.

(Ordinance 1960, February 7, 2011.)

Section 311. Compensation for Use Agreement and Rental Agreement

a. Compensation for Use Agreement. It shall be a term and condition of any Use Agreement issued in accordance herewith that as consideration for the right of a Grantee to occupy and use the Rights-of-Way and the Borough's permission thereby to occupy and use the Rights-of-Way that the Grantee shall pay each year to the Borough the following compensation:

b. Communications System - Wired Use Fee.

(1) Any Communications System that serves subscribers within the Borough shall pay annually as and for a Wired Use Fee five percent (5%) of its annual total local Gross Revenues derived from operation of the Communications System.

(2) Any Communications System which is not certificated as a local exchange carrier by the PUC and serves no Subscribers other than itself shall pay annually as and for a Wired Use Fee as follows:

(a) One dollar (\$1.00) per Linear Foot.

(b) In no event shall the Wired Use Fee be less than five hundred dollars (\$500.00) per annum.

c. Communications System - Wireless Use Fee. For Wireless Communications Facilities installed in the Rights-of-Way, the Grantee shall pay an annual Wireless Use Fee of one thousand two hundred dollars (\$1,200.00). In addition, when the number of Support Structures utilized exceeds three (3), then, in addition to the annual Wireless Use Fee, the Grantee shall pay a per structure Wireless Use Fee of four hundred dollars (\$400.00) for each additional Support Structure.

d. Combined Wireline and Wireless System. For a Communications System using combined Wireline and Wireless Communications Facilities, a Use Fee shall be the higher the above Sections 911(b) and 911(c) amount as calculated annually by the Borough.

e. Rental Agreement Fee.

(1) For Wireless Communications Facilities located on Borough-owned Support Structures in the Rights-of-Way, the Grantee must also obtain a Rental Agreement(s) and pay the Borough for each Borough-owned Support Structure utilized an additional fee of five hundred dollars (\$500.00) per Borough-owned Support Structure as the applicable Rental Agreement Use Fee.

(2) The Rental Agreement Use Fee shall be due and payable at the time a Rental Agreement is issued for new Borough-owned Support Structures utilized in a given year, and with each annual Rental Agreement Use Fee required by this Section, the Grantee shall pay the Rental Agreement Use Fee based on the number of Borough-owned Support Structures being utilized at the time the annual Rental Agreement Use Fee is due. There shall be no proration of the Rental Agreement Use Fee.

f. Additional Applicable Payment Requirements.

(1) Any Communications System or part thereof located in the Borough Rights-of-Way and not subject to a Use Agreement approved by the Borough in accordance with Ordinance shall obtain a Use Agreement under this Ordinance. The Use Fees stated in this Section and as set forth in an exhibit attached to a Use Agreement shall apply except as prohibited by Applicable Law, PUC authority or as otherwise determined by the Borough.

(2) The Wired and Wireless Use Fees and Rental Agreement Use Fees shall be payable quarterly and as described in a Use Agreement or Rental Agreement.

(a) Each quarterly payment shall be payable and reportable no less than thirty (30) days after the relevant assessment date.

(b) Each payment shall be accompanied by a report from the Grantee in a form approved by the Borough and as set forth in an exhibit attached to a Use Agreement showing the basis for the computation and other relevant data as may be required by the Borough.

(c) Each of the reports shall contain a notarized verification by the chief financial officer of the Grantee and the reports shall be verified annually, within ninety (90) days of the close of business of the last day of the calendar year, by a certified public accountant selected by the Borough at the expense of the Grantee.

(d) Failure to comply strictly with this Section shall be deemed to be a violation of this Ordinance and shall subject the Grantee to all penalties and remedies, both legal and equitable, which are available to the Borough.

(3) The acceptance of any payment required hereunder by the Borough shall not be construed as an acknowledgement that the amount paid is the correct amount due, nor shall the acceptance of payment be construed as a release of any claim which the Borough may have for additional sums due and payable.

(a) All payments shall be subject to audit by the Borough and assessment or refund if the payments is found to be in error.

(b) In the event that audit results in an assessment by and an additional payment to the Borough, additional payment shall be subject to interest at the rate of six percent (6%) per year and to a penalty of six percent (6%) per year, which shall be due and payable immediately.

(4) Nothing in this Ordinance shall be construed to limit the liability of the Grantee for all applicable federal, state and local taxes.

g. Third Party Use of Communications Facilities. Any revenues derived by a Grantee from the use of its Facilities by any Person other than Grantee, including any lease arrangement, shall be fully disclosed by a Grantee to the Borough and the revenue derived by Grantee from such use shall be subject to all applicable fee payments required by this Section. Further, to the extent such use or Services by such Person may be subject to the obtaining of a Use Agreement pursuant to this Ordinance or a Franchise Agreement pursuant to the Cable System Regulatory Ordinance such Person will be required, prior to any lawful use by such Person of any portion of a Grantee's Communications Facilities, to receive a Use Agreement or Franchise from the Borough.

h. Quarterly Payments Made. Grantee shall make payments quarterly, except as described in a Use Agreement. Grantee shall send all payments payable hereunder, to:

Finance Department
Borough of State College
243 South Allen Street
State College, PA 16801

(Ordinance 1960, February 7, 2011.)

Section 312. Indemnification and Waiver.

a. Indemnification. As a condition of use of the Rights-of-Way, every Grantee at its sole cost and expense, shall indemnify, protect, defend and hold harmless the Borough, its elected officials, officers, employees, and agents acting in their official capacities, from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and expenses of any kind, including, without limitation, reasonable attorney's fees, directly or indirectly, in whole or in part, resulting from the granting of a Use Agreement, property damage or bodily injury (including accidental death) that arise out of Grantee's construction, operation, maintenance or removal of a Communications System, except to the extent arising from or caused by the sole or gross negligence or willful misconduct of the Borough, its elected officials, officers, employees, agents or contractors. The Borough shall give Grantee written notice of its obligation to indemnify and defend the Borough within ten (10) business days of receipt of a claim or action pursuant to this Section. If the Borough determines that it is necessary for it to employ separate counsel, the costs for such separate counsel shall be the responsibility of the Borough.

(Ordinance 1960, February 7, 2011.)

Section 313. Insurance.

a. Insurance Required. Upon execution of this Agreement, the Grantee shall carry a Commercial General Liability insurance policy naming the Borough as an Additional Insured thereunder. Additional Insured coverage shall apply as primary insurance with respect to any other insurance afforded to Borough. The coverage available to the Borough, as Additional Insureds, shall not be less than \$1 million Each Occurrence, \$2 million General Aggregate, \$2 million Products/Completed Operations Aggregate, and \$1 million Personal and Advertising Injury limits. A Certificate of Insurance shall be provided to the Borough indicating the described coverage exists during the entire term of this agreement.

Umbrella Liability Insurance: The coverage shall not be less than \$2 million Each Occurrence, \$2 million Aggregate. Such insurance shall provide coverage over and above the stated Commercial General Liability limits.

Such insurance shall cover liability arising from any aspect of this agreement. All coverage shall be placed with an insurance company duly admitted in the State of Pennsylvania, shall be reasonably acceptable to the Borough and must maintain an A.M. Best rating of A- or better.

Additionally and prior to commencement of any aspect of this agreement, the Grantee shall provide the Borough with a Certificate of Insurance showing liability insurance coverage as

described above. In the event any of these policies are terminated, Certificates of Insurance showing replacement coverage shall be provided to the Borough. Each policy required shall be endorsed to provide at least thirty (30) days prior notice of cancellation for any reason except non-payment of premium. Alternatively, Grantee agrees to provide at least thirty (30) days prior notice of cancellation for any reason except non-payment of premium. Grantee agrees to provide at least ten (10) days prior notice of cancellation for non-payment of premium.

(Ordinance 1960, February 7, 2011, as amended by Ordinance 2070, February 1, 2016, Section 1.)

Section 314. Notices.

a. Notices. All notices which shall or may be given pursuant to this Ordinance and a Use Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or e-mail transmission, if a hard copy of the same is followed by delivery through the U.S. mail or by overnight delivery service as just described, addressed as described in a Use Agreement.

b. Date of Notices; Changing Notice Address. Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next business day in the case of facsimile, e-mail, or overnight delivery.

(Ordinance 1960, February 7, 2011.)

Section 315. Enforcement.

a. Violation. Each of the following shall constitute a violation by Grantees:

(1) Failure to make any payments to the Borough by the due date, as required to be made in respect to any payment required of Grantee is set forth in this Ordinance and a Use Agreement.

(2) Failure to maintain the required liability insurance policies, or to provide evidence of such to the Borough upon request.

(3) Failure to provide and maintain a valid surety bond or letter of credit as provided in this Ordinance and a Use Agreement.

(4) Any substantial breach of a material provision of any condition to use of Rights-of-Way set forth herein.

(5) Any persistent failure by Grantee to comply with any of the provisions, terms or

conditions of this Ordinance or Use Agreement or with any rules, regulations, orders or other directives of the Borough or their applicable authority including the PUC after having received written notice of a failure to comply.

(6) Any act or omission that is not in compliance with any provision of any regulatory ordinance that is not cured within thirty (30) days written notice thereof.

(7) The condemnation by public authority, other than the Borough, or sale or dedication under threat or in lieu of condemnation, of all or substantially all of the Grantee's Facilities.

b. Remedies of the Borough. Upon the occurrence of a violation, the Borough shall notify the Grantee in writing in accordance with Sections 914(a) and 914(b) herein at least thirty (30) days before pursuing any of the following remedies:

(1) Make a claim against the surety bond required by the provisions of this Ordinance for any specified amount due to the Borough.

(2) Make a claim against the surety bond required by the provisions of this Ordinance for the collection of penalties in an amount up to two hundred dollars (\$200.00) per day or per incident.

(3) Revoke the rights and privileges granted under this Ordinance or a Use Agreement, and require Grantee to remove its Facilities from the Rights-of-Way.

(4) Invoke any other remedy available by law or equity.

c. Procedure for Imposition of Penalties.

(1) If the Borough is able to demonstrate that a Grantee has committed a violation in accordance with Section 915(a) above, it shall promptly notify Grantee in writing of the nature of such violation and, if applicable, the section of this Ordinance or Use Agreement that it believes has been violated. If the Borough does not notify Grantee of any violation of this Ordinance or Use Agreement, it shall not operate as a waiver of any rights of the Borough hereunder or pursuant to Applicable Law.

(2) Grantee shall have forty-five (45) days to cure such violation after written notice is received by taking appropriate steps to comply with the terms of this Ordinance or Use Agreement, except that any violations of any applicable safety or construction requirements or regulations that present a threat to health or safety may be required to be eliminated or remedied in a shorter period of time as deemed appropriate under the circumstances by the Borough Manager.. If the nature of the violation is such that, in the Borough's reasonable judgment, it cannot be fully cured within forty-five (45) days due to circumstances outside of Grantee's

control, the period of time in which Grantee must cure the violation may be extended by the Borough in writing for such additional time necessary to complete the cure, provided that Grantee shall have promptly commenced to cure and is diligently pursuing its efforts to cure in the reasonable judgment of the Borough.

(3) If the violation has not been cured within the time allowed under Section 915(c) of this Ordinance, then Grantee shall be liable for liquidated damages in accordance with Section 915(d) of this Ordinance.

The Borough shall not pursue any remedies by reason of any violation that is either (i) cured or with respect to which a plan to cure reasonably acceptable to the Borough has been presented to the Borough by the Grantee prior to the time at which the proposed draw can be made, or (ii) with respect to which the Grantee have not been given notice as provided above. A claim against any surety bond shall, to the extent of such claim, constitute a credit against the amount of the applicable liability of the Grantee to the Borough.

d. Liquidated Damages and Opportunity to Cure.

(1) Because Grantee's failure to comply with provisions of this Ordinance or Use Agreement may result in harm to the Borough and because it will be difficult to measure the extent of such harm, the Borough may assess liquidated damages against Grantee. Such damages shall not be a substitute for specific performance by Grantee, but shall be in addition to such performance.

(2) The first day for which liquidated damages may be assessed, if there has been no cure after the end of the applicable cure period, shall be the day after the end of the applicable cure period, including any extension of the cure period granted by the Borough. Liquidated damages may not be assessed for a time period exceeding one hundred and twenty (120) days, after which the Borough may initiate an action in law or equity in a court of competent jurisdiction.

(3) Without limiting or waiving any rights of enforcement of this Ordinance or a Use Agreement the Borough may have, it may assess liquidated damages against Grantee in the following amount provided Grantee has had an opportunity to cure in accordance with Section 915(c)(2) of this Ordinance:

For failure to comply with any provision of this Ordinance or Use Agreement two hundred dollars (\$200.00) per day for each day the violation continues.

e. Non-Enforcement by Borough. Grantee shall not be relieved of any obligations to comply with any of the provisions of this Ordinance or Use Agreement by reason of any failure or delay of the Borough to enforce prompt compliance. The Borough may only waive its rights

hereunder by expressly so stating in writing and with approval of the Borough Council. Any such written waiver by the Borough of a breach or violation of any provision of this Ordinance or Use Agreement shall not operate as or be construed to be a waiver of any subsequent breach or violation.

f. Taxes and License Fees. Grantee shall be fully responsible for the payment of all applicable PUC, FCC and other applicable authority, ad valorem, property, use, and other taxes, as well as business license and other fees. (Ordinance 1960, February 7, 2011.)

Section 316. Assignment, Transfer of Ownership. The rights and privileges herein granted to Grantees in a Use Agreement shall be personal to Grantee. Accordingly, a Grantee shall not sell, transfer, lease, assign, sublet, or dispose of in whole or in part, either by forced or voluntary sale, or by ordinary sale, consolidation, or otherwise, any of the rights or privileges granted it by this Ordinance and a Use Agreement, without the prior consent of the Borough, which consent shall not be unreasonably withheld. (Ordinance 1960, February 7, 2011.)

Section 317. Miscellaneous Provisions.

a. Miscellaneous Provisions. The provisions which follow shall apply generally to the obligations of the parties under this Ordinance.

b. Non-Exclusive Use. Grantees understand that this Ordinance and a Use Agreement or Rental Agreement does not provide Grantee with exclusive use of the Rights-of-Way or any Borough-owned Support Structures and that Borough shall have the right to permit other Providers of Communications Systems to install equipment or devices in the Rights-of-Way and on Borough-owned Support Structures also used by Grantee.

c. Severability of Provisions. If any one (1) or more of the provisions of this Ordinance shall be held by court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision(s) shall be deemed severable from the remaining provisions of this Ordinance and shall not affect the legality, validity, or constitutionality of the remaining portions of this Ordinance. Each party hereby declares that it would have entered into this Ordinance and each provision hereof regardless of whether any one (1) or more provisions may be declared illegal, invalid, or unconstitutional.

d. Contacting Grantee. Grantee shall be available to the staff employees of any Borough department having jurisdiction over Grantee's activities twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the attachment, installation, operation, maintenance or removal of a Communications System. The Borough may contact by telephone the network control center operator at a telephone number and Person or Persons as described in a Use Agreement.

e. **Descriptive Headings.** The captions to sections and subsections contained herein are intended solely to facilitate the reading thereof. Such captions shall not affect the meaning or interpretation of the text herein.

f. **Governing Law; Jurisdiction.** This Ordinance shall be governed and construed by and in accordance with the laws of the Commonwealth of Pennsylvania, without reference to its conflicts of law principles. If suit is brought by a party to this Ordinance, the parties agree that trial of such action shall be vested exclusively in the state courts of Pennsylvania, Centre County or in the United States District Court serving Pennsylvania.

g. **Amendment of Ordinance.** This Ordinance may not be amended except pursuant to a written notice to affected Grantees and after public hearing by Borough Council.

h. **Acceptance.** The rights and privileges granted by this Ordinance shall not be effective until receipt by the Borough of an unconditional acceptance from Grantee, in written form to a Use Agreement thirty (30) days of approval by the Borough Council and shall be in writing and shall include delivery of all outstanding and current payments, insurance certificates, applications, acceptance fees, and performance of other requirements as set forth in this Ordinance and the Use Agreement.