

ORDINANCE NO.: 2010-088

Granting DukeNet Communications, LLC, its Successors and Assigns the Right, Power and Authority to Construct, Install, Maintain and Operate In, Over, Upon and Under the Streets and Public Places of the City of Columbia, its Fiber Optic Network Facilities for Such Period as Provided Herein; to Provide for the Payment of Compensation for its Use of the Streets and Public Places; and to authorize the City Manager to execute the attached Rights-of-Way Access Agreement

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WHEREAS, DukeNet Communications, LLC has requested consent of the City of Columbia to use the streets and public places of the municipality to construct, maintain, and operate its fiber optic network facilities for use in providing telecommunications services for its own business purposes and profit but will not be providing services to customers within the municipality; and,

WHEREAS, other telecommunications providers either have or are likely to seek a similar consent; and,

WHEREAS, it is the policy of the municipality to permit such entry into the corporate limits and such use of the streets and public places for the provision of telecommunication services, subject to the duty and authority of the municipality to manage its streets, public property and rights-of-way, and to require fair and reasonable compensation from telecommunications providers for the use thereof on a competitively neutral and nondiscriminatory basis and to publicly disclose the amount of compensation; NOW, THEREFORE,

BE IT ORDAINED by the Mayor and City Council of the City of Columbia this 23rd day of June, 2010, as follows:

Section 1: As used in this ordinance, the word "Company" means DukeNet Communications, LLC, a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business in South Carolina, its successors and assigns.

Section 2: As used in this ordinance, the term "Fiber Optic Network Facilities" means fiber optic cables, conduits, converters, splice boxes, cabinets, handholes, manholes, vaults, equipment, drains, surface location markers, appurtenances, and related facilities located or to be located by Company in the public rights-of-way of the City and used or useful for the transmission of Telecommunications Services.

Section 3: As used in this ordinance, the word "Municipality" means the City of Columbia, South Carolina.

Section 4: As used in this ordinance, the term "Telecommunications Services" has the meaning and definition given to that same term by S.C. Code Ann. Section 58-9-220 (1) (1999); provided, however, for purposes of this ordinance, the term "Telecommunications Services" does not include cable television. Cable television services may only be provided in the municipal limits pursuant to a separate franchise pursuant to 42 USC 542.

Section 5: The non-exclusive right, power and authority is hereby granted and vested in the Company to construct, maintain, and operate in, over, under, and upon the streets, alleys, bridges, rights-of-way and other public places of the Municipality, its lines, poles, wires, cables, and other fiber optic network facilities and to use those facilities within the corporate limits of the Municipality.

Section 6: Prior to the commencement or continuation of any construction or operation in the corporate limits of the Municipality, the Company shall be duly authorized to do business in South Carolina and shall have received any necessary certificate of public convenience and necessity or other required authority from the South Carolina Public Service Commission or the Federal Energy Regulatory Commission. Evidence that such authority has been acquired or that it is not required will be filed with the Municipality.

Section 7: All work upon the streets and public places of the Municipality shall be in accordance with all applicable standards, codes, and ordinances, and will be done under the general supervision of the Mayor and Council of the Municipality. All new construction will, wherever practicable, be placed underground. Any necessary aboveground construction will, wherever practicable, utilize existing utility poles. No street, alley, bridge, right-of-way or other public place used by the Company shall be obstructed longer than necessary during its work of construction or repair, and shall be restored to the same good order and condition as when said work was commenced. No part of any street, alley, bridge, right-of-way, or other public place of the Municipality, including any public drain, sewer, catch basin, water pipe, pavement or other public improvement, shall be damaged. However, should any such damage occur, the Company shall repair the same as promptly as possible, and, in default thereof, the Municipality may make such repairs and charge the reasonable cost thereof to and collect the same from the Company. The Company shall save the Municipality harmless from all liability or damage (including judgments, decrees, court costs, and defense costs) arising out of the Company's operations within the corporate limits of the Municipality, the exercise of the privileges granted to the Company by this ordinance, or the acts or omissions of the Company's employees, contractors, or agents.

Section 8: In consideration of the grant of authority to utilize the streets and public places of the Municipality for the provision of Telecommunication Services, and in accordance with applicable laws and ordinances, the Company shall pay

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annually such fees, business license taxes if applicable, and administrative fees if applicable as are presently permitted by Article 20 of Chapter 9 of Title 58 of the 1976 Code of Laws of South Carolina, as enacted in 1999, and as may be enacted and imposed by the Municipality. The Company shall also pay all such ad valorem taxes, service fees, sales taxes, or other taxes and fees as may now or hereafter be lawfully imposed on other businesses within the Municipality. Provided, however, that in the event that Article 20 of Chapter 9 of Title 58 of the 1976 Code of Laws of South Carolina, as enacted in 1999, or other laws governing franchise fees, business license taxes and/or other fees with respect to Telecommunication Services shall be substantially modified by subsequent legislation or court decision, the provisions herein contained shall be brought into conformity with the changes in the applicable law by appropriate amendment to this ordinance. If the limitations on the amount of franchise fees, administrative fees, and business license taxes on providers of Retail Telecommunications Services presently contained in said statute shall be removed or modified, the Municipality will be free, by amendment to this ordinance, to impose such fair, reasonable, competitively neutral, and non-discriminatory fees and taxes as may then be permitted by that statute or by such applicable South Carolina and federal law as may then govern.

Section 9: Except as specifically provided herein, or otherwise mandated by law, the privilege granted to the Company by this ordinance does not exempt or excuse the Company from the police power and all other municipal authority and laws including, but not limited to, those relating to zoning, permitting, traffic control, construction and excavation, planning, aesthetics, and the environment.

Section 10: The non-exclusive consent granted by this ordinance shall be in force and effect for an initial term of five (5) years. It is understood and agreed that the decision of whether to renew this consent pursuant to this Section shall be made by those elected officials then in office under such circumstances as may then obtain, and that the Company has no reasonable expectation of renewal or non-termination.

Section 11: This consent ordinance is subject to the Constitution and laws of the State of South Carolina. In conforming this ordinance to the requirements of S.C. Code Ann. Section 58-9-2200 et. seq. as enacted by the General Assembly of South Carolina in 1999, the Municipality does not concede or imply that the General Assembly has the authority to restrict by general law the powers denied to the General Assembly and reserved to the municipalities of South Carolina by Article VIII Section 15 of the Constitution of South Carolina.

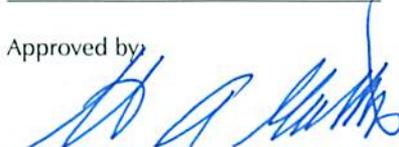
This ordinance is effective as of final reading.

Requested by:



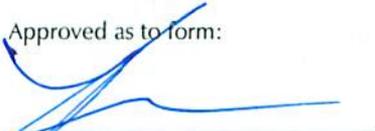
MAYOR

Approved by:



City Manager

Approved as to form:



City Attorney

ATTEST:



City Clerk

Introduced: 6/16/2010
Final Reading: 6/23/2010

CITY OF COLUMBIA, SOUTH CAROLINA
RIGHTS-OF-WAY ACCESS AGREEMENT

This Rights-of-Way Access Agreement ("Agreement") is made as of the ___ day of _____, 2010, by and between the City of Columbia, South Carolina, ("City"), and DukeNet Communications, LLC, a limited liability company authorized to do business within the State of South Carolina, and having its principal office at 400 South Tryon Street, Ste. 29B, Charlotte, North Carolina 28285 ("Permittee").

RECITALS

WHEREAS, Permittee is a limited liability company duly organized and existing under the laws of the State of Delaware, and is authorized by the Federal Communications Commission to provide Telecommunications Services, as such term is hereinafter defined, and is certified as a public utility under state law; and,

WHEREAS, Permittee desires to construct, install and maintain Fiber Optic Network Facilities within the Public Rights-of-Way; and,

WHEREAS, the City has the authority to grant access to its Public Rights-of-Way.

NOW, THEREFORE, in consideration of the recitals and the mutual promises contained herein, the City and Permittee agree as follows:

DEFINITIONS

Fiber Optic Network Facilities or Facilities means fiber optic cables, conduits, converters, splice boxes, cabinets, handholes, manholes, vaults, equipment, drains, surface location markers, appurtenances, and related facilities located

or to be located by Permittee in the Public Rights-of-Way of the City and used or useful for the transmission of Telecommunications Services.

Law means any local, state or federal legislative, judicial or administrative order, certificate, decision, statute, constitution, ordinance, resolution, regulation, rule, tariff, guideline or other requirement, as amended, now in effect or subsequently enacted or issued during the term of this Agreement, including, but not limited to, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, codified at 47 U. S.C., and all orders, rules, tariffs, guidelines and regulations issued by the Federal Communications Commission or the governing state authority pursuant thereto.

Local Service Revenues shall mean cash revenues billed or invoiced by Permittee for the provision of on-network dedicated carrier, local and switched services that originate within the City.

Public Rights-of-Way means the surface and the area across, in, over, along, upon and below the surface of the public streets, roads, sidewalks, lanes, courts, ways, alleys and boulevards.

Telecommunications Services is defined as set forth in §58-9-2200, 1976 South Carolina Code of Laws, as amended, Act 112 of 1999.

CONSTRUCTION, MAINTENANCE AND OPERATION OF THE SYSTEM

1. Access. Subject to the provisions of this Agreement, and all applicable Law, the City hereby grants to Permittee the right to construct, install, maintain, locate, move, operate, place, protect, reconstruct, reinstall, relocate, remove and replace the Facilities in, under, over, across, upon and along the Public Rights-of-Way for the purpose of providing Telecommunications Services. The term of this Agreement shall be for an initial period of five (5) years commencing on the date of the signing of this Agreement. This Agreement may be renewed for additional five (5) year

periods, by written agreement of both parties.

2. **No Interference.** Except as permitted by applicable Law or this Agreement, in the performance and exercise of its rights and obligations under this Agreement, Permittee shall not interfere in any manner with the existence and operation of any and all public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, overhead and underground electric and telephone wires, electronics, cable televisions, and other telecommunications, utility and municipal property.

3. **No Property Interest.** This Agreement is not a grant by the City of any fee simple property interest and is made subject and subordinate to the prior and continuing right of the City to use the Public Rights-of-Way as a street and for the purpose of laying, installing, maintaining, repairing, protecting, replacing and removing sanitary sewers, water mains, storm drains, gas mains, poles and for other municipal uses and with right of ingress and egress, along, over, across and in said Public Rights-of-Way.

4. **Application for Permits.** As required by Law, Permittee shall apply for a permit for all work and each job within the Public Rights-of-Way. Permittee shall furnish detailed plans of the work and other such information as required by Law, and shall pay all standard processing, field marketing, engineering 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 Law.

5. **Issuance of Permits.** Upon execution of this Agreement and Permittee's performance of the obligations in Section 4, the City will issue all permits necessary to the installation of Permittee's Facilities, in accordance with the City's standard permitting procedures.

6. **Manner of Construction.** The construction, installation, operation, maintenance and removal of its Fiber Optic Network Facilities shall be

accomplished without cost or expense to the City and in such a manner so as not to endanger persons or property, or unreasonably obstruct travel on any road, walk or other access thereon within the Public Rights-of-Way.

7. **Condition of Facilities.** Permittee agrees to keep its Fiber Optic Network Facilities in good and safe condition and free from any nuisance.

8. **Relocation for City Purposes.** Permittee shall relocate at its sole expense, and in cooperation with the City, any Facilities installed, used and maintained under this Agreement if and when made necessary by any lawful change of grade, alignment or width of any street, including the construction, maintenance or operation of any underground subway or viaduct by the City and/or the construction, maintenance or operation of any other of the City's underground or above-ground facilities.

9. **Removal and Abandonment.** If any portions of the Fiber Optic Network Facilities covered under this Agreement are abandoned for a period of twelve (12) months, Permittee shall notify the City and shall either promptly vacate and remove the Facilities at its own expense, or, at the City's election, abandon some or all of the Facilities in place.

10. **Undergrounding of Facilities.** Permittee shall place its Facilities underground if required by the City pursuant to Law.

11. **Restoration of Public Rights-of-Way.** After the removal, relocation or construction of the Fiber Optic Network Facilities, Permittee shall, at its own cost, repair and return the Public Rights-of-Way to the same or similar condition existing before such removal, relocation or construction. Permittee shall be responsible for damage to City street pavements, existing utilities, curbs, gutters and sidewalks due to Permittee's installation, maintenance, repair or removal of its Fiber Optic Network Facilities in Public Rights-of-Way, and shall repair, replace and restore in kind, the said damaged property at its sole expense.

COMPENSATION

1. **Business License Tax.** In the event Permittee provides Retail Telecommunications Services, as defined in §58-9-2200(2) of the South Carolina Code of Laws, within the City, Permittee shall pay to the City an annual business license fee in the amount prescribed by §58-9-2220, 1976 South Carolina Code of Laws, as amended, Act 112 of 1999.

2. **Other Fees.** Permittee shall pay all standard, nominal permit and user fees to the City in accordance with Law, including a franchise fee of \$1,000 per year, the maximum amount allowed by South Carolina Code of Laws §58-9-2230.

GENERAL TERMS

1. **Indemnification.** Permittee agrees to indemnify, defend (with counsel reasonably acceptable to the City) and hold harmless the City, its officers, employees and agents from and against any and all claims, demands, losses, damages, liabilities, fines, and penalties, and all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees and costs of defense (collectively, the "Losses") arising out of any breach by Permittee of its obligations described in this Agreement, except to the extent any Losses arise from the willful misconduct or negligent acts or omissions of the City, its officers, employees or agents.

2. **Insurance.** Permittee shall maintain throughout the term of this Agreement, workmen's compensation insurance and liability insurance with regard to all damages in the minimum amounts of:

a. General Liability – public liability, including premises, products and complete operations.

- (1) Bodily injury liability
\$600,000 each person

\$1,200,000 each occurrence

- (2) Property damage liability
\$1,200,000 each occurrence, or
- (3) Bodily injury and property damage combined
\$1,200,000 single limit

b. Comprehensive – Automobile Liability Insurance, including owned, non-owned and hired vehicles.

- (1) Bodily injury liability
\$600,000 each person
\$1,200,000 each occurrence
- (2) Property damage liability
\$1,200,000 each occurrence
- (3) In lieu of (1) and (2)
Bodily injury and property damage combined
\$1,200,000 single limit

c. Permittee agrees that the above-required insurance will contain the following required provisions:

- (1) the City and its officers, agents, employees, board members and elected officials shall be named as additional insureds (as the interests of each may appear) as to the general liability coverage, and
- (2) Permittee shall endeavor to provide thirty (30) days notice to the City prior to cancellation.

- d. Permittee is a qualified self-insurer in the state of South Carolina for workers' compensation and automobile liability. City agrees that Permittee may satisfy the insurance requirements for workers' compensation and automobile liability either through its program of self-insurance or through commercial insurance.

3. **Construction Bond.** Upon commencement of construction of the Facilities, Permittee shall deposit with the City a surety bond naming the City as an obligee in the amount of Fifty Thousand Dollars (\$50,000.00). Permittee's obligation to maintain the surety bond shall terminate thirty (30) days following completion of construction of the initial Facilities. The City may draw against the surety bond, up to its full face amount, for any loss or damage to the Public Rights-of-Way utilized by Permittee during construction of the initial Facilities to the extent the City previously has not been otherwise compensated through a withdrawal from the surety bond or by Permittee.

4. **Law.** The terms and conditions of this Agreement shall be subject to any and all applicable Law that is currently in force, or that may hereafter be prescribed by any federal, state or local governmental authority. Any such Law shall automatically supersede the provisions hereof and the parties agree to modify, in writing, the affected term(s) and condition(s) of this Agreement to bring them into compliance with such Law. Should any term of this Agreement be determined by a court or other entity with competent jurisdiction to be unenforceable, all other terms of this Agreement shall remain in full force and effect.

5. **Assignment.** Permittee may not assign or collaterally assign, in whole or in part, its rights, interests and obligations hereunder without limitation to any of its affiliates, any party providing financing to Permittee, and any successors and assigns of the foregoing without the consent of the City which consent shall not be unreasonably withheld. Permittee will provide the City with notice of any assignment. The City agrees that the holder of any security interest shall not be prevented or impeded by the City from enforcing

such security interest and shall not terminate this Agreement without the prior written consent of the assignee.

6. **Notices.** All notices required or permitted to be given under this Agreement shall be in writing, addressed as set forth below, and shall be hand-delivered to the addressee, sent by Federal Express or similar overnight delivery service, or sent by U. S. Mail, certified and return receipt requested.

To the City: City of Columbia
Post Office Box 147
Columbia, South Carolina 29217
Attention: City Manager

To Permittee: DukeNet Communications, LLC
400 South Tryon Street, Ste. 29B
Charlotte, North Carolina 28285
Attention: Vice President, Sales & Customer
Relations

with a copy to: Office of the General Counsel, Duke Energy
Corporation
Attention: Dorothy K. Corbett, Esq.
139 East Fourth Street
Room 25 AT II
Cincinnati, Ohio 45202

7. **Successors.** This Agreement shall inure to the benefit of, and shall be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties have duly executed this Agreement as of the date first above written.

WITNESSES:

Deborah S. Shap
Manda A. Hill

Dukenet Communications, LLC
BY: Anthony R. Coker
ITS: Vice President

Quiana D. Salley
JY Daniels

CITY OF COLUMBIA
BY: Steven A. Gantt
Steven A. Gantt
ITS: City Manager

APPROVED BY
CITY OF COLUMBIA
LEGAL DEPT.
[Signature]