

ORDINANCE 21-04
AN ORDINANCE GRANTING AN ELECTRIC UTILITY FRANCHISE AND
GENERAL UTILITY EASEMENT
TO
FIRST DIGITAL TELECOM LLC.

THIS FRANCHISE AGREEMENT ("Agreement") is entered into by and between the Nibley City, Utah, a municipal corporation and political subdivision of the State of Utah ("CITY"), with its principal offices at 455 West 3200 South, Nibley City, Utah 84321, and FirstDigital Telecom, LLC, a Utah Limited Liability Company ("PROVIDER"), with its principal offices at 90 South 400 West Suite M100, Salt Lake City, Utah 84101

WITNESSETH:

WHEREAS, PROVIDER desires to provide telecommunications transmission services within CITY and in connection therewith to establish a telecommunications network in, under, along, over and across present and future rights-of-way of CITY; and

WHEREAS, the City, pursuant to *Utah Code Ann.* §10-8-11, as amended, the City's inherent authority, Title 13, Chapter 10 of the Nibley City Code, and other statutory authority, regulates the use of City Right-of-Way for the benefit of its residents; and

WHEREAS, CITY, in exercise of its management of public rights-of-way, believes that it is in the best interest of the public for PROVIDER to have a nonexclusive franchise to operate a telecommunications network in CITY.

NOW, THEREFORE, in consideration of the mutual covenants and agreements of the parties contained herein, and for other good and valuable consideration, CITY and PROVIDER agree as follows:

ARTICLE 1. FRANCHISE AGREEMENT AND ORDINANCE

1.1 Agreement. Upon execution by the parties, this Agreement shall be deemed to constitute a contract by and between CITY and PROVIDER.

1.2 Ordinance. CITY has adopted the Telecommunications System Franchises Ordinance, Title 13, Chapter 10 of the Nibley City Code, incorporated herein by reference. PROVIDER acknowledges that it has had an opportunity to read and become familiar with the Telecommunication System Franchises Ordinance. The parties agree that the terms of this Agreement are intended to, and that each party hereby agrees to be contractually bound to, comply with the terms of the Telecommunication System Franchises Ordinance. The definitions in the Telecommunication System Franchises Ordinance shall apply herein unless a different meaning is specifically indicated herein. Nothing in this Section shall be deemed to require PROVIDER to comply with any provision of the Telecommunication System Franchises Ordinance which is determined to be unlawful or beyond CITY's authority.

1.3 Ordinance Amendments. CITY reserves the right to amend Telecommunication System Franchises Ordinance at any time. CITY shall give PROVIDER notice and an opportunity to be heard concerning any proposed amendments. If there is any inconsistency between PROVIDER's rights and obligations under the Telecommunication System Franchises Ordinance as amended and this Agreement, the provisions of this Agreement shall govern during its term. Otherwise, PROVIDER agrees to comply with any such amendments.

1.4 Franchise Description. The franchise provided hereby shall confer upon PROVIDER the nonexclusive right, privilege, and franchise to own, construct, maintain, lease, use, and operate a telecommunications network in, under, above, and across the present and future public rights-of-way in CITY. The franchise does not grant to PROVIDER the right, privilege or authority to engage in community antenna (or Cable) television business; although, nothing contained herein shall preclude PROVIDER from: (1) permitting those with a cable franchise who are lawfully engaged in such business to utilize PROVIDER's system within CITY for such purposes; or (2) from providing such service in the future if an appropriate franchise is obtained and all other legal requirements have been satisfied.

1.5 Licenses. PROVIDER acknowledges that it has obtained the necessary approvals, licenses, or permits required by federal and state law to fulfill its obligations consistent with the provisions of this Agreement and with the Telecommunication System Franchises Ordinance.

1.6 Relationship. Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third persons or the public in a manner that would indicate any such relationship with each other.

ARTICLE 2. FRANCHISE TAX

2.1 Municipal Telecommunications License Tax. For the Franchise granted herein, PROVIDER shall pay to CITY a municipal telecommunications license tax pursuant to the Municipal Telecommunications License Tax Act adopted by the State. UCA § 10-1-401 *et seq.* and CITY'S Municipal Telecommunications License Tax Ordinance, Nibley City Code 5.06.030. PROVIDER shall make payments to the Utah State Tax Commission and comply with all rules, requests, and auditing requirements imposed by the Utah State Tax Commission and governing law regarding this tax.

2.2 Equal Treatment. CITY agrees that if any service forming part of the base for calculating the franchise fee under this Agreement is, or becomes, subject to competition from a third party, CITY will either impose and collect from such third party a fee or tax on gross revenues from such competing service in the same percentage specified herein, plus the percentage specified as a utility revenue tax or license fee in the then current ordinances of CITY, or waive collection of the fees provided for herein that are subject to such competition.

ARTICLE 3. TERM AND RENEWAL

3.1 Term and Renewal. The franchise granted to PROVIDER shall be for a period of ten (10) years commencing on the first day of the month following this Agreement, unless this Franchise be sooner terminated as herein provided. At the end of the initial ten (10) year term of

this Agreement, the franchise granted herein may be renewed by PROVIDER upon the same terms and conditions as contained in this Agreement for an additional five (5) year term, by providing to CITY's representative designated herein written notice of PROVIDER's intent to renew not less than ninety (90) calendar days before the expiration of the initial franchise term.

3.2 Rights of PROVIDER upon Expiration or Revocation. Upon expiration of the franchise granted herein, whether by lapse of time, by agreement between PROVIDER and CITY, or by revocation or forfeiture, PROVIDER shall have the right to remove from CITY's rights-of-way any and all of its system, but in such event, it shall be the duty of PROVIDER, immediately upon such occurrence, to restore the rights-of-way from which such system is removed to as good a condition as the same was before the removal was effected.

ARTICLE 4. PUBLIC USE RIGHTS

4.1 CITY Uses of Poles and Overhead Structures. CITY shall have the right, without cost, to use all poles owned by PROVIDER within CITY for fire alarms, police signal systems, or any lawful public use; provided, however, any said uses by CITY shall be for activities owned, operated, or used by CITY for any public purposes and shall not include the provision of telecommunications service to third parties.

4.2 Limitations on Use Rights. Nothing in this Agreement shall be construed to require PROVIDER to alter the manner in which PROVIDER operates and maintains its equipment. Such CITY attachments, if any, shall be installed and maintained in accordance with the reasonable requirements of PROVIDER and the current National Electrical Safety Code. CITY attachments shall be attached or installed only after written approval by PROVIDER, which approval will be processed in a timely manner and will not be unreasonably withheld.

4.3 Maintenance of CITY Facilities. CITY's use rights shall also be subject to the parties reaching an agreement regarding CITY's maintenance of CITY attachments.

ARTICLE 5. POLICE POWERS

CITY expressly reserves, and PROVIDER expressly recognizes, CITY's right and duty to adopt, from time to time, in addition to provisions herein contained, such ordinances and rules and regulations as CITY may deem necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties.

ARTICLE 6. CHANGING CONDITIONS, SEVERABILITY, AND ASSIGNMENT

6.1 Meet to Confer. PROVIDER and CITY recognize that many aspects of PROVIDER's business are currently the subject of discussion, examination and inquiry by different segments of the industry and affected regulatory authorities and that these activities may ultimately result in fundamental changes in the way PROVIDER conducts its business and the way CITY regulates the business. In recognition of the present state of uncertainty respecting these matters, PROVIDER and CITY each agree, upon request of the other during the term of this Agreement, to meet with the other and discuss in good faith whether it would be appropriate, in view of developments of the kind referred to above during the term of this Agreement, to amend

this Agreement or enter into separate, mutually satisfactory arrangements to effect a proper accommodation of any such developments.

6.2 Severability. If any section, sentence, paragraph, term or provision of this Agreement or the Telecommunications System Franchise Ordinance is for any reason determined to be or rendered illegal, invalid or superseded by other lawful authority, including any state or federal, legislative, regulatory, or administrative authority having jurisdiction thereof, or is determined to be unconstitutional, illegal, or invalid by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such determination shall have no effect on the validity of any other section, sentence, paragraph, term, or provision, all of which shall remain in full force and effect for the term of this Agreement or any renewal or renewals thereof. Provided that if the invalidated portion is considered a material consideration for entering into this Agreement, the parties will negotiate, in good faith, an amendment to this Agreement. As used herein, "material consideration" for CITY is its ability to collect a municipal telecommunications license tax during the term of this Agreement and its ability to manage its affairs in a manner similar to that provided in this Agreement, the Telecommunications System Franchise Ordinance, and CITY'S Excavation Permit Ordinance. For PROVIDER, "material consideration" is its ability to use the City rights-of-way for telecommunication purposes in a manner similar to that provided in this Agreement, and CITY'S Ordinance regulating CITY's rights-of-way.

6.3 Assignment. If PROVIDER is the subject of a sale, merger, transfer or assignment, or is disposed of in whole or in part by ordinary sales, consolidation, or otherwise such that its successor entity is obligated to inform or seek the approval of the Public Service Commission of Utah, PROVIDER or its successor shall notify CITY of the nature of the transaction. The notification shall include the successor entity's certification that it unequivocally agrees to all of the terms of this Agreement. Upon receipt of a notification in accordance with this section CITY shall send notice affirming the transfer/assignment of the Agreement to the successor entity. If CITY has good cause to believe that the successor entity may not comply with this Agreement, it may require an application for the transfer/assignment.

ARTICLE 7. EARLY TERMINATION, REVOCATION OF FRANCHISE, AND OTHER REMEDIES

7.1 Grounds for Termination. CITY may terminate or revoke this Agreement and all rights and privileges herein provided for any of the following reasons:

7.1.1 PROVIDER fails to make timely payments of the franchise tax required under Article 2 of this Agreement and does not correct such failure within sixty (60) calendar days after written notice by CITY of such failure;

7.1.2 PROVIDER, by act or omission, materially violates a material duty herein set forth in any particular within PROVIDER's control, and with respect to which redress is not otherwise herein provided. In such event, CITY, acting by or through its city council, may determine, after hearing, that such failure is of a material nature, and thereupon, after written notice giving PROVIDER notice of such determination, PROVIDER, within sixty (60) calendar days of such notice, shall commence efforts to remedy the conditions

identified in the notice and shall have ninety (90) calendar days from the date it receives notice to remedy the conditions. After the expiration of such 90-day period and failure to correct such conditions, CITY may declare the franchise forfeited and this Agreement terminated, and thereupon, PROVIDER shall have no further rights or authority hereunder; provided, however, that any such declaration of forfeiture and termination shall be subject to judicial review as provided by law, and provided further, that in the event such failure is of such nature that it cannot be reasonably corrected within the 90-day period provided above, CITY shall provide additional time for the reasonable correction of such alleged failure if the reason for the noncompliance was not the intentional or negligent act or omission of PROVIDER; or

7.1.3 PROVIDER becomes insolvent, unable or unwilling to pay its debts; is adjudged bankrupt; or all or part of its facilities installed along the public rights-of-way within CITY should be sold under an instrument to secure a debt and is not redeemed by PROVIDER within sixty (60) days.

7.2 Reserved Rights. Nothing contained herein shall be deemed to preclude PROVIDER from pursuing any legal or equitable rights or remedies it may have to challenge the action of CITY.

7.3 Remedies at Law. In the event PROVIDER or CITY fails to fulfill any of its respective obligations under this Agreement, CITY or PROVIDER, whichever the case may be, shall have a breach of contract claim and remedy against the other, in addition to any other remedy provided herein or by law; provided, however, that no remedy that would have the effect of amending the specific provisions of this Agreement shall become effective without such action that would be necessary to formally amend the Agreement.

7.4 Third Party Beneficiaries. The benefits and protection provided by this Agreement shall inure solely to the benefit of CITY and PROVIDER. This Agreement shall not be deemed to create any right in any person who is not a party and shall not be construed in any respect to be a contract in whole or in part for the benefit of any third party (other than the permitted successors and assigns of a party hereto).

ARTICLE 8. PARTIES' DESIGNEES

8.1 CITY Designee and Address. City Manager or his or her designee(s) shall serve as CITY's representative regarding administration of this Agreement. Unless otherwise specified herein or elsewhere required by statute or ordinance, all notices from PROVIDER or CITY pursuant to or concerning this Agreement, shall be addressed and delivered to CITY's representative at Nibley City Manager, 455 West 3200 South, Nibley City, Utah 84321, or such other officer and address as CITY may designate by written notice to PROVIDER.

8.2 PROVIDER Designee and Address. PROVIDER's designee(s) shall serve as PROVIDER's representative regarding administration of this Agreement. Unless otherwise specified herein or subsequently changed by written notice to CITY, all notices from CITY to PROVIDER, pursuant to or concerning this Agreement, shall be delivered to Brandon Balmforth,

90 South, 400 West, Suite M100 Salt Lake City, Utah 84101, or such other officer and address as PROVIDER may designate by written notice to CITY.

8.3 Failure of Designee. The failure or omission of CITY's or PROVIDER's representative to act shall not constitute any waiver or estoppels by CITY or PROVIDER.

ARTICLE 9. INSURANCE AND INDEMNIFICATION

9.1 Insurance. Prior to commencing operations in CITY pursuant to this Agreement, PROVIDER shall obtain and furnish to CITY evidence that it has adequate general liability and property damage insurance, in such form, amount and scope of coverage acceptable to the CITY. PROVIDER agrees to provide evidence of insurance upon reasonable request by CITY during the term of this Agreement.

9.2 Indemnification. PROVIDER agrees to indemnify, defend and hold CITY harmless from and against any and all claims, demands, liens, and all liability or damage of whatsoever kind on account of or arising from PROVIDER's acts or omissions pursuant to or related to this Agreement, and to pay any and all costs, including reasonable attorneys' fees, incurred by CITY in defense of such claims. CITY shall promptly give written notice to PROVIDER of any claim, demand, lien, liability, or damage, with respect to which CITY seeks indemnification and, unless in CITY's judgment a conflict of interest may exist between the parties with respect to the claim, demand, lien, liability, or damage, CITY shall permit PROVIDER to assume the defense of such with counsel of PROVIDER's choosing, unless CITY reasonably objects to such counsel. Notwithstanding any provision of this Section to the contrary, PROVIDER shall not be obligated to indemnify, defend or hold CITY harmless to the extent any claim, demand, lien, damage, or liability arises out of or in connection with negligent acts or omissions of CITY.

ARTICLE 10. INSTALLATION AND MAINTENANCE

10.1 Permits and General Obligations. PROVIDER shall be responsible for obtaining, at its own cost and expense, all generally applicable permits, licenses, or other forms of approval or authorization necessary to construct, operate, maintain or repair its telecommunication facilities and services, or any part thereof, prior to the commencement of any such activity. Construction, installation, and maintenance of the telecommunication facilities by PROVIDER shall be performed in a safe, thorough and reliable manner using materials of good and durable quality in accordance with federal, state, and CITY regulations. All transmission and distribution structures, poles, other lines, and equipment installed by PROVIDER shall be located so as to minimize the interference with the proper use of the CITY Rights-of-Ways and the rights and reasonable convenience of property owners who own property that adjoins any such Right-of-Way.

10.2 Coordinated Installation. In order to prevent and/or minimize the number of cuts to and excavations within CITY's rights-of-way, PROVIDER shall coordinate with CITY and other providers or users of CITY's rights-of-way, when such cuts and excavations will be made. When possible, installation, repairs or maintenance of lines and facilities within CITY's rights-of-way shall be made in the same trench and at the time other installations, repairs, or maintenance of facilities are conducted within CITY's rights-of-way. CITY will give PROVIDER a schedule

of street repairs in advance of CITY work which schedule may be subject to change based upon funding. In addition, CITY will hold regular meetings with PROVIDER to provide updates to road projects and opportunities to share costs on burying lines.

10.3 Underground Installation. Unless otherwise provided, all of PROVIDER's facilities within CITY shall be constructed underground. PROVIDER may be permitted to install facilities overhead if: (1) it is infeasible to go underground at the time; (2) lines can be placed on already existing poles; and (3) PROVIDER agrees to move its facilities underground at PROVIDER's own expense when CITY directs and so long as CITY, at the same time, directs other franchisees with overhead facilities in the same location to move their facilities underground.

10.4 Restoration of Rights-of-Way. If in connection with the construction, operation, maintenance, or repair of PROVIDER's telecommunication facilities, PROVIDER disturbs, alters, or damages any CITY Right-of-Way, PROVIDER agrees that it shall at its own cost and expense replace and restore any such Right-of-Way to a condition reasonably comparable to the condition of the Right-of-Way existing immediately prior to the disturbance.

10.5 Relocation of Facilities. PROVIDER agrees to relocate its facilities or lines as follows:

10.5.1 CITY Requests. If the grades or lines of any CITY Right-of-Way are lawfully changed at any time during the term of this Agreement, PROVIDER is given not less than sixty (60) calendar days advance written notice to arrange for such temporary relocation and no less than one hundred twenty (120) business days for a permanent relocation. PROVIDER shall at its own cost and expense, protect or promptly alter or relocate its telecommunication network, facilities, lines, and any part thereof, so as to conform with the changed CITY Right-of-Way or such alternate CITY Right-of-Way that is reasonably acceptable to CITY and PROVIDER. In the event that CITY requests relocation efforts from PROVIDER solely for aesthetic reasons, then CITY agrees to pay all costs associated with relocation.

10.5.2 Other Requests. Upon reasonable prior written request of any other person holding a permit issued by the CITY, PROVIDER shall move any line or facility provided (i) PROVIDER may impose a reasonable charge on the person for the movement of any such line or facility and may require such charge to be paid in advance of the movement of the line or facility; and (ii) PROVIDER is given not less than sixty (60) calendar business days advance written notice to arrange for such temporary relocation and no less than one hundred twenty (120) business days for a permanent relocation.

ARTICLE 11. MISCELLANEOUS PROVISIONS

11.1 Binding Agreement. The parties represent that: (a) when executed by their respective parties, this Agreement shall constitute legal and binding obligations of the parties; and

(b) each party has complied with all relevant statutes, ordinances, resolutions, by-laws and other legal requirements applicable to their operation in entering into this Agreement.

11.2 Utah Law. This Agreement shall be interpreted pursuant to Utah law.

11.3 Time of Essence. Time shall be of the essence of this Agreement.

11.4 Interpretation of Agreement. The invalidity of any portion of this Agreement shall not prevent the remainder from being carried into effect. Whenever the context of any provision shall require it, the singular number shall be held to include the plural number, and vice versa, and the use of any gender shall include any other and all genders. The paragraphs and section headings in this Agreement are for convenience only and do not constitute a part of the provisions hereof.

11.5 No Presumption. All parties have participated in preparing this Agreement. Therefore, the parties stipulate that any court interpreting or construing the Agreement shall not apply the rule of construction that the Agreement should be more strictly construed against the drafting party.

11.6 Amendments. This Agreement may be modified or amended by written agreement only. No oral modifications or amendments shall be effective.

11.7 Binding Agreement. This Agreement shall be binding upon the heirs, successors, administrators and assigns of each of the parties.

[SIGNATURE PAGE FOLLOWS]

SIGNED AND ENTERED INTO THIS 25 day of February, 2021.

"CITY"

Nibley City, a Utah Municipal Corporation

By: _____

Mayor

ATTEST: _____

City Recorder

Approved as to Form:

Attorney for City



State of Utah)

ss:

County of Salt Lake)

The foregoing instrument was acknowledged before me this 25 day of February, 2021, by Shaun Dustin, the Mayor of the City of Nibley City, a Utah municipal corporation, on behalf of said municipal corporation by authority of its City Council.



Cheryl Bodily

Notary Public

My commission expires:

Residing at:

"PROVIDER"

FirstDigital Telecom, LLC A Utah Limited Liability Company

By: _____

(Print name and title above)

State of _____)

ss:

County of _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2021, by _____, the _____ of FirstDigital Telecom, a Utah Limited Liability Company, on behalf of the company.

Notary Public

Notary registration number:

My commission expires: