

TELECOMMUNICATIONS FRANCHISE AGREEMENT

THIS TELECOMMUNICATIONS FRANCHISE AGREEMENT (hereinafter "Agreement") is entered into by and between Orem City (hereinafter "City" or "Party"), a municipal corporation of the State of Utah, with principal offices at 56 North State Street, Orem, Utah 84057, and Central Telcom Services, LLC, DBA CentraCom Interactive, a Utah limited liability company with principal offices at 35 South State, Fairview, UT 84629, (hereinafter "Provider," "Party," or together with City, "Parties").

WITNESSETH:

WHEREAS, the Provider owns or intends to install telecommunications infrastructure within the City; and

WHEREAS, the Provider may provide telecommunications services within or through the City and in connection therewith use present and future rights-of-way of the City; and

WHEREAS, the City has enacted Article 18-4 of the Orem City Code (hereinafter the "Telecommunications Tax Ordinance") which levies a municipal telecommunications license tax on the gross receipts from telecommunications service attributed to the City; and

WHEREAS, the City, in exercise of its management of public Rights-of-Way, believes that it is in the best interest of the public to provide the Provider a nonexclusive franchise to provide telecommunications services in the City.

NOW, THEREFORE, in consideration of the mutual covenants and agreements of the Parties contained herein, and for other good and valuable consideration the receipt and sufficiency of which City and Provider acknowledge, the City and the Provider agree as follows:

ARTICLE 1. FRANCHISE AGREEMENT, ORDINANCE, AND POLICY.

1.1 Agreement. Upon approval by the Parties, this Agreement shall be deemed to constitute a contract by and between City and Provider.

1.2 Ordinance and Procedure. The City has adopted the Telecommunications Tax Ordinance and the Telecommunications Rights-of-Way Ordinance, which are hereby incorporated by reference into this Agreement and attached hereto as "Exhibit A." Provider acknowledges that it has had an opportunity to read and become familiar with these ordinances. The Parties agree that the provisions and requirements of these ordinances are material terms of this Agreement, and that each Party hereby agrees to be contractually bound to comply with their terms. The definitions in the ordinances shall apply herein unless a different meaning is indicated. The City also has excavation procedures for use of City's Rights-of-Way and Provider agrees to be bound by and follow said excavation procedures ("Excavation Procedures").

1.3 **Ordinance and Procedure Amendments.** The City reserves the right to amend the Telecommunications Tax Ordinance, the Telecommunications Rights-of-Way Ordinance or the Excavation Procedure at any time, but shall provide notice of such amendments to Provider.

1.4 **Franchise Description.** The Telecommunications Franchise provided hereby shall confer upon the Provider the nonexclusive right and franchise to maintain and expand a telecommunications system in, under, above and across the present and future public Rights-of-Way in the City ("Provider's System"). Nothing contained herein shall preclude the Provider, in its sole discretion, from permitting another provider of telecommunications services with a telecommunications franchise who is lawfully engaged in such business to utilize the Provider's System within the City for such purposes. The franchise does not grant to the Provider the right, privilege or authority to engage in cable television or other video system service business; although, nothing contained herein shall preclude the Provider, in its sole discretion, from (1) permitting those with a cable franchise who are lawfully engaged in such business to utilize the Provider's System within the 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.** The Provider acknowledges that it has obtained the necessary approvals, licenses or permits required by federal and state law to provide telecommunications services consistent with the provisions of this Agreement.

1.6 **Underground Facilities/Blue Stakes.** As owner of Provider's System, the Provider is an operator, and when repairing or expanding Provider's System, the Provider is an excavator under Utah Code Ann. § 54-8a-2 *et seq.* and is liable for its acts or omissions under said statute.

1.7 **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. TELECOMMUNICATIONS TAX; ADMINISTRATIVE FEES

2.1 **Telecommunications Tax Ordinance.** Pursuant to the Utah Municipal Telecommunications License Tax Act, Utah Code §§ 10-1-401 to 410, as amended, the City has levied a municipal telecommunications license tax on the gross receipts from telecommunications service attributed to the City codified in the Telecommunications Tax Ordinance. In accordance with state law, the municipal telecommunications tax is levied by the City in lieu of franchise fees (except for administrative fees discussed at Section 2.3 herein) and imposed upon telecommunications providers of telecommunications services as those terms are defined in the Telecommunications Tax Ordinance. Provider shall give notice to the City when it provides telecommunications services that are taxable under the Telecommunications Tax Ordinance.

2.2 **Non-Telecommunications Services.** The municipal telecommunications license tax described by Section 2.1 does not apply to non-telecommunications services offered by Provider unless the Provider fails to separately charge its customers for the non-telecommunications services or the charge for non-telecommunications services cannot be reasonably identified in the books and records Provider keeps in the normal course of business. All other provisions of this Agreement apply whether Provider's services are telecommunications or non-telecommunications services.

2.3 **Administrative Fees.** The Provider shall pay to the City any and all applicable administrative fees required by ordinance.

ARTICLE 3. TERM AND RENEWAL.

3.1 **Term.** The franchise granted to the Provider shall be for a period of fifteen (15) years commencing on the first day of the month following execution of this Agreement, unless this Franchise be sooner terminated as herein provided.

3.2 **Rights of Provider upon Expiration or Revocation.** Upon expiration of the franchise granted herein, whether by lapse of time, by agreement between the Provider and the City, or by revocation or forfeiture, the Provider shall have the right to remove from the Rights-of-Way any and all of Provider's System, subject to the limitations and conditions of the Excavation Procedure. In such event, it shall be the duty of the Provider, immediately upon such removal, to restore the Rights-of-Way from which Provider's 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 Use of Poles, Underground Trenches or Infrastructure, and Overhead Structures.** Subject to the restrictions in Section 4.2 below, when Provider has space available, the City shall have the right, without cost, to use all poles, underground trenches or conduit, owned or leased by the Provider within the City for fire alarms, police signal systems, or any lawful public use; provided, however, any of said uses by the City shall be only for activities owned, operated or used by the City for public purposes, and shall not, in any way, be commercially competitive with the Provider .

4.2 **Limitations on Use Rights.** Nothing in this Agreement shall be construed to require the Provider to increase pole or underground capacity, alter the manner in which the Provider attaches equipment to the poles, or alter the manner in which the Provider operates and maintains its equipment. Such City attachments and other lawful public uses of Provider's underground trenches, infrastructure and overhead structures shall not interfere with Provider's equipment or ability to provide telecommunications services and shall be installed and maintained in accordance with the reasonable requirements of the Provider and the current National Electrical Safety Code. City attachments and other lawful public uses permitted by this Agreement shall be attached or installed only after written notice to the Provider.

ARTICLE 5. POLICE POWERS

The City expressly reserves, and the Provider expressly recognizes, the City's right and duty to adopt, in addition to provisions herein contained, such ordinances and rules and regulations as the 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 AND SEVERABILITY

6.1 **Changing Conditions.** The Provider and the City recognize that conditions in the telecommunications industry may change in ways that affect the way the Provider offers telecommunications services and the way the City regulates the telecommunications industry. In recognition of that possibility, the Provider and the City each agree, upon request of the other during the term of this Agreement, to meet with the other to discuss in good faith whether it would be appropriate, in view of new developments in the industry during the term of this Agreement, to amend this Agreement or to 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, the Telecommunications Tax Ordinance, Telecommunications Rights-of-Way Ordinance, or the Excavation Procedure 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 the City is its ability to collect the municipal telecommunications license tax during the term of this Agreement and its ability to manage the Rights-of-Way in a manner similar to that provided in this Agreement, and the Excavation Procedure. For the Provider, "material consideration" is its ability to use the Rights-of-Way for telecommunications purposes in a manner similar to that provided in this Agreement and the Rights-of-Way Excavation Procedure.

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

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

- (a) The Provider fails to make timely payments of taxes or fees as required under Article 2 of this Agreement and does not correct such failure within sixty (60) calendar days after written notice from the City of such failure;

(b) The Provider, by act or omission, materially violates a material duty herein set forth in any particular within the Provider's control, and with respect to which redress is not otherwise herein provided. In such event, the 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 the Provider notice of such determination, the 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, the City may declare the franchise forfeited and this Agreement terminated, and thereupon, the 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 time period provided above, the 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 the Provider;

(c) The Provider becomes insolvent, unable or unwilling to pay its debts; is adjudged bankrupt; or all or part of its facilities are to be sold under an instrument to secure a debt and are not redeemed by the Provider within sixty (60) days.

7.2 Remedies at Law. In the event the Provider or the City fails to fulfill any of its respective obligations under this Agreement, the City or the 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.

7.3 Third Party Beneficiaries. The benefits and protection provided by this Agreement shall inure solely to the benefit of the City and the 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. NOTICES

8.1 Notices. All notices or other communications required or permitted hereunder shall be in writing and may be given by depositing the same in United States mail, addressed to the Party to be notified, postage prepaid and registered or certified with return receipt requested, by overnight courier or by delivering the same in person to such Party:

If to City:
City of Orem

If to Provider:
Central Telcom Services, LLC

Attn: City Manager
56 N. State Street
Orem, Utah 84057

Attn: General Manager
35 S. State Street
Fairview, Utah 84629

8.2 Notice shall be deemed given and effective when actually received. Either Party may change the address for notice by notifying the other Party of such change in accordance with this paragraph.

ARTICLE 9. INSURANCE AND INDEMNIFICATION

9.1 **Insurance.** Prior to commencing operations in the City pursuant to this Agreement, the Provider shall furnish to the City evidence that it has adequate general liability and property damage insurance. The evidence may consist of a statement that the Provider is effectively self-insured if the Provider has substantial financial resources, as evidenced by its current certified financial statements and established credit rating, or substantial assets located in the state of Utah. Any and all insurance, whether purchased by the Provider from a commercial carrier, whether provided through a self-insured program, or whether provided in some other form or other program, shall be in a form, in an amount and of a scope of coverage acceptable to the City.

9.2 **Indemnification.** The Provider agrees to indemnify, defend and hold the 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 the 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 the City in defense of such claims. The City shall promptly give written notice to the Provider of any claim, demand, lien, liability, or damage with respect to which the City seeks indemnification and, unless in the City's reasonable judgment a conflict of interest may exist between the parties with respect to the claim, demand, lien, liability, or damage, the City shall permit the Provider to assume the defense of such with counsel of the Provider's choosing, unless the City reasonably objects to such counsel. Notwithstanding any provision of this section to the contrary, the Provider shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand, lien, damage, or liability arises out of or in connection with gross negligent acts or omissions of the City.

ARTICLE 10. GENERAL PROVISIONS

10.1 **Binding Agreement.** The Parties represent that (a) when executed by their respective representatives, this Agreement shall constitute legal and binding obligations of the Parties; and (b) that each Party has complied with all relevant statutes, ordinances, resolutions, bylaws and other legal requirements applicable to their operation in entering into this Agreement.

10.2 **Utah Law/Venue.** This Agreement shall be governed by and interpreted pursuant to Utah law. Any action to enforce this Agreement shall be filed in the Fourth Judicial District for the State of Utah, Utah County, or in the Federal District Court for the District of Utah.

10.3 **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.

10.4 **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.

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

10.6 **Assignment.** The Provider may not assign this Agreement to a successor or assign without the written consent of the City which shall not be unreasonably withheld, conditioned, or delayed.

[The remainder of this page is intentionally left blank. Signature page to follow.]SIGNED AND ENTERED INTO this 12th day of Feb, 2014.

The City of Orem

By:


Richard F. Brunst, Mayor


Attest:


Donna Weaver, City Recorder



Provider

CENTRAL TELCOM SERVICES, LLC, DBA
CENTRACOM INTERACTIVE

By: 
Its: MANAGING MEMBER

