



Town Council Agenda Report

SUBJECT: Resolution

TITLE OF AGENDA ITEM:

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, AUTHORIZING THE MAYOR TO EXECUTE AN INTERIM RIGHT-OF-WAY USE AGREEMENT BETWEEN THE TOWN OF DAVIE AND MEDIAONE OF GREATER FLORIDA, INC.; AND PROVIDING FOR AN EFFECTIVE DATE.

REPORT IN BRIEF:

This agreement grants permission for MediaOne of Greater Florida, Inc. to utilize a portion of the Town's public rights of way. MediaOne is providing an alternative local exchange telecommunications service, a local phone service, to the City of Weston. MediaOne needs to provide cable within the Town of Davie along SW 148th Avenue for a distance of approximately 200 feet. This agreement allows MediaOne to install this cable within this Town right-of-way. The agreement for use of the right-of-way has been drafted with the assistance of Interim Town Attorney, Monroe Kiar. The terms of the agreement include an application and permit fee in the amount of \$2500.00 as well as requiring a construction bond and provision of insurance including naming the Town of Davie as an additional insured.

DISCUSSION:

The agreement allows MediaOne to connect their system through a small area of the Town of Davie along SW 148th Avenue. The telephone service does not serve the Town of Davie so a franchise agreement is not required. The Communication Services Tax Simplification Law adopted by the Florida Legislature in the 2000 Regular Session contains provisions for requiring right-of-way regulations for telecommunications by January 1, 2001. These new regulations are going to be very restrictive in terms of a maximum permit fee of \$100.00 or most likely no fee for permits to use the right-of-way (If a fee is charged then the taxes received by a municipality will be significantly reduced). The agreement enables MediaOne to connect their system prior to new right-of-way regulations being reviewed and enacted by the Town.

CONCURRENCES: Not Applicable

FISCAL IMPACT: The Town will receive an application fee of \$2500.00.

RECOMMENDATION(S): Motion to approve the resolution.

Attachment(s): Resolution, the agreement, and Memorandum from Monroe Kiar dated July 18, 2000.

RESOLUTION _____

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, AUTHORIZING THE MAYOR TO EXECUTE AN INTERIM RIGHT-OF-WAY AGREEMENT BETWEEN THE TOWN OF DAVIE AND MEDIAONE OF GREATER FLORIDA, INC.; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Chapter 95-403, Florida Laws, authorizes competition in the local exchange telecommunications business, effective January 1, 1996, and provides for alternative local exchange telecommunications companies to be certified by the Florida Public Service Commission; and

WHEREAS, MediaOne of Greater Florida, Inc. has been certified by the Florida Public Service Commission as an alternative local exchange telecommunications company and desires to utilize a portion of the Town's public rights-of-way; and

WHEREAS, the Town has the right and authority to manage the public rights-of-way of the Town, and to establish reasonable requirements for the use of the public rights-of-way of the Town; and

WHEREAS, MediaOne has requested approval for the use of right-of-way from the Town; and

WHEREAS, the Town and MediaOne have negotiated this Agreement which is mutually agreeable to both parties.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF DAVIE, FLORIDA.

SECTION 1. That the recitals set forth above are true and correct and are made a part of this resolution.

SECTION 2. The Town Council of the Town of Davie hereby approves the aforementioned agreement and authorizes the Mayor to execute the Interim Right-Of-Way Use Agreement , a copy of which is attached as Exhibit "A".

SECTION 3. This resolution shall take effect immediately upon its passage and adoption.

PASSED AND ADOPTED THIS _____ DAY OF _____, 2000.

MAYOR/COUNCILMEMBER

ATTEST:

TOWN CLERK

APPROVED THIS _____ DAY OF _____, 2000.

INTERIM RIGHT-OF-WAY USE AGREEMENT

THIS AGREEMENT is by and between the **Town of Davie**, a municipal corporation, whose address is 6591 Orange Drive, Davie, Florida 33313 (hereinafter referred to as the "Town") and **Media One of Greater Florida, Inc.**, a Florida corporation (hereinafter referred to as the "MediaOne").

WHEREAS Chapter 95-403, Florida Laws, authorizes competition in the local exchange telecommunications business, effective January 1, 1996, and provides for alternative local exchange telecommunications companies to be certified by the Florida Public Service Commission;

WHEREAS MediaOne has been certified by the Florida Public Service Commission as an alternative local exchange telecommunications company and desires to utilize a portion of the Town's Public Rights-of-Way as shown on Exhibit A ("Right-of-Way Section");

WHEREAS Town has the right and authority to manage the Public Rights-of-Way of the Town, and to establish reasonable requirements for use of the Public Rights-of-Way of the Town;

WHEREAS MediaOne has requested from the Town approval for the use the Right-of-Way Section; and

WHEREAS the Town and MediaOne have negotiated this Agreement which is mutually agreeable to both parties.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and intending to be legally bound thereby, the Town and MediaOne enter into this Right-of-Way Use Agreement and agree as follows:

SECTION 1. DEFINITIONS.

1.1 "Agreement" or "Right-of-Way Use Agreement" shall mean this Agreement.

1.2 "Effective Date" shall mean the date on which this Agreement is executed by the last of the two parties to execute this Agreement.

1.3 "FCC" shall mean the Federal Communications Commission.

1.4 "Recurring Local Service Revenues" means revenues from the monthly recurring charges for local service, including but not limited to (1) recurring basic area revenues derived from the provision of flat-rated basic area services, (2) recurring optional extended area revenues derived from the provision of optional extended area services, (3) local private line revenues derived from local services which provide communication between specific locations, either through dedicated circuits, private switching arrangements, predefined transmission paths, whether virtual or physical, or any other method of providing such services; and (4) revenues derived from the sale of local services for resale; and (5) other local service revenues from the

provision of secondary features that are integrated with the telecommunications network, including, without limitation, services such as call forwarding, call waiting, and touchtone line service. Recurring local service revenues do not include revenues from (1) toll charges for the transmission of voice, data, video, or other information; (2) access charges paid to MediaOne by carriers for origination and/or termination of toll telephone service as defined in Section 203.012(7), Florida Statutes, or other charges required by the Federal Communications Commission which are directly passed through to end users; (3) interstate service; (4) ancillary services such as directory advertising, directory assistance, detailed billing services, inside wire maintenance plans, bad check charges, and non-recurring charges for installation, move, changes or termination services; (5) cellular mobile telephone or telecommunications services; or specialized mobile telephone or telecommunications service; or specialized mobile telephone or telecommunications services; or specialized mobile radio, or pagers or paging service, or related ancillary services; (6) public telephone charges collected on site; (7) teletypewriter or computer exchange services as defined in Section 203.012(6), Florida Statutes; or (8) local message rated (message, unit or time basis) and minutes of use charges in excess of the minimum flat-rated charges for similar services.

1.5 "PSC" shall mean the Florida Public Service Commission.

1.6 "Telecommunications Services" shall mean any services that MediaOne is authorized to provide by the FCC or the PSC. This term shall not be interpreted to include the provision of cable television services within the Town of Davie.

1.7 "Telecommunications System," "System" or "Facilities" shall refer to the system or facilities of the MediaOne in the Public Rights-of-Way, as authorized by this Agreement.

SECTION 2. Right of Way Use Approval

2.1 **Right-of-Way Use Approval.** Subject to all the terms and conditions contained herein, and to all State and local laws, the Town hereby grants MediaOne permission to use the Right-of-Way Section to construct, install, operate, repair, maintain its Telecommunications Facilities in accordance with plans approved by the Town Engineer. In the event that MediaOne, in the future, should seek to expand its facilities to use additional Rights-of-Way that MediaOne shall be required to seek an amendment to this Agreement.

2.2 **Nonexclusive/Priority.** The permission hereby granted shall be nonexclusive. This approval does not establish any priority for the use of the public rights-of-way of the Town by MediaOne .

2.3 **Term of Use Approval.** The term of this Agreement shall be five (5) years from the Effective Date unless earlier terminated or partially terminated as provided below. MediaOne shall, upon request, be entitled to a 5-year renewal of this agreement, subject to the fees applicable to the use of the Town's right-of-way for such facilities, in effect at the time of the renewal.

2.4. **Termination** This Agreement shall terminate prior to the above described term upon the occurrence of any of the following:

a. Upon the Town's enactment of an ordinance consistent with Section 337.401, Florida Statutes, as amended by Section 50 of SB 1338 in the 2000 Legislative Session ("Section 50"), in which event MediaOne shall have one hundred twenty (120) days to register in accordance with the lawful registration provisions of the Town's ordinance, as required at the time of the termination; and MediaOne shall be subject to the lawful provisions of such an ordinance. Following such termination of this Agreement, MediaOne shall be entitled to continue to use the rights-of-way, without interruption, subject to compliance with the one hundred twenty (120) day registration requirement; or

b. On September 30, 2001, if the provisions of Section 337.401, Florida Statutes, in effect on that date continue to limit local governments to a registration procedure as opposed to an agreement or franchise for access to their rights-of-way. MediaOne shall have one hundred and twenty (120) days to register in accordance with said section and the provisions of this Agreement shall terminate, except as set forth in paragraph 7.7 of this Agreement. MediaOne shall be entitled to occupy the Right-of-Way Section subject to compliance with the one hundred twenty (120) day registration requirement; or

c. If this Agreement is not terminated pursuant to (a) or (b) above, or otherwise, then at such time as Section 202-24(2)(a), Florida Statutes, as enacted by SB 1338 in the 2000 Legislative Session or Section 337.401, Florida Statutes, as amended by Section 51 of SB 1338 in the 2000 Legislative Session, or other similar statutory provisions become effective prohibiting a local government from requiring the payment of fees now required under Section 3.1 of this Agreement, then Section 3.1 shall no longer be effective.

2.5 Governing Requirement. MediaOne shall, at all times during the life of this Agreement, be subject to all lawful exercise of the police power by the Town, provided that such police power shall not alter the Grantee's rights or obligations under this Agreement.

SECTION 3. FEE.

3.1 Payment of Fee. MediaOne shall pay to the Town a fee equal to one percent (1%) of its Gross Receipts on recurring local services revenues from Telecommunications Services provided within the municipal limits of the Town. Included within such one percent (1%) maximum fee or consideration are all taxes, licenses, fees, in-kind contributions accepted pursuant to Florida Statute 337.401(5), and other impositions except *ad valorem* taxes and amounts for assessments for special benefits, such as sidewalks, street pavings, and similar improvements, and occupational license taxes levied or imposed by the Town upon a Telecommunications Company.

3.2 Method of Payment. All payments of the fees identified in Section 3.1 above shall be made within thirty (30) business days after the close of each fiscal quarter, and MediaOne shall file, with the Town, a statement, signed by an authorized accounting or financial representative of MediaOne, of the gross receipts on recurring local service revenues derived in the preceding quarter. Any payments due not made within the time set forth herein shall accrue interest at the rate of twelve percent (12%) per annum. Acceptance of any fee payment shall not be deemed a waiver or release of any claims the Town may have for additional sums, nor be construed as an accord that the amount paid is correct.

3.3 Application and Permit Fee MediaOne shall pay to the Town of Davie prior to the execution of this Agreement by the Town, a non-refundable fee of \$2,500.00 which shall defray the Town's costs related to the application by MediaOne for this approval and the permit fees associated with the Town's review and approval of the right of way installation. In accordance with Section 337.401, Florida Statutes, this fees shall be a credit against any payments that become due to the Town pursuant to Section 3.1 of this Agreement.

SECTION 4. CONSTRUCTION REQUIREMENTS.

4.1 Compliance With Laws. MediaOne shall construct, install, operate and maintain the Telecommunications System in a manner consistent with all Federal, State and local laws, ordinances, construction standards, FCC technical standards and rules and regulations, and all other applicable governmental requirements, including, but not limited to the standards of the Occupational Safety and Health Administration and the National Electrical Safety Code.

4.2 Construction Bond Required. Prior to performing any work in the Public Rights-of-Way, the MediaOne shall establish in the Town's favor a construction bond in an amount adequate to ensure the MediaOne's faithful performance of the construction, upgrade, rebuild or other work. The construction bond shall be in an amount equal to the contractor's certified estimate for the construction, or such other estimate of cost as is reasonably acceptable to the Town Engineer and shall be in form which is substantially similar to the public construction bond as set forth in Section 255.05, Florida Statutes. In the event a MediaOne fails to complete the work in a safe, timely and competent manner in accordance with the provisions of the permit, within seven (7) days of Town's notice to MediaOne of such failure or as required by applicable law, there shall be recoverable, jointly and severally from the principal and surety of the bond, any damages or loss suffered by the Town as a result, including the full amount of any compensation, indemnification or cost of removal or abandonment of any property of the MediaOne, or the cost of completing the work, plus a reasonable allowance for attorneys' fees, up to the full amount of the bond.

SECTION 5. INSURANCE AND INDEMNIFICATION.

5.1 Indemnification.

a. MediaOne shall and does hereby agree to, save, indemnify and hold the Town, elected and appointed offices, officers, boards, commissions, legal counsel, employees and agents harmless from any injury, claim, demand, suit, judgment, execution, liability, debt, damages or penalty arising out of, resulting from, or alleged to rise out of or result from any act or omission by MediaOne relating to its performance under this Agreement, including MediaOne's negligent acts or omissions in the operation of the Facilities together with all costs, expenses, and liabilities incurred by the Town in connection with each such claim, demand, action or proceeding. The MediaOne's obligation to indemnify the Town shall not include indemnification for acts or omissions of the Town, or its officers, boards, commissions, legal counsel, employees and agents, which acts are negligent, wrongful, or in bad faith.

b. In all instances in which MediaOne is obligated to indemnify and hold harmless the Town as provided for in this Agreement, MediaOne's obligation shall be

conditioned upon (i) the Town giving MediaOne written notice of all claims, damages, losses, suits and any other events which are in any way related to or asserted by the Town as a basis for such obligation, which notice shall be given within a reasonable time after the Town becomes aware thereof, and (ii) MediaOne shall be afforded the sole right to the defense of such matter and the sole right to determine the disposition of such matter, unless such defense assumption and control over the disposition of the case would not be permitted by the Town's insurance carrier or excess insurance carrier without jeopardizing the Town's available coverage.

5.2 Insurance. During the term of this Agreement, MediaOne shall maintain, or cause to be maintained, in full force and effect and at its sole cost and expense, the following types and limits of insurance:

a. Workers' compensation insurance within Florida statutory limits and employers' liability insurance with minimum limits of One Hundred Thousand Dollars (\$100,000) each accident, or such greater minimum amount as is required by law;

b. Comprehensive general liability insurance with minimum limits of Two Million Dollars (\$2,000,000) as the combined single limit for each occurrence of bodily injury, personal injury and property damage. The policy shall provide blanket contractual liability insurance for all written contracts, and shall include coverage for products and completed operations liability, independent contractor's liability; coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage; and coverage for loss or damage arising out of publications or utterances in the course of or related to advertising, broadcasting, telecasting or other communication activities conducted by or on behalf of MediaOne;

c. Automobile liability insurance covering all owned, hired, and non-owned vehicles in use by MediaOne, its employees and agents, with personal protection insurance and property protection insurance to comply with the provisions of the applicable State law, including residual liability insurance with minimum limits of Two Million Dollars (\$2,000,000) as the combined single limit for each occurrence for bodily injury and property damage; and

5.3 MediaOne may self-insure all or a portion of the insurance coverage and limit requirements required by this Section. In the event MediaOne does self-insure, MediaOne shall not be required to comply with the requirement for the naming of additional insureds under Section 6.3 below. If MediaOne elects to self-insure, MediaOne shall provide to the reasonable satisfaction of the Town administration, evidence demonstrating its financial ability to self-insure the insurance coverage and limit requirements required under this Section.

5.4 Named Insureds. All certificates of insurance shall name the Town of Davie as an additional insured.

5.5 Cancellation of Policies of Insurance. At least thirty (30) days prior written notice shall be given to the Town by the insurer of any intention not to renew such policy or to cancel, replace or materially alter same, such notice to be given by registered mail to the

Town. In the event the required insurance is canceled, or for any reason terminated and is not replaced with a new or renewed insurance policy which covers the contractual period, Town shall suspend this agreement until such time as a new or renewed certificate is received by the Town.

SECTION 6. DEFAULT.

6.1 Events of Default. MediaOne shall be in default if, during the term of this Agreement, MediaOne fails to perform or observe any term, covenant, agreement or condition of this Agreement, on the part of MediaOne, to be performed within thirty (30) days after prompt written notice thereof from the Town, unless such performance shall reasonably require a longer period, in which case MediaOne shall not be deemed in default if MediaOne commences the required performance promptly and thereafter pursues and diligently completes such action.

6.2 Notice and Cure. Neither party shall be in default under this Agreement or in breach of any provision hereof unless and until the other party shall have given such party written notice of such default and the defaulting party shall have failed to cure the default within thirty (30) days after receipt of such notice; provided, however, that where such default cannot reasonably be cured within such thirty (30) day period, if the defaulting party shall proceed promptly to cure the same and prosecute such cure with due diligence, the time for curing such default shall be extended for such period of time as may be reasonably necessary under the circumstances to complete such cure.

SECTION 7. MISCELLANEOUS.

7.1 Notices. Except as otherwise specified herein, all notices, consents, approvals, requests and other communications (herein collectively referred to as Notices") required or permitted under this Agreement shall be effective only when given in writing and mailed by registered or certified first-class mail, return receipt requested, addressed as follows:

If to the Town: Town Administrator
 Town of Davie
 6591 Orange Drive
 Davie, Florida 33314

If to MediaOne: _____

All Notices shall be deemed given on the day of mailing. Either party may change its address for the receipt of Notices at any time by giving notice thereof to the other as provided in this Section. Any Notice given by a party hereunder must be signed by an authorized representative of such party.

7.2 Assignment or Transfer. MediaOne may assign this Agreement without prior notice to or approval of the Town when such assignment is to: (a) a subsidiary, affiliate or

parent company; (b) any firm or corporation which MediaOne controls, is controlled by, or is under common control with; or (d) any entity which succeeds to all or substantially all of its assets whether by merger, sale or otherwise. However, any such assignee shall provide notice to the Town within 60 days after the assignment and shall provide the Town with proof of its compliance with Section 5.2 of this Agreement and evidence that the Assignee is certified by the Public Service Commission and authorized to do business in the State of Florida. All other assignments shall require approval of the Town Administrator which approval shall not be unreasonably withheld, and shall be granted within fifteen (15) working days provided the assignee or transferee is certificated by the Florida Public Service Commission and has complied with the insurance requirements as required herein.

7.3 Captions. The headings of the Sections in this Agreement are for convenience only to facilitate reading and reference to its provisions and shall not be used to construe or interpret the scope or intent of this Agreement or in any way affect the same.

7.4 Survival. Any rights either party may have, which rights accrued to that party prior to termination of this Agreement, shall survive termination of the Agreement.

7.5 Governing Law; Venue. This Agreement shall be construed pursuant to the laws of the State of Florida. Any litigation regarding this Agreement shall commence in the Circuit Court for the 17th Judicial Circuit of Florida, or in the United States District Court for the Southern District of Florida.

7.6 Waiver of Compliance. No failure by either party to insist upon the strict performance of any covenant, agreement, term or condition of this Agreement, or to exercise any right, term or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or such covenant, agreement, term or condition. No waiver of any breach shall affect or alter this Agreement, but each and every covenant, agreement, term or condition of this Agreement shall continue in full force and effect with respect to any other existing or subsequent breach hereof.

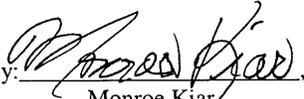
[Signatures on Next Page]

ATTEST:

TOWN OF DAVIE, Florida

By: _____, Town Clerk
Gail Reinfeld

Approved as to form

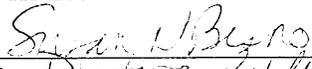
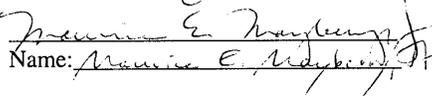
By:  _____, Town Attorney
Monroe Kiar

By: _____, Mayor
Harry Venis

By: _____, Town
Robert Middaugh, Administrator

WITNESS:

MEDIAONE


Name: Susan L. Bly

Name: Maurice E. Mayberry

By:  _____
John A. Wakszynski
Vice President of Finance/Chief
Financial Officer

Exhibit A

That portion of the Town of Davie's right-of-way for 148th Avenue that lies south of State Road 84 and north of Shotgun Road.

MONROE D. KIAR
INTERIM TOWN ATTORNEY
TOWN OF DAVIE
6191 SW 45th Street, Suite 6151A
Davie, Florida 33314
(954) 584-9770

MEMORANDUM

DATE: July 18, 2000
TO: Will Allen, Programs Director
FROM: Monroe Kiar *MK*
RE: Control #000615/Interim Right-of-Way Use Agreements between Town of Davie and Media One of Greater Florida, Inc.

Attached please find the Interim Right-of-Way Use Agreement which was the subject of discussion and the negotiations conducted by you and I with Attorney Barbara A. Hall recently in your office. The proposed Agreement includes the provisions which we requested and has been executed by Mr. John A. Waksmunski, Vice President of Finance of Media One. Also enclosed is a copy of Ms. Hall's letter of July 14, 2000 in which she indicates that the \$2,500.00 application and permit fee provided in Section 3.3 of the Agreement will be paid by Media One after Town Council approval and before execution of the Agreement by the Town.

Will you please make arrangements to have this item placed on the next Town Council Agenda for the Town Council's approval to be held in the first week of August, 2000. It should be noted that I have written to Ms. Hall and requested that she provide to us the name and address of the persons to receive the notices referenced in Section 7.1 on behalf of Media One.

MDK/gmv
enclosure

cc: Thomas Willi, Interim Town Attorney
The Honorable Harry Venis, Mayor
Councilmembers

TOWN ATTORNEY'S OFFICE
TOWN OF DAVIE, FLORIDA
6191 SW 45th Avenue
Suite 6151A
Davie, Florida 33314
(954) 584-9770

Monroe D. Kiar
Town Attorney

July 18, 2000

Barbara A. Hall, Esquire
Greenberg Traurig, Attorneys at Law
Post Office Box 14036
Fort Lauderdale, Florida 33302

Re: Interim Right-of-Way Use Agreement Between Town of Davie and Media One of reater
Florida, Inc.

Dear Barbara:

This will acknowledge receipt of the executed Agreement signed by Mr. John A. Wakmunski, Vice President of Finance/Chief Financial Officer, of Media One. I have approved the Agreement as to form and have forwarded it on to Mr. Will Allen and have requested that he place it on the next Town Council Agenda to be held in the first week of August. Will you please provide to us the name and address of the individuals to be served with all notices, consents, approvals, requests and other communications as required under Section 7.1 of the Agreement.

Very truly yours,


MONROE D. KIAR

MDK/gmv

cc: Will Allen, Programs Director
Thomas Willi, Interin Town Administrator