



# Town Council Agenda Report

**SUBJECT:** Resolution

**TITLE OF AGENDA ITEM:**

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, AUTHORIZING THE MAYOR TO EXECUTE A TEMPORARY RIGHT-OF-WAY USE AGREEMENT BETWEEN THE TOWN OF DAVIE AND TCG SOUTH FLORIDA; AND PROVIDING FOR AN EFFECTIVE DATE.

**REPORT IN BRIEF:**

This agreement grants permission for TCG South Florida to utilize a portion of the Town's public rights of way. TCG South Florida installs telecommunication cable to provide local area telephone service; therefore, TCG South Florida will be seeking the necessary permits from the Town of Davie. Through the permitting process, TCG South Florida will specifically identify the desired right-of-ways in which their cable will be placed.

This is an interim agreement to use the right-of-way. The agreement was negotiated with Town Attorney, Monroe Kiar in light of the regulations which are going to be in place per the Communication Services Tax Simplification Law adopted in the the 2000 Regular Session of the Florida Legislature. The agreement is consistent with the agreement recently adopted for FPL FibreNet LLC. The terms include an application and permit fee of \$2500.00. The terms include requiring a construction bond, provision of insurance naming the Town of Davie as an additional insured and indicates the agreement is temporary. It would need to be replaced upon adoption of a permanent Right-Of-Way Ordinance by the Town of Davie.

**DISCUSSION:**

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 in the early months of 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 TCG South Florida to connect their system prior to new right-of-way regulations being reviewed and enacted by the Town. The application fee negotiated by Town Attorney Kiar is a plus. The Florida League of Cities and the State of Florida are going to provide a model ordinance to municipalities for the right-of-way regulations, hopefully in the near future.

**CONCURRENCES:** Not Applicable

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

**RECOMMENDATION(S):** Motion to approve the resolution.

**ATTACHMENTS:**

Resolution

Agreement

Memorandum from Monroe Kiar dated November 28, 2000 with attachments.

RESOLUTION \_\_\_\_\_

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, AUTHORIZING THE MAYOR TO EXECUTE A TEMPORARY RIGHT -OF-WAY AGREEMENT BETWEEN THE TOWN OF DAVIE AND TCG SOUTH FLORIDA; 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, TCG South Florida 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, TCG South Florida has requested approval for the use of right-of-way from the Town; and

WHEREAS, the Town and TCG South Florida 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 Temporary 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.

## **LICENSE AGREEMENT**

**THIS LICENSE AGREEMENT** effective as of \_\_\_\_\_, 2000 by and between the TOWN OF DAVIE, a municipal corporation of the State of Florida, whose address is 6591 S.W. 45<sup>th</sup> Street, Davie, Florida 33314 (hereinafter referred to as the "Town") and ADELPHIA BUSINESS SOLUTIONS OF FLORIDA, L.L.C, a Delaware corporation, whose address is One North Main Street, Coudersport, Pennsylvania 16915 (hereinafter referred to as the "Licensee").

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

**WHEREAS**, Licensee has been certified by the Florida Public Service Commission as an alternate local exchange telecommunications company and desires to utilize the Town's right-of-way to serve customers in the Town;

**WHEREAS**, State law, confers on the Town certain rights and requirements for permission to use the public ways of the Town;

**WHEREAS**, Licensee has requested from the Town a license to use the streets and public ways of the Town to conduct business as a telecommunications provider; and

**WHEREAS**, The Town and Licensee have negotiated this License 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 Licensee enter into this License Agreement and agree as follows:

### **SECTION 1. DEFINITIONS.**

**1.1 "Agreement" or "License Agreement"** shall mean this Agreement.

**1.2 "Customer"** shall mean any Person who is provided Services of any kind by Licensee, directly or indirectly. For the purpose of provision of Services between different locations of the same Customer, the term "Customer" shall include any Person controlling, controlled by or under common control with such Customer.

**1.3 "Effective Date"** shall mean the date on which this Agreement is executed by both the Town and Licensee.

**1.4 "FCC"** shall mean the Federal Communications Commission.

**1.5 "License Area"** shall mean that area in which Licensee is authorized to transact a local business, as described in Section 2.4.

**1.6 "License Year"** shall be the fiscal year from January 1st through December 31st provided that the first License Year shall begin on the effective date of this Agreement and end as provided in Section 2.3 of this Agreement.

**1.7 "Local Service Revenues"** are defined as all revenues received by Licensee from its Customers for providing the local transport of voice, data and video signals as provided in this Agreement, including but not limited to, those revenues derived from telecommunication services listed in subsection (2) of Section 203.012, Florida Statutes, as it may be amended.

**1.8 "PSC"** shall mean the Florida Public Service Commission.

**1.9 "Telecommunications System" or "System"** shall mean the system which is used by the Licensee in the Town.

**1.10 "Telecommunications Provider"** shall mean any entity that provides Telecommunications Services.

**1.11 "Telecommunications Services" or "Services"** shall mean any services that Licensee is authorized to provide by the FCC or the PSC.

## **SECTION 2. LICENSE.**

**2.1 Permission/License.** Subject to all the terms and conditions contained herein, and to all State and local laws, the Town hereby grants Licensee permission to erect, construct, install, operate, repair, maintain, expand and use the Telecommunications System in, on, over, under and/or across the public right-of-way.

**2.2 Nonexclusive/Priority.** The permission and license hereby granted ("License") are nonexclusive. This License does not establish any priority for the use of the right-of-way by Licensee or by any present or future franchisee or other permit holders.

**2.3 Term of License.** The term of this Agreement shall be five (5) years unless earlier terminated or partially terminated as provided below:

(a) Upon this Agreement being terminated by operation of law; or

(b) Upon the City'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 Provider shall have one hundred twenty (120) days to register in accordance with the lawful registration provisions of the City's ordinance as required at the time of the termination. Following such termination of this Agreement, Provider 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

- (c) 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, Provider shall have one hundred twenty (120) days to register in accordance with said section and the provisions of this Agreement shall terminate, except for the rights and obligations of this paragraph which shall survive a termination. Provider shall be entitled to continue to use the City's rights-of-way, without interruption, subject to compliance with the one hundred twenty (120) day registration requirement; or
- (d) If this Agreement is not terminated pursuant to (a), (b) or (c) 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.

**2.4 License Area.** This License is granted on a nonexclusive basis through municipal rights-of-way located within the Town.

**2.5 Applicable Law.** Licensee shall, at all times during the life of this License, be subject to all lawful exercise of the police power by the Town, provided that such police power shall not alter the Licensee's rights or obligations under this Agreement.

### **SECTION 3. LICENSE FEE.**

**3.1 Payment of License Fee.** Licensee shall pay to the Town an annual License Fee equal to one percent (1%) of its gross receipts on recurring Local Service Revenues derived from services provided within the corporate limits of the Town by Licensee. This License Fee is being paid to the Town under the authority of Section 337.401(3), Florida Statutes. In the event Section 337.401 is amended, this Agreement shall be amended in conformity with any such amendment. The Town hereby warrants that the percentage of gross receipts charged is no greater, and no less, than the percentage of gross receipts charged to the incumbent Local Exchange Carrier or any other

Telecommunications Provider. The Town hereby warrants that such fee is no greater than the fee being paid to the Town by the incumbent Local Exchange Carrier or any other Telecommunications Provider, and is being required on a nondiscriminatory and competitively neutral basis.

**3.2 Method of Payment.** All payments of the License Fees identified in Section 3.1 above shall be made within forty (40) business days after the close of the calendar year, and Licensee shall file, with the Town's Director of Finance, a statement, signed by an authorized accounting or financial representative of Licensee, of the gross receipts on recurring local service revenues derived in the preceding year. 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.

#### **SECTION 4. RECORDS.**

**4.1 Public Inspection and Business Confidentiality.** Licensee recognizes that the Town must comply with the provisions of Chapter 119, Florida Statutes. However, the Town acknowledges that certain records provided by Licensee may be exempt from the disclosure requirements of Chapter 119, Florida Statutes and may be required to remain confidential. These documents include, but are not necessarily limited to, records included within the provisions of Sections 119.07(3)(r) and 166.231(9)(c), Florida Statutes.

#### **SECTION 5. CONSTRUCTION AND INSTALLATION OF LICENSEE'S TELECOMMUNICATIONS SYSTEM.**

##### **5.1 General.**

a. Licensee may construct the Telecommunications System within the public right-of-way in conformity with this Agreement.

b. No construction or installation of the System, or any part thereof, shall be commenced until the required written permits have been issued by the proper departments of the Town. As a condition of any permits so issued, such officials may impose such reasonable conditions and regulations as are required for compliance with this Agreement and may also impose such reasonable conditions and regulations as are necessary for the purpose of protecting any structures within the public right-of-way and which are imposed on other Telecommunications Providers. The Town shall use its best efforts to assist Licensee in obtaining all such local licenses, permits and authorizations in an expeditious and timely manner.

c. In the event the Licensee deems the trimming or removal of any trees reasonably necessary to construct any portion of the System and to maintain the integrity and safety of same it shall, pursuant to

the requirements of existing or subsequently enacted Town ordinances, obtain any required permits from the appropriate Town personnel.

**5.2 Laws, Regulations and Construction Standards.** Licensee 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.

**5.3. Construction Bond.** Prior to performing any work in the public rights of way, Licensee shall establish in the Town's favor, a construction bond in an amount adequate to insure the Licensee'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 Davie Town Engineer. In the event Licensee 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 Licensee 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 Licensee, or the cost of completing the work, plus a reasonable allowance for attorneys' fees, up to the full amount of the bond.

## **SECTION 6. INSURANCE AND INDEMNIFICATION.**

### **6.1 Indemnification.**

a. Licensee 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 Licensee relating to its performance under this Agreement, including Licensee's negligence in the operation of the Facilities.

b. The Town, to the extent provided by law, shall, and does hereby agree to, as permitted by Florida law, save, indemnify and hold Licensee and its officers, directors, shareholders, employees, agents and contractors harmless from any injury, claim, demand, suit, judgment, execution, liability, debt, damages or penalty arising out of, resulting from, or alleged to arise out of or result from, the Town's negligence in connection with any action or actions taken in connection with the rights granted herein.

c. In all instances in which a party is obligated to indemnify and hold harmless the other as provided for in this Agreement, Indemnitor's obligation shall be conditioned upon (i) Indemnitee giving Indemnitor written notice of all claims, damages, losses, suits and any other events which are in any way related to or asserted by Indemnitee as a basis for such obligation, which notice shall be given promptly after Indemnitee becomes aware thereof, and (ii) Indemnitor shall be afforded the sole right to the defense of such matter and the sole right to determine the disposition of such matter.

**6.2 Insurance.** During the term of this License, Licensee 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.

b. Comprehensive general liability insurance with minimum limits of Three Million Dollar (\$3,000,000) 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 Licensee.

c. Automobile liability insurance covering all owned, hired, and non-owned vehicles in use by Licensee, 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.

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

**6.4 Cancellation of Policies of Insurance.** At least sixty (60) 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 cancelled, 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 required by the Town.

## **SECTION 7. DEFAULTS.**

**7.1 Events of Default.** Subject to Section 7.2 herein, Licensee shall be in default if, during the term of this Agreement, Licensee fails to perform or observe any term, covenant, agreement or condition of this Agreement, on the part of Licensee 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 Licensee shall not be deemed in default if Licensee commences the required performance promptly and thereafter pursues and diligently completes such action.

**7.2 Notice and Cure.** Neither party shall be in default under this License 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 necessary under the circumstances to complete such cure.

**7.3 Appeal.** Licensee may appeal any determination of default either to arbitration or a court of competent jurisdiction.

## **SECTION 8. REMEDIES.**

**8.1 Remedies Not Exclusive.** The rights and remedies of the Town set forth in this Agreement shall be in addition to and not in limitation of, any other rights and remedies provided by law or in equity.

## **SECTION 9. MISCELLANEOUS.**

**9.1 Amendments.** The parties hereto may from time to time consider it in their best interest to change, modify or extend a term, condition or covenant of this Agreement. Any such change, addition, deletion, extension or modification, which is mutually agreed upon by and between the Town and Licensee shall be incorporated in written amendments (herein referred to as "Amendments") to this Agreement. Such Amendments shall not invalidate this Agreement nor relieve or release either party of any of their respective obligations under this Agreement except as expressly stated in such Amendment. No Amendment to this Agreement shall be effective and binding upon the parties unless it expressly makes reference to this Agreement. Any law, rule, or regulation of the federal or state government, their regulatory agencies or commissions, which may become applicable subsequent to the effective date of this Agreement relating to the use of municipal rights-of-way

for the installation, operation or maintenance of the Telecommunications System shall take precedence over this Agreement. The Town and Licensee shall amend this License to comply with newly enacted, amended or repealed laws or regulations.

**9.2 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: Mayor of the Town of Davie  
6591 S.W. 45<sup>th</sup> Street  
Davie, FL 33314

If to Licensee: Manager—Legal/Regulatory Affairs  
Adelphia Business Solutions  
of Florida, L.L.C.  
One North Main Street  
Coudersport, Pennsylvania 16915

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.

**9.3 Assignment.** Licensee shall not assign or transfer this Agreement without the written consent of the Town, which consent will not be unreasonably withheld; except that upon written notice to the Town, Licensee may make such assignment to: (a) a subsidiary, affiliate or parent company; or (b) any firm or corporation which Licensee controls, is controlled by, or is under common control with; or (c) any partnership in which it has a majority interest; or (d) to any entity which succeeds to all or substantially all of its assets whether by merger, sale or otherwise. Consent will be deemed granted within 120 days of any request unless the Town finds that the proposed assignee or transferee lacks the legal, financial or technical qualifications to operate Licensee's system. Any such assignee shall provide notice to the Town within 30 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.

**9.4 Entire Agreement.** This Agreement contains the entire agreement between the parties. Neither party has made any representations except those expressly set forth herein, and no rights or remedies are or shall

be acquired by either party by implication or otherwise unless expressly set forth herein.

**9.5 Terminology.** Unless the context otherwise expressly requires, the words "herein", "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Section or other subdivision.

**9.6 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.

**9.7 Governing Law.** This Agreement shall be construed pursuant to the laws of the State of Florida.

**9.8 Force Majeure.** In the event of forced delay in the performance by either party of obligations under this Agreement due to acts of God or of the public enemy, fires, floods, epidemics, riots, insurrection, war, unavoidable casualties or other conditions or events beyond Licensee's control, the time for performance of such obligations shall be extended for the period of the forced delay.

**9.9 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.

**9.10 Independent Contractor Relationship.** The relationship of Licensee to the Town is and shall continue to be an independent contractual relationship, and no liability or benefits, such as worker's compensation, pension rights or liabilities, insurance rights or liabilities or other provisions or liabilities, arising out of or related to a contract for hire or employer/employee relationship, shall arise or accrue to either party or either party's agents or employees as a result of the performance of this Agreement, unless expressly stated in this Agreement.

**9.11 Severability.** If any section, paragraph or provision of this Agreement shall be held to be invalid or unenforceable for any reason, the invalidity

or unenforceability of such section, paragraph, or provision shall not affect any of the remaining provisions of this Agreement.

**9.12 Reservation of Rights.** Neither party shall be deemed to have waived any rights provided by law by entering into this Agreement.

**TOWN OF DAVIE**

By: \_\_\_\_\_  
\_\_\_\_\_, Mayor

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_, Town Clerk

Approved as to form & legal sufficiency

By: \_\_\_\_\_  
\_\_\_\_\_, Town Attorney

WITNESSES:

Shan-jun  
George Y. Eidle

**ADELPHIA BUSINESS SOLUTIONS  
OF FLORIDA, L.L.C.**

By: John B. Glicksman  
Name: John B. Glicksman  
Title: V.P. General Counsel

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

MEMORANDUM

DATE: September 14, 2000  
TO: Will Allen, Programs Administrator  
FROM: Monroe Kiar   
RE: Control #000716/Adelphia Business Solutions of Florida, L.L.C.

Attached please find two executed originals of the proposed License Agreement between the Town of Davie and Adelphia Business Solutions of Florida, L.L.C. These have been signed by John B. Glicksman, Vice President and General Counsel for Adelphia Business Solutions of Florida, L.L.C. Also attached, please find a copy of my letter of September 13, 2000 to Genevieve D. Sapir, attorney for Adelphia Business Solutions. Since preparation of my letter of September 13, 2000 to Ms. Sapir, I have spoken with her and she has informed me that the \$2,500.00 application and permit fee is being sent to us by Federal Express and therefore, does not need to be included in the License Agreement.

The proposed License Agreement appears to be acceptable as to form in its present state and is similar to the Agreement previously entered into by the Town of Davie with e.spire. Accordingly, will you please have this item placed on the next Davie Town Council Agenda for review and if appropriate, approval by the Davie Town Council.

MDK/gmv  
enclosures

cc: Thomas Willi, Town Administrator  
Mayor and Councilmembers