

RESOLUTION NO. 1184

A RESOLUTION OF THE GOLDEN CITY COUNCIL  
APPROVING THE STANDARD FORM  
TELECOMMUNICATION PROVIDER RIGHTS-OF-WAY USE  
AGREEMENT BETWEEN THE CITY OF GOLDEN AND  
METROMEDIA FIBER NETWORK SERVICES

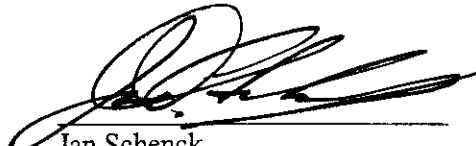
WHEREAS, on June 8, 2000 City Council approved a Standard Form Telecommunication Provider Rights-of-Way Use Agreement; and

WHEREAS, Metromedia Fiber Network Services, Inc., a provider of telecommunication services desires to operate within the City.


THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GOLDEN, COLORADO:

The Standard Form Telecommunication Provider Rights-of-Way Use Agreement between the City of Golden and Metromedia Fiber Network Services, Inc. is approved in substantially the same form as the copy attached hereto and made a part of this resolution.

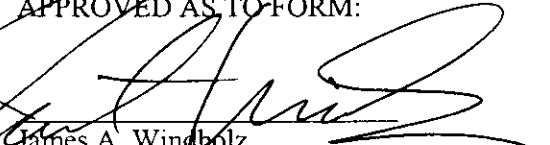
Adopted the 8<sup>th</sup> day of February, 2001.

  
Jan Schenck  
Mayor

ATTEST:

  
Susan M. Brooks, CMC/AAE  
City Clerk

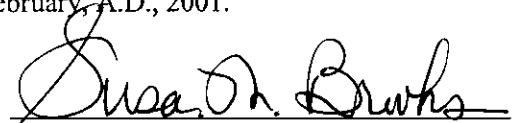
APPROVED AS TO FORM:

  
James A. Windholz  
City Attorney

I, Susan M. Brooks, City Clerk of the City of Golden, Colorado, do hereby certify that the foregoing is a true copy of a certain Resolution adopted by the City Council of the City of Golden, Colorado at a regular meeting thereof held on the 8<sup>th</sup> day of February, A.D., 2001.

(SEAL)

ATTEST:

  
Susan M. Brooks, City Clerk of the City of  
Golden, Colorado

**Standard Form Telecommunication MFN  
Rights-of-Way Use Agreement**

THIS RIGHTS-OF-WAY USE AGREEMENT effective this 8th day of February, 2001, is by and between the City of Golden (City), a Colorado home rule municipality and Metromedia Fiber Network Services, Inc., (hereinafter, "MFN").

**Recitals**

**WHEREAS**, MFN is in the business of providing telecommunication services and as such desires to construct, operate and maintain its Facilities within the City's rights-of-way; and

**WHEREAS**, although the City controls the use of its rights-of-way through its police powers, it desires to accommodate MFN's reasonable needs while also ensuring that its citizens health, safety and welfare is protected.

**Agreement**

**Now, therefore**, for good and valuable consideration, the receipt and sufficiency are hereby acknowledged, and the parties agree to the following covenants, terms, and conditions:

**I. DEFINITIONS**

For the purpose of this Agreement, the following words shall have the following meanings:

- A. "Access Vault" means any structure containing one or more ducts, conduits, manholes, hand hole or other such Facilities in MFN's Facilities.
- B. "City" means the City of Golden, Colorado.
- C. "Degradation" means a decrease in the useful life of the right of way or damage to any landscaping within the rights of way caused by excavation in or disturbance of the rights of way, resulting in the need to reconstruct the surface and/or subsurface structure of such rights of way earlier than would be required if the excavation or disturbance did not occur.
- D. "Director" means the Director of Public Works or the Director's authorized designee.
- E. "Duct" or "Conduit" means a single enclosed raceway for cables, fiber optics or other wires.
- F. "Emergency" means any event which may threaten public health or safety, including, but not limited to, damaged or leaking water or gas conduit systems, damaged, plugged, or leaking sewer or storm drain conduit systems, damaged underground electrical and communications Facilities, or downed overhead pole structures.
- G. "Excavate" means to dig into or in any way remove or penetrate any part of a right(s) of way.
- H. "Facilities" is defined to include, without limitation, any pipes, conduits, wires, cables, amplifiers, transformers, fiber optic lines, antennae, poles, ducts, and other like

equipment, fixtures and appurtenances used in connection with transmitting, receiving, distributing, offering, and providing utility and other services.

- I. "Fence" means any artificially constructed barrier of wood, masonry, stone, wire, metal, or any other manufactured material or combination of materials erected to enclose partition, beautify, mark, or screen areas of land.
- J. "Infrastructure" means any public facility, system, or improvement including, without limitation, water and sewer mains and appurtenances, storm drains and structures, streets and sidewalks, and public safety equipment.
- K. "Landscaping" means materials, including without limitation, grass, ground cover, shrubs, vines, hedges, or trees and non-living natural materials commonly used in landscape development, as well as attendant irrigation systems.
- L. "MFN" means the telecommunication business using the City's rights-of-way subject to the terms and conditions of this Agreement.
- M. "Person" means any person, firm, partnership, special, metropolitan, or general district, association, corporation, company, or organization of any kind.
- N. "Public right of way" or "right of way" or "public way" means any public street, way, place, alley, sidewalk, easement, park, square, plaza, and City-owned right of way dedicated to public use.
- O. "Specifications" means engineering regulations, construction specifications, and design standards adopted by the City.
- P. "Structure" means anything constructed or erected with a fixed location below, on, or above grade, including, without limitation, foundations, fences, retaining walls, awnings, balconies, and canopies.
- Q. "Surplus Ducts or Conduits" are Conduits or Ducts other than those occupied by MFN or any prior telecommunications provider, or unoccupied Ducts held by MFN as emergency use spares, or other unoccupied Ducts that MFN reasonably expects to use within three (3) years from the date of a request for use.
- R. "Work" means any labor performed on rights of way, or any use or storage of equipment or materials therein, including but not limited to, construction of streets and all related appurtenances, fixtures, improvements, sidewalks, driveway openings, bus shelters, bus loading pads, street lights, and traffic signal devices. It shall also mean construction, maintenance, and repair of all underground structures such as pipes, conduit, ducts, tunnels, manholes, vaults, buried cable, wire, or any other similar structure located below surface, and installation of overhead poles used for any purpose.

## II. POLICE POWERS RESERVED

MFN's rights hereunder are subject to the police powers of the City, which include the power to adopt and enforce ordinances and amend this Agreement as necessary for the safety, health, and welfare

of the public. MFN shall comply with all applicable laws and ordinances enacted, or hereafter enacted, by the City or any other legally constituted governmental unit having lawful jurisdiction over the subject matter hereof. The City reserves the right to exercise its police powers, notwithstanding anything in this Agreement to the contrary. Any conflict between the provisions of the Agreement and any other present or future lawful exercise of the City's police powers shall be resolved in favor of the latter.

### **III. TERM**

This Agreement shall commence on the effective date as stated herein and shall have an initial term through December 31, 2001. The Agreement shall automatically renew for \_\_\_\_\_ consecutive one-year terms except that, notwithstanding any other provision herein, the City may terminate this Agreement with or without cause by written notice to MFN during the month of January of any succeeding term.

### **IV. ENTRY UPON PROPERTY**

A. Attachment to City property. The City hereby authorizes MFN, subject to the conditions set forth in this Agreement, to enter upon the Public rights-of-way and to locate, place, attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Facilities in or on pre-designated and approved City property for the purposes of operating its system and providing services to persons located within or without the limits of the City.

B. Attachment to Third-Party Property. Subject to obtaining the permission of the owner(s) of the affected properties, and the conditions set forth in this Agreement, the City hereby authorizes MFN to enter upon the Public rights-of-way and to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Facilities in or on poles or other structures owned by public utility companies or other property owners located within the Public rights-of-way as may be permitted by the public utility company or property owner. MFN shall furnish to the City documentation of such permission from the individual utility or property owner.

C. No Interference. MFN in the performance and exercise of its rights and obligations under this Agreement shall not interfere in any manner with the existence and operation of any and all public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, traffic signalization, and other telecommunications, utility, or city property, without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable law or this Agreement.

D. Compliance with Laws. MFN shall comply with all applicable laws in the exercise and performance of its rights and obligations under this Agreement.

### **V. PERMIT REQUIRED**

A. If the attachment, installation, operation, maintenance, or location of the Facilities in the Public rights-of-way shall require any permit, MFN shall apply for the appropriate permit and pay any standard and customary permit fees. City shall promptly respond to MFN's requests for permits and shall otherwise cooperate with MFN in facilitating the deployment of MFN in the Public rights-of-way in a reasonable and timely manner.

### **VI. PUBLIC RIGHTS-OF-WAY RENTAL POLICY AND CHARGES (RESERVED).<sup>1</sup>**

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<sup>1</sup> Pending Colorado Supreme Court decision involving the City of Denver.

## VII. INSURANCE AND INDEMNIFICATION

A. MFN shall file with the City an insurance policy or certificate in a form satisfactory to the City with coverage as follows:

1. MFN shall carry and maintain in full effect at all times during the Agreement, a comprehensive general liability policy, including broad form property damage, completed operations and contractual liability for limits not less than one million dollars (\$1,000,000.00) each occurrence for damages of bodily injury or death to one or more persons; and five hundred thousand dollars (\$500,000.00) each occurrence for damage to or destruction of property.
2. Insurance coverage for special hazards: special hazards coverage, such as, but not limited to, property damage as a result of explosion hazard, collapse hazard, underground property damage hazard, commonly known as XCU, shall all be specifically added by endorsement to the herein above required liability policies.
3. Workers compensation insurance as required by State law.

B. Whenever MFN has filed with the City evidence of insurance as required, any additional or subsequent person in the employ of said MFN may, at the discretion of the City, be excused from depositing or filing any additional evidence of insurance if such employee is fully covered by MFN's insurance policy.

C. MFN shall construct, maintain, and operate its Facilities in a manner which provides protection against injury or damage to persons or property.

1. MFN, for itself and its related entities, agents, employees, subcontractors, and the agents and employees of said subcontractors, shall save the City harmless, defend, and indemnify the City, its successors, assigns, officers, employees, agents, and appointed and elected officials from and against all liability or damage and all claims or demands whatsoever in nature, and reimburse the City for all its reasonable expenses, as incurred, arising out of the installation, maintenance, operation or any other Work or activity in the Public rights-of-way.

The indemnification, defend and hold harmless provision includes all actions related to the Work by MFN, its employees, agents, contractors, related entities, successors and assigns, or the securing of and the exercise by MFN of the rights granted in this Agreement, including any third party claims, administrative hearings, and litigation; whether or not any act or omission complained of is authorized, allowed, or prohibited by this ordinance or other applicable law.

2. The terms of each contract awarded by MFN for activities pursuant to this Agreement shall contain indemnity provisions whereby the contractor shall indemnify the City to the same extent described above.
3. MFN shall have the right to defend the City with regard to all third party actions, damages and penalties arising in any way out of the exercise of any rights in this Agreement. If at any time, however, MFN refuses to defend, and the City elects to defend itself with regard to such matters, MFN shall pay all actual expenses incurred by the City related to its defense, including attorneys' fees.

4. In the event the City institutes litigation against MFN for a breach of this Agreement and the City is the prevailing party, MFN shall reimburse the City for all costs related hereto, including reasonable attorney's fees. MFN shall not be obligated to hold harmless or indemnify the City for claims or demands to the extent that they are due to the gross negligence, or any intentional and/or willful acts of the City or any of its officers, employees, or agents.
5. Nothing herein is intended to waive any of the rights and protections afforded the City by the Colorado Governmental Act, CRS 24-10-101 *et seq*, or otherwise provided by law.

#### **VIII. PERFORMANCE BOND/LETTER OF CREDIT**

A. MFN shall, prior to commencement of any Work, file with the Director a bond or letter of credit in favor of the City in an amount equal to the total cost of construction, including labor and materials, or five thousand dollars, whichever is greater. The bond or letter of credit shall be executed by MFN as principal and by at least one surety upon whom service of process may be had in the state. The bond or letter of credit shall be conditioned upon the applicant fully complying with all provisions of the City's ordinances, rules and regulations and this Agreement, and upon payment of all judgments and costs rendered against the applicant for any material violation of City ordinances or state statutes that may be recovered against MFN by any person for damages arising out of any negligent or wrongful acts of MFN in the performance of Work done pursuant to this Agreement. The City may bring an action on the bond or letter of credit on its own behalf or on behalf of any person so aggrieved as beneficiary. The bond or letter of credit must be approved by the City's finance director as to form and as to the responsibility of the surety thereon prior to the commencement of Work. However, the City may waive the requirements of any such bond or letter of credit or may permit MFN to post a bond without surety thereon upon finding that MFN has financial stability and assets located in the state to satisfy any claims intended to be protected against the security required by this section.

B. The performance bond, letter of credit or letter of responsibility shall remain in force and effect for a minimum of three years after completion and acceptance of any street cut, excavation or lane closure.

#### **IX. PERFORMANCE WARRANTY/GUARANTEE**

A. Any warranty made hereunder shall serve as security for the performance of Work necessary to repair the Public rights-of-way if MFN fails to make the necessary repairs or to complete the Work.

B. MFN expressly warrants and guarantees complete performance of the Work in a manner acceptable to the City and warrants and guarantees all Work done for a period of three years after the date of probationary acceptance, and agrees to maintain upon demand and to make all necessary repairs during the three-year period. This warranty shall include all repairs and actions needed as a result of:

1. Defects in Workmanship.
2. Settling of fills or excavations.
3. Any unauthorized deviations from the approved plans and specifications.
4. Failure to barricade.

5. Failure to clean up during and after performance of the Work.
6. Any violation of this Agreement or the City's ordinances.

C. The three-year warranty period shall run from the date of the City's probationary acceptance of the Work. If repairs are required during the three-year warranty period, those repairs need only be warranted until the end of the initial three-year period starting with the date of probationary acceptance. It is not necessary that a new three-year warranty be provided for subsequent repairs after probationary acceptance.

D. At any time prior to completion of the three-year warranty period, the City may notify MFN of any needed repairs. Such repairs shall be completed within twenty-four (24) hours if the defects are determined by the City to be an imminent danger to the public health, safety and welfare. Nonemergency repairs shall be completed within thirty (30) calendar days after notice.

## **X. INSPECTIONS**

A minimum of three inspections shall take place. First, MFN shall request that the City conduct a pre-construction inspection, to determine any necessary conditions for the Work. Second, MFN shall notify the City immediately after completion of Work operations. The City shall inspect the completed Work within twenty one (21) days of MFN's notification. Probationary acceptance will be made if all Work meets City standards. Third, approximately thirty (30) days prior to the expiration of the three-year guarantee, the City shall conduct a final inspection of the completed Work. If the Work is still satisfactory the bond or letter of credit shall be returned or allowed to expire, with a letter of final acceptance, less any amounts needed to complete Work not done by MFN.

## **XI. PUBLIC SAFETY**

MFN shall maintain a safe Work area, free of safety hazards. The City may make any repair necessary to eliminate any safety hazards not performed as directed. Any such Work performed by the City shall be completed and billed to MFN at overtime rates. MFN shall pay all such charges within thirty (30) days of the statement date. If MFN fails to pay such charges within the prescribed time period, the City may, in addition to taking other collection remedies, seek reimbursement through the warranty guarantee. Furthermore, MFN shall be barred from performing any Work in the Public rights-of-way, and under no circumstances will the City issue any further permits or authorizations to perform work of any kind to said MFN, until all outstanding charges have been paid in full.

## **XII. TRAFFIC CONTROL**

A. When it is necessary to obstruct traffic, a traffic control plan shall be submitted to the City prior to starting Work. No Work may commence until the plan is approved by the City. MFN shall not block access to and from private property, block emergency vehicles, block access to fire hydrants, fire stations, fire escapes, water valves, underground vaults, valve housing structures, or any other vital equipment unless MFN provides the City with written verification of written notice delivered to the owner or occupant of the facility, equipment or property at least forty-eight (48) hours in advance. If a street closing is desired, MFN will request the assistance and obtain the approval of the Director. It shall be the responsibility of MFN to notify and coordinate all Work in the public way with police, fire, ambulance, other government entities, and transit organizations.

B. When necessary for public safety, MFN shall employ flag persons whose duties shall be to control traffic around or through the construction site. The use of flag persons may be required by the Director.

C. Unless approved by the Director, MFN shall not impede rush hour traffic on arterial or collector streets during the morning or evening rush hours. No construction shall be performed nor shall any traffic lane be closed to traffic during the hours of 7:00 a.m. to 9:00 a.m. or 3:30 p.m. to 6:00 p.m. without the prior approval of the Director.

D. Traffic control devices, as defined in Part VI of the Manual on Uniform Traffic Control Devices, must be used whenever it is necessary to close a traffic lane or sidewalk. Traffic control devices are to be supplied by MFN. If used at night, they must be reflectorized and must be illuminated or have barricade warning lights.

E. Oil flares or kerosene lanterns are not allowed as means of illumination.

F. Part VI of the Manual on Uniform Traffic Control Devices or any successor publication thereto shall be used as a guide for all maintenance and construction signing. At the direction of the Director, such warning and control devices shall be modified.

### **XIII. GENERAL RIGHTS OF WAY USE AND CONSTRUCTION**

A. Right of Way Meetings. MFN will make reasonable efforts to attend and participate in meetings of the City, of which MFN is made aware, regarding Public rights-of-way issues that may impact its Facilities, including, planning meetings to anticipate joint trenching and boring. Whenever it is possible and reasonably practicable to joint trench or share bores or cuts, MFN shall Work with such other entities so as to reduce so far as possible the number of Public rights-of-way cuts within the City.

B. Minimal Interference. Work in the Public rights-of-way, on other public property, near public property, or on or near private property shall be done in a manner that causes the least interference with the rights and reasonable convenience of property owners and residents. MFN's Facilities shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits, pedestals, structures, or other Facilities that may have been laid in the rights of way by, or under, the City's authority. MFN's Facilities shall be located, erected and maintained so as not to endanger or interfere with the lives of persons, or to interfere with new improvements the City may deem proper to make or to unnecessarily hinder or obstruct the free use of the Public rights- of-way or other public property, and shall not interfere with the travel and use of public places by the public during the construction, repair, operation or removal thereof, and shall not obstruct or impede traffic.

C. Underground Construction and Use of Poles.

1. When required by ordinances, resolutions, regulations or rules of the City or applicable state or federal law, MFN's Facilities shall be placed underground at MFN's expense. Placing Facilities underground does not preclude the use of ground-mounted appurtenances.

2. Where all Facilities are installed underground at the time of MFN's construction, or when all such Facilities are subsequently placed underground, all MFN Facilities shall also be placed underground at no expense to the City unless funding is generally available for such relocation to all users of the Public rights-of-way. Related equipment, such as pedestals, must be placed in accordance with the City's applicable code requirements and rules. In areas where existing Facilities are aerial, MFN may install aerial Facilities.



3. For above ground Facilities, MFN shall utilize existing poles and conduit wherever possible.
4. Should the City desire to place its own Facilities in trenches or bores opened by MFN, MFN shall cooperate with the City in any construction by MFN that involves trenching or boring, provided that the City has notified MFN in writing, and such notice has been provided in reasonable time so as to avoid causing delays in MFN's schedule, that it is interested in sharing the trenches or bores in the area where MFN's construction is occurring. MFN shall allow the City to place its Facilities in MFN's trenches and bores, provided the City incurs any incremental increase in cost of the trenching and boring. The City shall be responsible for maintaining its respective Facilities buried in MFN's trenches and bores under this paragraph.

D. Use of Conduits by the City. The City may install or affix and maintain its own Facilities for City purposes in or upon any and all of MFN's ducts, conduits or equipment in the rights of way and other public places, at a charge to be negotiated between the parties (but in no event greater than the best price charged by MFN to any other user), to the extent space therein or thereon is reasonably available, and pursuant to all applicable ordinances and codes. For the purposes of this subsection, "City purposes" shall mean those purposes for which the City is acting in its governmental capacity. Such governmental purposes may include, without limitation, the use of the structures and installations for City fire, police, traffic, water, telephone, and/or signal systems, or analogous uses by other local governments acting in their governmental capacities. "City Purposes" shall not include any use for which the City is acting in a proprietary capacity, including the provision of conduit capacity to commercial third parties or other local governments acting in their proprietary capacities.

E. Common Users. The Public rights-of-way have a finite capacity for containing Facilities. Therefore, whenever the City determines it is impracticable to permit construction of an underground Conduit system by any other entity which may at the time have authority to construct or maintain Conduits or Ducts in the Public rights-of-way, but excluding entities providing services in competition with MFN, and unless otherwise prohibited by federal or state law or regulations, the City may require MFN to afford to such entity the right to use MFN's Surplus Ducts or Conduits in common with MFN, pursuant to the terms and conditions of an agreement for use of Surplus Ducts or Conduits entered into by MFN and the other entity. Nothing herein shall require MFN to enter into an agreement with such entity if, in MFN's reasonable determination, such an agreement could compromise the integrity of MFN's Facilities.

#### **XIV. JOINT PLANNING AND CONSTRUCTION; COORDINATION OF EXCAVATIONS**

A. MFN shall meet annually with the Director, at the Director's request to discuss MFN's excavation master plan. At such meeting, to the extent not already in possession of the City, MFN shall submit documentation, in a form required by the Director, showing a location of MFN's existing Facilities in the Public rights-of-way. MFN shall also identify any planned major excavation Work in the City. MFN shall meet with the Director to discuss an initial excavation master plan no later than sixty (60) days after executing this Agreement. As used in this subsection, the term "planned major excavation Work" refers to any future excavations planned by MFN when the excavation master plan or update is submitted that will affect any Public rights-of-way for more than five (5) days. Between the annual meetings to discuss planned major excavation Work, MFN shall use its best efforts to inform the Director of any substantial changes in the planned major excavation Work discussed at the annual meeting.

B. In performing location of Facilities in the Public rights-of-way in preparation for construction under this Agreement, MFN shall compile all information obtained regarding its or any other

Facilities in the Public rights-of-way related to this Agreement, and shall make that information available to the City in a written and verified format acceptable to the Director.

C. Prior to its undertaking any Work in the Public rights-of-way or related landscaping, the City may notify MFN of the Work to be performed. Upon such notification, MFN shall, within seven (7) days, locate their Facilities in the Public rights-of-way in which the Work will be performed, and provide documentation in a format acceptable to the Director of MFN's Facilities in that Public rights-of-way.

#### **XV. MINIMIZING THE IMPACTS OF WORK IN THE RIGHTS OF WAY**

A. Relocation and Protection of Utilities. Before beginning excavation in any Public rights-of-way, MFN shall contact the Utility Notification Center of Colorado (UNCC) and, to the extent required by C.R.S. §9-1.5-102 et seq., make inquiries of all ditch companies, utility companies, districts, local government departments, and all other agencies that might have Facilities in the area of Work to determine possible conflicts.

MFN shall contact the UNCC and request field locations of all Facilities in the area pursuant to UNCC requirements. Field locations shall be marked prior to commencing Work. MFN shall support and protect all pipes, conduits, poles, wires, or other apparatus, which may be affected by the Work from damage during construction or settlement of trenches subsequent to construction.

B. Noise, Dust, Debris, Hours of Work. MFN shall conduct Work in such manner as to avoid unnecessary inconvenience and annoyance to the general public and occupants of neighboring property. In the performance of the Work, MFN shall take appropriate measures to reduce noise, dust, and unsightly debris. No Work shall be done between the hours of 8:00 p.m. and 7:00 a.m. nor at any time on Sunday, except with the written permission of the Director, or in case of an emergency.

C. Trash and Construction Materials. MFN shall maintain the Work site so that:

1. Trash and construction materials are contained so that they are not blown off the construction site.
2. Trash is removed from a construction site often enough so that it does not become a health, fire, or safety hazard or nuisance.
3. Trash dumpsters and storage or construction trailers are not placed in the street without specific approval of the Director.

D. Deposit of Dirt and Material on Roadways. MFN shall eliminate the tracking of mud or debris upon any street or sidewalk. Equipment and trucks used during construction, excavation, or Work activity shall be cleaned of mud and debris prior to leaving any Work site.

E. Protection of Trees and Landscaping. MFN shall protect trees, landscape, and landscape features as required by the City. All protective measures shall be provided at MFN's expense.

F. Protection of Paved Surfaces From Equipment Damage. Backhoe equipment outriggers shall be fitted with rubber pads whenever outriggers are placed on any paved surface. Tracked vehicles with grousers are not permitted on paved surface unless specific precautions are taken to protect the surface. MFN will be responsible for any damage caused to the pavement by the operation of such equipment and, shall repair such surfaces. Failure to do so will result in the use of MFN's performance/warranty guarantee by the City to repair any damage, and, possibly, the requirement of additional warrantee(s).

G. Protection of Property. MFN shall protect from injury any adjoining property by providing adequate support and taking other necessary measures. MFN shall, at its own expense, shore up and protect all buildings, walls, fences or other property likely to be damaged during the Work, and shall be responsible for all damage to public or private property resulting from failure to properly protect and carry out Work in the public way.

H. Clean-Up. As the Work progresses, all Public rights-of-way and private property shall be thoroughly cleaned of all rubbish, excess dirt, rock, and other debris. All clean-up operations shall be done at MFN's expense.

I. Preservation of Monuments. MFN shall not disturb any surface monuments or survey hubs and points found on the line of Work unless approval is obtained from the Director. Any monuments, hubs, and points disturbed will be replaced by a Colorado Registered Land Surveyor at MFN's expense.

J. MFN shall make provisions for employee and construction vehicle parking so that neighborhood parking adjacent to a Work site is not impacted.

K. MFN shall maintain an adequate and safe unobstructed walkway around a construction site or blocked sidewalk in conformance with City Code.

L. MFN shall clear all snow and ice hazards from public sidewalks at the Work site by noon following a snowfall, in conformance with City Code.

## **XVI. STANDARDS FOR REPAIRS AND RESTORATION**

A. MFN Responsibility. MFN shall be fully responsible for the cost and actual performance of all Work in the Public rights-of-way. MFN shall do all Work in conformance with any and all engineering regulations, construction specifications, and design standards adopted by the City. These standards shall apply to all Work in the Public rights-of-way unless otherwise specified in this Agreement.

B. All restoration shall result in a Work site condition equal to or better than that, which existed prior to construction. In addition to the regulations, specifications and standards referred to in subsection (A) the following provisions shall apply to Work in the Public rights-of-way of the City.

1. Pavement cuts shall be filled with compacted select material. Either concrete or asphalt patches will be placed to match the existing street cross section. Select material shall include select fill, stone (CDOT 26 or 57) or controlled density (flowable) fill.
2. Select fill shall be placed in an excavation to the density required by City compaction specifications.
3. Flowable fill backfill material, satisfying design and construction standards adopted the City, shall be used to restore all trenches that have been excavated in the paved portion of any public street or alley. For trench excavations in excess of five feet in depth, MFN may utilize granular backfill material in lieu of flowable fill backfill material, provided that all of the following conditions are satisfied:
  - a. Prior to the commencement of Work, in the Public Rights-of-way, MFN must request and receive approval for the use of granular backfill material.

b. The type, gradation, placement, compaction, and testing of the granular backfill material shall meet or exceed all requirements specified in design and construction standards adopted the City.

c. In cases where it is impossible to achieve the compaction required by the City's building code on select fill, the City shall require the use of controlled density fill or flash fill material. When controlled density fill type material is used, steel plate will be placed to cover the opening for the time required to allow the material to set.

d. Once the compacted backfill has been placed, an asphalt cutback shall be made. The cutback will extend six (6) inches minimum on each side of the opening and will be over undisturbed pavement material (1-1/2 inch deep minimum). All edges of the opening shall be neatly cut with an asphalt saw at 90 degrees to traffic and uniformly tacked.

e. New asphalt will be placed in lifts (3 inches maximum) and compacted upon placement. Asphalt depths will be governed the existing cross section of the street but not less than four (4) inches of full deep asphalt shall be used to fill a street cut regardless of the existing cross section. Concrete meeting all construction standards of the City shall be used to replace concrete pavement wherever it occurs.

#### **XVII. CONSTRUCTION AND RESTORATION STANDARDS FOR NEWLY CONSTRUCTED OR OVERLAID STREETS**

MFN shall not cause an open trench excavation or potholing of utilities in the pavement of any Public rights- of-way for a period of three (3) years from the completion of construction or resurfacing unless MFN provides to the Director:

1. A detailed and dimensional engineering plan that identifies and accurately represents the Public rights-of-way or property that will be impacted by the proposed excavation, as well as adjacent streets, and the method of construction.
2. The street width or alley width including curb and gutter over the total length of each City block that will be impacted by the proposed excavation.
3. The location, width, length, and depth of the proposed excavation.
4. The total area of existing street or alley pavement in each individual City block that will be impacted by the proposed excavation.
5. A written statement addressing the criteria for approval.

A. Upon receipt of such information, the Director shall approve MFN's excavation request only if Director finds that all of the following criteria have been met:

1. Boring or jacking without disturbing the pavement is not practical due to physical characteristics of the street or alley or other utility conflicts.
2. Alternative utility alignments that do not involve excavating the street or alley are found to be impracticable.

3. The proposed excavation cannot reasonably be delayed until after the three-year deferment period has lapsed.

B. Exemptions for Emergency Operations. Emergency maintenance operations shall be limited to circumstances involving the preservation of life, property, or the restoration of customer service.

C. Construction and Restoration Standards for Newly Constructed or Overlaid Streets and Alleys. The streets shall be restored and repaired in accordance with design and construction standards adopted the City.

## **XVIII. RELOCATION OF FACILITIES**

If at any time the City requests MFN to relocate its Facilities, in order to allow the City to make any public use of public rights-of-way, or if at any time it shall become necessary because of a change in the grade or for any other purpose by reason of the improving, repairing, constructing, or maintaining of any Public rights-of-way, or reason of traffic conditions, public safety or by reason of installation of any type of structure of public improvement the City or other public agency or special district, and any general program for the undergrounding of such Facilities, to move or change MFN's Facilities within or adjacent to Public rights-of-way in any manner, either temporarily or permanently, the City shall notify MFN, at least ninety (90) days in advance, except in the case of emergencies, of the City's intention to perform or have such Work performed. MFN shall thereupon, at its sole cost and expense, accomplish the necessary relocation, removal or change within a reasonable time from the date of the notification, but in no event later than three (3) Working days prior to the date the City has notified MFN that it intends to commence its Work or immediately in the case of emergencies. If MFN fails to accomplish such Work, the City or other public agencies or special district may perform such Work at MFN expense and MFN shall reimburse the City or other agency within thirty (30) days after receipt of a written invoice. Following relocation, all affected property shall be restored to, at a minimum, the condition that existed prior to construction at MFN's expense. Notwithstanding the requirements of this section, MFN may request additional time to complete a relocation project. The Director shall grant a reasonable extension if in the Director's sole discretion, the extension will not adversely affect the City's project.

## **XIX. ABANDONMENT AND REMOVAL OF FACILITIES**

A. Notification of Abandoned Facilities. If MFN intends to discontinue use of any Facilities within the Public rights-of-way, MFN shall notify the Director in writing of the intent to discontinue use. Such notice shall describe the Facilities for which the use is to be discontinued, a date of discontinuance of use, which date shall not be less than thirty (30) days from the date such notice is submitted to the Director and the method of removal and restoration. MFN may not remove, destroy or permanently disable any such Facilities during said thirty (30) day period without written approval of the Director. After thirty (30) days from the date of such notice, MFN shall remove and dispose of such Facilities as set forth in the notice, as the same may be modified by the Director, and shall complete such removal and disposal within six months, unless additional time is requested from and approved by the Director.

B. Conveyance of Facilities. At the discretion of the City, and upon written notice from the Director within thirty (30) days of the notice of abandonment, MFN may abandon the Facilities in place, and shall further convey full title and ownership of such abandoned Facilities to the City. The consideration for the conveyance is the City's permission to abandon the Facilities in place. MFN is responsible for all obligations as owner of the Facilities, or other liabilities associated therewith, until the conveyance to the City is completed.

## **XX. TERMINATION**

This Agreement may be terminated by either party upon forty five (45) days' prior written notice to the other party upon a default of any covenant or term hereof by the other party, which default is not cured within forty-five (45) days of receipt of written notice of default (or, if such default is not curable within forty-five (45) days, if the defaulting party fails to commence such cure within forty-five (45) days or fails thereafter diligently to prosecute such cure to completion), provided that the grace period for any monetary default shall be ten (10) days from receipt of notice. Except as expressly provided herein, the rights granted under this Agreement are irrevocable during the term. Within ninety (90) days of the termination of this Agreement, MFN, at its sole cost and expense, shall promptly remove all Facilities located in the Public Rights-of-way by virtue of this Agreement. MFN shall repair the Public Rights-of-way to the condition, as it existed immediately prior to the effective date of this Agreement, normal wear and tear excepted.

#### **XXI. NOTICE**

Any notice or communication between MFN and the City which may be required or which may be given, under the terms of this Agreement shall be in writing, and shall be deemed to have been sufficiently given when directly presented or sent pre-paid, first class United States Mail, addressed as follows:

City of Golden  
Attention: \_\_\_\_\_

911 10<sup>th</sup> Street  
Golden, Colorado 80401

Metromedia Fiber Network Services, Inc.  
Attention: Vice President-Legal  
Affairs

360 Hamilton Avenue  
White Plains, NY 10601

With a copy to:

Christopher Hayes, Esq.  
Ireland, Stapleton, Pryor & Pascoe, P.C.  
1675 Broadway, Suite 2600  
Denver, CO 80202

#### **XXII. NON-ASSIGNABILITY**

Neither this Agreement, nor any of the rights or obligations of the parties hereto, shall be assigned by either party without the written consent of the other. The transfer of this Agreement to a parent corporation, subsidiary corporation, or affiliated corporation by MFN shall not be deemed an assignment for purposes of this section. In the event MFN transfers the Agreement as provided in the preceding sentence, MFN shall so notify the City in writing, within 90 days of the transfer.

#### **XXIII. DEFAULT/ATTORNEY FEES**

In the event of default of any of the provisions herein, the defaulting party shall be liable to the non-defaulting party for all reasonable attorney fees, legal expenses and costs incurred as a result of the default.

**XXIV. VENUE**

This Agreement shall be governed by the laws of the State of Colorado, and any legal action concerning the provisions hereof shall be brought in the County of Jefferson, State of Colorado.

**XXV. ENTIRE AGREEMENT**

This Agreement contains the entire Agreement between MFN and the City, superseding all prior oral or written communications. None of the provisions of this Agreement may be amended, modified or changed, except upon written agreement of the parties.

In witness whereof, the parties hereto, by their authorized representatives, bind themselves to the terms and conditions of this Agreement.

CITY OF GOLDEN

METROMEDIA FIBER NETWORK SERVICES, INC.

By \_\_\_\_\_  
Jan C. Schenck  
Mayor

By \_\_\_\_\_  
Its \_\_\_\_\_  
(Title)

ATTEST

\_\_\_\_\_  
Susan M. Brooks, CMC/AAE  
City Clerk

APPROVED AS TO FORM

\_\_\_\_\_  
James A. Windholz  
City Attorney