C: Dir., Public Works

City of NORFOLK

To the Honorable Council
City of Norfolk, Virginia

September 15, 2015

From: David Ricks, Director of Public Works

Subject: Nonexclusive Telecommunications Franchise Agreement with Cavalier Telephone L.L.C.

Reviewed: Ronald H. Williams, Jr., Deputy City Manager

Ward/Superward: City-wide

Approved: Marcus D. Jones, City Manager

Item Number: **R-15**

I. **Recommendation:** Adopt Ordinance

II. **Applicant:** Cavalier Telephone L.L.C.
4001 Rodney Parham Road
Little Rock, Arkansas 72212

III. **Description:**
This agenda item is an ordinance approving a Nonexclusive Telecommunications Franchise Agreement between the City of Norfolk and Cavalier Telephone L.L.C. The term of the Agreement is for 5 years.

IV. **Analysis:**
Cavalier Telephone is provider of local phone, DSL, Internet, voice and data services for business and residential customers. This Agreement grants Cavalier Telephone the right, upon certain conditions, to install, operate and maintain telecommunications facilities, in, over, under, and across the City's rights-of-way for the purpose of enabling telecommunication services within certain areas of the City. This Agreement replaces an existing agreement that expires next January.

V. **Financial Impact:**
The City receives a 3% franchise fee for the use of its City rights-of-way on an annual basis. The most recent franchise fee payment from Cavalier Telephone was approximately $47,000.

VI. Environmental:

N/A

VII. Community Outreach/Notification:

Public notification for this agenda item was conducted through the City of Norfolk's agenda notification process.

VIII. Board/Commission Action:

N/A

IX. Coordination/Outreach:

This letter and ordinance have been coordinated with the City Attorney's Office and the Department of Public Works.

Supporting Material from the Department of Public Works:

- Ordinance
- Exhibit A, (Nonexclusive Telecommunications Franchise Agreement)

8/19/15 MPM/sb
Form and Correctness Approval:

By Martha P. McGann
Office of the City Attorney

Form CCO-003

Contents Approved:

By
DEPT. PUBLIC WORKS

NORFOLK, VIRGINIA

ORDINANCE No.

AN ORDINANCE APPROVING A NONEXCLUSIVE TELECOMMUNICATIONS FRANCHISE AGREEMENT WITH CAVALIER TELEPHONE, L.L.C.

- - -

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the Nonexclusive Telecommunications Franchise Agreement between the City of Norfolk and Cavalier Telephone, L.L.C., a copy of which is attached hereto as Exhibit A, by which Cavalier Telephone, L.L.C., shall have the right, upon certain conditions, to install and operate conduit in the City's rights of way for the purpose of enabling telecommunications services within certain areas of the City, is hereby approved.

Section 2:- That the proper officers of the City are authorized to enter into such agreement in behalf of the City, subject to approval by the City Attorney as to the agreement's form and correctness, and to do all things necessary and proper to carry out its provisions.

Section 3:- That this ordinance shall be in effect from and after thirty days from the date of its adoption.

EXHIBIT A

NONEXCLUSIVE TELECOMMUNICATIONS FRANCHISE AGREEMENT

This Nonexclusive Telecommunications Franchise Agreement (hereinafter "Agreement") is made and entered into as of _____ ___, 2015, by and between the City of Norfolk, Virginia, a Virginia municipal corporation (hereinafter "City" or "Grantor") and Cavalier Telephone, L.L.C. (hereinafter "Cavalier" or "Grantee"), a Virginia limited liability company, having an office at 4001 Rodney Parham Road, Little Rock, AR 72212.

WHEREAS, Cavalier has requested the right to install and operate a telecommunications system or facilities in the City's rights-of-way in order to provide telecommunication services within certain areas of the City; and

WHEREAS, Cavalier desires to enter the City's rights-of-way under a nonexclusive telecommunications Franchise to use the rights-of-way at its own risk; and

WHEREAS, the City is agreeable to allowing Cavalier to use the City's rights-of-way subject to certain terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, the City and Cavalier agree as follows:

Section 1. Grant of Authority. Cavalier is hereby granted a nonexclusive telecommunications Franchise to construct, maintain, and operate telecommunications facilities in, over, under, and across the public ways within the City, as designated on the routing map attached as Exhibit 1, for the sole purpose of providing telecommunication services, including, but not limited to, both local and long distance. This Franchise does not include any provision of any cable television services of any type or any wireless services or other types of services other than telecommunication services as defined in the definitions section of this Agreement. The City specifically reserves the right to grant other telecommunications franchises, licenses or other rights as it deems appropriate for other telecommunication systems or facilities or any other purposes in accordance with the law.

Section 2. Acceptance of Franchise. Cavalier hereby accepts the franchise and agrees to comply with all of the terms of the Agreement, as well as with all applicable Federal, State and local laws, ordinances, resolutions, codes, rules and regulations, regardless of whether they are expressly referenced in this Agreement.

Section 3. Definitions. For the purpose of this Agreement, and the interpretation and enforcement thereof, the following words and phrases shall have the following meanings, unless the context of the sentence in which they are used shall indicate otherwise:

"Affiliate" means a person that directly, or indirectly, through one or more intermediaries, owns, controls, is owned or controlled by, or is under common ownership or control with another person.

"Cable Act" shall mean the Cable Communications Policy Act of 1984, 47 U.S.C. *§532, et seq.* as now and hereafter amended.

"Cable operator" means a person providing or offering to provide "cable service" within the City as that term is defined in the Cable Act.

"Cable service" for the purpose of this Agreement shall have the same meaning provided by the Cable Act.

"City" means the City of Norfolk, Virginia, and where appropriate its officers, agents, employees and volunteers.

"City property" means and includes all real property owned by the City, other than public streets and utility easements, as those terms are defined herein, and all property held in a proprietary capacity by the City, which are not subject to right-of-way franchising as provided by law.

"Communications Act" means the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, and as may be amended from time to time.

"Conduit" means any materials such as the metal or plastic pipe that protects wire, cable, lines, fiber optic cable, or other technology for the provision of telecommunication service.

"Duct" means a pipe, tube, channel or similar item for carrying wires, lines, cables, fiber optic cable, or other technology for the provision of telecommunications service.

"Excess capacity" means the volume or capacity in any existing or future duct, innerduct, conduit, manhole, handhold or other utility facility within the public way that is, or will be, available for use for additional telecommunications facilities.

"Effective Date" means the date of this Agreement as set forth on the first page of this Agreement, which shall be effective upon the date on which this Agreement has been fully executed by all the parties. This date shall be used for reference purposes and all other purposes.

"FCC" or ***"Federal Communications Commission"*** means the Federal administrative agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.

"Franchise" means the non-exclusive, revocable license granted to Grantee in this Agreement to use the public ways of the City for the purposes of constructing, installing, using, maintaining testing, inspecting, operating, repairing and removing the Telecommunications System pursuant to and in accordance with this Agreement.

"Grantee" or ***"Cavalier"*** means Cavalier Telephone L.L.C.

"Grantor" means the City of Norfolk, Virginia.

"Maintenance" means any effort or expenditure taken or made by a Grantee to preserve, repair, or improve existing telecommunications facilities or infrastructure in accordance with generally accepted industry standards.

"Other ways" means the highways, streets, alleys, utility easements or other rights-of-way within the City, but under the jurisdiction and control of a governmental entity other than the City.

"Overhead facilities" means utility poles, utility facilities and telecommunications facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

"Person" means any natural person, corporation, company, association, joint stock company or association, firm, partnership, limited liability company, joint venture, trust, individual and any other legally recognized entity, private or public, whether for profit or not-for-profit and includes the officers, agents, employees or representatives of such entity where appropriate.

"Public street" means the surface of and the space above and below any public street, road, highway, avenue, sidewalk, way, bridge, viaduct, alley or other public right-of-way, including non-paved surfaces, now or hereafter held by the City for the purpose of public travel, communications, alarm, street lighting, power distribution, water or sewer easements or similar public use.

"Public way" means and includes all public streets and utility easements, as those terms are defined herein, now or hereafter held or controlled by the City, but only to the extent of the City's right, title, interest

or authority to grant a License to occupy and use such streets and easements for telecommunications facilities.

***"State"* or "Commonwealth"** means the Commonwealth of Virginia.

"State Corporation Commission" means the State administrative agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers in the Commonwealth of Virginia.

"Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the State Corporation Commission or other regulatory entity, to allow its use by a telecommunications carrier for a pole attachment.

"Telecommunications facilities" means the plant, equipment and property, including but not limited to, fiber optic cables, cables, lines, wires, conduits, ducts, circuits, pedestals, antennae, electronics and other appurtenances or technology used or to be used to transmit, receive, distribute, provide or offer telecommunications services.

"Telecommunications service" means the providing or offering for rent, sale or lease, or in exchange for other value received, the transmittal of signals, including but not limited to voice, data, image, graphic or video or other programming information between or among points by wire, lines cable, fiber optics, circuits, laser or infrared, microwave, radio, satellite or other telecommunications facilities.

"Telecommunications system," see ***"Telecommunications facilities"***

"Underground facilities" means utility or telecommunications facilities located under the surface of the ground, excluding the underground foundations or supports for Overhead Facilities.

"Usable space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the State Corporation Commission or other regulator entity.

"Public Utility" *or* ***"Utility"*** shall be defined in accordance with applicable state laws regarding public utilities, but shall specifically include providers of telecommunications services.

"Utility easement" means any easement held by the City and acquired, established, dedicated or devoted for public utility purposes not inconsistent with telecommunications facilities.

"Utility facilities" means the plant, equipment and property, including but not limited to, the poles, pipes, mains, conduits, ducts, cables, fiber optic cables, circuits, wires, lines, plant and equipment located under, on or above the surface of the ground within the public ways of the City and used or to be used for the purpose of providing utility or telecommunications services.

Section 4. Grantee's Authority. Grantee warrants and represents that it has obtained all necessary and appropriate authority and approval from all applicable federal and state agencies or authorities to provide all telecommunications facilities and services it intends to provide within the City and upon request by the City will provide evidence of such authority.

Section 5. Franchise Only. Grantee acknowledges and agrees that all Grantee is granted by this Agreement is a nonexclusive telecommunications Franchise and that no other rights of any kind are granted by this Agreement, including but not limited to any right to provide any type of cable television services or wireless services.

Section 6. Application of Undergrounding Ordinances. Grantee understands that the City is in the process of amending its undergrounding ordinances. Grantee acknowledges and agrees that to the extent

these ordinances require new utility facilities to be installed underground, within sixty (60) days of enactments, or, if such requirement is challenged in an administrative or judicial proceeding, within sixty (60) days of final resolution thereof, Grantee shall initiate, and expeditiously complete, the placement of all of its new utility facilities in the City's public ways underground at its sole cost and without charge to the City.

Section 7. Compensation. As compensation to the City for use of the City's rights of way, Grantee shall pay to the City annually, in the manner set forth hereinafter, three (3) percent of its gross earnings in accordance with Section 24-2 of the Norfolk City Code, 1979.

7.1 The annual compensation for a Franchise as provided for in Section 7, shall be payable annually on or before the 60th day after the end of each calendar year or fraction thereof.

7.2 Each annual payment shall be by check made payable to the City and filed with the Norfolk Commissioner of Revenue.

7.3 Each payment required by this section shall be accompanied by a statement executed by an authorized officer of the Grantee certifying the amount of gross earnings for the period covered by the payment.

7.4 All payments required by this section, and accompanying statements, shall be subject to audit by the Norfolk Commissioner of Revenue and assessment or refund if the payment is found to be in error.

7.5 In the event that such audit results in an assessment by and an additional payment to the City, such additional payment shall be subject to interest at the rate of one and one-half percent (1½%) per month, or any fraction of a month elapsed after the due date where the additional payment exceeds five percent (5%) of the amount paid by the Grantee.

7.6 Failure of the Grantee to pay the fees required under this Section 7 within thirty (30) days of the due date shall subject the Grantee to a ten percent (10%) penalty, and interest charges of one and one-half percent (1½%) per month, or portion thereof, for each month payment is delinquent.

7.7 Failure of the Grantee to make the annual payment required under this Section 7 within ninety (90) days of the due date may subject the Grantee to the revocation of its Franchise following thirty (30) days written notice from the City. In the event the annual payment is not received within one hundred and twenty (120) days of the due date, the Grantee shall be considered to have abandoned the telecommunications facilities installed under this Franchise and said telecommunications facilities shall become the property of the City.

Section 8. Term. The term of the franchise shall begin on the Effective Date of this Agreement and shall expire five (5) years from the Effective Date. The term may be terminated earlier by mutual agreement or in the event of default.

Section 9. Other Remedies. Nothing in this Agreement shall be construed as waiving or limiting any rights or remedies that the City or Grantee may have, at law or in equity, for enforcement of this Agreement.

Section 10. Severability. If any section, subsection, sentence, clause, phrase, or other portion of this Agreement, or its application to any person, is, for any reason, declared invalid, in whole or in part by any court or agency of competent jurisdiction, said decision shall not affect the validity of the remaining portions hereof.

Section 11. Transfer of Ownership. Grantee shall not sell, transfer, lease, assign, sublet, or dispose of, in whole or in part, either voluntarily or by forced or involuntary sale, or ordinary sale, consolidation, or otherwise (except to a parent or affiliate, or in connection with financing by Grantee in the ordinary course of business) any of the rights or privileges granted by this Agreement without the prior consent of the City

Council, which consent shall not be unreasonably withheld. Notwithstanding any other provision of this Agreement, but subject to any applicable requirements in the City Charter and the State Code, no consent from the City shall be required for a transfer in trust, mortgage, collateral, assignment or other instrument of hypothecation, in whole or in part, to secure an indebtedness, or for a *pro forma* transfer of corporation, partnership, or other entity controlling, controlled by or under common control with the Grantee.

Section 12. Administrative Costs. Grantee will pay to the City the sum of One Thousand Dollars ($1,000) for the administrative costs and expenses incurred by the City related to the grant of this Franchise. Upon execution of the Agreement by both parties, the administrative fee shall be paid to the City within 14 days. Failure to pay such fee shall entitle the Grantor to revoke this Franchise Agreement at its sole discretion.

Section 13. Location of Facilities. Subject to the terms of Section 16 of this Agreement, Grantee's facilities shall be constructed, installed and located, at their sole expense, as follows:

(a) Grantee shall install its telecommunications facilities within an existing underground duct or conduit whenever excess capacity exists within such utility facility, so long as Grantee, by so doing, would not be required to relinquish ownership and control of its facilities to the owner of the duct or conduit.

(b) Subject to any applicable City ordinances or code provisions, Grantee may install its telecommunications facilities on pole attachments to existing or replacement utility poles to the extent that space is available thereon.

(c) Grantee shall comply, at its sole expense, with all requirements regarding the placement of its facilities underground in those areas designated as underground districts in the Norfolk City Code, or whenever all new and existing cable facilities and telecommunications facilities are located or are required to be located underground within a particular segment of a public way of the City.

Section 14. Permits. Grantee, including its contractors and consultants, prior to any construction or work being commenced, is required to obtain at its sole expense all applicable permits, including any application and permit for street opening if any streets will be disturbed. However, nothing herein shall prohibit the City and a Grantee from agreeing to an alternative plan to review permit and construction procedures provided such alternative procedures provide substantially equivalent safeguards for responsible construction practices, and are in accordance with applicable City Code provisions. Grantee understands that pursuant to Section 42-59(b) of the Norfolk city Code, 1979, every permit for the construction of a conduit system shall be subject to the condition that the City shall at all times have the free and unrestricted use of one duct for municipal wires and such duct is to be used solely by the City for public purposes.

Section 15. Public Works. The rights and privileges granted by this Agreement shall not be in preference or hindrance to the rights of the City and any other lawful governmental authorities having jurisdiction to perform or carry out any public works or public improvements. Should the telecommunications system interfere with the construction, maintenance or repair of such public works or improvements, Grantee, at its expense, shall protect or relocate the telecommunications system, or any applicable part thereof, as directed by the City or other governmental authorities having jurisdiction.

Section 16. Use of Public Ways.

16.1 Grantee, in any opening it shall make in the public ways of the City, shall be subject to the provisions of this Agreement and to all applicable ordinances, codes and regulations of the City. The telecommunications system of the Grantee shall be located so as not to interfere with the public safety or with the convenience of persons using the public ways.

16.2 The City reserves the right by resolution of the City Council or otherwise through proper representatives of the City to specifically designate the location of the telecommunications system of Grantee with reference to municipal facilities, such sewer and water mains, drainage facilities, fiber optic cable, signal poles and lines and similar services, other facilities, such as public telephone utilities, public electric utilities, public cable television utilities, and railway communication and power lines, in such a manner as to protect the public safety and public and private property. Failure by the City to so designate does not relieve Grantee of its responsibilities in matters of public safety as provided in this Agreement. Grantee shall construct, maintain and locate its telecommunications system so as not to interfere with the construction, location and maintenance of sewer, water, drainage, electrical, signal and fiber optic facilities of the City.

16.3 Except in the cases of emergencies, Grantee shall not move, alter, change or extend any of its telecommunications system in any public way unless prior written notice of its intention to do so is given to the City Manager and permission in writing to do so is granted by the City Manager or such requirement is waived by the City Manager. Such permission shall be conditioned upon compliance with the terms and conditions of this Agreement, with such other terms and conditions as will preserve, protect and promote the safety of the public using the public ways, and as will prevent undue interference with or obstruction of the use of the public ways by the public, the City or by any other public utility or public service corporation for their respective purposes and functions. Such work by Grantee shall also be coordinated with the City's annual paving program through the Department of Public Works.

16.4 The City may require that written permits, in any and all cases, be obtained by Grantee whenever it becomes necessary for Grantee to excavate in the public ways in order to install, construct, maintain or extend the telecommunications system. Such permits, if required, may be made applicable to any and all types of excavations in the public ways, as prescribed by City, and City may establish a fee for each excavation made in a public way by a Grantee. Such permits may require the particular part or point of the public ways where construction or excavation is to be conducted, the length of time in which such permit shall authorize such work to be done and the hours of each day during which such work shall be undertaken. A single permit maybe issued for multiple excavations to be made in public ways; provided, however, any public way opening fee established by City shall apply to each excavation made in public ways of the City. Exceptions to the requirement for a written permit may be allowed in cases of emergencies involving public safety or restoration of service. In the case of emergency excavations made in the public ways without permit, Grantee shall attempt to notify the Director of Public Works or his designee immediately to obtain appropriate guidance and authority; however, in the event Grantee is unable to make such contact after making a diligent attempt to do so, Grantee may make a report of each such excavation to the City within two (2) working days and pay such fee as may be established by City for excavations in public ways by Grantee. Any permit applications and inspections related to repair of excavations shall be promptly acted upon by the City so as not to unreasonably delay Grantee in efficiently discharging its public service obligation.

16.5 Immediately after installation, repair or extension of the telecommunications system or any portion thereof or any pavement cut by Grantee in any public way of the City, the incidental trenches or excavations shall be refilled by Grantee in a manner acceptable to the City Manager. Pavement, sidewalks, curbs, gutters or any other portions of public ways damaged, disturbed or destroyed by such work shall be promptly restored and replaced with like materials to their former condition by Grantee at its own expense; however, where it is necessary, and if authorized by the City, in order to achieve the former conditions, Grantee shall use materials whose type, specification and quantities exceed or are different from those used in the installation, then Grantee at its own expense shall provide such different materials. Where a cut or disturbance is made in a section of sidewalk or paving, rather than replacing only the area actually cut, Grantee shall replace the full width of the existing sidewalk or appropriate sections of paving as determined by the Director of Public Works and the full length of the section or sections cut, a section being defined as that-area marked by expansion joints or scoring or as determined by the Director of Public Works. Grantee shall maintain, repair and keep in good condition for a period of two (2) years following such

disturbance all portions of public ways disturbed by Grantee, provided such maintenance and repair shall be necessary because of defective workmanship or materials supplied by Grantee.

16.6 Grantee shall promptly remove or correct any obstruction, damage, or defect in any public way which may have been caused by Grantee in the installation, operation, maintenance or extension of Grantee's telecommunications system. Any such obstruction, damage, or defect which is not promptly removed, repaired or corrected by Grantee after proper notice so to do, given by the City to Grantee, may be removed or corrected by the City, and the cost thereof shall be charged against Grantee and may be enforced as a lien upon any of Grantee's properties or assets. Any expense, cost, or damages incurred for repair, relocation, or replacement to City water, sanitary sewer, storm sewer, storm drainage, communication facilities or other property resulting from construction or maintenance of Grantee's telecommunications system shall be borne by Grantee and any and all expense and cost incurred in connection therewith by the City shall be fully reimbursed by the Grantee to the City.

16.7 If weather or other conditions do not permit the complete restoration required by this Section, the Grantee shall temporarily restore the affected public ways or property. Such temporary restoration shall be at the Grantee's sole expense and the Grantee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.

16.8 Grantee or other person acting in its behalf shall use suitable barricades, flags, flagmen, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such ways or property and shall comply with all federal, state, and local laws and regulations, including the Virginia Department of Transportation flagging requirements.

16.9 Grantee shall not open, disturb or obstruct, at any one time, any more of the public ways than reasonably may be necessary to enable it to proceed in laying or repairing its telecommunications system. Neither shall Grantee permit any public ways so opened, disturbed or obstructed by it in the installation, construction, repair or extension of its telecommunications system to remain open or the public way disturbed or obstructed for a longer period of time than reasonably shall be necessary. In all cases where any public ways shall be excavated, disturbed or obstructed by Grantee, Grantee shall take all precautions necessary or proper for the protection of the public and shall maintain adequate warning signs, barricades, signals and other devices necessary or proper to adequately give notice, protection and warning to the public of the existence of all actual conditions present.

16.10 Whenever the City shall widen, reconstruct, realign, pave or repave, or otherwise work on any public ways, or shall change the grade or line of any public ways, or shall construct or reconstruct any water, sanitary sewer, storm sewer, drainage or communications facility of the City, it shall be the duty of Grantee to move, alter or relocate its telecommunications system or any part thereof as requested by the City at Grantee's expense. Upon written notice by the Director of Public Works of the City's intention to perform work as specified above, Grantee shall within a reasonable period of time accomplish its obligation in accordance with and to conform to the plans of the City for such construction, reconstruction or improvements. Should the Grantee fail, refuse or neglect to comply with such notice, the telecommunications system or any part hereof may be removed, altered or relocated by the City and the City shall not be liable to Grantee for any damages resulting from such removal, alteration or relocation.

Section 17. Damage to Property. Neither Grantee, nor any person acting on Grantee's behalf, shall take any action or permit any action to be done which may impair or damage any City Property, public ways of the City, other Ways or other property located in, on or adjacent thereto.

Section 18. Repair and Emergency Work. In the event of an unexpected repair or emergency, Grantee may commence such repair and emergency response work as required under the circumstances,

provided Grantee shall notify the City as promptly as possible, before such repair or emergency work is started or as soon thereafter as possible if advance notice is not practicable.

Section 19. Maintenance of Facilities. Grantee shall maintain its facilities in good and safe condition and in a manner that complies with all applicable federal, state and local requirements, laws, ordinances, and regulations.

Section 20. Safety Standards. Grantee shall at all times employ a high standard of care and shall install and maintain and use approved methods and devices for preventing failure or accidents which are likely to cause damages, injuries or nuisances to the public.

Section 21. Police Power. All rights and privileges granted hereby are subject to the lawful exercise of the police power of the City to adopt and enforce local laws, rules and regulations necessary to the health, safety and general welfare of the public. Expressly reserved to the City is the right to adopt, in addition to the provisions of this Agreement and existing laws, such additional ordinances and regulations as are necessary for the lawful exercise of its police power for the benefit and safety of the public.

Section 22. Relocation or Removal of Facilities. Within one hundred and twenty (120) days following written notice from the City, Grantee shall temporarily or permanently remove, relocate, change or alter the position of any telecommunications facilities within the public ways at Grantee's expense whenever the City shall have determined that such removal, relocation, change or alteration is reasonably necessary for:

(a) The construction, repair, maintenance or installation of any City facilities or other public improvement in or upon the public ways.

(b) The operations of the City or other governmental entity in or upon the public ways.

Section 23. Street Vacation or Abandonment. In the event any Street or portion thereof used by Grantee shall be vacated by the City or the use thereof discontinued by Grantee, during the term of this Franchise, Grantee shall not be obligated to remove its facilities therefrom unless specifically requested by the City to do so, and on the removal thereof Grantee shall, at its own expense, restore, repair or reconstruct the Street area where such removal has occurred, and place the Street area where such removal has occurred, to a condition similar to that existing before such removal took place. In the event of failure, neglect or refusal of Grantee, after ninety (90) day notice by the City to remove the facilities or to repair, restore, reconstruct, improve or maintain such Street portion, the City may do such work or cause it to be done, and the cost thereof as found and declared by the City shall be paid by Grantee as directed by the City and collection may be made by any available remedy.

Section 24. Emergency Removal or Relocation of Facilities. The City retains the right and privilege to cut or move any telecommunications facilities located within the public ways or other areas of the City as the City may determine to be necessary, appropriate or useful in response to any life-threatening emergency. The City will endeavor to notify Grantee of such emergencies that may affect their telecommunications facilities. Nothing herein shall create any duties or obligations on the City to so notify Grantee nor shall the City, its officers, agents, employees, or volunteers in any way be liable for any failure to notify Grantee.

Section 25. Damage to Grantee's Facilities. Except for acts of gross negligence or willful misconduct, and subject to the City's rights to sovereign immunity, the City, its officers, agents, and employees, shall not be liable for any damage to or loss of any Grantee's telecommunications services or telecommunications facilities within the public ways or any other areas of the City as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work or activity or lack of any activity of any kind by or on behalf of the City.

Section 26. Duty to Provide Information. Within ten (10) days of a written request from the City, Grantee shall furnish the City with information sufficient to demonstrate:

(a) That Grantee has complied with all requirements of this Agreement.

(b) That all franchise fees, municipal sales taxes, telecommunications taxes, utility taxes or any other taxes, fees or charges due the City in connection with the telecommunications services or facilities provided by the Grantee have been properly collected and/or paid by Grantee.

(c) All books, records, maps, and other documents maintained by Grantee with respect to its services or facilities within City or the public ways shall be made available for inspection by representatives of the City at least every six (6) months and at other reasonable times and intervals.

Section 27. Insurance and Bond Requirements.

27.1 Requirement of Insurance. Grantee shall, at its expense, obtain and maintain during the life of this Agreement the insurance and bond required by this Agreement. Any required insurance and bond shall be effective prior to the beginning of any work by Grantee within the City.

27.2 Commercial General Liability. Grantee shall maintain during the life of this Agreement Commercial General Liability insurance coverage on an occurrence basis insuring against all claims, loss, cost, damage, expense or liability from loss of life or damage or injury to persons or property arising out of any of the work or activity under or by virtue of this Agreement. The minimum limits of liability for this coverage shall be $2,000,000 combined single limit for any one occurrence.

27.3 Contractual Liability. Grantee shall maintain during the life of this Agreement broad form Contractual Liability insurance including the indemnification obligation set forth in this Agreement.

27.4 Workers' Compensation. Grantee shall maintain during the life of this Agreement Workers' Compensation insurance covering Grantee's statutory obligation under the laws of the Commonwealth of Virginia and Employer's Liability insurance for all its employees engaged in work under this Agreement.

27.5 Automobile Liability. Grantee shall maintain during the life of this Agreement Automobile Liability insurance. The minimum limit of liability for such insurance shall be $1,000,000 combined single limit applicable to owned or non-owned vehicles used in the performance of any work under this Agreement.

27.7 Umbrella Coverage. The insurance coverages and amounts set forth in subsections (b), (c), (d) and (e) of this Section may be met by an umbrella liability policy following the form of the underlying primary coverage in a minimum amount of $5,000,000. Should an umbrella liability insurance coverage policy be used, such coverage shall be accompanied by a certificate of endorsement stating that it applies to the specific policy numbers indicated for the insurance providing the coverages required by subsections (b), (c), (d) and (e), and it is further agreed that such statement shall be made a part of the certificate of insurance furnished by Grantee to the City.

27.8 Pollution Liability Insurance. Grantee shall maintain during the life of this Agreement Pollution Liability Insurance in the amount of $1,000,000 each occurrence. Coverage shall be provided for bodily injury and property damage resulting from pollutants, which are discharged suddenly and accidentally. In addition, the insurance will provide coverage for cleanup costs.

27.9 Evidence of Insurance. All insurance shall meet the following requirements:

(a) The Grantee shall furnish the City a certificate or certificates of insurance showing the type, amount, effective dates and date of expiration of the policies. Certificates of insurance shall include any insurance deductibles, the amount of such deductible being subject to approval by the City.

(b) The required certificate or certificates of insurance shall include substantially the following statement: "The insurance covered by this certificate shall not be canceled or materially altered, except after thirty (30) days written notice has been received by the City of Norfolk."

(c) The required certificate or certificates of insurance shall name the City of Norfolk, its officers, agents, employees and volunteers as additional insured.

(d) Insurance coverage shall be in a form and with an insurance company approved by the City which approval shall not be unreasonably withheld. Any insurance company providing coverage under this Agreement must be authorized to do business in the Commonwealth of Virginia.

Section 28: Liability. Grantee agrees and binds itself to indemnify, keep and hold the City, its officers, agents, and employees free and harmless from any and all claims, causes of action, damages or any liability on account of any injury or damage of any type to any persons or property growing out of, or directly or indirectly resulting from, any act or omission of Grantee, including but not limited to: (a) Grantee's use of the public ways or other areas of the City; (b) the acquisition, construction, reconstruction, erection, installation, operation, maintenance, repair or extension of Grantee's telecommunications facilities; (c) the exercise of any right or privilege granted by or under this Agreement; or (d) the failure, refusal or neglect of Grantee to perform any duty imposed upon or assumed by Grantee by or under this Agreement. In the event that any suit or proceeding shall be brought against the City at law or in equity, either independently or jointly with Grantee on account thereof, Grantee, upon notice given to it by the City, will defend the City in any such action or other proceeding at the cost of the Grantee. In the event of any settlement or final judgment being awarded against the City, either independently or jointly with Grantee, then Grantee will pay any such settlement or judgment or will comply with such decree, pay all costs and expenses of whatsoever nature and hold the City, it officers, agents, and employees free and harmless therefrom.

Section 29: Hazardous Materials.

29.1 While on or near City's property or easement or in its performance of this Agreement, Grantee shall not transport, dispose of or release any hazardous substance, material, or waste, except as necessary in performance of its work under this Agreement and in any event Grantee shall comply with all federal, state, and local laws, rules, regulations, and ordinances controlling air, water, noise, solid wastes, and other pollution, and relating to the storage, transport, release, or disposal of hazardous material, substances or waste. Regardless of City's acquiescence, Grantee shall indemnify and hold City, its officers, agents, employees and volunteers harmless from all costs, claims, damages, causes of action, liabilities, fines or penalties, including reasonable attorney's fees, resulting from Grantee's violation of this paragraph and agrees to reimburse City for all costs and expenses incurred by City in eliminating or remedying such violations. Grantee also agrees to reimburse City and hold City, its officers, agents, employees and volunteers harmless from any and all costs, expenses, attorney's fees and all penalties or civil judgments obtained against any of them as a result of Grantee's use or release of any hazardous substance or waste onto the ground, or into the water or air from, near or upon City's premises.

29.2 The Grantee shall protect, indemnify, and hold harmless the City from any and all demands for fees, claims, suits, actions, causes of action, or judgments based on the alleged infringement or violation of any patent, invention, article, arrangement, or other apparatus that may be used in the performance of any work or activity arising out of the use of any telecommunication facilities or the provision of telecommunication service.

Section 30: Performance and Labor and Material Surety. Before this Agreement is effective, and as necessary thereafter, the Grantee shall provide-such bonds or other instruments in form and substance acceptable to the City as may be required by this Agreement.

Section 31: Bond.

31.1 Within 10 consecutive calendar days after the effective date of this Agreement but before any construction is commenced, Grantee shall furnish to the City a performance bond made payable to the City in the amount of one hundred thousand dollars ($100,000). The Performance Bond is to guarantee that the project is constructed and maintained in a proper manner without damage to the public ways or other areas of the City. The bond shall be written by a corporate surety acceptable to the City and authorized to do business in the Commonwealth of Virginia. Upon satisfactory completion of construction of the Grantee's telecommunications facilities, the performance bond may be reduced to the amount of twenty-five thousand dollars ($25,000) and made payable to the City, and shall be maintained at this amount throughout the term of this Agreement.

31.2 The bond shall guarantee, to the satisfaction of the City:

(a) timely completion of construction;

(b) construction in compliance with applicable plans, permits, technical codes and standards;

(c) proper location of the facilities as specified by the City;

(d) proper maintenance of Grantee's facilities during the term of this Agreement;

(e) restoration of the public ways and other property affected by any construction or repair work performed by or at the request of Grantee;

(f) the submission of "as-built" drawings after completion of the work as required by this Agreement; and

(g) timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the work.

Section 32: Coordination of Construction Activities. Grantee is required to cooperate with the City as follows:

(a) Anytime Grantee plans expansion of its backbone system, Grantee shall provide the City with a schedule of its proposed construction activities in and around any public ways, or that may affect the public ways.

(b) Grantee shall meet with the City and other users of the public ways annually, or as determined by the City, to schedule and coordinate construction in the public ways.

(c) All construction locations, activities and schedules shall be coordinated, as ordered by the Director of Public Works, to minimize public inconvenience, disruption or damages.

Section 33: Nonenforcement by City. Grantee shall not be excused from complying with any of the terms and conditions of this Agreement by any failure of the City, upon any one or more occasions, to insist upon Grantee's performance or to seek Grantee's compliance with any one or more of such terms or conditions of this Agreement.

Section 34: Construction Codes. Telecommunications facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, state and local codes, rules and regulations including the National Electrical Safety Code.

Section 35: Engineer's Certification. All permit applications shall be accompanied by the certification of a registered professional engineer that the drawings, plans and specifications submitted with the application comply with applicable technical codes, rules and regulations.

Section 36: Traffic Control Plan. All permit applications which involve work on, in, under, across or along any public ways shall be accompanied by a traffic control plan demonstrating the protective measures and devices that will be employed, consistent with applicable local, state and federal laws and regulations, to prevent injury or damage to persons or property and to minimize disruptions to efficient pedestrian and vehicular traffic.

Section 37: Issuance of Permit. Within forty-five (45) days after submission of all plans and documents required of the applicant and payment of the fees required by this Agreement, and compliance with the provisions of the Virginia Code, the City, if satisfied that the applications, plans and document comply with all requirements of this Agreement, shall issue a permit authorizing construction of the facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as may be deemed necessary or appropriate.

Section 38: Construction Schedule. The Grantee shall submit a written construction schedule to the Director of Public Works ten (10) working days before commencing any work in or about the public ways. The Grantee shall further notify the Director of Public Works not less than five (5) working days in advance of any excavation or work in the public ways and shall comply with the provisions of the Virginia Underground Utility Damage Prevention Act, Virginia Code § 56-265.14 et. seq.

Section 39: Compliance with Permit. All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the facilities. The City and its representatives shall be provided access to the work and such further information as it may require to ensure compliance with such requirements.

Section 40: Display of Permit. The Grantee shall maintain a copy of the construction permit and approved plans at the construction site, which shall be displayed and made available for inspection by the City at all times when construction work is occurring.

Section 41: Survey of Underground Facilities. The Grantee shall supply and specify the location of all facilities by depth, line, grade, proximity to other facilities or other standard, the Grantee shall cause the location of such facilities to be verified, to the extent required, by a registered state surveyor. The Grantee shall relocate, at its expense, any facilities which are not located in compliance with permit requirements.

Section 42: Noncomplying Work. Upon order of the City, all work which does not comply with the permit, the approved plans and specifications for the work, or the requirements of this Agreement, shall be removed at the sole expense of Grantee.

Section 43: Completion of Construction. The Grantee shall promptly complete all construction activities so as to minimize disruption of the City's public ways and other public and private property. All construction work authorized by a permit within the public ways, including restoration, must be completed within 30 days of the date of issuance of the permit.

Section 44: As-Built Drawings. Within sixty (60) days after completion of construction, the Grantee shall furnish the City with two (2) complete sets of as-built plans, drawn to scale and certified to the City as accurately depicting the actual location of all telecommunications facilities constructed pursuant to the permit and shall include a digitized map(s) in both printed and electronic form readable by the current version of Auto CAD and tied to the Virginia State Plane Coordinate System and tied to the City's Survey Control monuments and geographic information. Grantee shall, upon request, provide updated maps annually.

Section 45: Landscape Restoration.

45.1 All trees, landscaping and grounds removed, damaged or disturbed as a result of the construction, installation, maintenance, repair or replacement of telecommunications facilities shall be replaced

or restored, as nearly as may be practicable, to the condition existing prior to performance of the work.

45.2 All restoration work within the public ways or other areas shall be done in accordance with landscape plans approved by the Director of Public Works, or his designee, and shall comply with sections 45-10 through 45-31 of the Code of the City of Norfolk, 1979.

Section 46: Responsibility of Owner. The owner of the facilities to be constructed and, if different, the Grantee is responsible for performance of and compliance with all provisions of this Agreement.

Section 47: Controlling Law. This Agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Virginia and any applicable federal laws.

Section 48: Captions. The paragraph Captions and Headings in this Agreement are for convenience and reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 49: Nondiscrimination. Grantee shall not discriminate on the basis of race, religion, color sex or national origin in its employment practices, contracting or provision of services.

Section 50: Commencement of Work. Grantee will not commence work within City until detailed plans have been provided to and approved by the Director of Public Works.

Section 51: Forum Selection. By virtue of entering into this Agreement, Grantee agrees and submits itself to a court of competent jurisdiction in the City of Norfolk, Virginia, or in the United States District Court for the Eastern District of Virginia, Norfolk Division, and further agrees that this Agreement is controlled by the laws of the Commonwealth of Virginia or any applicable federal laws and that all claims, disputes and other matters shall be decided only by such court according to the laws of the Commonwealth of Virginia or any applicable federal laws or by any regulatory body with jurisdiction including the Federal Communications Commission.

Section 52: Effective Date. This Agreement shall be in full force and effect as of the Effective Date when fully executed by an authorized officer of Grantee and the authorized officials of the City.

Section 53: Removal of Grantee's Facilities. Subject to applicable law, if Grantee is not awarded a franchise or otherwise granted rights by any future ordinance or agreement adopted by the City, or if the term of this Agreement expires or the rights granted to Grantee by this Agreement are revoked by the City, Grantee shall immediately cease operations within the City and shall not be permitted to operate, maintain or repair its existing encroachments or facilities and shall promptly remove any and all Grantee's facilities and equipment within the City, all at the sole cost of Grantee.

Section 54: Notices. All notices hereunder must be in writing and shall be deemed validly given if sent by certified mail, return receipt requested, or by a nationally recognized overnight courier, addressed as follows or if sent by facsimile to the facsimile number set forth below, with a hard copy contemporaneously mailed as previously specified:

If to Grantor to:

City Manager
1101 City Hall Building
Norfolk, Virginia 23510
Fax No. (757) 664-4239

With copies to:

City Attorney
908 City Hall Building
Norfolk, Virginia 23510
Fax No. (757) 664-4201

Director of Public Works
700 City Hall Building
Norfolk, Virginia 23510
Fax No. (757) 664-4603

If to Grantee to:

Cavalier Telephone, L.L.C.

11101 Anderson Drive
Little Rock, AR 72212
ATTN: Franchises & Easements
Fax No. (330) 486- 6238

With a copy to:

Cavalier Telephone, L.L.C.
4001 Rodney Parham Road
Little Rock, AR 72212
ATTN: Legal Department
Phone: (800) 599-1000 or (800) 843-9214

Grantor or Grantee may from time to time designate any other address for this purpose by written notice to the other party.

Section 55. Compliance with Federal Immigration Law. At all times during which any term of this Agreement is in effect, Grantee shall not knowingly employ any unauthorized alien. For purposes of this section, an "unauthorized alien" shall mean any alien who is neither lawfully admitted for permanent residence in the United States nor authorized to be employed by either Title 8, section 1324a of the United States Code or the U.S. Attorney General.

Section 56. Compliance with State Law – Authorization to Conduct Business in the Commonwealth: Grantee hereby represents that it is organized as a stock or non-stock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership and is authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law.

Cavalier, by the undersigned authorized agent, does hereby agree to abide by the terms, conditions, and obligations of the Agreement.

WITNESS the following duly authorized signatures:

CITY OF NORFOLK
NORFOLK, VIRGINIA

By: _____
City Manager

_____
Date

ATTEST:

_____
City Clerk

_____
Date

CAVALIER TELEPHONE, L.L.C.

By: _____

Title: _____

_____
Date

ATTEST:

_____
Secretary

_____
Date

Approved as to Content:

_____
Director of Public Works

Approved as to Form and Correctness:

_____
Deputy City Attorney

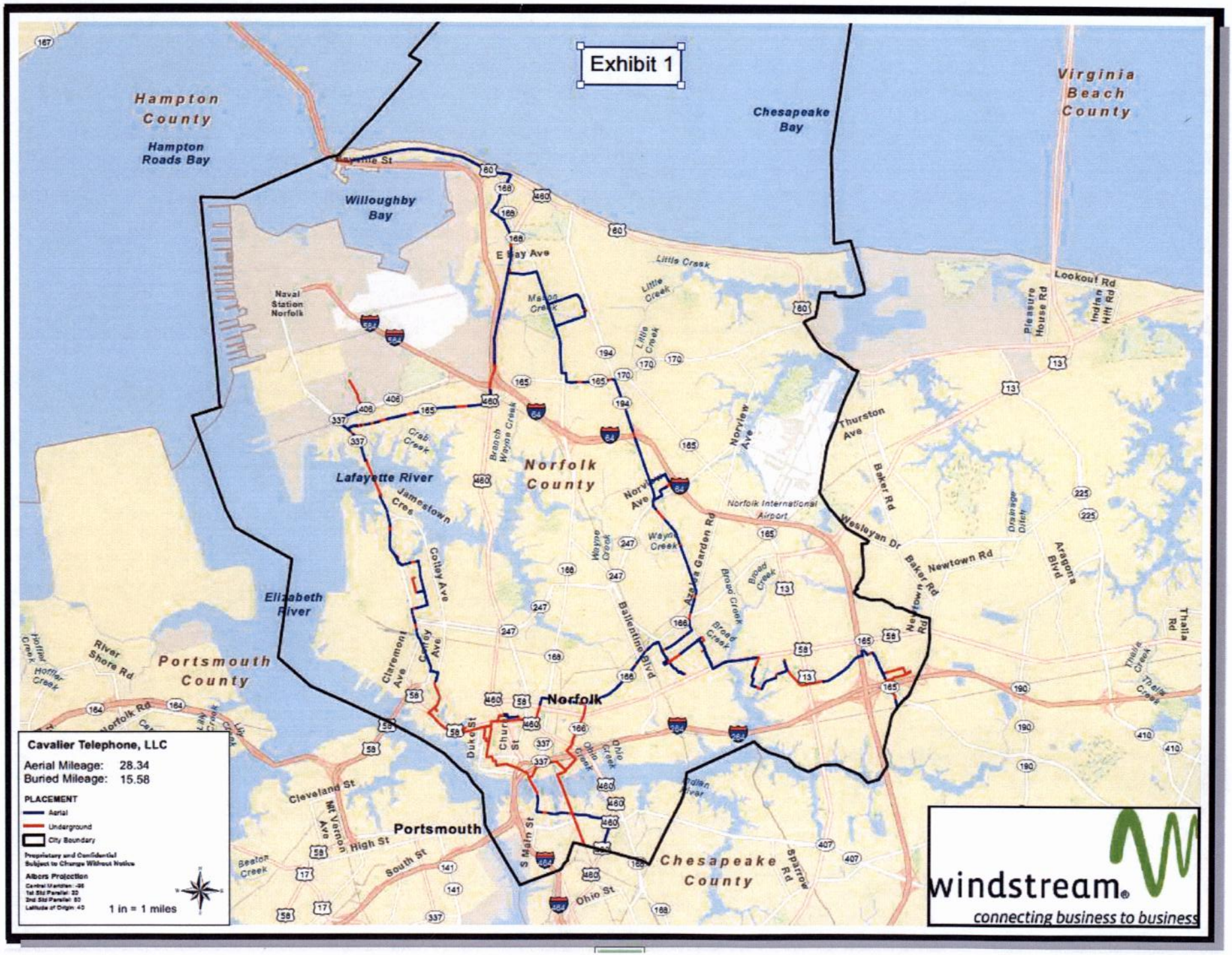
Exhibit 1
Hampton County
Hampton Roads Bay
Willoughby Bay
Chesapeake Bay
Virginia Beach County
Naval Station Norfolk
Lafayette River
Elizabeth River
Norfolk County
Portsmouth County
Chesapeake County
Norfolk
Portsmouth
Norfolk International Airport
Cavalier Telephone, LLC
Aerial Mileage: 28.34
Buried Mileage: 15.58
PLACEMENT
Aerial
Underground
City Boundary
Proprietary and Confidential
Subject to Change Without Notice
Albers Projection
1 in = 1 miles
windstream
connecting business to business