



CITY OF BURLINGTON, VERMONT

OFFICE OF

THE CITY ATTORNEY

AND

CORPORATION COUNSEL

149 CHURCH ST.
BURLINGTON, VT 05401-8489
(802) 865-7121
(TTY) 865-7142
FAX 865-7123

KENNETH A. SCHATZ, Esq.
City Attorney

EUGENE M. BERGMAN, Esq.
Sr. Assistant City Attorney

NIKKI A. FULLER, Esq.
Assistant City Attorney

RICHARD W. HAESLER, JR., Esq.
Assistant City Attorney

GREGG M. MEYER, Esq.
Assistant City Attorney

To: Transportation, Energy, & Utilities Committee of the City Council
From: Gene Bergman, Sr. Asst. City Attorney *JB*
Re: Geothermal Water System Agreement with Champlain College
Date: March 16, 2012

On March 12, 2012, the Board of Finance requested that this agreement be placed on your agenda for discussion and recommendation back to the board, consistent with previously stated sentiments of the council with regard to having right-of-way occupation agreements sufficiently discussed in committee(s) prior to an agreement being considered for authorization by the full council.

Summary of the key agreement issues

*** College is asking to place a utility corridor in the Maple St. right of way for a geothermal water system for the new residential housing on the north side of Maple St.**

Project is similar to a utility's placement of a line in the right of way:

- a. water is being run through utility corridor into a system to generate energy for the heating and cooling of 3 student dormitory buildings (276 beds total).
- b. similar to Vermont Gas' or Burlington Electric lines being used to pipe fuel for dorm furnaces and air conditioners.

*** License-type Agreement is most appropriate for this project**

(1) City needs to be able to require the movement of utilities from their current locations in the event the maintenance of the street, including the combined sewer/stormwater or stormwater collection systems, requires the utilities to be moved. Easements are not granted for utility lines in the Right of Way because the permanent rights granted by an easement are inconsistent with the needs of the city to maintain the right of way

(2) College's utility corridor should be treated just like the other utilities that have their means of transmission beneath the road way, with the right to stay in the placed location unless maintenance of the street requires relocation or placement, or maintenance interferes with the right of way or other utilities.

*** Key non-fee provisions**

- (1) Allows college to place and maintain the utility corridor in the Maple St. right of way
- (2) Allows city to require relocation if ROW maintenance requires it, upon reasonable notice and at college's cost
- (3) Requires college to obtain an excavation permit and meet requirements for all ROW excavations
- (4) Prohibits college's placement, use and maintenance of utility corridor in way that interferes with placement, use and maintenance of utilities already located in the ROW and the normal uses of the ROW
- (5) College must indemnify and hold the city harmless from all liability arising out of its placement, maintenance and use of the utility corridor

*** Agreement's fee provision**

- (1) The comparison with the use of the right of way by other utilities is a fair and reasonable approach, more fair and reasonable than the flat, one time \$1,000 fee the college proposed
- (2) Utilities that occupy the right of way for the placement and maintenance of lines and other means of transmission are subject to a franchise fee of 2.5% fee of gross receipts found in the city's ordinances in chapter 27, Art. VI absent an alternative agreement
- (3) We proposed that the college pay an annual fee of 2.5% of the annual percentage of the rent attributable to the heating and cooling costs of the dormitory
- (4) The Board of Finance prefers that the agreement have an initial set annual fee that would be adjusted for inflation. We propose an initial annual fee of \$5,520. This is based on there being 276 beds in the 3 dormitories, a residence hall fee of \$8,000 (based on Champlain's published fee), an estimate that the cost of heating and air conditioning attributable to the rent is 10%, and a 2.5% right of way occupation fee (based on the fee set by the franchise fee ordinance)

GEOTHERMAL WATER SYSTEM AGREEMENT WITH CHAMPLAIN COLLEGE

This Agreement is made by and between the City of Burlington, a municipal corporation organized and validly existing under the laws of the State of Vermont (hereinafter “City”) and Champlain College, Inc., a Vermont non-profit educational corporation with its principal offices in Burlington, Vermont (hereinafter “Champlain”).

WHEREAS, Champlain seeks to construct, maintain, repair, replace and use an underground pipe/line/conduit (“utility corridor”) upon and across Maple St. for the benefit of an energy-efficient geothermal water system (“Geothermal System”) to serve Champlain’s residential housing known as Res-Tri Dormitories located on the north side of Maple St; and

WHEREAS, such activity requires the running of said utility corridor upon and across the City’s right of way on Maple St., such occupation of the right of way to be approximately twenty (20) feet in width and running from the southerly sideline of the right of way for Maple Street to the northerly sideline of the right of way for Maple St., the centerline of said occupation being located approximately 438 feet west of the westerly sideline of South Willard St. at the Maple St. intersection, as depicted and shown on a Plan entitled “Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 (“Plan”) and adopted by reference into this Agreement and

WHEREAS, the occupation of the City’s right of ways requires approval of the Burlington City Council and the excavation of right of ways requires the approval of the Department of Public Works;

W I T N E S S E T H:

NOW, THEREFORE, in consideration of the above and the following mutual covenants the City and Champlain enter into the following Agreement:

1. **UTILITY CORRIDOR PLACEMENT, CONSTRUCTION, MAINTENANCE, REPLACEMENT & USE**

Champlain may construct, maintain, repair, replace and use an underground utility corridor for the benefit of an energy-efficient Geothermal System to serve Champlain's residential housing known as Res-Tri Dormitories located on the north side of Maple St upon and across the City's right of way on Maple St., subject to the terms and conditions set forth in this Agreement.

Such occupation of the right of way is to be at a depth as depicted and shown on a Plan entitled "Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 ("Plan") and adopted by reference into this Agreement.

The utility corridor is approximately twenty (20) feet in width. The utility corridor will run from the southerly sideline of the right of way for Maple Street to the northerly sideline of the right of way for Maple St., the centerline of said occupation being located approximately 438 feet west of the westerly sideline of South Willard St. at the Maple St. intersection, as depicted and shown on a Plan entitled "Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 ("Plan") and adopted by reference into this Agreement.

Any and all construction, maintenance, repair, or replacement shall be done pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work.

The right to construct, maintain, repair, replace and use an underground utility corridor in the above location is offered and accepted "AS IS, WHERE AS" and "WITH ALL FAULTS;" and neither the City nor its agents, employees or other representatives make any guarantee, representation or warranty, express or implied (and the City shall not have any liability whatsoever) as to the value, uses, habitability, condition, design, operation, financial condition or prospects, or fitness for a particular purpose or use of the right of way or the City's land adjacent thereto, or any part thereof, or any other guarantee, representation or warranty whatsoever, express or implied, with respect to the right of way or any part thereof or the City's land adjacent thereto, or information supplied to Champlain with respect thereto. Further, the City shall have no liability for any latent, hidden, or patent defect as to the right of way or the City's land adjacent thereto.

2. **RELOCATION**

The Parties acknowledge and agree that the use, repair, improvement and maintenance

of the Maple St. right of way, including sidewalks, street, and combined sewer/stormwater and stormwater system have first priority to, within, on, or about the right of way.

The Parties acknowledge and agree that the City Engineer or his/her designee may at a future date determine that it is necessary to relocate utility corridors, including Champlain's, within and/or upon the Maple St. right of way for the proper maintenance and improvement of this right of way, including the maintenance and improvement of the street, sidewalks, and stormwater and/or combined sewer/stormwater system located upon and within the right of way,.

In the event of such a determination and upon reasonable written notice of no less than six (6) calendar months, Champlain shall relocate said utility corridor pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work.

3. MAINTENANCE & PERFORMANCE OF WORK

Except during construction, maintenance, replacement, repair or relocation, Champlain shall maintain the utility corridor and the land needed to support it in a manner that does not impair the public rights of way, including the protection of utilities, pedestrians and vehicles traveling upon the public right-of-ways within and adjacent to the property occupied by the utility corridor.

Champlain may enter onto the City's Maple St. right of way to bore under, excavate, support, fill and otherwise take such actions as may be necessary or appropriate as required from time to time to ensure the structural integrity of the Geothermal System pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work.

Champlain shall maintain the utility corridor and the land needed to support it in a manner that protects the right of way and all utilities, existing or future, located within the right of way or adjacent to the rights-of-ways. Champlain agrees that any and all expenses assumed by a utility to repair damages caused to the utility by the construction, use, maintenance, repair or relocation of the utility corridor allowed by this Agreement shall be reimbursed by Champlain. Utilities currently located in the right of way are depicted in the Plan and are incorporated herein by reference. Prior to the commencement of any future work by Champlain on the right of way pursuant to this Agreement, a then current drawing(s) of utilities located in and adjacent to the relevant portions of the right of way shall be prepared by Champlain and submitted to the City.

Champlain agrees to protect vehicles and pedestrians traveling upon the Maple St. right-of-way from damage caused by its or its officers', representatives', agents', employees', or contractors' in connection with the construction, maintenance, repair, relocation, or use of the utility corridor.

In the exercise of its rights under this Agreement, Champlain will perform all work in the right of way in a good and workmanlike manner, in conformance to the requirements of any and all permits and permit requirements required for such activity by the City. Champlain shall perform all work so as to cause no unnecessary damage or disturbance to the City's lands or the utilities located therein or the public's rights in the right of way. In each and every instance, Champlain shall restore each portion of the right of way disturbed by Champlain's entry to the same and as good a state and condition as they were immediately prior to Champlain's entry unless otherwise required by a permit or permit condition issued by the City concerning said work.

4. RIGHT OF PROTECTION

Upon reasonable notice to the City, Champlain shall have the right to enter upon the Maple St. right of way from time to time for the purposes of the protection of the utility corridor, including but not limited to conducting inspections, surveys, preparing appraisals, conducting soils tests or engineering studies, and obtaining other information about the right of way.

Champlain's entry onto the right of way for the purposes set forth herein and its activities on the right of way as permitted herein shall occur at the sole risk of Champlain. Champlain shall indemnify, hold the City harmless and defend the City from and against any and all claims, liens, damages, losses and causes of action which may be asserted by Champlain or Champlain's employees and agents or any third party as a result of any such entry. Champlain's entry onto or testing of the right of way shall be conducted in a manner that minimizes any disturbance to the land and to the use and enjoyment of the right of way by the City or the public. Subsequent to completing said inspections, surveys and tests, Champlain shall, at its sole expense, return the right of way as nearly as is practicable to the same and as good a state and condition as they were immediately prior to Champlain's entry unless otherwise required by a permit or permit condition issued by the City concerning said work.

5. PERMITS

Champlain is subject to any and all permits and permit conditions required for the above stated activity by the City, including but not limited to applicable permits for land use, excavation, obstructions, stormwater and building construction. Prior to the commencement of work, Champlain must obtain all requisite governmental approvals and permits necessary to construct, maintain and use the utility corridor and the improvements benefiting from the utility corridor described herein. All work done and

improvements made in connection with the utility corridor granted herein shall be completed in accordance with the governmental approvals and permits issued to Champlain and shall be made at Champlain's sole cost and expense. Grantee shall restore the Maple St. right-of-ways, if disturbed, following any disturbance in accordance with all governmental regulations, permits and approvals, and such restoration shall be made at Champlain's sole cost and expense.

6. PAYMENT FOR FAILURE TO PERFORM

If Champlain fails to perform its obligations hereunder as and when called for, then Champlain shall make payment to the City of reasonable compensation for the failure to perform. After notice to the Champlain and failure to timely cure by Champlain, City also shall have the right, in its sole discretion, to recover all amounts expended by City in furtherance of purposes and terms of this Agreement and pursue any further legal or equitable remedies provided by law, including specific performance and damages. In the event that a legal action is instituted arising out of a breach of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs.

7. INSURANCE

Champlain shall maintain in effect throughout the term of this Agreement comprehensive public liability insurance with an A rated insurance carrier, or better, qualified to transact business in the State of Vermont, insuring against all legal liability for injuries or damages suffered as a result of the exercise of rights granted pursuant to this Agreement in an amount not less than \$1,000,000 each occurrence and \$3,000,000 general aggregate. The City shall be named as an additional insured on such insurance policy.

Prior to execution of this Agreement, Champlain shall furnish the City with a certificate of insurance which shall include the provision that the City is named as an additional insured and shall be given 30 days written notification prior to cancellation of such insurance. The certificate shall be attached to this Agreement.

It is the responsibility of Champlain to ensure that a current certificate of insurance are on file with the City at all times.

8. INDEMNIFICATION

Champlain agrees to indemnify, defend and hold the City harmless and free from any and all liability arising out of Champlain's use of the right of way pursuant to this Agreement and Champlain agrees to make no claim against the City or any of its officers, employees, agents or representatives for any loss or damage caused by the City's use or maintenance of its right-of-way.

9. FEE

There shall be an annual fee paid by Champlain for the rights provided by this Agreement equal to 2.5% of the percentage of annual rent paid by the residents of the Res-Tri Dormitories attributable to the heat and cooling costs. The percentage of the annual rent paid by the residents of the Res-Tri Dormitories attributable to the heat and cooling costs shall be declared by Champlain on an annual basis as part of its annual October 1 installment payment. This fee shall be paid to the Burlington City Clerk-Treasurer's Office in installments due October 1 and February 1 annually.

Or, as an alternative, consistent with what was discussed with the BOF

There shall be an annual fee paid by Champlain for the rights provided by this Agreement of \$5,520.

This fee is based on the following: 276 beds in the Res-Tri Dormitories multiplied by an \$8,000 annual fee per bed multiplied by 10% (percent of the \$8000 attributable to the heat and cooling costs) multiplied by 2.5% (right of way occupation fee).

This fee shall be adjusted annually to reflect the cost of living set forth in the Northeast Region Consumer Price Index Average for "all items" shown in such index for "Urban Wage Earners and Clerical Workers (including single workers) all items, groups, subgroups and special groups of items" as promulgated by the Bureau of Labor Statistics of the U.S. Department of Labor or a successor index or a comparable index for Burlington if one shall be determined by the Bureau of Labor Statistics.

10. REVOCATION

This Agreement is immediately revoked in the event Champlain discontinues the use of the utility corridor. Upon revocation, Champlain must remove at its own expense the utility corridor and appurtenances thereto. If Champlain refuses to promptly remove the utility corridor and appurtenances thereto, they may be removed by the City and Champlain shall be liable for all expenses of such removal.

11. NUISANCES PROHIBITED

Champlain shall not, during the effectiveness of this Agreement, maintain the utility corridor in a manner which creates a nuisance or violation of any applicable City of Burlington ordinance, State or Federal statute, or controlling bylaw, regulation, or condition imposed, whether existing at the time of commencement of this Agreement or enacted, amended, or otherwise put into effect during the term of this Agreement. Such prohibition of nuisances or violations of law shall include permitting the creation of a nuisance or violation of law.

12. ASSIGNMENT OF RIGHTS

Champlain shall not sell or assign its rights pursuant to this Agreement or permit the use of the premises or any part thereof by any other entity without the express prior written consent of the City. Any unauthorized action in violation of this provision shall be void, and shall terminate Champlain’s rights pursuant to this Agreement.

13. LIMITATION OF RIGHTS

Champlain acknowledges that no property or other right is created other than that specifically defined and limited by this Agreement.

DATED at Burlington, Vermont this _____ day of _____,
2012.

CITY OF BURLINGTON

Witness

By: _____
Mayor
Duly Authorized

Champlain College, Inc.

Witness

By: _____
Duly Authorized

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AMENDMENT TO AGREEMENT

THIS AMENDMENT TO AGREEMENT dated as of September 20, 2000 is made by and between Mountain Cable Company, d/b/a Adelpia Cable Communications ("Mountain Cable") and the City of Burlington, Vermont acting by and through the City Council (the "City").

RECITALS

WHEREAS, Mountain Cable Company and the City entered into an agreement dated September 18, 1990 which resolved many of the disputes between them; and

WHEREAS, the City and Mountain Cable now desire to amend certain portions of that Agreement;

NOW, THEREFORE, IN CONSIDERATION of the promises and mutual covenants contained herein, Adelpia and the City hereby agree to amend Sections 3.1 and 5 of the Agreement dated September 18, 1990, to read as follows:

Sec. 3. Excavation Fees.

3.1 By acceptance of Mountain Cable's commitment in Paragraph 5.1 to pay an annual fee to the City of Burlington, the City agrees that this is in lieu of any unpaid excavation fees due to the City by Mountain Cable and in satisfaction of any excavation fees for the term of this Agreement. The City agrees and hereby does release Mountain Cable from all past, present and future excavation fees, including claimed administrative and inspection expenses associated with excavation.

Sec. 5. City of Burlington Fee.

5.1 Mountain Cable agrees to pay a fee to the City of Burlington in the amount of \$46,340.00 per year due and payable on July 1 of each year. Commencing July 1, 2001 the commitment shall be adjusted annually to reflect the cost of living set forth in the Northeast Region Consumer Price Index Average for "all items" shown in such index for "Urban Wage Earners and Clerical Workers (including single workers) all items, groups, subgroups and special groups of items" as promulgated

by the Bureau of Labor Statistics of the U.S. Department of Labor, or a successor index or a comparable index for Burlington if one shall be determined by the Bureau of Labor Statistics.

Mountain Cable and the City agree for purposes of this Agreement only that the annual fee referenced in this paragraph shall not constitute a franchise fee for the purposes of the 5% franchise fee cap under Paragraph 2.6 of this Agreement.

5.2 Any payment which shall not have been paid when due shall bear interest at the rate of one percent (1%) per month, which interest shall be paid by Mountain Cable in addition to the annual fee amount.

Except as herein above set forth, the terms and conditions of the Agreement dated September 18, 1990 shall remain the same and in full force and effect.

IN WITNESS WHEREOF, the parties have executed this Amendment to Agreement to be effective as of the day and date first above written.

CITY OF BURLINGTON, VERMONT

Joseph W. Putzier By: [Signature]
Witness _____, Duly Authorized

[Signature] Title MAYOR
Witness _____

MOUNTAIN CABLE COMPANY
d/b/a Adelfia Cable Communications

[Signature] By: Randall A. Fisher
Witness _____, Duly Authorized

[Signature] Title Paralegal
Witness _____

1b/c: KAS 2000/Adelfia Cable (Mountain Cable) Amendment to 1990 Agreement

AGREEMENT

This Agreement dated as of September 18, 1990, is made by and between Mountain Cable Company, an existing Vermont limited partnership ("Mountain Cable"), and the City of Burlington, Vermont, acting by and through the City Council (the "City").

RECITALS

WHEREAS, Mountain Cable and the City entered into an Agreement dated 10 June 1985 resolving issues and litigation pending between them at that time;

WHEREAS, the United States District Court for the District of Vermont found and held the 10 June 1985 Agreement to be void ab initio by the Opinion and Order of Franklin S. Billings, Jr., Chief Judge, dated 29 January 1990;

WHEREAS, Mountain Cable and the City have made conflicting and disputed claims concerning the rights and obligations of each party in the aftermath of the 10 June 1985 Agreement having been declared void;

WHEREAS, there is litigation now pending between Mountain Cable and the City in the Chittenden Superior Court, which litigation is docketed as Mountain Cable Company v. City of Burlington, Chittenden Superior Court, Docket No. S654-89CnC,

and was initiated to contest the City's property tax assessment of Mountain Cable (hereinafter the "Tax Case");

WHEREAS, by pleading dated 29 March 1990 the City brought a motion to add certain permissive counterclaims in the Tax Case, which motion is disputed by Mountain Cable and yet to be acted upon by the Chittenden Superior Court, and which counterclaims include the following Counts:

1) Count I - Alleging that Mountain Cable owes the City certain amounts under the terms of the City's Code of Ordinances Sec. 27-30, as amended on 19 March 1984 and again in January of 1986, for all excavation within the greenbelts and sidewalks of the City's rights-of-way from 12 April 1984 to present, and that Mountain Cable be declared liable to pay to the City franchise fees for Mountain Cable's use of the City's streets and rights-of-way since 1 April 1985 and until the present time, and that further Mountain Cable be ordered liable to the City for future franchise fees for Mountain Cable's use and occupation of the City's streets and rights-of-way;

2) Count II - Asserting that the City is authorized by City Charter Sec. 48XL to acquire for public use the physical properties employed or used in the cable television business owned by Mountain Cable and located in the City, that such property may be taken by condemnation and that the fair market value as established in the Tax Case be declared determinative

of the price the City is to pay Mountain Cable in connection with any condemnation of its Burlington property;

WHEREAS, Mountain Cable asserts its right to recoup \$1,000,000 paid to City under the 10 June 1985 Agreement;

WHEREAS, the City has adopted a Street Franchise Fees Ordinance effective 1 July 1990, City Code of Ordinances Sections 27-109 through 27-115, which imposes on Mountain Cable a monthly fee of 5% of gross revenues derived from deregulated cable television business within Burlington, the validity of which is disputed by Mountain Cable;

WHEREAS, Mountain Cable and the City are currently engaged in a dispute concerning Mountain Cable's obligation to pay amounts for the operating expenses of public, educational and governmental access ("PEG Fees") in connection with a proceeding entitled Petition of Chittenden County Government Access Board for a Declaratory Ruling Re: Term of Government Access Funding, PSB Docket No. 5421, and the parties hereto wish to enter into this Agreement wherein PEG Fees are equated to and considered Franchise Fees without said treatment for the purposes of this Agreement being utilized in any way by either party to bolster its position in the dispute now pending before the Vermont Public Service Board; and

WHEREAS, Mountain Cable and the City desire to resolve many of the disputes between them by this Agreement;

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

PROVISIONS OF AGREEMENT

SECTION 1. REPRESENTATIONS AND WARRANTIES

1.1 City represents that it is duly organized, validly existing and in good standing under the laws of Vermont and has full power and authority to enter into this Agreement under its Charter and under the laws of Vermont.

1.2 City represents that the persons executing and delivering this Agreement on City's behalf are acting pursuant to proper authorization and that this Agreement is the valid and binding obligation of City, enforceable in accordance with its terms.

1.3 Mountain Cable represents that it is a Vermont limited partnership duly organized, validly existing and in good standing under the laws of Vermont and has full power and authority to enter into this Agreement.

1.4 Mountain Cable represents that the persons executing and delivering this Agreement on behalf of Mountain Cable are acting pursuant to proper authorization and that this Agreement is the valid and binding obligation of Mountain Cable, enforceable in accordance with its terms.

SECTION 2. THE STREET FRANCHISE FEES ORDINANCE

2.1 Mountain Cable will not contest the Street Franchise Fees Ordinance as currently enacted.

2.2 The amount to be paid by Mountain Cable to City under the Street Franchise Fees Ordinance (hereinafter referred to as the "Burlington Franchise Fee") shall be made annually within thirty (30) days of the end of each fiscal year ending June 30th. Quarterly payments of 25 percent (25%) of the total amount due shall be paid on October 1, January 1 and April 1 of each fiscal year. For purposes of determining the quarterly payments, the amount paid for the preceding fiscal year shall be used as the numerator and the number four as the denominator, except that in fiscal year 1990-91 the quarterly payments for the first three quarters shall be \$37,500. At the end of each fiscal year an accounting shall be made by Mountain Cable to the City showing the actual amount of the Burlington Franchise Fee for that fiscal year with the final quarterly payment being adjusted to meet that year's actual obligation and a credit against future fiscal year quarterly payments allowed if the amount paid by Mountain Cable in the first three quarters of the fiscal year exceeds that fiscal year's total actual obligation. The Burlington Franchise Fee will be computed solely on gross subscriber revenues derived from those sub-

scribers residing within the city limits of Burlington. For purposes of this Agreement, "Gross Subscriber Revenues" shall mean all revenues derived by Mountain Cable from the recurring monthly fees paid by subscribers for the provision of any cable programming service. Gross Subscriber Revenues shall not include nonsubscriber revenues (such as revenues derived from the sale of advertising and from home shopping networks), non-recurring revenues (such as revenues derived from installation fees), revenues not derived from the purchase of cable programming services (such as revenues derived from the sale of cable programming guides), and revenues not derived by Mountain Cable (such as sales taxes collected by Mountain Cable for the benefit of a governmental entity). Mountain Cable shall provide reasonable proof of its annual Gross Subscriber Revenues for purposes of determining the amount due to City.

2.3 City acknowledges that it will at all times treat the Burlington Franchise Fee as constituting a "Franchise Fee" for purposes of this Agreement and as that term is defined in the Cable Communications Policy Act of 1984, 47 U.S.C. § 542(g) (the "Cable Act"), or any successor legislation thereto. For purposes of this Agreement, the term "Franchise Fee(s)" shall also include all fees defined as such under the Cable Act and all amounts the parties designate as Franchise Fees under this

Agreement, whether imposed on a system-wide or community-specific basis.

2.4 It is agreed and acknowledged that certain Franchise Fees are and may in the future be paid by Mountain Cable that are applicable to its entire "Green Mountain Cablevision System" which serves other municipalities in Vermont in addition to the City of Burlington from a headend located in Williston, Vermont ("System-Wide Franchise Fees"). Amounts for the operating expenses of public, educational and governmental access ("PEG Fees") are deemed to be paid in lieu of System-Wide Franchise Fees under this Agreement. Any fees enacted on a state-wide basis by the Vermont Legislature or ordered by the Vermont Public Service Board, which qualify as a Franchise Fee as defined in the Cable Act, shall also be treated as a System-Wide Franchise Fee for purposes of this Agreement. The one-half of one percent (0.5%) utility tax imposed by 30 V.S.A. § 22 shall not be considered a Franchise Fee for purposes of this Agreement only. However, if the amount Mountain Cable must pay under 30 V.S.A. § 22 is increased, or 30 V.S.A. § 22 is otherwise modified, and to the extent the Vermont Legislature, Vermont Public Service Board or a court of competent jurisdiction declares the amount then due under 30 V.S.A. § 22 to constitute a franchise fee, then it shall be considered a System-Wide Franchise Fee for purposes of this Agreement.

2.5 It is agreed and acknowledged that certain franchise fees, such as the Burlington Franchise Fee, are presently and may in the future be levied upon the revenues derived by Mountain Cable from its cable television operations in specific communities served by the Green Mountain Cablevision System ("Community-Specific Franchise Fees"). Presently, only the City of Burlington has sought to impose such a Community-Specific Franchise Fee. In the event other municipalities serviced by the Green Mountain Cablevision System enact ordinances imposing fees similar to the Burlington Franchise Fee for the use of their streets, greenbelts, alleys, rights-of-way and public property, or impose other Franchise Fees upon Mountain Cable, then such fees shall also be deemed Community-Specific Franchise Fees under this Agreement.

2.6 It is hereby agreed and acknowledged that Mountain Cable shall in no event be obligated to pay Franchise Fees and PEG Fees which exceed five percent (5%) of the Gross Subscriber Revenues derived from the operation of the Green Mountain Cablevision System as a whole ("Franchise Fee Cap"). Accordingly, it is hereby agreed and acknowledged that in the event the total Franchise and PEG Fees payable by Mountain Cable exceeds the Franchise Fee Cap, then the Burlington Franchise Fee may be reduced, without any further action required

on the part of the City of Burlington, until the Franchise Fee Cap is met.

2.7 It is hereby agreed and acknowledged that any reduction in the Burlington Franchise Fee will be accomplished consistent with the following principles:

A. Community-Specific Franchise Fees shall be reduced before System-Wide Franchise Fees and PEG Fees. System-Wide Franchise Fees and PEG Fees may not be reduced until all Community-Specific Franchise Fees have been reduced to zero.

B. In no event shall the Burlington Franchise Fee, when combined with the City of Burlington's allocated share of all System-Wide Franchise Fees and PEG Fees, be less than five percent (5%) of the Gross Subscriber Revenues derived from the operation of the Green Mountain Cablevision System within the City of Burlington. The share of System-Wide Franchise Fees and PEG Fees allocated to the City of Burlington for this purpose shall be the same proportion of the total System-Wide Franchise Fees and PEG Fees imposed on the Green Mountain Cablevision System that the Gross Subscriber Revenues derived from the operation of the Green Mountain Cablevision System in the City of Burlington bears to the total Gross Subscriber Revenues derived from the operation of the Green Mountain Cablevision System as a whole.

C. The determination of the total Franchise and PEG Fees paid or to be paid and the amount of any required reduction of the Burlington Franchise Fee will be determined separately for each fiscal year ending June 30th.

2.8 The amount due City under the Burlington Franchise Fee shall be in lieu of any payment claimed by the City to be made directly or indirectly by Mountain Cable to the City pursuant to City Charter Section 48XL or any ordinance or resolution enacted thereunder, or any other ordinance, law, rule or order of the City imposed against Mountain Cable or its customers because of their status as such. This payment does not relieve Mountain Cable of i) the annual amount of property tax lawfully assessed by the City on Mountain Cable's property, and ii) the annual pole rentals paid by Mountain Cable to the Burlington Electric Light Department pursuant to any pole attachment agreements.

2.9 The term of this Agreement is the earlier i) twenty five (25) years or ii) abandonment of, or termination or revocation of, Mountain's, including its successors and assigns, Certificate(s) of Public Good by the Public Service Board to provide service within the corporate limits of the City of Burlington.

SECTION 3. EXCAVATION FEES

3.1 By acceptance of Mountain Cable's commitment in paragraph 5.1 to provide an Elderly Subsidy, the City agrees that this is in lieu of any unpaid excavation fees due to the City by Mountain Cable and in satisfaction of any excavation fees for the term of this Agreement. City agrees to and hereby does release Mountain Cable from all past, present and future excavation fees, including claimed administrative and inspection expenses associated with excavation.

3.2 City agrees to stipulate to dismiss with prejudice Count I of its Permissive Counterclaim in the Tax Case.

SECTION 4. ACQUISITION OF CABLE TELEVISION SYSTEM

4.1 City agrees to stipulate with Mountain Cable to dismiss without prejudice Count II of its Permissive Counterclaim in the Tax Case.

4.2 City agrees that if it ever asserts that it is entitled to condemn, take by eminent domain or otherwise acquire Mountain Cable's cable television system in Burlington, it will not assert that it is entitled to condemn, take by eminent domain or otherwise acquire the system at the value it had before it was rebuilt in 1985.

4.3 City agrees that neither its Street Franchise Fees Ordinance nor this Agreement gives it any greater authority

to condemn, take by eminent domain or otherwise acquire Mountain Cable's cable television system in Burlington that City may or may not have under City Charter Section 48XL and any other existing law.

SECTION 5. ELDERLY SUBSIDY

5.1 Mountain Cable agrees to provide as an "Elderly Subsidy" credits against bills of elderly subscribers within Burlington as determined by City up to an aggregate of \$35,000 per year. Commencing July 1, 1991 the commitment shall be adjusted annually to reflect the cost of living set forth in the Northeast Region Consumer Price Index average for "all items" shown in such index for "urban wage earners and clerical workers (including single workers) all items, groups, subgroups and special groups of items" as promulgated by the Bureau of Labor Statistics of the U.S. Department of Labor, or a successor index or a comparable index for Burlington if one shall be determined by the Bureau of Labor Statistics.

Mountain Cable and the City agree for purposes of this Agreement only that monies provided toward the Elderly Subsidy in this paragraph shall not constitute a Franchise Fee for the purposes of the 5% Franchise Fee Cap under paragraph 2.6 of this Agreement.

SECTION 6. LIMITATION OF LIABILITY

6.1 City agrees that Mountain Cable's liability for any claim for damages arising out of an alleged breach of this Agreement shall be limited to Mountain Cable's ownership interest in the Burlington, Vermont portion of its cable television system and Mountain Cable shall not be personally liable to the City nor shall there be recourse against Mountain Cable except as to its physical assets located in Burlington. City and Mountain Cable agree that any judgment hereafter rendered against Mountain Cable for breach of this Agreement may be satisfied only by execution or levy against Mountain Cable's ownership rights in that cable television system and the City hereby waives and relinquishes any rights that it may have or hereafter acquire to enforce any judgment against Mountain Cable or any assets of Mountain Cable other than Mountain Cable's ownership interest in that cable television system.

6.2 It is agreed that by entering into this Agreement, Mountain Cable's commitments hereunder are in lieu of the Burlington Street Franchise Fee Ordinance; however, by so doing, Mountain Cable does not expressly or implicitly concede the validity or authority of that ordinance.

6.3 None of the representations, commitments or provisions of this Agreement shall be used or otherwise relied

upon by either party as grounds for advancing a position one party has in connection with some dispute between the parties over an issue not addressed in this Agreement, whether now pending or to be brought in the future.

SECTION 7. ASSIGNABILITY

7.1 The rights and duties of the City and Mountain Cable shall run with the assets of the cable television system located within the corporate limits of the City of Burlington and shall be assignable or delegable by either party without the express written consent of the other. This Agreement shall be binding upon Mountain Cable's and the City's respective successors and assigns.

SECTION 8. SEVERABILITY

8.1 Mountain Cable and City agree that the provisions of this Agreement are severable. If one or more provisions is for any reason declared null and void, then it is the intention of the parties that the remaining provisions of the Agreement be enforced in full.

SECTION 9. ENTIRE AGREEMENT AND GOVERNING LAW

9.1 This Agreement supercedes for all purposes any and all previous agreements the parties hereto may have had

with respect to any matters relating to the subject matter of this Agreement, including specifically the 10 June 1985 Agreement. This Agreement contains the entire agreement between Mountain Cable and the City as to all matters addressed herein.

9.2 This Agreement, and all provisions hereof, shall be governed by and interpreted in accordance with the laws of the State of Vermont.

9.3 It is acknowledged and agreed that this Agreement is the product of negotiation by the parties, acting on advice of counsel, and that it is to be considered as jointly drafted by both parties.

9.4 The recitals and title headings shall not be deemed to be a part of this Agreement.

SECTION 10. NOTICE

10.1 All notices required to be given in writing hereunder shall, unless the contrary is specified in this Agreement, be given to the respective parties at the following addresses or at such other addresses as the parties may designate in writing:

CITY

c/o The Mayor
City of Burlington
City Hall
Burlington, Vermont 05401

Copy to Burlington City Attorney and Corporation
Counsel

City Hall
Burlington, Vermont 05401

MOUNTAIN CABLE

Mountain Cable Company
Adelphia Cable Communications
5 West Third Street
Coudersport, Pennsylvania 16915
Attention: Michael Rigas

Copy to

Downs Rachlin & Martin
199 Main St., P.O. Box 190
Burlington, Vermont 05402-0190

IN WITNESS WHEREOF, the parties have executed multiple
originals of this Agreement on the date set forth above.

CITY OF BURLINGTON

Witness:

Wm. J. Francis
George Probert

By

[Signature]
Name
MAYOR
Title

MOUNTAIN CABLE COMPANY

Witness:

Deise L. Chiumento
Debra J. Wilson

By Michael R. King
Name
Vice President
Title

B3/udd/filetr/0629

Resolution Relating to

RESOLUTION

Sponsor(s) Councilor Aswad

AUTHORIZATION FOR EXECUTION OF AGREEMENT WITH VERMONT GAS SYSTEMS, INC.

Introduced: Referred to: Action: Passed Date: 8/23/93 Signed by Mayor:

CITY OF BURLINGTON

In the year One Thousand Nine Hundred and Ninety-three Resolved by the City Council of the City of Burlington, as follows:

WHEREAS, on December 18, 1985 the City and Vermont Gas Systems, Inc. (VGS) executed an agreement relating to excavations by VGS within the City of Burlington street system; and

WHEREAS, because of the level of excavations by VGS the City requested to renegotiate the terms of the agreement; and

WHEREAS, as a result of negotiations between the parties a new agreement has been prepared which, among other things, increases the base annual payment by VGS to the City from \$45,000.00 to \$56,000.00 subject to annual escalation in accordance with the Consumer Price Index but subject to a 5% annual adjustment; and

WHEREAS, the term of the agreement shall be 30 years dating from July 1, 1993;

NOW, THEREFORE, BE IT RESOLVED that with the prior approval of the Board of Finance the Honorable Mayor Peter Brownell be and hereby is authorized to execute the agreement to be dated August 24, 1993 on behalf of the City as per the terms and conditions of such agreement.

lb\jem\RES\VTGASAGREE 8/17/93

See earlier agreement dated Dec. 18, 1985 in Public Works k #1 file

See Joe's file at SO. University

AGREEMENT

This Agreement dated August 24, 1993, is made by and between Vermont Gas Systems, Inc. ("Utility") and the City of Burlington, Vermont, acting by and through the City Council (the "City").

PRELIMINARY STATEMENT.

This Agreement shall be referred to herein as the "Agreement."

The Utility has a Charter, statutory authority and certificates of public good, authorizing it to provide gas service within Burlington. The City claims that the provisions of Section 48(XL) of the Burlington City Charter provide the City with the jurisdiction and authority to impose a Street excavation fee upon the Utility.

In this Agreement, the City agrees to assist the Utility in the expeditious completion of its future excavations, in consideration of the payment of certain sums of money to the City by, and certain other undertakings made to the City by, the Utility. All capitalized terms used in this preliminary statement shall have the meanings assigned thereto in Section 1.

This Agreement is not intended to address issues regarding property tax lawfully assessed by the City upon the Utility. Payments made under the terms of this Agreement shall have no effect upon, and shall not be affected by, imposition or collection of lawfully assessed property tax.

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

SECTION 1. DEFINITIONS

1.01 "Agreement" shall mean this Agreement.

1.02 "Burlington" shall mean the geographic confines of the City of Burlington, Vermont.

1.03 "Charter" shall mean the Burlington City Charter, Act No. 298, Acts of 1949 as amended.

1.04 "City" shall mean the City of Burlington, Vermont, its City Council, and all political subdivisions of Burlington, Vermont, specifically including the Church Street Marketplace District and Marketplace District Commission.

1.05 A "Fiscal" year shall mean the twelve months which run from July 1 of a prior calendar year through June 30 of the stated calendar year -- e.g., Fiscal 1993, which began July 1, 1992, and ended June 30, 1993.

1.06 "Street" shall include the entire width between property lines of every way used for vehicular traffic and pedestrian travel which has become public by authority of the law, and such ways in public places other than highways as the public is permitted to use for vehicular and pedestrian traffic.

1.07 "Utility" shall mean Vermont Gas Systems, Inc., its successors and assigns.

1.08 "Percent Change" shall be the number determined according to Section 4.01(b)(1) of this Agreement.

SECTION 2. REPRESENTATION AND WARRANTIES

2.01 The City represents that it is duly organized, validly existing and in good standing under the laws of Vermont and has full power and authority to enter into this Agreement under the Charter and under the laws of Vermont.

2.02 The City represents that the persons executing and delivering this Agreement on the City's behalf are acting pursuant to proper authorization and that this

Agreement is the valid and binding obligation of the City, enforceable in accordance with its terms.

2.03 The Utility represents that it is a legally constituted entity, duly organized, validly existing and in good standing under the laws of Vermont, with full power and authority to enter into this Agreement.

2.04 The Utility represents that the persons executing and delivering this Agreement on behalf of the Utility are acting pursuant to proper authorization and that this Agreement is the valid and binding obligation of the Utility, enforceable in accordance with its terms.

SECTION 3. UNDERTAKINGS OF CITY

3.01 In consideration of the undertakings of the Utility set forth herein, the City hereby:

a. Agrees that the Utility can commence and complete excavations and installations in and above the Streets in Burlington without any payment to the City, or any district, department, commission, or other subdivision thereof, other than the payment provided under Section 4 of this Agreement and agrees to issue all permits required for said excavation and installation without further payment or condition.

b. Agrees that the City will use its best efforts to assist the Utility in the rapid inspection and completion of excavations within the Streets.

c. Agrees that, if the Utility makes reasonable efforts to complete an excavation within 15 days and reasonably informs the City that additional time is necessary to conclude its work, a reasonable extension shall be granted in writing, during which period the City shall offer any means of assistance legally available to effect such completion; it is understood that the City shall exercise judicious discretion

in reaching any decision to seek sanctions for alleged violations of these time provisions.

d. Without prejudice to either party's claims as to whether authorization is required, agrees that the Utility does not need to apply to the City Council for permission to install new mains which are less than one thousand linear feet long.

e. Agrees not to commence, apply for participation in, or to participate in, proceedings before the Vermont Environmental Commissions or Board, or the Vermont Public Service Board, or any court or other governmental forum, in relation to the Utility's excavation, use or occupation of Streets in Burlington.

3.02 In further consideration of the undertakings of the Utility set forth herein, the City agrees to accept the payments by the Utility specified in Section 4.01 of this Agreement as liquidated payments offered to and accepted by the City in full satisfaction, release and waiver of any losses, liabilities, claims, damages, rights or other entitlements that the City has had, now has or will have in respect of: (i) excavation fees and any other obligations arising out of the Utility's use or occupation of Streets in Burlington, including any additional use, occupation, excavation or patching fees, charges or claims arising out of any future use or occupation or future excavation of Streets in Burlington performed by the Utility; (ii) any fees due and payable from the Utility to the City pursuant to any provision, now or hereafter in effect throughout the term of this Agreement, of the Charter, or the Ordinances, Regulations or By-laws of the City in connection with the excavation of Streets in Burlington by the Utility, including any fees for Street excavation previously, presently or subsequently imposed by the Burlington City Council or ultimately set or established

in any judicial proceeding. The Utility and the City expressly agree that this Agreement, by providing for a liquidated payment of excavation claims, constitutes among other things an agreement as to the terms, conditions and regulations, including any sum of money that would be paid, for the use and occupation of the Streets in Burlington, within the meaning of Charter Section 48(XL) and Ordinance Section 27 as they are now in effect or hereafter amended, modified or altered, throughout the term of this Agreement.

3.03 In further consideration of the undertakings of the Utility herein, the City agrees to make its best efforts in facilitating the Utility's excavations of Streets in Burlington, and in locating the Utility's facilities outside the paved portion of the Streets in Burlington.

3.04 Further, the City agrees that the payments provided under Section 4.01 of this Agreement are in satisfaction of excavation fees claimed by the City as set forth in Section 3.02 above and that this Agreement constitutes an agreement in alteration and modification of any excavation ordinance requirement pursuant to §48(XL) of the Charter.

3.05 In further consideration of the undertakings of the Utility set forth herein, the City specifically covenants and agrees that the payments specified in Section 4.01 of this Agreement are in lieu of any other payments for the use or occupation of any Street in Burlington that may be required to be made, directly or indirectly, by the Utility to the City pursuant to any provision of the City's ordinances, the Charter or Vermont or federal law, and, specifically, the City acknowledges and agrees that such payments are in lieu of any excavation or other fees arising out of the Utility's use or

occupation of Streets in Burlington that might otherwise be payable under Vermont law or otherwise, after the execution of this Agreement.

3.06 In further consideration of the undertakings of the Utility set forth herein, the City also agrees that the Utility shall be entitled to maintain, repair, or replace pre-existing lines without change of depth. The City further agrees to arrive promptly for trench inspection purposes, and to accept the Utility's reasonable efforts to locate all existing Utility lines on maps prior to the issuance of excavation permits so long as generally accepted safety precautions are met, and otherwise to aid the Utility in order to expedite the Utility's work.

3.07 The City shall provide sufficient advance written notice of its annual pavement reconstruction schedule so that the Utility can make reasonable efforts to coordinate its pavement excavation as provided under Section 4.04 of this Agreement.

3.08 In further consideration of the undertakings set forth herein of this Agreement, the City shall use its best efforts to assist the Utility in the expeditious completion of all excavation throughout the term of this Agreement.

SECTION 4. UNDERTAKINGS OF UTILITY

4.01 In consideration of the undertakings of the City set forth herein, the Utility agrees to pay to the City as follows:

(a) \$56,000 annually for the thirty Fiscal years 1994 through 2023, adjusted according to the following subsection.

(b) Annually, beginning with determination of the annual payment due for Fiscal year 1995, the annual payment due shall be adjusted annually and fixed as follows:

- (1) Determination of "Percent Change." The "Consumer Price Index for All Urban Consumers (CPI-U): Selected Areas, all items index (1982-84=100)" table shall be consulted regarding "Northeast Urban, size C (50,000 to 500,000)" to determine the annual percent change between February of the current calendar year and the previous February. (If said index is discontinued, then reference shall be made to the "U.S. City average" set forth in the same table for the same period.)

The number so determined shall be the Percent Change, except that in the event that the Percent Change so determined exceeds "5.0" (or five percent), the Percent Change shall be limited to, and shall not exceed 5.0.

- (2) Annual Adjustment: The annual payment due for each Fiscal year beginning with Fiscal year 1995 shall be increased or decreased from the previous Fiscal year's annual payment due according to the Percent Change as annually determined in the preceding paragraph. The amount shall be rounded down to the highest dollar.

Examples:

Example 1: Determination of annual payment due for Fiscal year

X + 2: The annual payment due for Fiscal year X + 1 was \$1,000. The Percent Change from February X to February X + 1 was 4.3. Therefore, the annual payment due for

Fiscal year X + 2 will be \$1,043. (\$1,000, plus 4.3% of \$1,000);

Example 2: Determination of annual payment due for Fiscal year X + 3: The annual payment due for Fiscal year X + 2 was \$1,043. The Percent Change from February X + 1 to February X + 2 was -3.0. Therefore, the annual payment due for Fiscal year X + 3 will be \$1,012 (\$1,043, minus 3% of \$1,042 (\$30.29), or \$1,012.71 rounded down to the nearest dollar.)

Example 3: Determination of annual payment due for Fiscal year X + 4: The annual payment due for Fiscal Year X + 3 was \$1,012. The Percent Change from February X + 2 to February X + 3 was 6.7. Therefore, the annual payment due for Fiscal Year X + 4 will be \$1,062 (\$1,012, plus 5% of \$1,012 (or \$50.60), rounded down to the nearest dollar.

(c) The annual payment due for each of the second through thirtieth years of this Agreement shall be calculated in the above manner, annually.

(d) The Utility and the City both expressly intend and understand that the payments set forth herein are not determined based upon a multiple of square footage. As one feature of this intention and understanding, it is agreed that, during the term of this Agreement, (i) future increases or decreases in actual square footage or measurement of excavation, maintenance, repair, replacement, location, use or occupation regardless of methods of calculation and regardless of the minimal or maximal extent of such excavation, maintenance, repair, replacement, location, use or

occupation, shall not operate to increase or decrease the annual payments due; and (ii) neither party is relying upon representations by the other regarding the actual extent of any future excavation, maintenance, repair, replacement, location, use or occupation.

(e) The annual payments due shall be payable in halves, in arrears semi-annually, on or before the final day of each six-month period.

4.02 The Utility and the City agrees that no other fees shall be payable by the Utility to the City regarding occupancy, use or excavation of Streets in Burlington through June 30, 2023.

4.03 Based upon reasonable engineering and economic determinations, the City desires the Utility to locate its lines outside the paved portions of the Streets in Burlington. The Utility's choice of excavation locations shall be final, except that the Utility shall make best efforts to locate excavations outside the paved portions of Streets in Burlington and to minimize pavement excavation in the wheelpaths of Streets in Burlington wherever it shall be reasonably practical for the Utility to do so.

4.04 The Utility shall make all reasonable efforts to coordinate its pavement excavation with the City's schedule of pavement reconstruction work, as provided by the City under Section 3.08 of this Agreement.

4.05 The Utility shall perform the excavations, and shall backfill and patch its excavations. The Utility shall warrant, for a period of three years from the date of replacement, that the portions of Streets in Burlington that it replaces shall be free from substantial defects in workmanship and materials, and it shall replace at its own expense all substantially defective work upon reasonable request, within a reasonable period of time, provided that notice is received from the City within three years from the date any work or repair was last completed. The Utility will also promptly replace,

and warrant for a period of three years from the date of replacement, all grass in the so-called "greenbelt" sections of Streets (located between the sidewalk and paved portion of the Streets) which is torn up or otherwise destroyed as a result of excavations therein by the Utility; except that the Utility shall not be responsible for damage caused by others.

SECTION 5. TERM

5.01 The obligations of the City and the Utility under this Agreement shall be absolute and binding for thirty years from July 1, 1993 through June 30, 2023.

SECTION 6. WAIVER AND MODIFICATIONS

6.01 No party shall be deemed to have waived any right under this Agreement unless such party shall have delivered a written waiver signed by its duly authorized agent to the other party hereto. Any waiver of a right under this Agreement shall be narrowly construed and shall relate solely to the separate right and specific instance detailed in the written notice of waiver.

6.02 This Agreement may only be modified by a written instrument signed by duly authorized agents of both the City and the Utility.

SECTION 7. ASSIGNABILITY

7.01 The rights and duties of the City and the Utility shall be assignable or delegable by each party without the express written consent of the other, and this Agreement shall be binding upon the Utility's and the City's respective successors and assigns.

SECTION 8. REMEDIES

8.01 Each party acknowledges and agrees that this Agreement constitutes a settlement and compromise of any and all present and future matters and claims

between the Utility and the City relating to use or occupation of Streets in any respect whatsoever. Each party further acknowledges and agrees that it will not initiate and will vigorously oppose, any collateral attack upon this Agreement or upon any of the terms, conditions, or provisions contained herein in any action commenced in any court, tribunal, agency, board, commission, or other forum of the State of Vermont, the United States, or any other state or jurisdiction. Upon request, each party shall exercise its best efforts to support applications for, and obtain, any permits or approvals of any kind that may be required to effectuate the terms of this Agreement. It is understood and agreed that, in the event of a breach or threatened breach of the obligations of each party to this Agreement, this Agreement shall be enforceable by the other by an order of specific performance or injunction, whether mandatory or prohibitory.

8.02 This Agreement constitutes a new Agreement, that is intended and understood by both the Utility and the City as supplanting an "Agreement" between the Utility and the City, dated December 18, 1985, and recorded in Volume 329 on page 95 et seq. of Miscellaneous Volumes in the Burlington City Clerk's office. In the event that this Agreement is invalidated or voided in any material respect, it is the express intention of both the Utility and the City that the supplanted "Agreement" dated December 18, 1985, and recorded in Miscellaneous Volume 329 on page 95 et seq. shall again be effective and fully enforceable.

SECTION 9. INDEMNIFICATION

9.01 In recognition that this Agreement is intended in part to compensate the City for excavation fees and any other fees arising out of Utility's use or occupation of Streets in Burlington, the City releases, waives, indemnifies and holds the Utility harmless from any additional use, occupation, excavation or patching fees, charges, or

claims arising out of any use or occupation or future excavation of Streets in Burlington performed by the Utility during the term of this Agreement.

SECTION 10. ADDRESSES

10.01 All notices required to be given in writing hereunder shall be given to the respective parties at the following addresses or at such other addresses as the parties may designate in writing:

THE CITY

c/o The Mayor
City of Burlington
City Hall
Burlington, Vermont 05401

Copy to: Burlington City Attorney and Corporation Counsel
City Hall
Burlington, Vermont 05401

THE UTILITY

Vermont Gas Systems, Inc.
P.O. Box 467
Burlington, Vermont 05402-0467

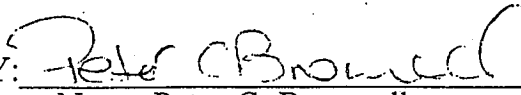
Copy to: Paul, Frank & Collins, Inc.
P.O. Box 1307
Burlington, Vermont 05402-1307

SECTION 11. GOVERNING LAW

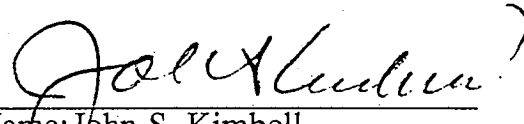
11.01 This Agreement, and all provisions hereof, shall be governed by and interpreted in accordance with the laws of the State of Vermont.

IN WITNESS WHEREOF, the parties have executed multiple originals of this Agreement as of the date set forth above.

CITY OF BURLINGTON

BY: 
Name: Peter C. Brownell
Title: Mayor

VERMONT GAS SYSTEMS, INC

BY: 
Name: John S. Kimbell
Title: President

[cgoodr/rap/vgscity.cln]

MEMORANDUM OF UNDERSTANDING AND AGREEMENT

THIS MEMORANDUM OF UNDERSTANDING AND AGREEMENT made and entered into between the City Council of the City of Burlington (Council) and the Department of Public Works of the City of Burlington acting by and through the Board of Public Works Commissioners (Board);

W I T N E S S E T H :

WHEREAS, the Water Resources Division of the Department of Public Works carries out its business within the City of Burlington and, in order to conduct such business, has located and desires to continue to locate its pipes, conduits, manholes, fixtures and other facilities on, in, or under public streets of the City; and

WHEREAS, in exchange for the ongoing privilege and right to use and occupy the streets of the City for such public utility purposes, the City and the Board believe that it is reasonable and proper that the Board should pay a franchise fee for such privilege in an amount representative of the fair rental value of using such street rights-of-way for such utility purposes; and

WHEREAS, it is believed by both the Council and the Board that a fair basis for determining the franchise fee to be paid on an annual basis is a percentage of the gross revenues taken in or received by the Water Resources Division from sales and/or services provided within the City;

NOW, THEREFORE, IT IS AGREED by and between the Council and the Board as follows:

1. Effective retroactive to July 1, 1990, the Board shall pay to the City Treasurer a franchise fee on an annual basis for the right and privilege of utilizing the City streets for the location of its poles, conduits, manholes, fixtures and other facilities. In this context, the term "street" shall mean all public streets, alleys, public ways and public places now laid out and dedicated and all additions thereto including air space above and ground underneath the street surface.

2. The franchise fee to be paid for the fiscal year which commenced July 1, 1990 shall be two and one-half (2.5%) percent of the gross revenues of the Board's Water Resources Division. Effective as of July 1, 1991, and continuing thereafter unless and until this Agreement is amended, the annual franchise fee shall be three and one-half (3 1/2) percent of such gross revenues. In this context, the gross revenues of the Water Resources Division shall mean all revenues taken in or received by the Division from sales and/or services provided within the City of Burlington. It shall include the total amounts actually received or receivable for the performance of any sale, act or service provided within the City for which a charge or credit is made. It shall also include all receipts, cash, credits and property of any kind or nature without any deduction therefrom on account of the property sold, the cost of the materials used,

labor or service costs, interest paid or payable, or losses or other expenses whatsoever.

3. The Board shall file monthly with the City Treasurer a sworn summary report, showing the gross revenues received from its Water Resources Division operations within the City during that month, and such other information as the Council shall request which is reasonably related to the purposes of this Agreement. The monthly reports shall be on forms prepared by the City Treasurer.

4. Payment of the franchise fees due under this Agreement shall be payable in monthly installments and remittance therefor shall be made no later than the last day of the month next succeeding the month in which the sum is collected.

5. The Board's Water Resources Division shall have the nonexclusive right, privilege and franchise, pursuant to this Agreement, to own, use, lease, lease purchase, place, maintain, operate, erect or construct poles, pipes, cables, underground conduits, manholes and other fixtures necessary for the proper maintenance and operation of the division, in, upon, along, across and under, and to otherwise use and occupy the streets, alleys, rights-of-way and public property of the City.

6. This Agreement shall terminate and be of no further force and effect as of midnight June 30, 2020.

7. Anything to the contrary herein notwithstanding, the uses of public streets within the City by the Water Resources Division are always subordinate to the paramount interests of the public therein. This Memorandum of Understanding and Agreement and the rights thereunder shall convey no property interest or vested right in the public streets or rights-of-way. Any relocation expenses incurred by the Division because of any work on such street undertaken by the City for any purposes shall be exclusively at the expense of the Division. Such use is privileged only, and is at all times subject to all specified ordinances, resolutions and regulations of the City. The Council expressly reserves the right to use the public streets for its own governmental purposes.

IN WITNESS WHEREOF, this Memorandum of Understanding and Agreement is made and entered into this 28th day of March, 1991.

CITY OF BURLINGTON
PUBLIC WORKS DEPARTMENT

By: Albert DiPietro
Department of Public
Works Commission Chair,
Duly Authorized

CITY OF BURLINGTON CITY COUNCIL

By: [Signature]
Mayor, Duly Authorized

\\JEM\DPWFEE.AGR

ARTICLE VI. - STREET FRANCHISE FEES ^[63]

⁽⁶³⁾ **Editor's note**— An ordinance enacted June 11, 1990, amended Ch. 27 by adding a new Art. VI, §§ 27-109—27-115. In order to conform to established Code format and to provide for future additions to Art. V without the necessity of point-numbering, the editor, at his discretion, has renumbered these new provisions as §§ 27-119—27-125. The original numbers of these sections have been retained in the history citation following each section and in the Code Comparative Table in order to assist in tracking.

[Sec. 27-119. - Title.](#)

[Sec. 27-120. - Definitions.](#)

[Sec. 27-121. - Grant of franchise; express agreements.](#)

[Sec. 27-122. - Franchise fees.](#)

[Sec. 27-123. - Term of franchise; reservation of city's right to alter, amend, revoke or repeal.](#)

[Sec. 27-124. - Charter notice.](#)

[Sec. 27-125. - Severability.](#)

[Sec. 27-126. - Regulating the placement of utility facilities below ground.](#)

Sec. 27-119. - Title.

This article shall be cited as the "Street Franchise Fee Ordinance" and is adopted pursuant to the Charter of the City of Burlington, Section 48, Subsection XL, Acts of 1949, No. 298, Vermont General Assembly, as amended.

(Ord. of 6-11-90, § 27-109)

Sec. 27-120. - Definitions.

The following definitions shall apply in the interpretation and enforcement of this article:

City means the City of Burlington.

Company means any street railroad, traction, telegraph, telephone, electric, electric lighting, electric power, gas, cable television, or telecommunications company, or other company or person enjoying the privileges or exercising the functions of any such company doing business within the City of Burlington by maintaining or using by ownership, lease, lease-purchase, access agreement or otherwise poles, wires, cables, conduits, manholes, fixtures or other facilities in connection with such business on, in, over, under or above any public street in the City of Burlington.

Council means the Burlington City Council.

Gross revenues means the gross revenues taken in or received by any company from sales and/or services provided within the City of Burlington. It includes the total amounts actually received or receivable for the performance of any sale, act or service provided within the city for which a charge or credit is made. It also shall include all receipts, cash, credits, and property of any kind or nature without any deduction therefrom on account of cost of the property sold, the cost of the materials used, labor or service costs, interest paid or payable, or losses or other expenses whatsoever. It shall not include

PART II - CODE OF ORDINANCES
Chapter 27 - STREETS AND SIDEWALKS
ARTICLE VI. - STREET FRANCHISE FEES

monthly sales within the city of the first two hundred fifty (250) kilowatt-hour of electric power to each residential customer including sale of New York Power Authority power by or on behalf of the Vermont Department of Public Service.

Month means a calendar month.

Street means all public streets, alleys, public ways and public places now laid out and dedicated, and all additions thereto and extensions thereof, including airspace above and ground underneath the street surface.

Sworn report means an affidavit sworn to before a person authorized to take oaths, or a declaration or certification made under penalty of perjury or an accounting as required to be filed under this article.

(Ord. of 6-11-90, § 27-110)

Sec. 27-121. - Grant of franchise; express agreements.

(a) The City of Burlington hereby grants to any company as herein defined which has not executed a valid and operative franchise agreement under authority of Charter Section 48(XL) with the city regarding street usage the nonexclusive privilege and franchise to own, use, lease, lease-purchase, place, maintain, operate, erect, or construct poles, wires, cables, fiber optics, underground conduits including pipes, manholes and other fixtures necessary for proper maintenance and operation in, upon, along, across, above, over and under, and to otherwise use and occupy the streets, alleys, rights-of-way and public property of the city.

(b) Companies which have executed operative, valid and binding franchise agreements with the city regarding their use and occupation of city streets under authority of City Charter Section 48(XL) shall be subject to the terms of said agreements for the term(s) specified therein in lieu of this article.

(Ord. of 6-11-90, § 27-111)

Sec. 27-122. - Franchise fees.

(a) Each company shall pay as compensation to the city for its use of city streets, a franchise fee in a sum equal to the following percentages of the company's gross revenues:

(1) Cable television services in Burlington have been declared by the Federal Communications Commission to be subject to "effective competition" and under the Cable Communications Policy Act of 1984 are therefore priced in Burlington on a deregulated market-will-bear basis. Congress has determined in Section 622(b) of that Act that a five (5) percent franchise fee is reasonable. Therefore, all such rate deregulated cable television companies which provide such service within Burlington shall pay a franchise fee of five (5) percent of gross revenue commencing July 1, 1990.

(2) Services such as natural gas, electric, local exchange telephone, water and wastewater are legal and/or natural monopolies provided by investor or publicly owned public service companies. Their service rates are established and/or regulated on a cost-of-service basis rather than a market-will-bear basis. All such companies (including, but not limited to, the Burlington Electric Department and the Water and Wastewater Divisions of the Public Works Department) shall pay a franchise fee of two and one-half (2.5) percent gross revenues commencing July 1, 1990.

All franchise fees are in addition to any pole rental fees, street excavation fees, or other fees and charges which may come due unless otherwise provided by an express agreement with

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the city executed under authority of Charter Section 48(XL).

(b) A company shall file monthly with the city treasurer a sworn summary report, showing the gross revenues received by the company from its operations within the city during that month and such other information as the city shall request which is reasonably related to the purposes of this article. The city shall also have access at all reasonable hours to all of a company's plans, contracts, and engineering, accounting, financial, statistical and customer service records relating to the operation of the company within the city. The monthly reports shall be on forms prepared by the city treasurer.

(c) Franchise fees due to the city under paragraph (a) above shall be payable in monthly installments and remittance therefor shall be made no later than the last day of the month next succeeding the month in which the sum is collected.

(d) If a company fails to file a return and payment when required, the city treasurer shall assess the amount of franchise fees due including applicable interest charges using any information in its possession. The monthly franchise fee payment shall be considered delinquent on the day after the report and payment are due. To all delinquent franchise fees there shall be an interest penalty equal to the legal rate of twelve (12) percent per annum simple interest. Any compensation due and unpaid and all interest charges thereon shall be a debt to the city and may be collected by appropriate action in law or equity.

(Ord. of 6-11-90, § 27-112)

Sec. 27-123. - Term of franchise; reservation of city's right to alter, amend, revoke or repeal.

(a) The terms herein for use of city streets shall take effect and be in force immediately upon the effective date after publication.

(b) The uses of public streets herein are always subordinate to the paramount interests of the public therein. Any franchise for such use conveys to no company any property interest or vested right in the public streets or rights-of-way. Any relocation expenses incurred by such company because of any work on such street undertaken by the city for any purpose shall be exclusively at the expense of such company. Such use is privileged only, and is at all times subject to all other ordinances, resolutions and regulations of the city. The city expressly reserves the right to use the public streets for its own governmental purposes, and expressly reserves the right to alter, amend, revoke or appeal [repeal] this article in whole or in part at any time.

(Ord. of 6-11-90, § 27-113)

Sec. 27-124. - Charter notice.

Notice is hereby given that Charter Section 48 Subsection XL provides as follows:

"48. The City Council shall have power.

"XL. To fix, demand, impose and enforce such terms, conditions and regulations for the use or occupation of any street or highway in said city by any street railroad, traction, telegraph, telephone, electric, gas, electric lighting, electric power, or other company or any person enjoying the privileges, or exercising the functions of any such company aforesaid, as shall be just and reasonable, including any sum or sums of money to be paid to said city for the use of any street or highway by any or all of said companies for the purpose of laying, maintaining and operating any street railway therein, or for the purpose of therein erecting and maintaining any poles, wires or

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any other apparatus in or under the surface of said street; and to prohibit the use of such street by any such company or person until such terms have been complied with.

"In case any such company or person cannot agree with said city upon such terms, said company or person may apply by petition to the county court within and for the County of Chittenden, and said court shall thereupon, after hearing all parties interested therein, fix such terms as shall be just and reasonable and make all necessary orders for carrying its decision therein into effect.

"Provided, however, that no special franchise shall be granted by said city council for a longer term than thirty (30) years, and further provided that at the expiration of any franchise, or at any time thereafter, the city shall have the right to acquire the title to and take over the property employed or used in the business for which such franchise was granted, upon the payment to the owner of the same of the fair value of the physical properties at that time employed or used in such business, and that in case the city is unable to agree with the owners as to the value of such physical properties, then said property may be condemned and taken for public use, and the value thereof ascertained and awarded as compensation therefor to the owner of the same in the manner, as near as may be, provided in the general laws of the state for the determination of the damages to be awarded persons aggrieved or damaged by the construction or operation of a street railway, and further provided that the grant of every such special franchise shall contain provisions embodying the foregoing conditions and limitations."

These terms of the Charter are incorporated herein by reference.

(Ord. of 6-11-90, § 27-114)

Sec. 27-125. - Severability.

If any part or parts or application of any part of this article is held invalid, such holding shall not affect the validity of remaining parts of this article.

(Ord. of 6-11-90, § 27-115)

Sec. 27-126. - Regulating the placement of utility facilities below ground.

(a) *Purpose.* This section is enacted in order to meet the following goals:

To improve the city's vistas, view corridors, and streetscapes, particularly those along streets which are heavily traveled and provide visual access to Lake Champlain, as well as those that serve as main approaches into the city;

To improve the city's physical environment where the opportunities exist to advance community goals for economic development, cultural and recreational activities, and the enhancement of its visual and historic resources;

To re-establish the city's street tree canopy where possible; and

To maintain consistency with existing policies regarding the underground construction of utility facilities.

(b) *Definitions.* The following terms, whether singular or plural, shall be defined as follows:

Person: Any agency, individual, firm, company, association, society, corporation, body, or group.

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Public improvement project: Any project undertaken by a local, state, or federal body for the benefit of the general public, such as, but not limited to, road or bridge construction, or the development of a park. Any utility facility project undertaken by a privately, publicly or cooperatively owned utility, or any combination thereof, that requires a certificate of public good from the Vermont Public Service Board or an Act 250 permit from the environmental board or district environmental commission shall be considered a public improvement project.

Substantial roadway reconstruction: The construction of any new road in the public right-of-way, and the construction of any new road that is part of a project subject to the jurisdiction of the subdivision regulations of the City of Burlington, and the modification of an existing road that results in an increase in the number of lanes for at least five hundred (500) feet of its length or an increase of over four (4) feet in the width of the paved portion of the road for at least five hundred (500) feet of its length.

Utility facility: Any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, cable television, power electricity, light, heat, gas, oil, crude products, water, steam, waste, stormwater not connected with the highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public.

(c) *Requirements:*

(1) *Review committee.* An underground utilities review committee consisting of a representative of the planning and zoning, Burlington electric, public works, community and economic development and parks departments shall review all projects covered by this section. Input shall be solicited from affected utilities during each project review. The underground utilities review committee shall maintain a record of the evidence presented during its review of each project.

(2) *New roadways.* On any new road, street, or highway hereafter constructed within the city, all new and existing utility facilities associated with the right-of-way of such project will be installed or relocated underground in accordance with the specifications of the affected utilities and the locational requirements of the department of public works unless the city council determines that underground installation is not feasible due to the existence of any of the conditions listed below.

The underground utilities review committee shall review the project and may recommend to the city council that the requirements of this subsection be waived, in whole or in part, for a specific new roadway project based on a finding that the placement of utility facilities underground is not feasible due to one or more of the following conditions:

- a. That hazardous conditions at or near the project site unduly endanger the health and safety of the workers or the public or both, either during or after installation;
- b. That the placement of utilities underground would irreparably endanger an important historic or natural resource;
- c. That physical and/or technical constraints exist at or near the site which cause unreasonable hardship with regard to the proper installation and maintenance of said utilities underground; and/or
- d. The engineering design or permitting process for a project has been substantially completed and the construction of that project will be completed in a timely manner.

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Upon receipt of the record and information from the committee, the city council may waive the requirements of this subsection for a specific project based on the existence of the conditions listed above. The council shall conduct a review of the record of the information presented to the underground utilities review committee and its decision shall be based solely on that evidence. The decision of the council shall be final.

(3) *Substantial highway reconstruction projects.* On all substantial roadway reconstruction or public improvement project in the areas of the city listed below, utility facilities will be installed or relocated underground in accordance with the specifications of the affected utilities and the locational requirements of the department of public works:

- a. The Waterfront Commercial-West (WFC-W), Waterfront Commercial-East (WFC-E), Waterfront Recreation, Conservation, Open Space (WRC), Waterfront Enterprise (WFE) and the Waterfront Residential, medium density (WRM) zoning districts as defined in the zoning ordinance;
- b. Main approaches into the city as described in the municipal development plan, such as the Champlain Parkway, Main Street, Riverside Avenue, Shelburne Street, and Pine Street;
- c. Neighborhood activity centers as defined in the municipal development plan; and
- d. Bike paths, view corridors and any other main approaches as delineated in the municipal development plan in effect at the time of the project.

However, in these identified areas, the city shall also consider whether there is an alternative to underground placement of utilities that is more appropriate. The underground utilities review committee shall determine the placement of utilities on all such projects for these areas using all relevant considerations including, but not limited to, aesthetics, public safety, physical and technical considerations of construction, alternatives to underground placement and an analysis of the economic impacts of requiring the placement of utilities underground for the project.

Any of the member departments of the underground utilities review committee or other person initiating the project, may appeal to the city council the committee's determination that there is a more appropriate alternative placement for the utilities in the areas listed in this subsection. The council shall conduct a review of the record of the information presented to the committee and issue a decision based solely on that evidence. The council's decision shall be final.

(4) *Other city streets.* On all other city streets, consideration should be given to placing utility facilities underground during substantial roadway reconstruction or public improvement projects.

The underground utilities review committee shall make a determination on these projects using the criteria outlined in subsection (3). Member departments of the committee or other person initiating the project, may appeal the committee's determination to the council also as provided in subsection (3). The council's decision shall be made based solely on the record of the evidence heard by the committee. The council's decision shall be final.

(5) *Cost.* In the case of any public improvement project or substantial roadway reconstruction where the placement of utility facilities underground is to be done for aesthetic or economic development purposes, the person initiating the project shall be responsible for securing the

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difference in cost between the placement of utility facilities above ground and their placement underground. The affected utilities shall be responsible for the costs if placement underground is being done in the best interest of service delivery. When the City of Burlington initiates a substantial roadway reconstruction for any purpose, the affected utilities shall be responsible for the underground relocation cost.

(6) *Utility apparatus.* It is acknowledged that some utility apparatus used in connection with underground utility service, such as transformers, switches, amplifiers, equipment cabinets, and other similar equipment, may be mounted at ground level in accordance with accepted construction standards and codes and locational standards of the department of public works.

(7) *Emergency work.* This section shall not apply to projects for the provision of temporary service or normal repairs or maintenance or for emergency services.

(d) *Enforcement and penalties:*

(1) Any person found to be in violation of any provision of this section shall be served by the city attorney with a written notice stating the nature of the violation and providing a specific time limit, of at least ten (10) working days, for satisfactory correction thereof.

(2) The city may commence appropriate civil enforcement proceedings against any person who fails to correct all violations within the time provided in the notice. The city may recover fines in an amount not to exceed five hundred dollars (\$500.00) for each violation. Each day's continued violation shall be considered a separate offense. The city may also seek injunctive or other appropriate relief.

(Ord. of 5-22-95; Ord. of 2-20-01; Ord. of 4-23-01; Ord. of 6-9-03)