CITY OF GAUTIER
MEMORANDUM

To: Samantha Abell, City Manager

From: Cindy Steen, Purchasing Agent

Through: Cindy Russell

Date: July 9th, 2013

Subject: Request to negotiate the terms of a video service agreement with Bellsouth Telecommunications, Inc. d/b/a AT&T Mississippi

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REQUEST:
The City Manager request Council authorization to negotiate the terms of the video service agreement with Bellsouth Telecommunications, Inc. d/b/a AT&T Mississippi.

BACKGROUND
AT&T Mississippi has a statewide franchise under 1886 Mississippi Laws, Chapter, Section 1, to construct, operate and maintain its telecommunications, video and life facilities in the public rights of way ("ROW") throughout the State of Mississippi without having to obtain a local franchise or pay franchise fees.

RECOMMENDATION:
The Council may:

(1) Direct the City Manager to negotiate terms and conditions, and or
(2) Terminate the Contract

.

ATTACHMENT(S):
Yes

VIDEO SERVICES AGREEMENT

THIS AGREEMENT ("Agreement") dated 8-19-2008 2008 ("Effective Date") is made by and between BellSouth Telecommunications, Inc. d/b/a AT&T Mississippi ("AT&T Mississippi"), a Georgia corporation, and the City of Gautier, Mississippi, a municipal corporation ("City"). AT&T Mississippi and City shall sometimes be referred to separately as a "Party," and collectively as the "Parties."

RECITALS

A. As a telephone corporation, AT&T Mississippi has a statewide franchise under 1886 Mississippi Laws, Chapter 38, Section 1, to construct, operate and maintain its telecommunications, video and like facilities in the public rights of way ("ROW") throughout the State of Mississippi without having to obtain a local franchise or pay franchise fees.

B. AT&T Mississippi is in the process of modifying its existing telecommunications network to provide an integrated Internet Protocol ("IP") enabled broadband platform of voice, data and video services ("IP Network"), the video component of which is a switched, two-way, point-to-point and interactive service ("IP Video Service"). The IP Network upgrade will involve the use of the public ROW.

C. For purposes of this Agreement, IP-enabled Video Services shall include any technological advances that may be used to provide video services in the future.

D. Both Parties agree that the deployment of the IP Network and the provision of competitive video services to consumers is in the public's best interest.

NOW, THEREFORE, in consideration of and reliance upon the respective representations, promises, concessions, terms and conditions contained herein, City and AT&T Mississippi agree as follows.

1. Term. Except as described in paragraph 1(a) below, the term of this Agreement shall be from the Effective Date through December 31, 2018. The term may be extended upon mutual agreement of the Parties in writing.

(a) The Parties agree to consult in the event that, after the Effective Date, any court, agency, commission, legislative body, or other authority of controlling jurisdiction issues a finding that limits the validity or enforceability of this Agreement, in whole or in part. Should the finding be final, non-appealable and binding upon either City or AT&T Mississippi, this Agreement shall be deemed modified or limited to the extent necessary to address the subject of the finding unless either Party, within thirty (30) days of receipt of the finding, provides written notice to the other party of election to terminate, in which case the Agreement shall terminate within six (6) months or such earlier period as the Parties mutually may agree. Where the effect of a finding is a modification, the Parties shall enter into good faith negotiations to modify this Agreement in the manner which best effectuates its overall purposes and the intentions of the Parties. Any benefits or requirements entitled to the City under said ruling other than audit assessments shall be deemed retroactive to the date any affected payments are first made under the Agreement. Failure to reach a mutually satisfactory modification within ninety (90) days of the commencement of such efforts shall entitle

either Party to terminate the Agreement on the provision of thirty (30) days' written notice.

(b) In addition to the termination rights set forth in Section 1 (a) above, AT&T Mississippi shall have the right to terminate this Agreement and all obligations hereunder upon ninety (90) days notice to the City, if (a) AT&T Mississippi concludes in its reasonable business judgment that IP-enabled Video Service in the City is no longer technically, economically, or financially consistent with AT&T Mississippi's business objectives; (b) Title VI of the Communications Act of 1934, as amended, obligations or any similar obligations are imposed on AT&T Mississippi; or (c) it becomes clear that AT&T Mississippi must offer or provide IP Video Service pursuant to a franchise (cable or otherwise) and/or franchise-like requirements or other local authorization.

2. Compensation to City. During the term of this Agreement, AT&T Mississippi shall pay to City a fee equal to five percent (5%) of the Gross Revenues of AT&T Mississippi collected from each subscriber to AT&T Mississippi's IP Video Services product, including any Gross Revenues from video services included in a bundle of services, and five percent (5%) of the portion of Gross Revenues (collectively referred to as "IP Video Services Provider Fee") from advertising which are defined below. The IP-enabled Video Services Provider Fee and the fee for PEG set forth in paragraph 3 may be identified and passed through on any subscriber bill by AT&T Mississippi, and all such fees collected will be forwarded to City quarterly and shall be due forty-five (45) days after the end of each quarter. This IP Video Services Provider Fee shall be in lieu of any permit fee or any other fee that could otherwise lawfully be imposed by the City on AT&T Mississippi in connection with work done in the public ROW; however, nothing in this Agreement shall restrict the right of the City to impose ad valorem taxes, sales taxes, or other taxes that are lawfully imposed on a majority of all other businesses by the City. In the event, the City grants the incumbent cable provider a rate for calculating a fee that is different than the Applicable Percentage, this Agreement shall be automatically amended without any action required by the parties to adjust the Applicable Percentage to the different rate given to the incumbent provider, provided that such different rate does not exceed the maximum fee permitted by 47 U.S.C. § 542(b). Upon request, AT&T Mississippi shall make their records available to the City to demonstrate compliance with this paragraph for a period of three (3) years preceding the request.

Payment shall be accompanied by a report, in such form and containing sufficient detail to determine AT&T's compliance with this Section, not later than forty-five (45) days after the last day of each March, June, September, and December, throughout the term of this Agreement setting forth the Gross Revenue for the quarter ending on said last day. The City shall have the right to audit any such payment for a period of three (3) years and no acceptance of any payment shall be deemed final until the period for audit shall have expired.

2.1 For purposes of this Agreement, Gross Revenues are limited to amounts billed to and collected from AT&T Mississippi IP Video Services product subscribers for the following:

(a) recurring charges for IP Video Services;
(b) event-based charges for IP Video Services, including but not limited to pay-per-view and video-on-demand charges;
(c) rental of set top boxes and other IP Video Services equipment;
(d) service charges related to the provision of IP Video Services, including, but not

limited to, activation, installation, and repair; and

(e) administrative charges related to the provision of IP Video Services, including, but not limited to, service order and service termination charges.

2.2 For purposes of this Agreement, Gross Revenues do not include:

(a) uncollectible fees, provided that all or part of uncollectible fees which is written off as bad debt but subsequently collected fees, shall be included in Gross Revenues in the period collected;

(b) discounts, refunds, and other price adjustments that reduce the amount of compensation received by AT&T Mississippi;

(c) late payment fees;

(d) maintenance charges;

(e) amounts billed to IP Video Services subscribers to recover taxes, fees or surcharges imposed upon IP Video Services subscribers in connection with the provision of IP Video Services, including the IP Video Services Provider Fee. authorized by this section;

(f) revenue from the sale of capital assets or surplus equipment; or

(g) charges, other than those described in subsection 2.1 (a), that are aggregated or bundled with amounts billed to IP Video Services subscribers.

"Gross Revenues" which are subject to the IP Video Services Provider Fee paid by AT&T Mississippi additionally include a pro rata portion of all revenue collected by AT&T Mississippi pursuant to compensation arrangements for advertising (less any commissions AT&T Mississippi receives from any third party for advertising) and home-shopping sales derived from the operation of AT&T Mississippi's IP Video Service within the City. Advertising commissions paid to third parties (excluding any refunds, rebates, or discounts the Company may make to advertisers) shall not be deducted from advertising revenue included in gross revenue. The allocation of advertising and home-shopping revenue referred to above shall be based on the number of subscribers in the City divided by the total number of subscribers in relation to the relevant regional or national compensation arrangement.

3. Public, Educational and Governmental Programming. In recognition of the technical architecture of IP Video Services, AT&T Mississippi at the later of such time as AT&T Mississippi achieves 10% market share of the pay TV subscriber market within City or within one hundred eighty (180) days of AT&T Mississippi's launch of IP Video Services the City may request PEG programming as set forth herein. During the term of this Agreement, and within one hundred and twenty (120) days of such a request from the City, AT&T Mississippi shall provide capacity for three "streams" or "channels" of noncommercial educational governmental programming through AT&T Mississippi's IP Video Service so long as City and educational institutions designated by the City provide any educational or governmental programming content in a standard digital format compatible with AT&T Mississippi's IP Video Technology. City and educational institutions designated by the City shall provide this programming, and AT&T Mississippi shall receive this programming, at AT&T Mississippi's designated connection point. City and educational institutions designated by the City will be solely and individually responsible for their own programming content.

Any operation of any PEG programming stream by City shall be the responsibility of City, and AT&T Mississippi shall be responsible for the transmission of such programming. The City will be responsible to ensure that all transmissions, retransmissions, content or programming that may be requested to be transmitted over a channel or facility by AT&T

Mississippi in the future, if any, are provided or submitted to AT&T Mississippi, at the AT&T Mississippi designated connection point, in a manner or form that is capable of being accepted and transmitted by AT&T Mississippi, without requirement for additional alteration or change in the format or content by AT&T Mississippi, over the network of AT&T Mississippi, and which is compatible with the technology or protocol utilized by AT&T Mississippi to deliver IP Video Services.

AT&T Mississippi shall remit to the City an additional one-half of one percent of Gross Revenues, as defined in Paragraph 2 herein, in accordance with 47 U.S.C. 531 and 541(a)(4)(B).

4. Emergency Message. AT&T Mississippi shall carry all Federal, State and Local alerts provided over the "Federal Emergency Alert System" through AT&T Mississippi's IP-enabled Video Services in the event of a public safety emergency, which at a minimum will include the concurrent rebroadcast of local broadcast channels.

5. Non-discrimination. AT&T Mississippi shall not deny access to its IP Video Services to any group of potential residential customers because of the income of the residents of the local area in which such group resides. Upon receipt of any complaint alleging a violation of this section, the City shall provide a copy of such complaint to AT&T Mississippi and AT&T Mississippi shall have sixty (60) days after receipt of such complaint to respond to such complaint.

6. Obligations of City. During the term of this Agreement City will not subject, nor attempt to subject, the provision of AT&T Mississippi's IP-enabled Video Services over the IP Network to regulation under any cable television franchise ordinance or similar ordinance. In addition:

(a) City agrees to subject the construction and installation of the IP Network to the same process and review as it subjects the installation and construction of AT&T Mississippi's existing telecommunications infrastructure.

(b) City agrees not to unreasonably block, restrict, or limit the construction and installation of the IP Network.

(c) City agrees to process any and all applicable permits for the installation, construction, maintenance, repair, removal, and other activities associated with the IP Network in a timely and prompt manner.

7. Indemnification.

(a) AT&T Mississippi agrees to indemnify, defend, and hold harmless City, its officers, agents, and employees, from and against any liability for damages and for any liability or claims resulting from tangible property damage or bodily injury (including accidental death), to the extent proximately caused by AT&T Mississippi's negligent construction, operation, or maintenance of its IP Network, provided that City shall give AT&T Mississippi written notice of its obligation to indemnify City within fifteen (15) days of receipt of a claim or action pursuant to this subsection. Notwithstanding the foregoing, AT&T Mississippi shall not indemnify City for any damages, liability or claims resulting from the negligence or willful misconduct of City, its officers, agents, employees, attorneys, consultants, independent contractors or third parties or for any activity or function conducted by any person or entity other than AT&T Mississippi in connection with PEG programming.

(b) With respect to AT&T Mississippi's indemnity obligations set forth above, AT&T Mississippi shall provide the defense of any claims brought against City by selecting counsel of AT&T Mississippi's choice to defend the claim, subject to the consent of City, which shall not be unreasonably withheld. Nothing herein shall be deemed to prevent City from cooperating with AT&T Mississippi and participating in the defense of any litigation by its own counsel at its own cost and expense, provided, however, that after consultation with City, AT&T Mississippi shall have the right to defend, settle or compromise any claim or action arising hereunder, and AT&T Mississippi shall have the authority to decide the appropriateness and the amount of any such settlement. In the event that the terms of any such settlement do not include the release of City and City does not consent to the terms of any such settlement or compromise, AT&T Mississippi shall not settle the claim or action, but its obligation to indemnify City shall in no event exceed the amount of such settlement.

(c) In the event the incumbent cable and/or video service provider(s) in the City files a claim against the City in state or federal court arising out of the fact that the City entered into this Agreement, challenging the lawfulness of this Agreement and/or seeking to modify its obligations under its existing cable franchise on the basis that the City entered into this Agreement, AT&T Mississippi shall cooperate with the City in responding to such claim.

At the City's request, AT&T Mississippi will intervene in any such action and defend any such claim. In such event, AT&T Mississippi shall assume, at its expense, the sole defense of the claim through counsel selected by AT&T Mississippi and shall keep the City fully informed as to the progress of such defense. Upon reasonable request by AT&T Mississippi and at AT&T Mississippi's expense, the City shall cooperate with AT&T Mississippi in the defense of the claim. At its option and expense, the City may retain and use separate counsel to represent it, including in-house counsel.

AT&T Mississippi shall maintain control of the defense and resolution or settlement of the claim, except that if the settlement of the claim would adversely affect the City, AT&T Mississippi may settle the claim as to the City only with its written consent, which consent shall not be unreasonably withheld or delayed.

AT&T Mississippi shall pay the full amount of (i) any judgment or award issued by a court against the City as a result of entering into this Agreement or (ii) any settlement negotiated by AT&T Mississippi with respect to the claim and all other expenses related to the resolution of the claim. AT&T Mississippi's obligation to pay excludes an incumbent cable and/or video service provider's costs, interests and reasonable attorneys' fees in bringing such action or claim unless otherwise agreed to by AT&T Mississippi in any settlement agreement or any final judgment ordered by the court.

8. Breach of Agreement. Should either party claim that a breach of any part of this Agreement has occurred, that party will provide prompt written notice to the other, specifying the nature of the breach; and upon receipt the other party shall cure such breach within sixty (60) days.

9. Dispute Resolution. The parties recognize and agree that it is in their best interests to avoid the time and expense of litigation should a dispute arise concerning the provisions of this Agreement and compliance therewith. Therefore, the parties agree to exercise good faith in resolving claims, disputes, and controversies arising out of this Agreement by participating in non-binding arbitration or other alternative means of dispute resolution,

including but not limited to mediation, upon terms and conditions mutually agreeable to the parties. The parties agree to refrain from instituting or pursuing actions at law or in equity until they have attempted to resolve the claim, dispute, or controversy by non-binding arbitration or other alternative means of dispute resolution save for those instances wherein non-binding arbitration or other alternative means of dispute resolution will result in immediate harm or be detrimental or prejudice the party's pursuit of an action.

10. Public Rights-of-Way. The City shall maintain any lawful and reasonable police powers provided for by law over installation of facilities in the public rights-of-way (ROW). AT&T Mississippi agrees that its facilities cannot disrupt sight distance for motorists; will place its video equipment on public ROW close to a property line abutting the public ROW, when and where feasible; cannot be below base flood elevation according to the most recent FIRM and flood insurance study; cannot obstruct drainage; and cannot obstruct pedestrian traffic or violate, to the extent applicable, provisions set forth in the Americans with Disabilities Act of 1990. AT&T Mississippi will also consider the aesthetics involved when placing its video equipment on residential and arterial streets.

11. Customer Service. AT&T Mississippi shall comply with the Federal Communications Commission customer service standards set forth under 47 C.F.R. 76.309**(c).**

12. Free Service to Buildings. If AT&T Mississippi agrees to provide free service to public facilities for any local government in Mississippi, AT&T Mississippi shall, upon written request by the City, install, at no charge, one service outlet to a demarcation point located on the outside of any designated public building provided such building demarcation point is within 125 feet from AT&T Mississippi's activated distribution point of connection. AT&T Mississippi shall not be required to extend its facilities beyond the appropriate demarcation point located outside the building or to perform any inside wiring. AT&T Mississippi shall provide complimentary video service to public schools, public libraries, police, fire, city attorney, and city hall and over that one service outlet free of charge, which service shall not be used for commercial purposes. The City may not receive service at the same building from more than one cable or video service provider at a time.

13. Notices. Any notice to be given under this Agreement shall be in writing and may be delivered to either personally, by facsimile or by certified or registered mail with postage prepaid and return receipt requested, addressed as follows:

If to City:

Sidney Runnels
City Manager
City of Gautier
3330 Highway 90
Gautier, MS 39553

With a Copy to:

Amy St. Pe', Esq.
Dogan & Wilkinson, PLLC
P.O. Box 1618
Pascagoula, MS 39568-1618

If to AT&T Mississippi:

AT&T Mississippi
General Counsel - Mississippi
Suite 790, Landmark Center
175 E. Capitol Street
Jackson, Mississippi 39201

14. Modification. This Agreement may be amended or modified only by a written instrument executed by both Parties.

15. Assignment. Except to affiliates, AT&T Mississippi may not assign or transfer this Agreement or any interest therein without the prior written consent of City.

16. Entire Agreement. This Agreement constitutes the entire agreement between City and AT&T Mississippi with respect to the subject matter contained herein and supersedes all prior or contemporaneous discussions, agreements, and/or representations of or between City and AT&T regarding the subject matter hereof.

17. Waiver. Failure on the part of either Party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision.

18. Choice of Law and Venue. This Agreement shall be construed and interpreted according to the laws of the State of Mississippi. The parties further agree that the appropriate venue for any legal action involving this Agreement will be in a court of competent jurisdiction in either the federal or state courts located in Mississippi.

19. Miscellaneous.

(a) AT&T Mississippi and City each hereby warrants that it has the requisite power and authority to enter into this Agreement and to perform according to the terms hereof.

(b) The headings used in this Agreement are inserted for convenience or reference only and are not intended to define, limit or affect the interpretation of any term or provision hereof. The singular shall include the plural; the masculine gender shall include the feminine and neutral gender.

(c) AT&T Mississippi and City shall cooperate fully with one another in the execution of any and all other documents and in the completion of any additional actions including, without limitation, the processing of permits that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

(d) AT&T Mississippi agrees to comply with any and all current and future state and federal laws, as well any and all current and future ordinances of the City.

(e) Nothing contained in this Agreement is intended or shall be construed as

creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties hereto toward any person or entity not a party to this Agreement, unless otherwise expressly set forth herein.

20. Binding Effect. This Agreement shall be binding upon and for the benefit of each of the Parties and their respective past and present principals, managers, City Council members, officers, directors, shareholders, agents, employees, attorneys, successors and assigns and any parents, subsidiaries or affiliated corporations or entities, as applicable.

21. Counterpart Execution. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement. Signature pages may be transmitted by facsimile and any signature transmitted by facsimile will be given the same force and effect as an original signature.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this Agreement and made the same effective as of this 18th day of August, 2008.

BellSouth Telecommunications, Inc. doing business as AT&T Mississippi

By: _____
Name: R. Mayo Flynt, III
Title: President - AT&T Mississippi

City of Gautier, Mississippi

By: _____
Name: Sidney Runnels
Title: City Manager, City of Gautier

Attest: _____
Name: Linda Green
Title: City Clerk, City of Gautier

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